

VALUING CARING RELATIONSHIPS WITHIN UK LABOUR LAW

by

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## **Abstract**

This thesis will consider UK labour law's role in promoting fairness for carers. Building upon Fineman's work, I will argue that caring relationships are of vital importance to society and should be supported by the state. The principle of justice as fairness, substantiated by the capabilities approach, will underpin this argument. I will focus upon modifying the workplace through care centric labour laws to achieve fairness for carers. Care centric legislation, developed by Busby, focuses upon promoting carers' rights to work, rather than workers' rights to care. Much of the analysis will focus upon reconciliation legislation, which aims to support people providing care within the paid workplace. This is because it has been the main way successive UK governments have aimed to help people reconcile these competing commitments. Although this body of legislation has gone some way towards achieving this, I will show that it could have done more. To make labour law care centric, something more radical is required. In this regard, I will analyse a right to care. To conclude, I will highlight the need for more empirical work in this context to further understand how fairness for all carers could be achieved.

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## Chapter One

### INTRODUCTION

After the hell he's gone through it is outrageous that Brad Haddin hasn't gotten his spot back for the third Ashes Test.

Any mum and dad who has experienced the issues Brad and his wife Karina are going through will understand there's no way he was in position to play cricket at Lord's.

But now that it's happened, it's behind them and Brad's been retained on tour, he just has to play.

What kind of precedent do the selectors want to set? It doesn't say much for the family-first policy if Brad puts his family first and all of a sudden he's out.<sup>1</sup>

In 2015, the issue of reconciling work and caring responsibilities hit sporting headlines across England and Australia. Brad Haddin, the Australian wicketkeeper, missed the second game in the Ashes test because his daughter, who suffers from neuroblastoma, a rare form of cancer, was in hospital. He had previously missed games in 2012, when she was diagnosed. He would have been entitled to ten days personal or carer's leave a year, under the Australian Fair Work Act 2009.<sup>2</sup> In addition, the Australian cricket team has a prominent family-first policy, where players are actively encouraged to prioritise their family over their cricketing commitments. Therefore, he was able to take a period of time away from his responsibilities to focus upon childcare, with the expectation that he would be welcomed back. He was ready to return by the third game, but was not included in the team. Although this decision may have been based upon Haddin's performance, it was nonetheless widely derided. The extract above is reflective of much of the sporting commentary, which criticised the selection

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<sup>1</sup> Matthew Hayden Presents a Case for Brad Haddin's Recall <http://www.news.com.au/sport/cricket/matthew-hayden-presents-a-case-for-brad-haddins-recall/story-fnu2penb-1227461121393> accessed 15.08.2015

<sup>2</sup> s. 96

committee and widely applauded Haddin for prioritising his family commitments, even over this most bitter sporting rivalry.

This example highlights some of the issues that people face in reconciling their paid work and caring relationships. The UK law's role in supporting these carers will be the subject of this thesis. I have focused upon this issue because of a long standing interest in gender inequality. Despite formal equality between women and men, women remain more likely to be carers.<sup>3</sup> Men's role in caring is less than women's in every way: they provide less care; they care for fewer hours a week; "the tasks they undertake are less onerous and stressful."<sup>4</sup> Women's continued association with caring labour has been widely acknowledged as a key reason the gender pay gap has stubbornly remained.<sup>5</sup> This is currently the lowest on record but remains high at 19.1% between all employees in the UK.<sup>6</sup> Even between full-time employees, the gap is 9.4%.<sup>7</sup>

The Equality and Human Rights Commission (EHRC) suggests that men's and women's careers now progress similarly in their twenties, but after this the wide gender pay gap emerges.<sup>8</sup> This is around the time that many people will become parents; the average age of motherhood is now 30.2 years old.<sup>9</sup> Motherhood changes employment patterns as women

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<sup>3</sup> Carers UK *Facts About Carers* (Carers UK, 2014) 4

<sup>4</sup> C. Glendinning, F. Tjadens, H. Arksey, M. Moree, N. Moran and H. Nies *Care Provision within Families and its Socio-Economic Impact on Care Providers* (Social Policy Research Unit, University of York, 2009) 124 <http://www.york.ac.uk/inst/spru/research/pdf/EUCarers.pdf> accessed 05.07.13

<sup>5</sup> S. Fredman 'Reversing Roles: Bringing Men into the Frame' (2014) 10 *International Journal of Law in Context* 442, 442. I. Robeyns 'Sen's Capability Approach and Gender Inequality: Selecting Relevant Capabilities' (2003) 9 *Feminist Economics* 61, 82.

<sup>6</sup> Office for National Statistics *Annual Survey of Hours and Earnings, 2014 Provisional Results* (Office for National Statistics, 2014) 10

<sup>7</sup> Office for National Statistics *Annual Survey of Hours and Earnings, 2014 Provisional Results* (n 6) 10

<sup>8</sup> Equality and Human Rights Commission *Sex and Power 2011* (Equality and Human Rights Commission, 2011) 1

<sup>9</sup> Office for National Statistics *Births in England and Wales, 2014* (Office for National Statistics, 2015) 6



“typically interrupt or drastically reduce their employment.”<sup>10</sup> In contrast, research suggests that fatherhood has little effect on men’s paid working hours in the UK.<sup>11</sup> Accordingly, the reconciliation of paid work and caring responsibilities has traditionally been deemed “women’s issues.”<sup>12</sup>

Women’s caring roles can lead to discrimination in the workplace which further contributes towards the gender pay gap. Recent research by the EHRC suggests that as many as 54,000 pregnant women a year were dismissed, made redundant, or “treated so poorly they felt they had to leave their job.”<sup>13</sup> The same research found that one in five pregnant women, as many as 100,000 women a year, “experienced harassment or negative comments from their employer and/or colleagues.”<sup>14</sup> Such discrimination is unlikely to stop after pregnancy. Indeed, further research suggests that those with caring responsibilities are subjected to statistical discrimination, which results in them receiving lower wages than non-carers.<sup>15</sup> Such discrimination occurs because carers, the vast majority of whom are women, are viewed as less reliable workers who are likely to be absent from the workplace. Therefore, motherhood causes ongoing disadvantage to women in the workplace.

Childless women may also be subjected to discrimination in the workplace. This is because all women are viewed as potential carers. Some employers “become wary of hiring women,” fearing they will become less committed to the workplace and prioritise their caring

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<sup>10</sup> P. Schober ‘The Parenthood Effect on Gender Inequality: Explaining the Change in Paid and Domestic Work When British Couples Become Parents’ (2013) 29 *European Sociological Review* 74, 74

<sup>11</sup> E. Dermott ‘What’s Parenthood got to do with it?: Men’s Hours of Paid Work’ (2006) 57 *The British Journal of Sociology* 619, 629

<sup>12</sup> C. Hein *Reconciling Work and Family Responsibilities: Practical Ideas for Global Experience* (International Labour Organisation, 2005) 29

<sup>13</sup> Equality and Human Rights Commission *Pregnancy and Maternity-Related Discrimination and Disadvantage: First Findings: Surveys of Employers and Mothers* (Crown, 2015) 9

<sup>14</sup> Equality and Human Rights Commission *Pregnancy and Maternity-Related Discrimination and Disadvantage* (n 13) 9

<sup>15</sup> A. Heitmueller, K. Inglis ‘The Earnings of Informal Carers: Wage Differentials and Opportunity Costs’ (2007) 26 *Journal of Health Economics* 812, 822

relationships in the future.<sup>16</sup> One recent survey indicates that a third of UK managers would still prefer to employ a man instead of a woman of childbearing age.<sup>17</sup> The effect of these problems is evidenced by women's underrepresentation in positions of power and influence; in 2010/11, women held only 26.2% of the "top jobs" in politics, 10.2% of directors in FTSE 250 companies and 26.1% in the public and voluntary sectors.<sup>18</sup> Therefore, a key question I will consider in this thesis is what role the law can play in challenging gender inequality and reducing the pay gap by contesting women's association with caring labour.

Against this background, it was striking to me that Haddin, as a man, prioritised his caring relationship over his paid work responsibilities. The widespread support he received for doing so within the masculine world of sport, especially from within Australia, where ideals of "white masculinity continue to organise and define Australian national identity," particularly caught my attention.<sup>19</sup> This may demonstrate that men's participation in caring relationships is changing, which could challenge gender inequality. This raises questions about how men's caring roles, especially as fathers, are valued by the state and what legislative support they receive for providing care. These will be key questions I consider throughout this thesis.

In challenging the gender inequality which results from the division of caring labour, I have found Fineman's work, *The Autonomy Myth: A Theory of Dependency* particularly insightful. Fineman argues that caring labour should be better "valued, compensated, and

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<sup>16</sup> J. Williams *Unbending Gender: Why Family and Work Conflict and What to do About it* (Oxford University Press, 2000) 70

<sup>17</sup> Slater & Gordon Highlights Maternity Discrimination <http://www.slatergordon.co.uk/media-centre/news/2014/08/slater-gordon-highlights-maternity-discrimination/> accessed 03.07.15

<sup>18</sup> Equality and Human Rights Commission *Sex and Power 2011* (n 8) 3-4

<sup>19</sup> K. Bode 'Aussie Battler in Crisis? Shifting Constructions of White Australian Masculinity and National Identity' (2006) 2 ACRAWSA E-Journal 1, 3

accommodated by society and its institutions.”<sup>20</sup> She bases this argument on the universality of caring relationships; “all of us were dependent as children, and many of us will be dependent as we age, become ill, or suffer disabilities.”<sup>21</sup> Fineman suggests that better valuing care will challenge gender inequality by structuring “an equal opportunity to engage in nurturing and caretaking.”<sup>22</sup> The state has a vital role to play in supporting carers. Fineman identifies one way this would be achieved; accommodating carers within the workplace through legislation such as “flexible workweeks, job sharing without penalty and paid family leave.”<sup>23</sup> Fineman notes that this should “ensure the caretaker’s right to work.”<sup>24</sup> Such legislation would enable people like Haddin to reconcile their paid work and caring responsibilities.

Fineman focuses predominantly on the family context, in particular marriage, and is writing in the United States of America where legislation which accommodates carers in the workplace is limited. Such legislation is therefore not her focal point. In the UK, a plethora of legislation aims to promote people’s ability to provide care whilst maintaining a paid workforce connection. This body of legislation has been subject to numerous changes since New Labour formed the Government in 1997. Maternity leave has been amended and extended,<sup>25</sup> whilst ordinary,<sup>26</sup> and additional paternity leave,<sup>27</sup> parental leave,<sup>28</sup> adoption leave,<sup>29</sup> shared parental leave,<sup>30</sup> emergency leave,<sup>31</sup> and the right to request flexible working

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<sup>20</sup> M. Fineman *The Autonomy Myth: A Theory of Dependency* (The New Press, 2004) 38

<sup>21</sup> M. Fineman *The Autonomy Myth* (n 20) 35

<sup>22</sup> M. Fineman *The Autonomy Myth* (n 20) 201

<sup>23</sup> M. Fineman *The Autonomy Myth* (n 20) 287

<sup>24</sup> M. Fineman *The Autonomy Myth* (n 20) 201

<sup>25</sup> Employment Relations Act 1999, Employment Act 2002, Work and Families Act 2006

<sup>26</sup> Employment Act 2002

<sup>27</sup> Additional Paternity Leave Regulations 2010

<sup>28</sup> Maternity and Parental Leave Regulations etc.1999

<sup>29</sup> Employment Act 2002

<sup>30</sup> Children and Families Act 2014, s. 117

<sup>31</sup> Employment Rights Act 1996, s. 57A

have been introduced.<sup>32</sup> Additional paternity leave has been repealed and replaced by shared parental leave.<sup>33</sup> The Carers (Leave Entitlement) Bill 2015-16 has also had its first reading in the House of Lords.<sup>34</sup> If enacted, this will introduce carers' leave. However, this is unlikely because it is a Private Member's Bill, which I will consider more in chapter three.<sup>35</sup>

These legislative entitlements were initially named family-friendly policies,<sup>36</sup> but have since been renamed work-life balance policies.<sup>37</sup> This marked a change in focus away from solely supporting those with caring responsibilities, as I will consider in chapter three.<sup>38</sup> I will refer to this body of law as reconciliation legislation. This was a definition adopted by Busby and James, which avoids focusing entirely upon childcare and covers the wide variety of policies that deal with the perceived conflict between paid work and care.<sup>39</sup>

The main aim of the thesis is to take up Fineman's challenge; I will examine how the substantive body of UK reconciliation legislation has changed the workplace and alleviated the conflict between paid work and caring labour. This will highlight how the legislation challenges gender inequality and promotes caring relationships. The focus will mainly be upon parents. This is because of the legislative focus; only the right to request flexible working and emergency leave are currently available to all carers. The vast majority of legislative changes have aimed to promote parents' ability to reconcile their paid work and caring responsibilities.

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<sup>32</sup> Employment Rights Act 1996, s. 80F(1)(a)

<sup>33</sup> Children and Families Act 2014, s. 125

<sup>34</sup> (HL Bill 42)

<sup>35</sup> See chapter three page 79

<sup>36</sup> S. Macpherson 'Reconciling Employment and Family Care-Giving: A Gender Analysis of Current Challenges and Future Directions for UK Policy' in N. Busby and G. James *Families, Care-giving and Paid Work: Challenging Labour Law in the 21<sup>st</sup> Century* (Edward Elgar, 2011) 24

<sup>37</sup> S. Macpherson 'Reconciling Employment and Family Care-Giving' (n 36) 24

<sup>38</sup> See chapter three page 78

<sup>39</sup> N. Busby and G. James *Families, Care-giving and Paid Work: Challenging Labour Law in the 21<sup>st</sup> Century* (Edward Elgar, 2011)

Originally, this body of legislation focused upon promoting mothers' attachment to the workplace. New Labour (1997-2010) aimed to remove obstacles to paid work and keep mothers from relying upon welfare.<sup>40</sup> This led to maternity leave being modified as well as adoption and parental leave being introduced, all of which will be analysed in chapter five.

Since then, reconciliation legislation has increasingly aimed to encourage fathers' caring roles. This is evidenced by the introduction of ordinary paternity leave, shared parental leave and the now repealed additional paternity leave, all three of which will be examined in chapters six and seven. These entitlements are not just available to fathers, but also mothers' and adopters' partners, civil partners and spouses, who will be referred to throughout as 'recognised co-parents'. Co-parents can include a number of different parenting relationships, including biological parents living together or apart,<sup>41</sup> non-biological lesbian parents,<sup>42</sup> the group of parents created in step-families,<sup>43</sup> or friends raising children together.<sup>44</sup> Therefore, it is used to describe the relationship between those raising children together, including mothers' or adopters' partners. However, as this wide ranging term could include more than just the parents protected in the reconciliation legislation, I will refer to the parents identified within this legislation as 'recognised co-parents'.

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<sup>40</sup> R. Lister 'Children (But Not Women) First: New Labour, Child Welfare and Gender' (2006) 26 *Critical Social Policy* 315, 318

<sup>41</sup> A. Belver-Prigat 'The Costs of Raising Children: Toward a Theory of Financial Obligations Between Co-Parents' (2012) 13 *Theoretical Inquiries in Law* 179, 183-4

<sup>42</sup> C. Donovan 'Who Needs a Father? Negotiating Biological Fatherhood in British Lesbian Families Using Self-Insemination' (2000) 3 *Sexualities* 149, 156

<sup>43</sup> D. Braithwaite, P. Toller, K. Daas, W. Durham, A. Jones 'Centered but not Caught in the Middle: Stepchildren's Perceptions of Dialectical Contradictions in the Communication of Co-Parents' (2008) 36 *Journal of Applied Communication Research* 33, 48

<sup>44</sup> J. Feinberg 'Friends as Co-Parents' (2009) 43 *University of San Francisco Law Review* 799, 802

The majority of parents eligible for this leave will be fathers, as 77% of dependent children within the UK are raised by heterosexual family units.<sup>45</sup> The predominance of heterosexual parenting as well as the legislation's aim to encourage men's caring role and challenge gender inequality means that I will refer simply to fathers in chapters six and seven, when appropriate.

### **Challenging women's association with all caring roles**

The gendered division of parenting is reflected in the wider provision of care. Those caring for other dependents, including the elderly, disabled or otherwise dependent, are mainly women and they often face even greater issues balancing their paid work and caring responsibilities than parents.<sup>46</sup> This is evidenced in the following two extracts of daughters describing their experiences of providing care for their respective parents:

#### Gill's story

Relatives say they admire you for what you're doing but they never offer any help... I really don't like to look to the future at the moment. I have worked full-time all my life. I'd spent a bit but I'd saved and I was coasting towards my retirement. Then caring came along and I'm losing all my savings.<sup>47</sup>

#### Jess' story

I was desperately worried that I'd have to give up work to look after her and I just couldn't – with my husband only working one day a week, it's only my salary that's

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<sup>45</sup> Office for National Statistics *Statistical Bulletin: Families and Households, 2014* (Office for National Statistics, 2015) 8

<sup>46</sup> Carers UK *The State of Caring 2015* (Carers UK, 2015) 12

<sup>47</sup> Gill's Story <http://www.carersuk.org/news-and-campaigns/features/gills-story> accessed 02.09.2015

paying for us to live. And my work was one of the only things which anchored me to reality.

I was on the verge of going to the doctor's and saying I couldn't cope – I just couldn't tell anyone about my real feelings because I felt they'd think I was being horrible.<sup>48</sup>

Gill and Jess both feel they are expected to care for their respective parents. This is evidenced by Jess' fear of being deemed "horrible," for struggling to provide care, as well as the lack of practical support Gill has been offered. This also shows that their work is not celebrated or deemed worthy of support; it is not newsworthy, unlike Haddin's caring labour. This is partly due to women's continued association with caring; Jess and Gill are just living up to the standards of womanhood and providing the care they are expected to. This is something I will explore in chapter two, but it means that women's experiences of caring do not receive as much attention as men, who are acting outside of their gendered expectations.<sup>49</sup>

Societal expectations therefore encourage women to perform caring roles. Yet this does not translate to caring labour being valued by the state. Women's labour is expected to take place in the home; it is often seen as a private family matter, for reasons I will again explore in chapter two.<sup>50</sup> As it is hidden in private homes, caring is not deemed worthy of support. Therefore, carers are disadvantaged in both the paid workforce and in their provision of care. Accordingly, challenging gender inequality not only requires efforts to enable more men like Haddin to provide care. It also requires that the value of caring labour is promoted; caring relationships should be recognised as vitally important and an "essential feature...of what it

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<sup>48</sup> Jess' story <http://www.carersuk.org/news-and-campaigns/features/jess-story> accessed 02.09.2015

<sup>49</sup> See chapter two page 26

<sup>50</sup> See chapter two page 33

is to be human.”<sup>51</sup> Therefore, throughout this thesis, I will consider how UK reconciliation legislation recognises and promotes the value of caring relationships.

### **The ethic of care**

To better understand the true value of caring relationships, I will analyse academic work which focuses upon the ethic of care. This has been a fundamental feminist concern since Gilligan’s breakthrough work in the 1980s, *In a Different Voice: Psychological Theory and Women’s Development*.<sup>52</sup> However, despite the obvious connection between this literature and scholarly work on reconciliation legislation, there have been very few attempts to combine them. Busby notes that the literature on balancing paid work and care too often focuses primarily upon paid work.<sup>53</sup> Accordingly, Busby considered the care literature in her book *A Right to Care? Unpaid Care Work in European Employment Law*, which has been another key influence on this thesis.<sup>54</sup> I will build upon this work in chapter two by focusing upon caring relationships as a fundamental part of the human experience. I will apply this understanding throughout the thesis to further reconcile these two areas of feminist work. Busby’s focus upon the care component leads her to argue that reconciliation legislation should come from a care centric vantage.<sup>55</sup> Busby notes that “the primary investigation becomes a consideration of the caring rights of employees,” rather than employees’ rights to care.<sup>56</sup> This is similar to Fineman’s proposal that “we ensure the caretaker’s right to work,” but Busby recognises that just introducing this legislation is not enough.<sup>57</sup> Instead, the

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<sup>51</sup> R. Horton ‘Care-Giving and Reasonable Adjustment in the UK’ in N. Busby and G. James *Families, Care-giving and Paid Work: Challenging Labour Law in the 21<sup>st</sup> Century* (Edward Elgar, 2011) 146

<sup>52</sup> C. Gilligan *In a Different Voice: Psychological Theory and Women’s Development* (Harvard University Press, 1982)

<sup>53</sup> N. Busby *A Right to Care? Unpaid Care Work in European Employment Law* (Oxford University Press, 2011) 41

<sup>54</sup> N. Busby *A Right to Care?* (n 53)

<sup>55</sup> N. Busby *A Right to Care?* (n 53) 49

<sup>56</sup> N. Busby *A Right to Care?* (n 53) 50

<sup>57</sup> M. Fineman *The Autonomy Myth* (n 20) 201



starting point of each legislative change should be to consider how carers can be helped to maintain a workforce connection.

To be care centric, reconciliation legislation should firstly recognise “the plurality of needs of children and dependent adults.”<sup>58</sup> This means that the nature of caring relationships, which will be considered in chapter two, should be reflected within the entitlements. Secondly, care centric legislation would account for the ongoing commitments of caring relationships and its regular impact upon people’s paid work. Thirdly, the importance of all caring relationships would be recognised by a care centric approach. Paid work and employers’ interests would not be prioritised over caring responsibilities. Reconciliation legislation would also protect all carers and facilitate the practical use of any entitlements. Therefore, caring relationships would increasingly impact upon the paid workplace, challenging employer’s reasoning for discriminating against women. In chapter four, I will consider how the UK reconciliation legislation could become care centric. I will then analyse how close the existing UK entitlements are to achieving this in chapters five, six and seven.

Busby’s work suggests that a radical change is needed to realise the importance of caring labour within the workplace.<sup>59</sup> In this regard, she develops a right to care within the European Union legal order. This enables people to provide care alongside paid employment.<sup>60</sup> This aims to promote the value of caring relationships through an overarching right which promotes workplace change to accommodate carers. Having analysed the UK legislation and demonstrated the many ways in which it is not care centric in chapters five to seven, I will consider how the right to care could be applied in the UK. In particular, I will focus upon

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<sup>58</sup> E. Caracciolo di Torella ‘Is there a Fundamental Right to Reconcile Work and Family Life in the EU?’ in N. Busby, G. James *Families, Care-giving and Paid Work: Challenging Labour Law in the 21<sup>st</sup> Century* (Edward Elgar Publishing, 2011) 63

<sup>59</sup> N. Busby *A Right to Care?* (n 53) 179

<sup>60</sup> N. Busby *A Right to Care?* (n 53) 182

how carers how could be protected by anti-discrimination law in the UK, including by the duty of reasonable adjustment, which Busby proposes at EU level.

### **Other key themes**

Haddin's experience contrasts significantly with both Gill and Jess' in other ways. The problems he faced were not as severe as those Gill and Jess encountered, and this is not just because of their different genders. Haddin is in a privileged position in comparison to many other carers for a number of reasons. These differences highlight a number of other key themes I will address in this thesis.

#### a) The practical usability of reconciliation entitlements

Firstly, Haddin is entitled to take this leave, whereas Gill and Jess currently cannot access such support. This may be remedied in the future as the Carers (Leave Entitlement) Bill 2015-16 proposes to enable carers to access leave to care for a sick or disabled dependent, although this is unlikely to be enacted.<sup>61</sup> Yet, even introducing carers' leave in the UK will not ensure that carers receive as much support as Haddin, who was encouraged to be absent from work to provide care. This is partly because much of the UK body of legislation has been criticised for being sound-bite. This means that the modifications often have "all the positive publicity and appearance of a novel and innovative right, but in reality offer little of substance for the majority of working families."<sup>62</sup> Also, many UK employees are reluctant to use any entitlements for fear of reprisals for not being perceived as committed as others.

Therefore, they fear that taking leave may impact negatively upon their career.

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<sup>61</sup> (HL Bill 42)

<sup>62</sup> M. Weldon-Johns 'The Additional Paternity Leave Regulations 2010: A New Dawn or More "Sound-Bite" Legislation?' (2011) 33 *Journal of Social Welfare and Family Law* 25, 25. The term was coined in L. Anderson 'Sound Bite Legislation: The Employment Act 2002 and New Flexible Working 'Rights' for Parents' (2003) 32 *Industrial Law Journal* 37. See further G. James *The Legal Regulation of Pregnancy and Parenting in the Labour Market* (Routledge, 2009) 41.

Despite the encouragement Haddin received to miss the test, he was not chosen to play again after this period of absence. This happened in a public arena, where sporting team selections will be scrutinised by journalists and the public. In the majority of jobs which occur outside the public eye, such pressure is much more likely to go undetected. For example, the vast numbers of women who are subjected to pregnancy-related discrimination goes mainly undetected because only around a thousand women register such claims at employment tribunals each year.<sup>63</sup> Therefore, most UK employees will face even greater challenges in balancing their paid work and caring relationships. This means that they may be right to fear the negative effects of taking leave on their career. Hayden's commentary also notes how such treatment may make others in the same workplace more hesitant to prioritise their caring labour over their paid work commitments for fear of similar reprisals. Therefore, in this thesis I will consider the uptake of reconciliation entitlements and how people could be encouraged to make use of them. In this regard, I will consider how trade unions could supplement reconciliation legislation to encourage its wider use in chapter three.<sup>64</sup>

b) Challenging the prioritisation of the sexual family

A second difference between Haddin's situation and that of Gill and Jess is that he is a parent. Parenting has been romanticised and deemed worthy of more protection than other caring relationships. This is demonstrated by the breadth of UK legislative protection for parents balancing paid work, which would have entitled parents in Jess and Gill's position to take parental leave to provide care. They are currently not entitled to any such protection. The legislation which is available to all carers will be analysed in chapter three.<sup>65</sup> This raises

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<sup>63</sup> G. James *The Legal Regulation of Pregnancy and Parenting in the Labour Market* (Routledge, 2009) 24. See chapter one page 3 on extent of discrimination.

<sup>64</sup> See chapter three page 97

<sup>65</sup> See page 91-97

questions about how different caring relationships are accommodated and protected within the workplace, which reflects how they are valued within society.

I had originally planned to contrast the protection afforded to carers with those to parents, and consider how all caring relationships could be better accommodated within the workplace. However, there is so little legislative protection to those providing care outside of the parenting relationship, that this became impossible. Therefore, this thesis will focus upon the parenting relationship and childcare, due to the legislative focus on parenting. In the final chapter, I will turn my attention to those providing care for those other than children. I will apply the lessons which have been learnt from the body of legislation which supports parents to consider how all carers could be better accommodated and supported in the workplace.

Parenting is particularly valorised when it is performed within a heterosexual couple, the family form Haddin provides care in. This is the purest form of the sexual family unit, a concept developed by Fineman which describes the sexually intimate couple which forms the basis of family regulation and policy.<sup>66</sup> Again, this prioritisation is borne out by the body of reconciliation legislation, which has mainly focused upon the care provided by two sexually affiliated parents.

Most of the substantial body of literature on the reconciliation of paid work and caring labour does not question this predominant focus upon parenting within the sexual family. Therefore, to add to this body of literature, I will consider how the definition of parenting in the body of reconciliation legislation could be expanded to better support those providing childcare outside the sexual family. I will focus mainly upon single parents and kinship carers, who are

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<sup>66</sup> M. Fineman *The Neutered Mother, the Sexual Family and Other Twentieth Century Tragedies* (Routledge, 1995) 150

non-parents, including relatives or friends, who care for children that would otherwise have entered the care system.<sup>67</sup> To better protect these carers within the workplace and challenge the sexual family ideal which excludes them, I will again draw on the work of Fineman. She advocates the application of the caretaker-dependent unit to replace the sexual family, which would recognise and accommodate all caring relationships.<sup>68</sup> I will analyse how this could underpin the reconciliation legislation and its potential affects in chapter four. I will then apply this in chapters five, six and seven.

c) Challenging class inequality

Support for carers like Jess and Gill will also depend upon the type of paid work they are performing. Employees with specific skills, like Haddin as well as people in professional-managerial roles, are more likely to receive support for caring relationships because employers want to retain them.<sup>69</sup> Unskilled employees, who are more likely to constitute the working classes, will be less likely to receive such support.<sup>70</sup> Some of the most vulnerable workers in the UK are entirely excluded from accessing the reconciliation entitlements, because they are only available to employees. This includes precarious workers, who perform jobs which are distinguishable by “low wages, few benefits, the absence of collective representation, and little job security.”<sup>71</sup> Such work is disproportionately carried out by “women, racial and ethnic minorities, disabled workers, and other groups with marginal social power.”<sup>72</sup> As such workers lack social power, they are forced to take precarious work

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<sup>67</sup> S. Nandy, J. Selwyn, E. Farmer, P. Vaisey *Spotlight on Kinship Care* (Buttle UK, 2011) 6

<sup>68</sup> M. Fineman *The Autonomy Myth* (n 20) 68

<sup>69</sup> R. Crompton *Employment and the Family: The Reconfiguration of Work and Family Life in Contemporary Societies* (Cambridge University Press, 2006) 213

<sup>70</sup> J. Williams *Reshaping the Work-Family Debate: Why Men and Class Matter* (Harvard University Press, 2010) 43

<sup>71</sup> J. Fudge, R. Owens *Precarious Work, Women and the New Economy: The Challenge to Legal Norms* (Bloomsbury, 2006) 12

<sup>72</sup> K. Rittich ‘Rights, Risk and Reward: Governance Norms in the International Order and the Problem of Precarious Work’ in J. Fudge, R. Owens *Precarious Work, Women and the New Economy: The Challenge to Legal Norms* (Bloomsbury, 2006) 49

out of desperation. Precarious workers are often “dependent in all meaningful senses (they own no assets and are not entitled to share residual profits).”<sup>73</sup> Yet they are allocated much of the economic risk within the workplace relationship, including the costs of being absent from work. Therefore, precarious workers are some of the most vulnerable and lowly paid people in the workforce. They will constitute some of the 6.7 million people living in poverty in a family where someone works.<sup>74</sup>

I argue that this lack of support is unfair, partly because the caring relationships of working class carers, including the precarious workers who perform low paid, insecure work are equally as important as skilled workers. This is because caring work is of vital importance, no matter who is performing it. Also, these workers are the most likely to need support. Haddin is extremely well paid, so will be more able to deal with the negative workplace consequences. He is more likely to survive periods of unemployment or reduced working, more able to scale back spending to meet the financial costs of caring and more able to outsource his caring responsibilities to high quality professional carers. In contrast, both Jess and Gill’s stories demonstrate how finances are a key concern. This is reflective of many carers in the UK; Carers UK report that 48% of carers “are struggling to make ends meet.”<sup>75</sup> Therefore, they would be less able to deal with similar problems and are in need of extra support.

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<sup>73</sup> K. Klare ‘Horizons of Transformative Labour Law and Employment Law’ in J. Conaghan, R. Fischl and J. Conaghan *Labour Law in an Era of Globalization* (Oxford University Press, 2002) 17

<sup>74</sup> T. MacInnes, H. Aldridge, S. Bushe, P. Kenway, A. Tinson *Monitoring Poverty and Social Exclusion 2013* (Joseph Rowntree Foundation, 2013) 26

<sup>75</sup> Carers UK *The State of Caring 2015* (n 46) 10

Nonetheless, the experiences of poor carers balancing their paid work and caring labour “continue to be largely invisible in policy debates concerning work/family problems.”<sup>76</sup>

Therefore, another key theme in this thesis will be how the UK reconciliation legislation could better support more working class carers. In particular, I will add to the existing body of literature by considering how precarious workers could be protected. I will draw upon Freedland and Kountouris’ personal work contract in this regard, which suggests that labour law protections should be extended and applied to those engaging in any type of work, not just employees.<sup>77</sup>

### **Methodology**

The methodology of this thesis is primarily doctrinal in nature. I aim to explain and systematically critique the existing body of UK reconciliation legislation, as identified at page 5. Analysing this alongside relevant case law enables me to identify and explore gaps within the existing body of reconciliation legislation. Furthermore, this doctrinal analysis prompts me to suggest relevant supplements and reforms to promote fairness for carers, mainly parents.

This focus upon UK legislation will be supplemented by consideration of the impact of EU law. Indeed, I will contend that EU law has been a key driving force in the numerous changes to the body of UK reconciliation legislation, and has often been a more progressive force than the UK legislator. In addition, where appropriate, I will draw upon relevant comparative examples. These will mainly consist of reconciliation legislation from Norway and Sweden. This is due to the more progressive reconciliation legislation which has been adopted in these

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<sup>76</sup> L. Williams ‘Poor Women’s Work Experiences: Gaps in the ‘Work/Family Discussion’ in J. Conaghan, K. Rittich *Labour Law, Work and Family* (Oxford University Press, 2005) 198

<sup>77</sup> M. Freedland, N. Kountouris *The Legal Construction of Personal Work Relations* (Oxford University Press, 2011) 367

jurisdictions. However, it is important to state that this is not primarily a comparative piece of work. The comparative analysis will be used to critique the current UK legislation and consider how it could be improved and supplemented, rather than to offer an in-depth cross-cultural comparison.

My doctrinal analysis will be informed by a political commitment to a feminist ethic of care, which will be examined in chapter two. As noted above, this approach was initially developed by Gilligan and has subsequently been developed by feminist writers including Noddings, Tronto and Held.<sup>78</sup> Reflecting the various different academic disciplines of such writers, this thesis will analyse a wide range of inter and cross disciplinary material, including psychology, sociology and political science literature, which has been influenced in various ways by care theory. In turn, I will show how the ethic of care has been a key influence on feminist legal theory, including both Fineman's and Busby's work, which are two main intellectual influences on this thesis.

I will combine the adoption of the ethic of care with an examination of jurisprudential sources to create a socio-economic framework through which I will critique the UK reconciliation legislation. In particular, I will draw on theories of justice. I do not aim here to develop or defend a comprehensive theory of justice. Instead, I refer to generally recognised principles of justice: individuals are of equal worth; the promotion of wellbeing is important; and justice concerns the distribution of resources. Specifically, I will reference Rawls' concept of justice as fairness,<sup>79</sup> since he is widely regarded as the preminent modern

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<sup>78</sup> See C. Gilligan *In a Different Voice* (n 52), N. Noddings *Starting at Home: Caring and Social Policy* (Cambridge University Press, 2002), J. Tronto *Moral Boundaries: A Political Argument for an Ethic of Care* (Routledge, 1993), V. Held *The Ethics of Care: Personal, Political and Global* (Oxford University Press, 2005)

<sup>79</sup> J. Rawls *A Theory of Justice* (Harvard University Press, 1971)



political philosopher and theorist of justice.<sup>80</sup> Rawls argues that it would be “unfair if someone accepts the benefits of a practice but refuses to do his part in maintaining it.”<sup>81</sup> This resonates with my argument that every person has accepted the benefits of care, but many have done nothing to maintain it, by either providing care or supporting those who do. According to Rawls’ theory this is unfair. Therefore, grounding my thesis in fairness justifies my argument in favour of state intervention to better support carers within society by challenging the sexual family ideal as well as gender and class inequality. Furthermore, the tenets of justice justify challenging the unfair treatment that carers currently face.

In summary, both justice and care will be key underpinning themes throughout this thesis. I will argue in chapter two that although the two ideas are widely seen to be conceptually opposed, they are not necessarily in tension in the context of reconciling paid work and caring relationships. In chapter three, I will consider the obligations of the state to support carers and justify the thesis’ focus upon modifying the workplace.

The socio-economic framework developed will also be informed by the capabilities approach. Developed by Sen and Nussbaum, this measures state action according to how far it supports individuals to have the capability to “lead the kind of lives they value – and have reason to value.”<sup>82</sup> People are treated unjustly if they are unable to achieve the basic capabilities. I will refer to the capabilities approach to substantiate my arguments as to how fairness for carers can be achieved. In particular, I will contend that both caring relationships and paid work are basic capabilities as they are both of fundamental importance to people. This further brings

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<sup>80</sup> See for example R. Dworkin ‘John Rawls’ (2003) *The Harvard Review of Philosophy* 7, 7. S. Freeman *Rawls* (Routledge, 2007) xvii. S. Fredman *Women and the Law* (Oxford University Press, 1997) 21. A. Sen *The Idea of Justice* (Harvard University Press, 2009) 52. A. Laden ‘The House That Jack Built: Thirty Years of Reading Rawls’ (2003) 113 *Ethics* 367, 379.

<sup>81</sup> J. Rawls ‘Justice as Fairness’ (1958) 67 *The Philosophical Review* 164, 180

<sup>82</sup> A. Sen *Development as Freedom* (Oxford University Press, 1999) 18

together the principles of justice and care.

Therefore, the socio-economic framework adopted to critique UK reconciliation legislation is constructed through analysis of the ethic of care, justice and the capabilities approach. This theoretical framework means that my doctrinal analysis is located in a broader social context. In taking up Fineman's challenge, which suggests that reconciliation legislation should "make nurturing and caretaking a central responsibility of the nonfamily arenas of life," I will consider how carers could be treated more fairly in the UK and how reconciliation legislation could and should facilitate this. The broader social context is also apparent in this thesis' exploration of relevant policy changes. In seeking to make policy recommendations, I will particularly draw upon sociological, economic and philosophical literature, in addition to legal sources. Accordingly, as this thesis focuses upon the place of law in everyday life, it may be broadly described as socio-legal.<sup>83</sup>

Within the confines of the thesis, I have been unable to undertake empirical research. Nonetheless, such socio-legal research would be an important complement to the type of doctrinal legal analysis undertaken in this thesis. Accordingly, in chapter nine, I highlight specific areas which could be the subject of further empirical enquiry.

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<sup>83</sup> R. Harding *Regulating Sexuality: Legal Consciousness in Lesbian and Gay Lives* (Routledge, 2010) 8

## Chapter Two

### RECONCILING CARE AND JUSTICE: WHY CARING LABOUR IS IMPORTANT

#### Introduction

In this chapter I will argue that caring relationships require societal support. Despite caring labour being life-sustaining, it has been historically undervalued and remains so.

Accordingly, although caring labour can have a varied impact, many carers in the UK face hardship. Carers UK report that 82% of those caring for an elderly, disabled or otherwise dependent person described it as having a negative impact on their health.<sup>1</sup> A further 55% reported that they suffered from depression.<sup>2</sup> In addition, the Carers Trust report that the financial consequences of caring are so bad that 33% of carers do not want to wake up.<sup>3</sup>

Accordingly, many carers become dependent on care themselves, which Fineman characterises as “derivative dependency.”<sup>4</sup> In this chapter, I will argue that the law should challenge these disadvantages to achieve fairness for carers.

In the first part of this chapter, I will analyse what is meant by care and why it is so important. I will then consider who provides care. The provision of care is not universal. As Fineman notes, “many people in our society totally escape the burdens and costs that arise from assuming the role of a caretaker.”<sup>5</sup> Women remain mainly associated with caring and thus face the majority of the hardships. I will analyse the complex reasons why this is the case, concluding that there is no singular reason for women’s continued association with caring labour. It is resultant of many interrelated social factors, including societal structure

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<sup>1</sup> Carers UK *The State of Caring 2015* (Carers UK, 2015) 8

<sup>2</sup> Carers UK *The State of Caring 2015* (n 1) 8

<sup>3</sup> Carers Trust *Broke and Broken: Carers Battle Depression and Poverty* <http://www.carers.org/press-release/broke-and-broken-carers-battle-poverty-and-depression> (accessed 03.06.13)

<sup>4</sup> M. Fineman *The Autonomy Myth: A Theory of Dependency* (The New Press, 2004) 35

<sup>5</sup> M. Fineman *The Autonomy Myth* (n 4) 36

and differences in socialisation. In particular, economic position affects women's caring role, which I will consider throughout this section. However, as it has been widely recognised that the "core of gender inequality is the gender division of time," it is clear that to achieve gender equality, these factors should be challenged.<sup>6</sup>

I will argue in the final section that the state has a key role to play in challenging these factors and valuing caring relationships because it alone can act for the whole of society. Yet, the state will not just protect carers because the work they perform is important. Therefore, an appropriate theoretical basis is needed to support such an approach. In this regard, I will rely on principles of justice and fairness. Although justice and caring principles have traditionally been considered to be in opposition, I will conclude that principles of justice not only demonstrate why carers need to be better valued and supported within society, but also provide the best theoretical underpinning to challenge the disadvantages currently facing carers. Therefore, justice principles will secure better treatment for carers. The capabilities approach will substantiate this argument and I will contend that despite the problems that carers face, caring relationships should be considered a basic capability. This will promote fairness for carers by highlighting the importance of their caring work. It would also challenge the disadvantage that they currently face by demonstrating carers' need for state support.

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<sup>6</sup> I. Robeyns 'Sen's Capability Approach and Gender Inequality: Selecting Relevant Capabilities' (2003) 9 *Feminist Economics* 61, 82. See also S. Fredman 'Reversing Roles: Bringing Men Into the Frame' (2014) 10 *International Journal of Law in Context* 442, 442. J. Lewis, S. Giullari J. Lewis, S. Giullari 'The Adult Worker Model Family, Gender Equality and Care: The Search for New Policy Principles and the Possibilities and Problems of a Capabilities Approach' (2005) 34 *Economy and Society* 76, 78

## Care and why it is important

Defining care is inherently complex, as caring relationships vary in numerous ways.<sup>7</sup> As Bowden notes, definitions of caring can be very broad, including “all that we do to sustain the best possible lives,” or can be narrower in focus, including only eternal self-sacrifice, which suggests that caring is an activity embarked upon by very few.<sup>8</sup> The acts of caring can also be “both active and passive, involving physical and non-physical presence.”<sup>9</sup> This encompasses “both caring activities, such as shopping and cleaning, as well as feelings of concern, affection and love.”<sup>10</sup> These variations have meant that much of the academic literature considers wide definitions of care, including the frequently cited definition provided by Tronto and Fisher; care is “a species of activity that includes everything that we do to maintain and continue and repair our ‘world’ so that we can live in it as well as possible.”<sup>11</sup>

This definition has been praised because it lifts care “out of the romanticised paradigm of the mother and child relationship.”<sup>12</sup> This is important for two reasons. Firstly, as Beresford has argued “models for adult caring have tended to be borrowed from childcare and grow out of the unequal relationships associated with looking after children,” which misunderstands the bilateral nature of caring relationships.<sup>13</sup> Cared for people, including children, often provide care as well as receive it, which is overlooked in the romanticised mother-child relationship. Secondly, Tronto and Fisher’s definition shows that all caring relationships are equally

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<sup>7</sup> P. Bowden *Caring: Gender-Sensitive Ethics* (Routledge, 1997) 1

<sup>8</sup> P. Bowden *Caring: Gender-Sensitive Ethics* (n 7) 1

<sup>9</sup> J. Lewis, S. Giullari ‘The Adult Worker Model Family, Gender Equality and Care; The Search for New Policy Principles and the Possibilities and Problems of a Capabilities Approach’ (2005) 34 *Economy and Society* 76, 84

<sup>10</sup> R. Crompton *Employment and the Family: The Reconfiguration of Work and Family Life in Contemporary Societies* (Cambridge University Press, 2006) 191

<sup>11</sup> B. Fisher and J. Tronto ‘Toward a Feminist Theory of Care’ in E. Abel and M. Nelson *Circles of Care: Work and Identity in Women’s Lives* (State University of New York Press, 1991) 40

<sup>12</sup> N. Busby *A Right to Care? Unpaid Care Work in European Employment Law* (Oxford University Press, 2011) 43

<sup>13</sup> P. Beresford *What Future for Care?* (Joseph Rowntree Foundation, 2008) 2  
<http://www.jrf.org.uk/sites/files/jrf/2290.pdf> accessed 04.07.2013

important. A wide range of caring activities are recognised and none are prioritised. This is particularly significant for this thesis, as I will consider how care work is valued in different caring relationships. This includes the care provided for children as well as for an elderly, disabled or otherwise dependent person.

However, this thesis will not be focused upon all the types of caring activity Tronto and Fisher recognise. I will adopt an expansive but limited definition of caring relationships. This will be of practical use because discussing broad relationships of care can lead to “generalizations that are abstract and distant from the lives of the very different practitioners of caring values and the range of practices in which the values of caring are embedded.”<sup>14</sup> Therefore, I will highlight the key parts of the definition of care which will be the focus.

I will concentrate on the physical act of providing care. Two different types of care have been described in the literature; caring for and caring about. Noddings notes that caring about is “when we cannot care directly for others but wish that we could...we rely on principles of justice that approximate (or enable others to undertake) the actions we would perform if we could be bodily present.”<sup>15</sup> In contrast, caring for describes “the face-to-face occasions in which one person, as carer, cares directly for another, the cared for.”<sup>16</sup> For Noddings, the physical act of caring is the most important. This is partly because it sustains the human race; “if babies are not looked after they will die; if food preparation ceased people would eventually starve.”<sup>17</sup> Accordingly, caring for is life-sustaining. The physical act of providing care is also important because care needs are universal. As Sevenhuijsen notes, people “can

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<sup>14</sup> P. Bowden *Caring: Gender-Sensitive Ethics* (n 7)10

<sup>15</sup> N. Noddings *Starting at Home: Caring and Social Policy* (Cambridge University Press, 2002) 3

<sup>16</sup> N. Noddings *Starting at Home* (n 15) 21-22

<sup>17</sup> M. Glucksmann ‘Why “Work”? Gender and the “Total Social Organisation of Labour”’ (1995) 2 *Gender, Work and Organisation* 63, 70

only exist as individuals through and via caring relationships.”<sup>18</sup> It is not just the obvious times of childhood, old age, illness and disability when people are dependent, but every day.<sup>19</sup> Finally, it is this caring labour which “gives life its point, provides it with meaning, and returns to those who give it some measure of security and emotional sustenance.”<sup>20</sup> As Busby notes, we need such relationships to “lead successful and fulfilling lives.”<sup>21</sup> On this basis Holloway argues that the provision of “care is the psychological equivalent to our need to breathe unpolluted air.”<sup>22</sup> Although the physical act of caring for is vital, it leads to disadvantages. Therefore, it is those who are providing this care that require societal support and will thus be the focus of this thesis.

Tronto and Fisher’s wide definition includes care of self, bodies and the environment.<sup>23</sup> Although each of these is important, this thesis is focused upon human care relationships. In particular, I will focus upon care provided by adults. This is not because an analysis of child carers is not needed; such research would be vital as many child carers are also in need of increased societal support. The Children’s Society reports that one in twenty children misses school because of caring work, which may detrimentally impact upon their future wellbeing.<sup>24</sup> However, they are beyond the scope of this thesis due to my focus upon modifying the workplace in chapters three to seven. Nonetheless, my aim would be that some of the arguments expounded could be used to promote better support for child carers too.

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<sup>18</sup> S. Sevenhuijsen ‘The Place of Care: The Relevance of the Feminist Ethic of Care for Social Policy’ (2003) 4 *Feminist Theory* 179, 182

<sup>19</sup> J. Herring *Caring and the Law* (Hart, 2013) 2

<sup>20</sup> R. West ‘The Right to Care’ in E. Feder Kittay, E. Feder *The Subject of Care: Feminist Perspectives on Dependency* (Rowman & Littlefield, 2002) 89

<sup>21</sup> N. Busby *A Right to Care?* (n 12) 46

<sup>22</sup> W. Holloway ‘Introducing the Capacity to Care’ in W. Holloway *The Capacity to Care: Gender and Ethical Subjectivity* (Routledge, 2006) 11

<sup>23</sup> J. Tronto *Moral Boundaries: A Political Argument for an Ethic of Care* (Routledge, 1993) 103

<sup>24</sup> Children’s Society *Hidden from View: The Experiences of Young Carers in England* (Children’s society, 2013) 5

## Women's continued association with care work

Although the need for care is universal, the provision of care is not. Women have historically been associated with this work and, despite formal equality, caring labour remains highly gendered.<sup>25</sup> Women “are routinely found performing all the tasks and responsibilities associated with caring.”<sup>26</sup> 60% of all carers are women,<sup>27</sup> women are much more likely to care for someone outside of their own home (65% of all these carers)<sup>28</sup> and women made up 62% of high intensity carers: those who care for more than twenty hours a week.<sup>29</sup> Women also perform more childcare than men, with three-quarters of mothers reporting that they have primary responsibility for their children.<sup>30</sup> Therefore, men's representation in caring is smaller in almost every way: “the proportion of men caring is smaller; they care for fewer hours per week; and the tasks they undertake are less onerous and stressful.”<sup>31</sup>

Many reasons for women's continued association with caring have been advocated, including:

essentialist claims that women are biologically attuned to care more than men; that differences in socialisation means that the drive to care is stronger in women than men; and that there are powerful social forces in legal structures and social expectations that push women into caring roles, specifically that family and employment structures restrict women into caring roles.<sup>32</sup>

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<sup>25</sup> J. Herring *Caring and the Law* (n 19) 34

<sup>26</sup> D. Morgan *Family Connections: An Introduction to Family Studies* (Polity Press, 1996) 101

<sup>27</sup> The NHS Information Centre, Social Care Team *Survey of Carers in Households 2009/10* (The NHS Information Centre for Health and Social Care, 2010) 28

<sup>28</sup> The NHS Information Centre, Social Care Team *Survey of Carers in Households 2009/10* (n 27) 29

<sup>29</sup> The NHS Information Centre, Social Care Team *Survey of Carers in Households 2009/10* (n 27) 30

<sup>30</sup> G. Eillison, A. Barker, T. Kulasuriya *Work and Care: A Study of Modern Parents* (Equality and Human Rights Commission, 2009) 34

<sup>31</sup> C. Glendinning, F. Tjadens, H. Arksey, M. Moree, N. Moran and H. Nies *Care Provision within Families and its Socio-Economic Impact on Care Providers* (Social Policy Research Unit, University of York, 2009) 124

<http://www.york.ac.uk/inst/spru/research/pdf/EUCarers.pdf> accessed 05.07.13

<sup>32</sup> J. Herring *Caring and the Law* (n 19) 36



In this section, I will consider each of these explanations. Such analysis is needed to highlight how women's association with caring could be challenged to achieve gender equality.

Theories of intersectionality also highlight how these factors may affect women differently, as “issues of [sexuality,] race, migration status, history, and social class, in particular, come to bear on one's experience as a woman.”<sup>33</sup> A key issue will be how economic status affects women's caring role. As noted in the introduction, economic disadvantage is a key problem carers face, due to the historic undervaluing of caring labour.<sup>34</sup> These various factors will demonstrate that it is impossible to give one reason why women remain associated with caring work because “not all women experience their womanhood in the same ways.”<sup>35</sup>

Instead, I will argue that the gendered division of labour is resultant of many of these interrelated factors.

a) Biological reasons

One explanation given for women's association with providing care is “their ‘natural’ focus on relationships, children and an ethic of care.”<sup>36</sup> Women are thought to be biologically different to men, so naturally take on caregiving roles and are better at them. Accordingly, Nussbaum notes that it is sometimes thought that “there would be something wrong with any attempt to shake up traditional patterns of care giving.”<sup>37</sup> Nussbaum suggests that a possible difference in preference of men and women may have once been evident in prehistory.<sup>38</sup>

However, she stresses that this was only in preference and that “men are capable of loving

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<sup>33</sup> G. Samuels, F. Ross-Sheriff ‘Identity, Oppression, and Power: Feminisms and Intersectionality Theory’ (2008) 23 *Journal of Women and Social Work* 5, 5

<sup>34</sup> Carers Trust *Broke and Broken* (n 3)

<sup>35</sup> G. Samuels, F. Ross-Sheriff ‘Identity, Oppression, and Power’ (n 33) 6

<sup>36</sup> J. Williams *Unbending Gender: Why Family and Work Conflict and What to do About it* (Oxford University Press, 2000) 1

<sup>37</sup> M. Nussbaum *Women and Human Development: The Capabilities Approach* (Cambridge University Press, 2000) 264

<sup>38</sup> M. Nussbaum *Women and Human Development* (n 37) 264

and caring.”<sup>39</sup> Other commentators have totally dismissed this argument. For example, Herring states that the argument holds “little validity in biological terms.”<sup>40</sup> Slaughter also argues that there is no biological imperative as to why women rear children, or why men have traditionally been excluded from doing so.<sup>41</sup>

This biological argument claiming to explain the gendered division of care should be rejected. It cannot explain the fact that not all women are equally engaged with caring.<sup>42</sup> Not all women provide care and not all women want to provide care. It also misunderstands caring labour, which cannot be understood simply as acting upon impulse, because it involves “quite a lot of thought and interpretation, especially evaluation.”<sup>43</sup> As Nussbaum notes, these are not the sort of things which are “simply there from birth; they have to be learnt.”<sup>44</sup> As caring roles are not biologically determined, natural differences between men and women cannot explain women’s association with caring work.

b) Women choose to care

Women’s association with caring remains popularly explained by men and women having “differing work orientations,” so women choose to provide care.<sup>45</sup> Williams notes that women are commonly portrayed as “opting out” of the workforce upon becoming mothers to focus upon childcare.<sup>46</sup> Hakim has been a key advocate of this, developing the controversial preference theory which states that lifestyle preferences are becoming increasingly important

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<sup>39</sup> M. Nussbaum *Women and Human Development* (n 37) 264

<sup>40</sup> N. Busby *Caring and the Law* (n 19) 36

<sup>41</sup> M. Slaughter ‘The Legal Construction of “Mother”’ in M. Fineman, I. Karpin *Mothers in Law: Feminist Theory and the Legal Regulation of Motherhood* (Columbia University Press, 1995) 73

<sup>42</sup> C. Conlon, V. Timonen, G. Carney, T. Scharf ‘Women (Re)Negotiating Care Across Family Generations: Intersection of Gender and Socioeconomic Status’ (2014) 28 *Gender and Society* 729, 730

<sup>43</sup> M. Nussbaum *Women and Human Development* (n 37) 265

<sup>44</sup> M. Nussbaum *Women and Human Development* (n 37) 265

<sup>45</sup> C. Hakim ‘Five Feminist Myths about Women’s Employment’ (1995) 46 *The British Journal of Sociology* 429, 448

<sup>46</sup> J. Williams *Reshaping the Work-Family Debate: Why Men and Class Matter* (Harvard University Press, 2010) 3

in determining women's roles.<sup>47</sup> She argues that formal equality has enabled all women to participate in activities other than caregiving, so their ongoing association with caring work is a result of their own decision.<sup>48</sup> Others have agreed with this, especially with regards to parenting which can be seen as "the end result of a decision-making process."<sup>49</sup> Case takes this further by comparing "the voluntary production of both poetry and children [because both] can be at once a source of pleasure and site of intense effort to those who do it."<sup>50</sup>

Some people certainly make positive decisions to care, such as when people choose to undergo in vitro fertilisation. Kessler further reports that some people make a positive decision to care as a mark of political resistance, especially those who are not regarded as families.<sup>51</sup> She draws on caregiving practices by black women who have "experienced motherhood as an empowering denial of the dominant society's denigration of their humanity."<sup>52</sup> Writing in the American context, she notes that black mothers have not traditionally been associated with the practical work of childcare. Instead, they have been more associated with paid work, where they face workplace exploitation.<sup>53</sup> Therefore, black women's practical caring for their children could be "understood at least in part as an act of resistance to wage market exploitation."<sup>54</sup> Likewise, Kessler notes that caregiving by gay men and lesbians "may constitute practices of conscious, political resistance to subjugating legal (and other) narratives."<sup>55</sup> She states that until the 1980s, "claiming a gay or lesbian identity was understood by many gays, lesbians, and society more broadly to be a rejection of

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<sup>47</sup> C. Hakim *Work-Lifestyle Choices in the 21<sup>st</sup> Century* (Oxford University Press, 2000) 17

<sup>48</sup> C. Hakim *Work-Lifestyle Choices in the 21<sup>st</sup> Century* (n 47) 274

<sup>49</sup> N. Busby *A Right to Care?* (n 12) 46

<sup>50</sup> M. Case 'How High the Apple Pie? A Few Troubling Questions about Where, Why, and How the Burden of Care for Children Should be Shifted' (2001) 76 *Chicago-Kent Law Review* 1753, 1779

<sup>51</sup> L. Kessler 'Transgressive Caregiving' (2005) 33 *Florida State University Law Review* 1, 3

<sup>52</sup> L. Kessler 'Transgressive Caregiving' (n 51) 20

<sup>53</sup> L. Kessler 'Transgressive Caregiving' (n 51) 23

<sup>54</sup> L. Kessler 'Transgressive Caregiving' (n 51) 23

<sup>55</sup> L. Kessler 'Transgressive Caregiving' (n 51) 38

the family.”<sup>56</sup> Such ideas have since been increasingly challenged as some “lesbian and gay men have engaged in care and kinship practices that contest the centrality of biology and heterosexual intercourse to the meaning of family.”<sup>57</sup> Therefore, caring may provide some people with an empowering opportunity to challenge societal standards from which they have been excluded, including heteronormative ideas of the family.<sup>58</sup> In such circumstances, people are clearly making a positive decision to provide care.

Nonetheless, characterising all caring relationships as a choice is wrong. Even in the situations described above where a positive decision to care has been made, Fineman notes that this does not mean that they have “also consented to the societal conditions attendant to that role and the many ways in which that status will negatively effect her [or their] economic prospects.”<sup>59</sup> She questions whether these carers realise what the costs of their decision might be, and even if they did, are the conditions “just too oppressive or unfair to be imposed by society even if an individual ostensibly agrees to or chooses them?”<sup>60</sup> Accordingly, Fineman argues that even if some women make a choice to prioritise caring relationships, their poor treatment is never justified. This is because caring labour “carries considerable social value.”<sup>61</sup> This is as true for childcare as it is for the provision of any other care work; as Fredman notes, children are “a social necessity.”<sup>62</sup>

Most people do not make such a positive decision to care. Characterising the caring relationships of these people as a choice is even more problematic. To make a choice:

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<sup>56</sup> L. Kessler ‘Transgressive Caregiving’ (n 51) 38

<sup>57</sup> L. Kessler ‘Transgressive Caregiving’ (n 51) 39

<sup>58</sup> J. Herring *Caring and the Law* (n 19) 43

<sup>59</sup> M. Fineman ‘Contract and Care’ (2000-01) 76 *Chicago-Kent Law Review* 1403, 1420

<sup>60</sup> M. Fineman ‘Contract and Care’ (n 59) 1420

<sup>61</sup> J. Herring *Caring and the Law* (n 19) 96

<sup>62</sup> S. Fredman *Women and the Law* (Oxford University Press, 1997) 179

at least two positive alternatives are required. This means being able to choose between *a* and *b*...rather than a negative choice that would involve choosing between alternatives *a* or not-*a*.<sup>63</sup>

It has been argued that such positive choice is only available to those with social privilege.<sup>64</sup> Financial advantage enables care to be outsourced, or for it to be provided without fear of the associated economic losses. Yet, for many women, these are not viable options. Those who are socio-economically disadvantaged are unlikely to be able to afford high quality outsourced care, yet may also be unable to deal with the financial consequences of providing the care themselves.<sup>65</sup> Therefore, they are not faced with two positive options. Indeed, they may not be afforded even one positive option; their reconciliation of paid work and caring labour is therefore more accurately highlighted as a necessity, rather than a choice. Accordingly, Crompton suggests that Hakim's preference theory may be better viewed as a reflection of economic advantage.<sup>66</sup>

However, even economically advantaged people are rarely faced with two positive outcomes. This is because of the potentially devastating consequences of not providing care.<sup>67</sup> Many carers are reluctant to transfer their caring responsibilities to others; they consider it to be their duty to provide the care. People report feeling guilt, sadness and failure when they cannot meet the caring needs of dependents.<sup>68</sup> This is because people's own wellbeing is affected by others. People, especially women, are relational in that they define themselves partly through their relationships.<sup>69</sup> Therefore, accepting the disadvantages that carers face

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<sup>63</sup> H. Arksey, C. Glendinning 'Choice in the Context of Informal Care-Giving' (2007) 15 *Health and Social Care in the Community* 165, 168

<sup>64</sup> R. Crompton *Employment and the Family* (n 10) 57

<sup>65</sup> J. Williams *Unbending Gender* (n 36) 154

<sup>66</sup> R. Crompton *Employment and the Family* (n 10) 57

<sup>67</sup> R. Crompton *Employment and the Family* (n 10) 11

<sup>68</sup> H. Arksey, C. Glendinning 'Choice in the Context of Informal Care-Giving' (n 63) 170

<sup>69</sup> C. Gilligan *In a Different Voice: Psychological Theory and Women's Development* (Harvard University Press, 1982) 156

may seem “like a perfectly rational choice when the alternative [of seeing loved ones harmed] seems so radical, so potentially damaging...and so unknown.”<sup>70</sup> Indeed, this may seem even more rational for women due to their relational sense of self. These feelings of guilt or sadness may be reinforced by the cared for person’s own views.

Older people are reported to be particularly likely to want only a close relative to look after them: refusing services can also reflect the care recipient’s insistence on maintaining ‘normality’, denying that anything is wrong or that external help is necessary.<sup>71</sup>

Therefore, for most people, not meeting these caring needs is not a positive option. This is true of all caring relationships; the socially advantaged are subject to the same pressures, irrespective of options about outsourcing their responsibilities. Likewise, although some people make a definite choice to have a child, the provision of care for that child cannot be characterised as a choice. Parents may be willing to accept disadvantages to support their children, just like those providing care for other dependents. In fact, many women may find it even harder to not provide care for their children, as many consider them “an extension of self that is not yet self.”<sup>72</sup> Accordingly, not caring for children may not be a realistic option for many.

The language of choice is thus particularly inappropriate when determining why women remain associated with caring labour. Eichner argues caring is better described as “a moral imperative based on one’s understanding of one’s self (conceived in terms of one’s relationships), which stands independent of individual preferences.”<sup>73</sup> This accounts for the importance and unavoidable nature of caring relationships. It also better reflects the pressure

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<sup>70</sup> K. Baker ‘The Problem with Unpaid Work’ (2007) 4 University of St Thomas Law Journal 599, 605

<sup>71</sup> H. Arksey, C. Glendinning ‘Choice in the Context of Informal Care-Giving’ (n 63) 170

<sup>72</sup> P. Bowden *Caring: Gender-Sensitive Ethics* (n 7)22

<sup>73</sup> M. Eichner ‘Square Peg in a Round Hold: Parenting Policies and Liberal Theory’ (1998) 59 Ohio State Law Journal 133, 172

that people, especially women, feel to provide care because of the powerful and, to some extent, inevitable feelings of guilt that will come if they do not. However, if there are no biological differences between men and women with regards to their caring roles, it is still unclear why women feel more pressure to provide care. I will argue that is resultant of a variety of complex and interrelated social factors, which further limit the choices available to women.

c) The public/private divide and the sexual family

Due to the reproductive imperative, the heterosexual family unit has an assumed “naturalness.”<sup>74</sup> Fineman notes that this is the purest form of the sexual family, which describes the sexually intimate couple which is “venerated in law, institutionalized as the appropriate form of intimacy and secured against defamation or violation by unsanctified alternatives.”<sup>75</sup> Roles and attributes were assigned according to gender within this protected family type. Men were associated with the mind and soul, whereas women were associated with the body; their only function was to reproduce, which justified their exclusion from the public sphere.<sup>76</sup> Therefore, women were consigned to the private sphere of the home. This meant that not only did women give birth, they also raised children too. Mothering thus ensured that caring came “to be perceived as an innate characteristic of women and therefore a natural determinant of women’s social possibilities and roles.”<sup>77</sup>

The private sphere was implicitly assumed to be inferior to the public sphere.<sup>78</sup> The caring work provided by women was treated as a marginal part of existence.<sup>79</sup> This was partly

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<sup>74</sup> M. Fineman *The Neutered Mother, the Sexual Family and Other Twentieth Century Tragedies* (Routledge, 1995) 150

<sup>75</sup> M. Fineman *The Neutered Mother* (n 74) 150

<sup>76</sup> V. Held *The Ethics of Care: Personal, Political and Global* (Oxford University Press, 2005) 59

<sup>77</sup> P. Bowden *Caring: Gender-Sensitive Ethics* (n 7) 8

<sup>78</sup> S. Fredman *Women and the Law* (n 62) 17

because the everyday nature of care “produces an aura of invisibility.”<sup>80</sup> This invisibility was reinforced because care work involves and deals with the negatives of the human body that society does not wish to acknowledge, like “decay, dirt, death, decline, failure.”<sup>81</sup> As needing care is considered tantamount to failure, few people identify with dependency “and actually want to be ‘cared for’ in this sense.”<sup>82</sup> Accordingly, care work was hidden in the private sphere through common consent.<sup>83</sup>

Although women were providing the caring labour, it was not their only work.<sup>84</sup> Both women and men have always participated in other work.<sup>85</sup> Households were units of production; both men and women participated not for money, but for “family survival and maintenance.”<sup>86</sup> Prior to the Industrial Revolution, people did not travel to work, but mainly worked on the land.<sup>87</sup> As Williams notes, work and family responsibilities were not sharply separated in space or time.<sup>88</sup> The Industrial Revolution changed this; work was done for money outside the home, in factories. Caring labour became “physically and conceptually more separate,” from the other work women were performing.<sup>89</sup> As the spheres separated, so did families working as units. Men were expected to work in factories and offices. This was deemed proper work, as it was paid, “occurring outside the home and done by someone holding a job.”<sup>90</sup> Meanwhile, “women (in theory) stayed behind to rear the children and tend the ‘home

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<sup>79</sup> J. Tronto *Moral Boundaries* (n 23) 111

<sup>80</sup> P. Bowden *Caring: Gender-Sensitive Ethics* (n 7) 5-6

<sup>81</sup> J. Twigg ‘Carework as a Form of Bodywork’ (2000) 20 *Ageing and Society* 389, 406

<sup>82</sup> P. Beresford *What Future for Care?* (n 13) 2

<sup>83</sup> J. Twigg ‘Carework as a Form of Bodywork’ (n 81) 405

<sup>84</sup> T. McBride ‘Women’s Work and Industrialization’ in L. Berlanstein *The Industrial Revolution and Work in Nineteenth Century Europe* (Taylor and Francis, 2005) 66

<sup>85</sup> S. Fredman *Women and the Law* (n 62) 17

<sup>86</sup> J. Cleveland, M. Stockdale, K. Murphy, B. Gutek *Women and Men in Organizations: Sex and Gender Issues at Work* (Psychology Press, 2000) 6

<sup>87</sup> M. Holmes *Gender and Everyday Life* (Routledge, 2009) 7

<sup>88</sup> J. Williams *Unbending Gender* (n 36) 1

<sup>89</sup> S. Boyd ‘Challenging the Public/Private Divide: An Overview’ in S. Boyd *Challenging the Public/Private Divide: Feminism, Law and Public Policy* (University of Toronto Press, 1997) 8

<sup>90</sup> K. Klare ‘Horizons of Transformative Labour Law and Employment Law’ in J. Conaghan, R. Fischl and J. Conaghan *Labour Law in an Era of Globalization* (Oxford University Press, 2002) 10



sweet home’.<sup>91</sup> This reflected the reality for middle class families, but working class women still needed to earn an income.<sup>92</sup> They were nonetheless affected by the desirability to confine women to the home, partly because the public/private divide was “used in order to put moral pressure on them [working class women], and to blame them for neglect of their children.”<sup>93</sup> Accordingly, women became more side-lined in the workplace, so working class women often undertook commodified work in the home or worked in others’ homes.<sup>94</sup> This made their paid work less visible and reinforced the idea that the public sphere was better than the private.

Therefore, the public/private divide resulted in a gendered division of labour.<sup>95</sup> As men dominated the public sphere, it was shaped around masculine norms.<sup>96</sup> The workplace was structured around a worker whose main focus was paid work and who had to make little or no time to provide care. The expectation that women would not participate in the paid workforce remained and was reinforced until the 1960s; men worked for a family wage, supposedly enough to support their whole family, so women would not need to work or only worked for ‘pin money’.<sup>97</sup> The public sphere thus made no concessions to the private sphere; it was assumed that all workers’ caring responsibilities were met by another.

Since then, women have been formally granted equal access to the workplace. This made visible one of the fallacies of the public/private divide, that “the public is fully insulated from

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<sup>91</sup> J. Williams *Unbending Gender* (n 36) 1

<sup>92</sup> S. Fredman *Women and the Law* (n 62)17

<sup>93</sup> S. Fredman *Women and the Law* (n 62)17

<sup>94</sup> A. Araba Ocran ‘Across the Home/Work Divide: Home-work in Garment Manufacture and the Failure of Employment Regulation’ in S. Boyd *Challenging the Public/Private Divide: Feminism, Law and Public Policy* (University of Toronto Press, 1997) 147

<sup>95</sup> S. Fredman *Women and the Law* (n 62)110

<sup>96</sup> J. Williams *Reshaping the Work-Family Debate* (n 46) 79

<sup>97</sup> S. Fredman *Women and the Law* (n 62)74

the private.”<sup>98</sup> Caring labour and paid work responsibilities will impact upon each other, so “what happens in one sphere influences the other...it is an illusion to think that complete separation can occur.”<sup>99</sup> The recognition of this interface might have changed the public sphere to allow people to reconcile both of these responsibilities, but the paradigm figure remains the fully committed worker, whose paid employment is their “principal life activity.”<sup>100</sup> This has resulted in long hours being considered “the key determinant of ‘commitment’ to work,” which those with caring responsibilities cannot provide.<sup>101</sup> Therefore, women often have to forgo opportunities to earn their own money or have more tenuous ties to the workplace which severely affects their financial position.<sup>102</sup> This is demonstrated in the persistent gender pay gap. As noted in chapter one, although it is currently the lowest on record, this remains high at 19.1% between all employees.<sup>103</sup> As women earn less money than men, this may explain why when paid work and caring responsibilities conflict, most families in the UK are more likely to scale back women’s employment.<sup>104</sup> It may be more financially viable for women to cut down their paid work commitments to provide care when necessary, as men’s wages are likely to be more vital to families’ survival. However, this does not mean that women’s differing working patterns can be described as a choice. Many women have to “make a ‘choice’ between marginalised

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<sup>98</sup> S. Fredman *Women and the Law* (n 62)17

<sup>99</sup> K. O’Donovan *Sexual Divisions in Law* (Weidenfeld and Nicolson, 1985) 160

<sup>100</sup> K. Klare ‘Horizons of Transformative Labour Law and Employment Law’ (n 90) 10

<sup>101</sup> I. Bacik, E. Drew ‘Struggling with Juggling: Gender and Work/Balance in the Legal Professions’ (2006) 29 *Women’s Studies International Forum* 136, 137

<sup>102</sup> M. Fineman *The Autonomy Myth* (n 4) 46

<sup>103</sup> Office for National Statistics *Annual Survey of Hours and Earnings, 2014 Provisional Results* (Office for National Statistics, 2014) 10. See chapter one page 2

<sup>104</sup> R. Crompton *Employment and the Family* (n 10) 199. Childcare still dictates women’s employment rates (Carers UK *Supporting Working Carers: The Benefits to Families, Business and the Economy* (Carers UK, 2013) 16). Women providing care for other dependents are also more likely to sacrifice employment to men (NIHR School for Social Care Research ‘Overcoming Barriers: Unpaid Care and Employment in England’ <[http://www.lse.ac.uk/LSEHealthAndSocialCare/pdf/Findings\\_10\\_carers-employment\\_web.pdf](http://www.lse.ac.uk/LSEHealthAndSocialCare/pdf/Findings_10_carers-employment_web.pdf)> accessed 27.01.14 1)

‘mother (or family-) friendly employment and ‘standard worker’ ‘mother (family-) unfriendly’ employment,” neither of which is a positive option.<sup>105</sup>

The scaling back of women’s employment may also be a result of discrimination against women within the workplace. As noted in chapter one, this remains widespread because some employers view women as less reliable workers who are likely to be absent from the workplace.<sup>106</sup> This affects all women, not just those who provide care, because “mothering is a realm of potentiality to which all women are in some way accountable.”<sup>107</sup> Therefore, women are discriminated against as potential carers who may be unable to fulfil the requirements of the workplace. This restricts all women’s ability to earn or succeed. Thus, one compelling reason why women are still associated with care is that structural hindrances caused by the public/private divide reinforce their caring role. Indeed, Conaghan notes that “it is difficult, if not impossible, to enter the world of work without concluding that its arrangements are unfair to women.”<sup>108</sup>

#### d) Differences in socialisation

The public/private divide and the prioritisation of the sexual family have created different expectations of men and women. “Caring has become tied up in society’s expectations around womanhood.”<sup>109</sup> Mothering is “seen as natural, universal and unchanging.”<sup>110</sup> Women are defined by their childcare role and are thus expected to prioritise their caring

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<sup>105</sup> R. Crompton *Employment and the Family* (n 10) 123

<sup>106</sup> See chapter one page 3

<sup>107</sup> P. Bowden *Caring: Gender-Sensitive Ethics* (n 7)23

<sup>108</sup> J. Conaghan ‘Feminism and Labour Law: Contesting the Terrain’ in A. Morris and T. O’Donnell *Feminist Perspectives on Employment Law* (Cavendish, 1999) 18

<sup>109</sup> J. Herring *Caring and the Law* (n 19) 36

<sup>110</sup> E. Nakano Glenn ‘Social Constructions of Mothering: A Thematic Overview’ in E. Nakano Glenn, G. Chang, L. Rennie Forcey *Mothering: Ideology Experience and Agency* (Routledge, 1994) 3

relationships.<sup>111</sup> This was reflected in the British Social Attitudes Survey, where 69% of all people thought that when caring for a child under school age, the mother should cut down their hours of paid work to either nothing or part-time.<sup>112</sup> However, this is now balanced with an emphasis upon paid work, which is considered of central importance to social morality.<sup>113</sup> This has been emphasised by the current Conservative Government (2015-present), who equate working hard with “doing the right thing.”<sup>114</sup> The importance of “employment in displaying socially appropriate masculinity is unquestioned.”<sup>115</sup> However, men’s caring role has increasingly been emphasised as the involvement of fathers in their children’s lives has been advocated as the solution to an array of social problems.<sup>116</sup> These include improved cognitive outcomes, lower levels of child behavioural problems and reduced levels of delinquency.<sup>117</sup> Yet these ideas of new fatherhood have not resulted in fathers providing a significant amount of childcare, as women remain the main carers.<sup>118</sup> This is because the emphasis upon paid work means that men tend to view fathering as “something that is fitted into a schedule dominated by paid employment.”<sup>119</sup> Accordingly, many women face a double burden of paid and unpaid work.

The assumed naturalness of the sexual family ideal and these gendered roles makes it difficult for individuals to transform them.<sup>120</sup> It is through caring labour that some women are accepted and feel they belong in the world, which explains why women tend to view

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<sup>111</sup> C. McGlynn ‘European Union Family Values: Ideologies of “Family” and “Motherhood” in European Union Law’ (2001) *Social Politics* 325, 328

<sup>112</sup> A. Park, C. Bryson, E. Clery, J. Curtice, M. Phillips *British Social Attitudes 30* (NatCen Social Research, 2013) 124

<sup>113</sup> A. Morris, T. O’Donnell *Feminist Perspectives on Employment Law* (Cavendish, 1999) 2

<sup>114</sup> The Conservative Party *The Conservative Party Manifesto 2015* (The Conservative Party, 2015) 3

<sup>115</sup> E. Dermott *Intimate Fatherhood: A Sociological Analysis* (Routledge, 2008) 41

<sup>116</sup> S. Sheldon, R. Collier *Fragmenting Fatherhood: A Socio-Legal Study* (Hart, 2008) 22

<sup>117</sup> P. Raamchandani, J. Domoney, V. Sethna, L. Psychogiou, H. Vlachos, L. Murray ‘Do Early Father-Infant Interactions Predict the Onset of Externalising Behaviours in Young Children? Findings from a Longitudinal Cohort Study’ (2013) 54 *Journal of Child Psychology and Psychiatry* 56, 57

<sup>118</sup> E. Dermott *Intimate Fatherhood* (n 115) 18

<sup>119</sup> C. Smart, B. Neale ‘“I Hadn’t Really Thought About It”: New Identities/New Fatherhoods’ in J. Seymour, P. Bagguley *Relating Intimacies: Power and Resistance* (MacMillan, 1999) 118

<sup>120</sup> A. Diduck *Law’s Families* (Lexis Nexis, 2003) 23

themselves relationally.<sup>121</sup> It thus corresponds that they would prioritise their caring relationships. Women's relational sense of self is further explained by the fact that "the caring orientation...seems to flourish in those who (even when well educated) remain responsible for the direct care of others."<sup>122</sup> By this, Noddings means that the expectation of caring has resulted in women often becoming better carers and defining themselves according to their caring role. The relational sense of self that women develop because of their association with caring means that after the labour intensive periods of childcare, women may still continue to perform care for others. This further reinforces women's caring role. Yet, it is clear that this is the result of gender socialisation and normative expectations rather than biological difference.<sup>123</sup>

The structural disadvantages women face in the paid workplace may further reinforce their caring orientation. This is because many women have to 'choose' between being an unappreciated worker and prioritising caring. Women are incentivised to prioritise caring relationships by an unaccommodating workplace and the ideals of a good woman, even though their caring labour is undervalued. Working class women are most likely to be in such an invidious situation. The skills and knowledge associated with middle class occupations make employers more willing to accommodate their caring relationships to retain skilled workers.<sup>124</sup> Working class women are more likely to find that their caring responsibilities may "threaten unemployment."<sup>125</sup> Facing more structural constraints may encourage or even push these women to sacrifice their paid work commitments to concentrate on care.<sup>126</sup> As Crompton argues, if women have limited career and life prospects, the idea and status of

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<sup>121</sup> J. Lewis, S. Giullari 'The Adult Worker Model Family, Gender Equality and Care' (n 9) 76

<sup>122</sup> N. Noddings *Starting at Home* (n 15) 4

<sup>123</sup> R. Crompton *Employment and the Family* (n 10) 17

<sup>124</sup> S. Damaske *For the Family?: How Class and Gender Shape Women's Work* (Oxford University Press, 2011) 91

<sup>125</sup> J. Herring *Caring and the Law* (n 19) 117

<sup>126</sup> J. Williams *Reshaping the Work-Family Debate* (n 46) 42

being a mother is often considered a good option, even though this work is undervalued.<sup>127</sup>

These problems faced by working class women also demonstrate how “habit, fear, low expectations and unjust background conditions deform people’s choice and even their wishes for their own lives.”<sup>128</sup> Women may prioritise caring labour because of a lack of other options.

It is perhaps surprising that the sexual family and gendered expectations remain prioritised in the UK as “it cannot be presumed that children will be raised by a couple.”<sup>129</sup> There are currently two million single parents in the UK.<sup>130</sup> Also, research has found that many mothers rely not upon the father for help with childcare, but on their own mothers.<sup>131</sup> In addition, many children in the UK are not raised by parents at all; estimates suggest that a vast number of children, from 139,000 to 300,000, are being raised by kinship carers, as defined in chapter one.<sup>132</sup> Therefore it is clear that other collaborative care arrangements “occur as a matter of social fact.”<sup>133</sup> Accordingly, the sexual family no longer reflects how children are raised in the UK.

It is arguable that the sexual family has never been reflective of families because it reflects a white, middle class ideology which has not accounted for dominant practices of motherhood

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<sup>127</sup> R. Crompton *Employment and the Family* (n 10) 181

<sup>128</sup> M. Nussbaum *Women and Human Development* (n 37) 114

<sup>129</sup> J. McCandless, S. Sheldon ‘The Human Fertilisation and Embryology Act (2008) and the Tenacity of the Sexual Family Form’ (2010) 73 *Modern Law Review* 175, 187

<sup>130</sup> Office for National Statistics *Statistical Bulletin: Families and Households, 2014* (Office for National Statistics, 2015) 5

<sup>131</sup> W. Mitchell, E. Green ‘I Don’t Know What I’d Do Without Our Mam: Motherhood, Identity and Support Networks’ (2002) 50 *Sociological Review* 1, 12

<sup>132</sup> S. Nandy, J. Selwyn, E. Farmer, P. Vaisey *Spotlight on Kinship Care* (Buttle UK, 2011) 6. As noted in the introduction, these are non-parents, including relatives or friends, who care for children who would otherwise have entered the care system (See chapter one page 14).

<sup>133</sup> J. McCandless, S. Sheldon ‘The Human Fertilisation and Embryology Act (2008) and the Tenacity of the Sexual Family Form’ (n 129) 198

across ethnic and social backgrounds.<sup>134</sup> Nakano Glenn reports on the practice of “shared mothering,” or sharing care with other women within black communities, noting it “has been [a] characteristic of African-American communities since slavery.”<sup>135</sup> Responsibility for providing childcare is more often shared with other family members as well as the wider community, rather than just parents.<sup>136</sup> Kessler notes that this is “in part an expression of a distinct, positive, conscious ideal of community-based independence involving shared family caregiving and nonmarital partnership with men.”<sup>137</sup> Barlow and Duncan further report that black mothers tended to reject the idea of motherhood entailing meeting care needs alone. Instead, they were inclined to see “paid employment as part of their moral responsibility to their children as good mothers, providing them with both financial security and a good role model.”<sup>138</sup>

Although shared mothering still positions women mainly as carers, they demonstrate the divergent ways in which childcare needs are being met in the UK. Nonetheless, the sexual family remains prioritised, as evidenced by the Conservative Government’s plans to expand the tax cut for those married or in civil partnerships.<sup>139</sup> This not only makes it harder for those caring within it to transform gendered expectations, but also is particularly limiting to those people providing care outside of this protected form.<sup>140</sup> As the sexual family ideal reflects white, middle class ideologies, this is particularly detrimental to the socially-economically disadvantaged. This includes the majority of kinship carers who live in poverty,<sup>141</sup> as well as

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<sup>134</sup> P. Hill Collins ‘Shifting the Centre: Race, Class, and Feminist Theorising about Motherhood’ in *Mothering: Ideology Experience and Agency* (Routledge, 1994) 45

<sup>135</sup> E. Nakano Glenn ‘Social Constructions of Mothering’ (n 110) 6

<sup>136</sup> E. Nakano Glenn ‘Social Constructions of Mothering’ (n 110) 6

<sup>137</sup> L. Kessler ‘Transgressive Caregiving’ (n 51) 25

<sup>138</sup> A. Barlow, S. Duncan ‘Supporting Families? New Labour’s Communitarianism and the ‘Rationality Mistake’: Part I’ (2000) 22 *Journal of Social Welfare and Family Law* 23, 35-36

<sup>139</sup> The Conservative Party *The Conservative Party Manifesto 2015* (n 114) 27

<sup>140</sup> A. Diduck *Law’s Families* (n 120) 23

<sup>141</sup> J. Selwyn, S. Nandy ‘Kinship Care in the UK: Using Census Data Estimate the Extent of Formal and Informal Care by Relatives’ (2014) 19 *Child and Family Social Work* 44, 50

single parents.<sup>142</sup> Some ethnic minorities will be equally excluded from the support, including those participating in shared mothering. Again, these people are already particularly vulnerable, as families headed by someone from an ethnic minority are also likely to experience poverty.<sup>143</sup> Therefore, the prioritisation of the sexual family detrimentally impacts upon those who are already vulnerable to multiple forms of discrimination, including “race, migration status, history, and social class,” in addition to gender.<sup>144</sup> In particular, this evidently negatively impacts upon the socially-economically disadvantaged.

Carers in same-sex relationships may be less vulnerable to discrimination in this regard due to efforts to expand the legal protection to other sexually affiliated couples, including those who are unmarried and those in same-sex relationships.<sup>145</sup> This culminated in the recognition of same-sex marriage in the UK.<sup>146</sup> Such reforms do represent progress in recognising different family formats. The formal recognition of same-sex couples also acknowledges that people can act outside their gendered roles and thus challenges the restrictive stereotypes. However, such reforms do not go far enough. This is because the extension of legislative recognition reproduces the sexual family, “merely affirm[ing] the centrality of sexuality to the fundamental ordering of society and the nature of intimacy.”<sup>147</sup> Therefore, the sexual family ideal remains unchallenged. Gendered expectations are also only minimally challenged, so women’s association with caring work continues to dominate “maternal labour force participation decisions as well as mothers’ evaluations of their own employment and childcare situations.”<sup>148</sup>

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<sup>142</sup> J. Evans, I. Macrory, C. Randall *Measuring National Well-being: Life in the UK, 2015* (Office for National Statistics, 2015) 28

<sup>143</sup> Office for National Statistics *A Profile of Child Poverty* (The Crown, 2010) 2

<sup>144</sup> G. Samuels, F. Ross-Sheriff ‘Identity, Oppression, and Power’ (n 33) 5

<sup>145</sup> M. Fineman *The Neutered Mother* (n 74)2

<sup>146</sup> Marriage (Same Sex Couples) Act 2013

<sup>147</sup> M. Fineman ‘The Sexual Family’ in J. Jackson, M. Fineman, A. Romero *Feminist and Queer Legal Theory: Intimate Encounters, Uncomfortable Conversations* (Ashgate, 2013) 45

<sup>148</sup> A. Hattery *Women, Work and Family: Balancing and Weaving* (Sage, 2001) 25



Accordingly, in addition to the structural constraints caused by the public/private divide, societal expectations of women's caring role explain why women continue to be associated with caring work. This is liable to particularly impact upon socio-economically disadvantaged women. If fairness is to be achieved for carers and women's association with caring labour challenged, it is thus vital that class inequality is dismantled, alongside the public/private divide and gendered expectations reinforced by the sexual family ideal.

### **Justifying the societal support of carers**

The elimination of the disadvantages carers face will require the redistribution of the advantages some members of society experience by avoiding caring labour. These include higher incomes and powerful positions within society. This success is achieved as a result of caring labour, which all people have been reliant upon throughout their lives because physical caring needs are episodic.<sup>149</sup> Accordingly, Fineman argues that a societal debt has been created that is owed to carers.<sup>150</sup> As many people have failed to repay this debt as they have not provided care themselves, it is fair that some of their resultant assets are redistributed. This redistribution should be led by a body which can act on behalf of all of society because any member of society could require care and thus the disadvantage could affect anyone. The state, which Fineman identifies as “a complex of coercive legal and institutional relationships that situate individuals, as well as complex societal organizations such as the family, in relation to one another,” is uniquely placed to lead this redistribution. This is because “it is the only organization in which membership is mandatory and universal.”<sup>151</sup> Thus, the state alone can “define the collective rights and responsibilities of its members.”<sup>152</sup> Therefore, it is

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<sup>149</sup> J. Herring *Caring and the Law* (n 19) 2

<sup>150</sup> M. Fineman *The Autonomy Myth* (n 4) 48

<sup>151</sup> M. Fineman *The Autonomy Myth* (n 4) 264

<sup>152</sup> M. Fineman *The Autonomy Myth* (n 4) 264

imperative that the state redistributes resources if carers are to avoid the disadvantages they currently face.

In chapter three I will analyse how this debt could be met. However, in the rest of this chapter, I will consider why the state should act for the collective and redistribute the advantages non-carers receive. Simply acknowledging that care is important does not necessitate that carers should be better supported by society. As Herring notes, “there are plenty of activities that the state does not support, despite their social value.”<sup>153</sup> Therefore, in the next section, I will consider why the state is justified in supporting carers.

a) The society-preserving nature of caring labour

Fineman bases her argument that caring relationships should be better supported by the state not only on the universality of caring needs, but also due to caring being “a society-preserving task.”<sup>154</sup> She acknowledges that this is mainly relevant to childcare; “care of children in particular is essential to the future of the society and all of its institutions.”<sup>155</sup> The state is dependent upon children becoming workers, citizens, students and consumers when they reach adulthood.<sup>156</sup> Fineman asserts that the state is paying an unfair price for the caretaking labour they rely upon to fulfil these roles.<sup>157</sup> Although this is not a straightforward business case which “stresses the bottom line advantages of adapting to change,” Fineman does assert the economic value of care.<sup>158</sup> Presenting care as an economic concern is appealing because it may result in change. This is because in the current economic climate, with the Government focusing upon austerity to decrease the deficit, costs are likely to

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<sup>153</sup> J. Herring *Caring and the Law* (n 19) 102

<sup>154</sup> M. Fineman *The Autonomy Myth* (n 4) 43

<sup>155</sup> M. Fineman *The Autonomy Myth* (n 4) 43

<sup>156</sup> M. Fineman *The Autonomy Myth* (n 4) 48

<sup>157</sup> M. Fineman *The Autonomy Myth* (n 4) 43

<sup>158</sup> S. Lewis ‘Family Friendly’ Employment Policies: A Route to Changing Organizational Culture or Playing About at the Margins?’ (1997) 4 *Gender, Work and Organization* 13, 19

prohibit changes to support carers.<sup>159</sup> However, if the future economic advantages of supporting carers are highlighted, a reluctant state may be more convinced.

Nonetheless, the emphasis upon raising future citizens which justifies supporting childcare now is problematic. Firstly, this is because it presents children as objects for society to rely upon.<sup>160</sup> They are not recognised as the autonomous, active participants in society that they are.<sup>161</sup> Secondly, this focus would support childcare but other caring relationships do not produce future citizens, so would be deemed economically unimportant. For example, those caring for the elderly may not receive support because their labour will not produce future employees. Indeed, they are often considered an economic burden on the state.<sup>162</sup> This disregards the enormous contributions the elderly provide to society, including £4 billion worth of unpaid volunteering and up to £50 billion worth of unpaid family care.<sup>163</sup> However, as such work is unpaid its value is often overlooked.<sup>164</sup> Those providing care to dependents who are unable to contribute to society by providing such unpaid volunteering or family care would be eligible for even less support under the society-preserving argument. Vital care work, such as end of life care, would not be supported by the state because it would not produce a future citizen. Therefore, the society-preserving argument would problematically undermine the importance of all caring relationships, focusing upon childcare. However, Eichner notes that economic arguments may not even justify the support of those caring for all children; at its most extreme, the society-preserving underpinning could deny support to

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<sup>159</sup> HM Treasury *Summer Budget 2015* (HM Treasury, 2015) 1

<sup>160</sup> M. Eichner *The Supportive State: Families, Government, and America's Political Ideas* (Oxford University Press, 2010) 76-77

<sup>161</sup> P. Alderson, J. Hawthorne, M. Killen 'The Participation Rights of Premature Babies' in M. Freeman *Children's Health and Children's Rights* (Martinus Nijhoff Publishers, 2006) 47

<sup>162</sup> R. Montgomery, E. Borgatta, M. Borgatta 'Societal and Family Change in the Burden of Care' in W. Liu, H. Kendig *Who Should Care for the Elderly?: An East-West Value Divide* (Singapore University Press, 2000) 33

<sup>163</sup> J. Vass *Agenda for Later Life 2013: Improving Later Life in Tough Times* (Age UK, 2013) 24

<sup>164</sup> D. Morris 'Volunteering: A Nice Little Job for a Woman?' in A. Morris, T. O'Donnell *Feminist Perspectives on Employment Law* (Cavendish, 1999) 113

children who may not reach adulthood.<sup>165</sup> She refers to cystic fibrosis, a disorder which may prevent children from reaching adulthood. Eichner argues that under an extreme application of the economic reasoning, the care of children with such a disorder may not be deemed important because they are less likely to perform economic roles in the future. This argument is clearly abhorrent and demonstrates conclusively that an economic argument for the support of carers would be wrong because it fails to understand the importance of all caring relationships.

Essentially, economic arguments misunderstand the value of caring relationships. As West notes, care “is what gives life its point, provides it with meaning, and returns to those who give it some measure of security and emotional sustenance...[it] creates the relationships, families, and communities within which our lives are made pleasurable.”<sup>166</sup> These benefits cannot be accounted for in economic terms alone. Therefore, carers should not be better supported because of the economic benefits of care. Instead, the justification for supporting carers should reflect the importance of all caring relationships, demonstrating that they are of value in and of themselves.<sup>167</sup> In this regard, I will argue that supporting carers is needed to achieve justice.

#### b) Challenging the perceived tension between justice and caring principles

Justice is often considered the “first virtue of social institutions.”<sup>168</sup> Therefore, grounding the argument that caring relationships need to be better accommodated in justice is appealing

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<sup>165</sup> M. Eichner *The Supportive State* (n 160) 77

<sup>166</sup> N. Busby ‘The Right to Care’ (n 20) 89

<sup>167</sup> In this regard, Eichner develops her own argument as to why care should be accommodated based upon dignity (M. Eichner *The Supportive State* (n 160) 75-78). However, as scepticism remains about how upholding dignity protects people and whether dignity can be pursued, I will not analyse this in detail in this thesis (See D. Feldman ‘Human Dignity as a Legal Value: Part 1’ [1999] Public Law 682, S. Fredman ‘Equality: A New Generation?’ (2001) 30 *Industrial Law Journal* 145, R. Leckey ‘Embodied Dignity’ (2005) 5 *Oxford University Commonwealth Law Journal* 63)

<sup>168</sup> J. Rawls *A Theory of Justice* (Harvard University Press, 1971) 3

because it provides some potential political influence. However, there are issues with such an approach. Firstly, defining justice is inherently complex. Reiner explains that “justice is a paradigmatic issue of an ‘essentially contested concept’ combining issues of analysis and evaluation in such complexly intertwined ways that no amount of debate is likely to achieve a final resolution.”<sup>169</sup> Nonetheless, there is a broad consensus about the central tenets of justice. These will form the basis of my argument that justice should underpin the argument that caring relationships need to be better supported. For many theorists, the first tenet of justice is that people are considered of equal worth.<sup>170</sup> Modern theories do not claim “any fundamental differences in importance or value between categories of people.”<sup>171</sup> Accordingly, justice protects people’s basic rights.<sup>172</sup> Equality is thus associated with justice, but this does not mean equal treatment. Instead, Campbell notes that the very idea of justice relies upon the “assumption that all be treated equally until relevant reasons are given for distinguishing between them.”<sup>173</sup>

Secondly, justice is concerned with the promotion of wellbeing for all; “implicitly, the standpoint for assessing the justice of social arrangements is some conception of human wellbeing.”<sup>174</sup> Wellbeing is identified in different ways; it is partly about thriving every day so “having good friends, a happy family, fulfilling employment, pleasurable leisure.”<sup>175</sup> It is this aspect of wellbeing which has become a key concern in the UK; the annual summary run by the Measuring National Well-being programme includes objective factors like health, occupation and finances as well as subjective assessments of “how satisfied people are with

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<sup>169</sup> R. Reiner ‘Justice’ in J. Penner, D. Schiff and R. Nobles *Jurisprudence & Legal Theory: Commentary and Materials* (Oxford University Press, 2005) 719

<sup>170</sup> T. Campbell *Justice* (Macmillan, 1988) 34

<sup>171</sup> R. Reiner ‘Justice’ (n 169) 720

<sup>172</sup> V. Held *The Ethics of Care* (n 76) 73

<sup>173</sup> T. Campbell *Justice* (n 170) 32

<sup>174</sup> R. Reiner ‘Justice’ (n 169) 720

<sup>175</sup> M. Vernon *Wellbeing* (Acumen, 2008) 6

their lives, their levels of happiness and anxiety.”<sup>176</sup> However, wellbeing is also concerned with the “sense of intrinsic meaning or overall direction or deeper purpose.”<sup>177</sup> This focuses upon “judgements about the meaning and purpose of one’s life.”<sup>178</sup> Thirdly, justice is concerned with the distribution of resources, including both benefits and burdens.<sup>179</sup> Overall, Rawls, who as noted in chapter one is widely regarded as the preeminent modern theorist of justice,<sup>180</sup> associates the principles of justice with fairness, “which relates to right dealing between persons who are cooperating with or competing against one another.”<sup>181</sup> He argues that “the concept of fairness [is] fundamental to justice.”<sup>182</sup> This is because it is fairness which underpins the focus of justice upon principles which could be mutually acknowledged “by free persons who have no authority over one another.”<sup>183</sup> As fairness forms the basis for justice, I will refer to the achievement of justice as fairness throughout.

Despite the consensus on these tenets of justice, reliance on this principle to promote carers’ accommodation may still be deemed problematic. This is because care and justice have traditionally been thought to conflict. Gilligan asserts that justice and care ideals reflect different moral orientations and are two “different ways of viewing the world.”<sup>184</sup> Justice seeks a fair conclusion between competing rights and protects equality and freedom.<sup>185</sup> According to Gilligan’s research, this approach is associated with men and thus underpins the public sphere. In contrast, the ethic of care, more associated with women and the private

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<sup>176</sup> J. Evans, I. Macrory, C. Randall *Measuring National Well-being* (n 142) 6

<sup>177</sup> M. Vernon *Wellbeing* (n 175) 6

<sup>178</sup> A. Steptoe, A. Deaton, A. Stone ‘Subjective Wellbeing, Health, and Ageing’ (2015) 385 *The Lancet* 640, 641

<sup>179</sup> T. Campbell *Justice* (n 170) 17

<sup>180</sup> See chapter one page 18

<sup>181</sup> J. Rawls ‘Justice as Fairness’ (1958) 67 *The Philosophical Review* 164, 178

<sup>182</sup> J. Rawls ‘Justice as Fairness’ (n 181) 179

<sup>183</sup> J. Rawls ‘Justice as Fairness’ (n 181) 179

<sup>184</sup> C. Gilligan ‘Remapping the Moral Domain: New Images of Self in Relationship’ in C. Gilligan, J. Ward, J. McLean Taylor *Mapping the Moral Domain* (Harvard University Press, 1986) 8

<sup>185</sup> V. Held *The Ethics of Care* (n 76) 15

sphere, recognises intertwined relationships, fostering social need and co-operation.<sup>186</sup>

Accordingly, Gilligan's work points "to the existence of something like such a psychological division of labor with different kinds of moral problems drawing out different kinds of moral response."<sup>187</sup> She considers these different responses to be "fundamentally incompatible."<sup>188</sup> Therefore, attempts to combine care and justice have been "viewed as philosophically unsophisticated."<sup>189</sup>

This supposed division is being increasingly challenged.<sup>190</sup> Firstly, there is growing awareness that there is not a "unique way moral psychology is best ordered and moral reasoning conducted."<sup>191</sup> Instead, different moral orientations, including justice or care reasoning, will be appropriate at different times. This is because moral considerations occur "over time and can involve the assimilation and accommodation of as much, and as messy, information as we like."<sup>192</sup> It is possible to reflect and rely upon both the ethic of justice and care to reach conclusions. Indeed, "most individuals use both orientations some of the time" in their own reasoning.<sup>193</sup> Therefore, it is wrong to see the two ideals as fundamentally incompatible. A second reason the division is being challenged is because feminists have noted that at the heart of justice is "a voice of responsibility, care, and concern for others."<sup>194</sup> As Noddings explains, "those that care about others in the justice sense must keep in mind that the objective is to ensure that caring actually occurs."<sup>195</sup> This is because "unless there is

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<sup>186</sup> V. Held *The Ethics of Care* (n 76) 15

<sup>187</sup> O. Flanagan, K. Jackson 'Justice, Care, and Gender: The Kohlberg-Gilligan Debate Revisited' (1987) 97 *Ethics* 622, 625

<sup>188</sup> C. Gilligan 'Remapping the Moral Domain' (n 184) 238

<sup>189</sup> J. Tronto *Moral Boundaries* (n 23) 148

<sup>190</sup> J. Herring *Caring and the Law* (n 19) 65

<sup>191</sup> O. Flanagan, K. Jackson 'Justice, Care, and Gender' (n 187) 636

<sup>192</sup> O. Flanagan, K. Jackson 'Justice, Care, and Gender' (n 187) 626

<sup>193</sup> O. Flanagan, K. Jackson 'Justice, Care, and Gender' (n 187) 624

<sup>194</sup> S. Okin 'Reason and Feeling in Thinking About Justice' (1989) 99 *Ethics* 229, 230

<sup>195</sup> N. Noddings *Starting at Home* (n 15) 24

caring there is no possibility for justice,” as there will be no life to be treated justly.<sup>196</sup> Caring labour is necessary if a just society is to exist because without it, the most basic human right, the right to life,<sup>197</sup> will be undermined. Therefore, principles of justice are dependent upon caring labour and the ideals of intertwined relationships, fostering social need and co-operation.

Yet Herring also states that although care is the most primary value, “we [still] need justice so that we can care.”<sup>198</sup> He reasons that without justice, “care can become abuse,” because by focusing upon the relationship, the individual may be overlooked.<sup>199</sup> This is one of the key reasons I will argue that the three basic tenets of justice identified, which focus upon equality and freedom, justify and promote the state’s role in better supporting carers. I will focus upon social justice, a strand of substantive justice which is concerned with the lives that people actually live.<sup>200</sup> This is the focus of Sen’s work, who highlights that “justice cannot be indifferent to the lives that people actually live.”<sup>201</sup> Focusing upon what actually happens to people is needed to highlight the very physical impact that caring has on people’s lives. Applying these ideals, I will agree with Held who argues that “neither justice nor care can be dispensed with: both are extremely important for morality.”<sup>202</sup>

### c) Why principles of justice should support caring relationships

The first reason that principles of justice would challenge the disadvantages carers face is because it would recognise that all caring relationships are equally important. Held

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<sup>196</sup> J. Herring *Caring and the Law* (n 19) 68

<sup>197</sup> This is protected in countless human rights treaties. See for example The European Convention on Human Rights, art. 2. Universal Declaration of Human Right, art. 3.

<sup>198</sup> J. Herring *Caring and the Law* (n 19) 68

<sup>199</sup> J. Herring *Caring and the Law* (n 19) 68

<sup>200</sup> This is opposed to a focus upon procedural of formal justice, which focuses upon fair and just systems of conflict resolution (see T. Campbell *Justice* (n 170) 23)

<sup>201</sup> A. Sen *The Idea of Justice* (Harvard University Press, 2009) 18

<sup>202</sup> V. Held *The Ethics of Care* (n 76) 68



recognises that justice is needed to assure “basic levels of equal treatment” for all carers.<sup>203</sup>

This is because it highlights the importance of all people. Modern theories of justice recognise the basic rights of everyone to survival without the exclusions that have historically denied some people, including those with a disability or impairment, the protection of justice.<sup>204</sup> As principles of justice stress that each life is valuable, it highlights that every carer, regardless of the dependent they are caring for, is providing important work. It follows that all caring relationships would be deemed equally worthy of support.

Secondly, achieving justice would ensure that all carers would be supported in achieving a good standard of wellbeing. Justice reasoning dictates that carers would not be entitled to just the minimum levels of support needed to survive, but would be supported in leading a life that they find to be rewarding and enjoyable. This would include promoting their wellbeing in both the everyday setting and in their long term “search for that good in life.”<sup>205</sup> This latter understanding of wellbeing is particularly important for carers because carers may lose their own sense of self. As Herring notes, “carers can often feel trapped: their life goals come to an end and they must adopt the role of carer while the rest of their life is put on hold.”<sup>206</sup> To achieve both these levels of wellbeing, it is vital that people are not just seen as part of their caring relationships. Caring relationships can “become abusive for both the carer and the cared for.”<sup>207</sup> A focus upon the relationship, which care promotes, may obscure this. Indeed, it was only after wives were recognised as individuals, rather than just part of a relationship with their husband, that violence within the home was recognised and efforts were made to

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<sup>203</sup> V. Held *The Ethics of Care* (n 76) 73

<sup>204</sup> M. Nussbaum *Frontiers of Justice: Disability, Nationality, Species Membership* (Harvard University Press, 2006) 17

<sup>205</sup> M. Vernon *Wellbeing* (n 175) 6

<sup>206</sup> J. Herring *Caring and the Law* (n 19) 79

<sup>207</sup> J. Herring *Caring and the Law* (n 19) 79

prevent it.<sup>208</sup> Therefore, a third reason why justice should underpin the accommodation of carers within society is because it recognises the individuals involved in caring relationships, which is necessary to ensure carers can achieve a sense of wellbeing.

The promotion of human wellbeing would also justify challenging both women's ongoing association with caring as well as its associated economic disadvantages. Gendered expectations may affect "how satisfied people are with their lives, their levels of happiness and anxiety."<sup>209</sup> Certainly, the expectation that women should care may cause anxiety to those who do not conform to those ideals or may frustrate some women's aspirations, such as restricting their success within the workplace. I noted earlier that this is likely to particularly restrict socio-economically disadvantaged women. Challenging these restrictive factors to achieve justice also corresponds with the first tenet of justice, which highlights the key role of equality. However, this argument focuses on the modern feminist understandings of equality, which rather than aiming to treat likes alike, "confronts gender preconceptions and reconfigures the [gendered] division of roles."<sup>210</sup> Therefore, ideals of justice would enable both women and men to be able to determine the roles they wish to undertake.

Finally, the redistributive function of justice could challenge the disadvantages that carers face as it would seek "a fair sharing of the burdens of care."<sup>211</sup> In Rawls' development of a conception of justice, he refers to the "original position," where "no one knows his place in society, his class position or social status, nor does any one know his fortune in the distribution of natural assets and abilities, his intelligence, strength, and the like."<sup>212</sup> This

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<sup>208</sup> M. Fineman *The Neutered Mother* (n 74)188

<sup>209</sup> J. Evans, I. Macrory, C. Randall *Measuring National Well-being* (n 142) 6

<sup>210</sup> S. Fredman 'Reversing Roles: Bringing Men Into the Frame' (2014) 10 *International Journal of Law in Context* 442, 444

<sup>211</sup> J. Herring *Caring and the Law* (n 19) 67

<sup>212</sup> J. Rawls *A Theory of Justice* (n 168) 12

“veil of ignorance” means that “all are similarly situated and no one is able to design principles to favour his particular condition, [so] the principles of justice are the result of a fair agreement or bargain.”<sup>213</sup> He suggests that this original position would result in rational persons choosing two central principles:

the first requires equality in the assignment of basic rights and duties, whilst the second holds that social and economic inequality, for example inequality of wealth and authority, are just only if they result in compensating benefits for everyone, and in particular the least advantaged in the group.<sup>214</sup>

As he had previously noted, it would be “unfair if someone accepts the benefits of a practice but refuses to do his part in maintaining it.”<sup>215</sup> Although Rawls’ work has been criticised for not considering the implications of this for women, applying the original position to carers would justify the state’s redistribution of assets.<sup>216</sup> As Fineman notes, the state and those who are able to avoid caregiving, accept the benefits of caregiving, but are currently doing very little to maintain it.<sup>217</sup> Such a situation would never have been agreed in the original position. Instead, the universal need for care due to the episodic nature of dependency needs would be recognised, as well as the important role of carers in meeting these needs. Carers’ potential to become derivatively dependent would also be acknowledged.<sup>218</sup> As a matter of fairness, the rational people behind the veil of ignorance would never choose to undervalue caring labour. Instead they would protect carers and those requiring care, recognising that these people could be some of the most disadvantaged in the group. Therefore, justice ideals validate the redistribution of assets, which could include both structural change to better advantage carers

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<sup>213</sup> J. Rawls *A Theory of Justice* (n 168) 12

<sup>214</sup> J. Rawls *A Theory of Justice* (n 168) 14-15

<sup>215</sup> J. Rawls ‘Justice as Fairness’ (n 181) 180

<sup>216</sup> S. Fredman *Women and the Law* (n 62)23

<sup>217</sup> M. Fineman *The Autonomy Myth* (n 4) 43

<sup>218</sup> M. Fineman *The Autonomy Myth* (n 4) 35

and redistributing the income earned by avoiding caring labour, both of which I will consider in chapter three.

Accordingly, justice and care are not necessarily in tension in this context and caring relationships should be better supported by the state to achieve fairness. This would justify challenging the underlying structures and presumptions which mean that carers are disadvantaged within society as well as recognise the importance of all caring relationships. In the next section, I will consider what this means in practice, concentrating upon how fairness can be achieved for carers. Sen argues that it is impossible to ever achieve a perfectly just conclusion or outcome for everyone because “it is not easy to brush aside [various conceptions of justice] as foundationless.”<sup>219</sup> This is because Sen does not rely on hypothetical examples like Rawls’ original position; he contends that “what really happens to people cannot but be a central concern of a theory of justice.”<sup>220</sup> On this basis, Sen argues that rather than aiming to achieve a “perfectly just society,” justice should be “about preventing manifestly severe injustice.”<sup>221</sup> To achieve this, he, and later Nussbaum, developed the capabilities approach. In the next section, I will analyse how this could be applied in practice to promote fairness for carers.

#### d) Achieving justice: the capabilities approach

The capabilities approach is an account of minimum core social entitlements which measures the wellbeing of people by the level of capabilities each individual has, rather than focusing just upon wealth and GDP. It is maintained that there is a threshold, a minimum standard of core entitlements, beneath which activities stop being human functioning.<sup>222</sup> These are

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<sup>219</sup> A. Sen *The Idea of Justice* (n 201) 14

<sup>220</sup> A. Sen *The Idea of Justice* (n 201) 68

<sup>221</sup> A. Sen *The Idea of Justice* (n 201) 21

<sup>222</sup> M. Nussbaum *Women and Human Development* (n 37) 6

capabilities, which Sen explains are the things a person needs to “lead the kind of lives they value – and have reason to value.”<sup>223</sup> Sen and Nussbaum both argue that a state that does not protect these capabilities is not fully just.<sup>224</sup> Therefore, to achieve justice, the state is required to play an active role in removing each person’s deprivation to enhance human freedom and promote all relevant capabilities.<sup>225</sup> Above this standard, the capabilities approach focuses upon individual wellbeing without making sweeping judgements about what everyone needs, recognising that a human being is a dignified, free being who shapes his or her own life in co-operation and reciprocity with others.<sup>226</sup> Each person is able to act upon the capabilities to make them functions, which Nussbaum describes as the “active realization of one or more capabilities.”<sup>227</sup> They both acknowledge that the achievement of the basic capabilities and the ability to turn these into functions would constitute a flourishing life. This includes not only flourishing in the sense of “self-realisation and personal growth,”<sup>228</sup> but according to Nussbaum also includes pleasure and enjoyment.<sup>229</sup> Therefore, the capabilities approach does not just ensure some basic level of protection is available; it also promotes the wellbeing and enjoyment of each person.

Determining which capabilities should be protected has been subject to considerable debate. A key difference between Sen’s and Nussbaum’s work has been their approach to identifying capabilities. Sen argues that no fixed list is usable for every purpose and has thus not provided one. Instead, he states that the relevant list of capabilities should be debated for each

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<sup>223</sup> A. Sen *Development as Freedom* (Oxford University Press, 1999) 18

<sup>224</sup> M. Nussbaum *Frontiers of Justice* (n 204) 75

<sup>225</sup> A. Sen *Development as Freedom* (n 223) 37

<sup>226</sup> M. Nussbaum *Women and Human Development* (n 37) 72

<sup>227</sup> M. Nussbaum *Creating Capabilities: The Human Development Approach* (Harvard University Press, 2011) 25

<sup>228</sup> D. Phillips *Quality of Life: Concept, Policy and Practice* (Routledge, 2006) 39

<sup>229</sup> M. Nussbaum *Women and Human Development* (n 37) 80

circumstance.<sup>230</sup> Nussbaum disagrees and argues that “we can arrive at an enumeration of central elements of truly human functioning that can command a broad cross-cultural consensus.”<sup>231</sup> The relevant capabilities she identifies are: life; bodily health; bodily integrity; sense, imagination and thought; emotions; practical reason; affiliation; other species; play; and control over one’s environment.<sup>232</sup> However, Nussbaum’s universal vision of capabilities has been criticised for reflecting the aims of the “highly educated, artistically inclined, self-consciously and voluntarily religious Western women.”<sup>233</sup> This is evidenced by the recognition of “imagination and thought in connection with experiencing and producing self-expressive work and events of one’s own choice, religious, literary, musical and so forth,” as part of the capability of “sense, imagination, and thought.”<sup>234</sup> These capabilities do reflect the aspirations of only certain people, which arguably do not reflect a cross-cultural consensus of human functioning. Also, Nussbaum’s list makes presumptions about what is best for a person which denies people’s autonomy. Therefore, Sen’s approach is preferred; it is vital that any list of capabilities is scrutinised and applied within each relevant circumstance.

In place of Nussbaum’s aspirational capabilities, I will adopt a functional interpretation of the capabilities approach, advocating the use of specified task-centred capabilities. This will enable me to apply the capabilities contextually. Such an approach is justified because of the thesis’ focus upon care as work and how this impacts upon people’s lives. I have rejected romanticised ideals of caring relationships and argued that if the state is to achieve justice by responding to the situations carers actually face, carers lived realities must underpin the

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<sup>230</sup> B. Agarwal, J. Humphries, I. Robeyns ‘Exploring the Challenges of Amartya Sen’s Work and Ideas: An Introduction’ in B. Agarwal, J. Humphries, I. Robeyns *Amartya Sen’s Work and Ideas: A Gender Perspective* (Routledge, 2005) 4

<sup>231</sup> M. Nussbaum *Women and Human Development* (n 37) 74

<sup>232</sup> M. Nussbaum *Women and Human Development* (n 37) 78-80

<sup>233</sup> S. Okin ‘Poverty, Well-being, and Gender: What Counts, Who’s Heard?’ (2003) 31 *Philosophy and Public Affairs* 280, 296

<sup>234</sup> M. Nussbaum *Women and Human Development* (n 37) 78-79

legislation. A functional approach to the capabilities approach provides a sound basis to achieve this.

In this regard, I have drawn upon a Robeyns' list of capabilities. Robeyns applies Sen's approach and adopts a list of capabilities for the "conceptualization of gender inequality in post-industrialized Western societies."<sup>235</sup> Therefore, Robeyns' list is applicable to this thesis, focusing upon ways to promote gender equality in countries like the UK. It will accordingly be referred to throughout. Robeyns identifies the following capabilities: life and physical health; mental wellbeing; bodily integrity; social relations; political empowerment; education and knowledge; domestic work and nonmarket care; paid work and other projects; mobility; leisure activities; respect; and religion.<sup>236</sup> Many of the same basic survival needs that Nussbaum recognises remain. Of particular interest in this chapter is Robeyns' identification of "domestic work and nonmarket care" as a capability.<sup>237</sup> Although Nussbaum notes that the capability of emotion includes the ability to "have attachments to things and people outside ourselves; to love those who live and care for us,"<sup>238</sup> this is substantially different from the capability identified by Robeyns. This is partly because it is more similar to Robeyns' "social relation" capability, which focuses upon "forming, nurturing, and enjoying social relations."<sup>239</sup> Also, Nussbaum presents a romanticised depiction of caring which falls short of Robeyns' more realistic capability. Robeyns recognises that although care work clearly is of great importance to those receiving the care, it "cannot unambiguously be seen as contributing to the well-being of the worker."<sup>240</sup> Accordingly, she notes that this is a somewhat controversial capability. However, it has become clear in this chapter that many of

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<sup>235</sup> I. Robeyns 'Sen's Capability Approach and Gender Inequality' (n 6) 71

<sup>236</sup> I. Robeyns 'Sen's Capability Approach and Gender Inequality' (n 6) 71-72

<sup>237</sup> I. Robeyns 'Sen's Capability Approach and Gender Inequality' (n 6) 72

<sup>238</sup> M. Nussbaum *Women and Human Development* (n 37) 79

<sup>239</sup> I. Robeyns 'Sen's Capability Approach and Gender Inequality' (n 6) 78

<sup>240</sup> I. Robeyns 'Sen's Capability Approach and Gender Inequality' (n 6) 80

these problems are the result of structural disadvantage, rather than the acts of caring themselves. Therefore, changes could be made to limit or even remove these disadvantages, so caring could be recognised as a valuable capability. Also, it has already been noted that caring relationships are “what gives life its point, provides it with meaning, and returns to those who give it some measure of security and emotional sustenance.”<sup>241</sup> For these reasons, I agree with Robeyns that caring should be seen as a basic capability of all people.

As women are overrepresented in the provision of care, it is men whose caring role has been restricted. Therefore, to enable each person to achieve the basic capability of providing care, it is important that efforts are made to challenge the gendered stereotypes and societal structure which associates women with care. This will enable men to realise the basic capability of participating in care work and thus promote the flourishing of both men and women. Robeyns notes that women’s wellbeing is less than men’s for many of the other basic capabilities, including “mental health, political empowerment, education and knowledge...leisure, time-autonomy, mobility, respect, and religion.”<sup>242</sup> Therefore, in most regards, it is women’s capabilities that are undermined, often as a result of their association with caring; it has already been noted that provision of care can lead to mental health deterioration, as well as affecting participation in the public sphere.<sup>243</sup> It is thus important that caring is not the only capability that women are associated with. The constraining societal expectations should be challenged to provide women with greater opportunities to flourish and achieve the other capabilities, as well as enable men to care.

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<sup>241</sup> R. West ‘The Right to Care’ (n 20) 89

<sup>242</sup> I. Robeyns ‘Sen’s Capability Approach and Gender Inequality’ (n 6) 86

<sup>243</sup> See chapter two page 21



The capabilities approach could then be used as an evaluative framework to determine how successfully care has been promoted as a capability.<sup>244</sup> It would provide a measure to determine if gendered expectations and societal restraints have been challenged to allow both men and women to flourish. Once the basic capabilities of all people have been recognised, any free and genuine choice people make to prioritise those “valuable contributions to personal well-being such as the love of those for whom the care is provided,” would be recognised and respected.<sup>245</sup> Justice would thus be achieved for all men and women, allowing them to live truly flourishing lives.

However, the capabilities approach’s focus upon individual wellbeing has led to some dismissing its applicability to caring relationships.<sup>246</sup> This is because, at a superficial level, the relational aspect of care, which emphasises the connection between people within caring relationships, is overlooked.<sup>247</sup> Yet Nussbaum acknowledges the importance of other bodies, not just individuals. She argues that the capabilities approach supports bodies, including families, according to what they do for the people within them.<sup>248</sup> Accordingly, the capabilities approach “does not assume atomistic individuals, nor that our functionings and capabilities are independent of our concern for others or of the actions of others.”<sup>249</sup> Instead, it recognises that people are interconnected yet are still individuals. Robeyns suggests that is needed to promote wellbeing.<sup>250</sup> This is because carers are not just defined by their caring relationships, which will rarely reflect their whole personality. The focus upon individual wellbeing also challenges perceptions of people needing care as “a problem, which the carer

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<sup>244</sup> N. Busby *A Right to Care?* (n 12) 37

<sup>245</sup> N. Busby *A Right to Care?* (n 12) 35

<sup>246</sup> J. Lewis, S. Giullari ‘The Adult Worker Model Family, Gender Equality and Care’ (n 9) 93

<sup>247</sup> J. Herring *Caring and the Law* (n 19) 2

<sup>248</sup> M. Nussbaum *Women and Human Development* (n 37) 74

<sup>249</sup> I. Robeyns ‘Sen’s Capability Approach and Gender Inequality’ (n 6) 65

<sup>250</sup> I. Robeyns ‘Sen’s Capability Approach and Gender Inequality’ (n 6) 65

solves.”<sup>251</sup> Therefore, the capabilities approach enables recognition of the important roles that many people dependent upon care can perform as well as the fact that carers are not solely defined by their caring responsibilities.<sup>252</sup>

Also, it is the consideration of individuals which legitimates challenging sources of unfairness. A focus just upon the caring relationship may disguise why many people become carers; gendered expectations, societal structure and economic class. These three influences are sources of unfairness which should be challenged. This is because they restrict people’s ability to realise their capabilities, limiting their flourishing. Recognising the individuals involved in caring relationships highlights this and necessitates that they are removed. Once these restrictions are challenged, the capabilities approach recognises that people may consider themselves to be flourishing if they are financially struggling because of their caregiving responsibilities, but “in receipt of valuable contributions to personal well-being such as the love of those for whom the care is provided,” or vice-versa.<sup>253</sup>

## **Conclusion**

Despite performing life-sustaining and incredibly important work, carers are subject to disadvantage in the UK. This can result in carers becoming derivatively dependent upon care themselves. In this chapter, I have demonstrated that due to an ongoing association with caring roles, it is women who mainly suffer these disadvantages. Women’s continued association with caring labour cannot be explained by biological gendered differences, neither can it be dismissed as lifestyle preference. Instead, a variety of complex and interrelated social factors, including the societal structure dictated by the public/private

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<sup>251</sup> J. Herring *Caring and the Law* (n 19) 21

<sup>252</sup> See for example, L. Graham, J. Moodley, L. Selipsky ‘The Disability-Poverty Nexus and the Capabilities Approach: Evidence from Johannesburg, South Africa’ (2013) 28 *Disability and Society* 324, 332

<sup>253</sup> N. Busby *A Right to Care?* (n 12) 35

divide, as well as differences in socialisation and economic position reinforce the gendered division of labour. Accordingly, to challenge gender inequality and the disadvantages that carers face, these social factors should be contested.

However, I recognised that the importance of caring relationships alone does not necessitate that the state should support carers. In this regard, I relied upon principles of justice. I demonstrated that these two moral ideals are not diametrically opposed, but that are both needed to achieve fairness for carers. This is because justice highlights the importance of all people, the promotion of wellbeing for all and recognises each individual in caring relationships. These principles would also warrant the support of child carers, as aimed at page 25, despite my focus upon adult carers. In addition, these central tenets of justice enable gender and class inequality to be challenged via redistribution of assets. Fairness for carers could be promoted in practice by applying the capabilities approach, which I have argued should recognise caring as a vital capability.

It is clear that the state has an important role to play in challenging these disadvantages because it is uniquely placed to act on behalf of the whole population. This is vital because of the universal need for care. I will return to this argument throughout the thesis, but in chapter three I will examine how the state could promote carers' basic capabilities. There are two options which Fineman identifies; firstly, caring labour could be paid and secondly, carers could be provided with "institutional accommodation or non-economic resources to assist in their labour."<sup>254</sup> I will consider these two options in chapter three to analyse which would best achieve fairness for carers.

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<sup>254</sup> M. Fineman *The Autonomy Myth* (n 4) 36

## Chapter Three

### MODIFYING THE WORKPLACE TO ACHIEVE FAIRNESS FOR CARERS

#### Introduction

In this chapter I argue that the workplace should be modified to allow carers to realise their capabilities. This will promote fairness for carers as defined in chapter two.<sup>1</sup> Fineman identifies two reasons why carers are disadvantaged; firstly, caring labour is unpaid and secondly, carers lack “institutional accommodation or non-economic resources to assist in their labour.”<sup>2</sup> Both of these problems exist because of the public/private divide, which has traditionally separated paid work and caring labour. Accordingly, to achieve fairness for carers, this should be dismantled. Also, as I recognised in chapter two, it is necessary to redistribute the advantages experienced by the members of society who avoid providing care.<sup>3</sup> To do so, either carers could be paid or the public sphere, namely the workplace, could be changed to better accommodate and support carers. Both these options will be considered in this chapter.

Payment for carers is important. Some level of state financed payment should be available to all carers to challenge their unfair treatment as detailed in chapter two.<sup>4</sup> Yet, this alone will not achieve fairness for carers; paying informal carers will reinforce the public/private divide and gender inequality. Another way of promoting fairness for carers would be to outsource care into more formalised caring arenas. Such an approach is advocated by the current Conservative Government, who introduced the Childcare Bill 2015-16 currently going

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<sup>1</sup> See chapter one page 48

<sup>2</sup> M. Fineman *The Autonomy Myth: A Theory of Dependency* (The New Press, 2004) 36

<sup>3</sup> See chapter two page 43

<sup>4</sup> See chapter two page 21

through Parliament.<sup>5</sup> This aims to provide thirty hours of free childcare to working parents with children under compulsory school age. Outsourcing care in this way will play an important role in allowing some women to access the workplace on more equal terms with men, but I will nevertheless contend that all care cannot be outsourced. This is because it will fortify class and gender inequality.

Accordingly, I will argue that paying carers in both formal and informal settings should be supplemented by institutional accommodation. I noted in chapter two that the workplace in particular limits carers' opportunities to achieve the basic capabilities.<sup>6</sup> This is because it remains modelled around the fully committed worker model; someone with no caring commitments and whose sole focus is paid work. This restricts carers' equal access to the workplace, reinforcing their financial disadvantage and undermining the achievement of gender equality. Therefore, modifying the workplace to accommodate carers would challenge gender and class inequality. It would represent a more radical change than paying carers and would be an important step towards achieving fairness for carers. Also, I will argue that paid work is so important that it should be recognised as a capability: a core entitlement of human flourishing.<sup>7</sup>

In this chapter, I will examine the plethora of reconciliation legislation that has been introduced to help people better combine their paid work and caring responsibilities in the UK. I will consider whether it meets Fineman's expectations of making caring labour a central part of the non-family arena.<sup>8</sup> The two entitlements available to all carers, emergency leave and the right to request flexible working, will be analysed, along with the proposal for

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<sup>5</sup> (HL Bill 54)

<sup>6</sup> See chapter two page 33

<sup>7</sup> M. Nussbaum *Women and Human Development: The Capabilities Approach* (Cambridge University Press, 2000) 6. See chapter two page 55.

<sup>8</sup> M. Fineman *The Autonomy Myth* (n 2) 201. See chapter two page 5

carers' leave under the Carers (Leave Entitlement) Bill 2015-16.<sup>9</sup> Analysing this legislation will demonstrate that it alone will not result in fairness for carers. Indeed, I will demonstrate that the reconciliation legislation prioritises the outdated sexual family ideal, despite its problematic gendered connotations.<sup>10</sup> Also, the legislation reinforces class inequality. Precarious workers, who are often socio-economically disadvantaged, cannot access the entitlements because they are only available to employees.<sup>11</sup> Therefore, some of those who are most in need of support are ineligible. Finally, analysis of reconciliation legislation demonstrates how caring work remains undervalued. The public sphere is still treated as superior; paid work and employers' needs are prioritised. Accordingly, I will argue that the legislation does not promote transformative change.

Due to the problems with this legal approach, I will consider how trade unions could support carers by implementing non-legal changes to the workplace. Account will be made of the ongoing attempts to restrict trade unions' powers in the UK, most recently evidenced by the Trade Unions Bill 2015-16.<sup>12</sup> This, combined with the fact that trade unions do not represent all workers, leads me to conclude that trade unions cannot be relied upon alone because they will not secure support for all carers. Their role should be supplemental to state implemented legal changes. To overcome the existing problems with the legislation, I will argue that it should become care centric by accounting for the practical nature of caring relationships.<sup>13</sup>

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<sup>9</sup> (HL Bill 42)

<sup>10</sup> As detailed in chapter two page 33

<sup>11</sup> See chapter one page 15

<sup>12</sup> Trade Union Bill (HC Bill 58)

<sup>13</sup> N. Busby *A Right to Care? Unpaid Care Work in European Employment Law* (Oxford University Press, 2011) 49

## Payment for carers

Despite the importance of caring labour, it is considered “economically valueless and non-productive,” so is unpaid.<sup>14</sup> This is “generally recognised as a source of disadvantage.”<sup>15</sup>

Although providing payment may not solve all the disadvantages carers experience, such as loneliness,<sup>16</sup> it would help the 48% of carers who struggle financially.<sup>17</sup> In addition, paying carers would recognise that they are participating in work. Work has traditionally been deemed something “occurring outside the home and done by someone holding a job.”<sup>18</sup> This excludes caring labour and thus disregards the fact that caring is not “high minded emotions, but hard work.”<sup>19</sup> Caring labour is often “conflict-laden, intense, gritty, and fleshy.”<sup>20</sup>

Therefore, caring should be deemed work: payment would recognise its life-sustaining value.

A key question to answer is who should be responsible for paying carers. The sexual family basis and the public/private divide traditionally meant that carers were supported by their own family. However, such an approach would not achieve fairness for carers. This is partly because it would reinforce the public/private divide; caring would remain considered a private concern of the family. Therefore, the work would remain somewhat invisible, which may result in it being undervalued, as noted in chapter two.<sup>21</sup> Also, women’s association with caring labour would be reinforced.<sup>22</sup> Due to the gendered expectations examined in chapter two, it is likely that familial financial support would result in men financially supporting

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<sup>14</sup> J. Conaghan ‘Feminism and Labour Law: Contesting the Terrain’ in A. Morris and T. O’Donnell *Feminist Perspectives on Employment Law* (Cavendish, 1999) 39

<sup>15</sup> J. Herring *Caring and the Law* (Hart, 2013) 91

<sup>16</sup> C. Ungerson ‘Social Politics and the Commodification of Care’ (1997) 4 *Social Politics* 362, 378

<sup>17</sup> Carers UK *The State of Caring 2015* (Carers UK, 2015) 10

<sup>18</sup> K. Klare ‘Horizons of Transformative Labour Law and Employment Law’ in J. Conaghan, R. Fischl and J. Conaghan *Labour Law in an Era of Globalization* (Oxford University Press, 2002) 10

<sup>19</sup> J. Herring *Caring and the Law* (n 15) 18

<sup>20</sup> D. Cooper ‘“Well, You Go There to Get Off”: Visiting Feminist Care Ethics through a Women’s Bathhouse’ (2007) 8 *Feminist Theory* 243, 257

<sup>21</sup> See chapter two page 33

<sup>22</sup> See chapter two page 26

women, who would provide care. Therefore, Ungerson notes paying carers in this way may mark the beginning of a revival of a form of domestic service.<sup>23</sup>

Reliance upon the traditional sexual family for financial support would also be problematic because it would not support all carers. This would include the 2 million lone parents living with dependent children in the UK.<sup>24</sup> 91% of these parents are women who may be unable to rely upon the child's father for payment. Also, those caring for other dependents may have no one to rely upon for financial support. Eichner argues that the elderly should "take some responsibility for planning and saving," but recognises that a variety of factors can mean that even the best laid economic plans can be scuppered.<sup>25</sup> In such circumstances, she identifies children as a potential source of financial support.<sup>26</sup> However, this is problematic, firstly because it excludes people without children. Secondly, it is unclear how this could apply to people with more than one child, or step-children. Also, for many families, this would impose an insurmountable burden, especially if they are trying to raise their own children.<sup>27</sup> Carers UK have described those with the double burden of childcare and caring for their elderly parents as 'sandwich carers,' and note that costs for these families in terms of their "health, finances, relationships and careers," can be severe.<sup>28</sup>

Therefore, family members alone cannot financially remunerate carers. Achieving fairness in this context requires the identification of other sources of financial support. This needs to be provided by a body which can act on behalf of all of society; everyone requires care,

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<sup>23</sup> C. Ungerson 'Social Politics and the Commodification of Care' (n 16) 378

<sup>24</sup> Office for National Statistics *Statistical Bulletin: Families and Households, 2014* (Office for National Statistics, 2015) 5

<sup>25</sup> M. Eichner *The Supportive State: Families, Government, and America's Political Ideas* (Oxford University Press, 2010) 87-88

<sup>26</sup> M. Eichner *The Supportive State* (n 25) 88

<sup>27</sup> M. Eichner *The Supportive State* (n 25) 88

<sup>28</sup> Carers UK *Sandwich Caring: Combining Childcare with Caring for Older or Disabled Relatives* (Carers UK, 2012) 1



therefore anyone could face the disadvantages currently associated with being a carer. The state is uniquely placed to provide this financial remuneration to ensure that all people can achieve the basic capabilities because, as Fineman notes, “it is the only organization in which membership is mandatory and universal.”<sup>29</sup>

a) The state’s role in funding carers

To achieve fairness for carers, the state could redistribute the monetary advantages people earn by avoiding caring work through taxing breadwinners to directly subsidise carers.<sup>30</sup> This would be justified because as noted in chapter two, it is through avoidance of meeting caring needs that many people are able to earn more money, despite being dependent upon caregiving labour themselves.<sup>31</sup> This is unjust because they have accepted the benefits of caregiving but have not maintained it.<sup>32</sup> The capabilities approach validates this “redistribution of resources through collective means,” because it focuses upon the level of capabilities each individual has, rather than the collective wellbeing.<sup>33</sup> It is unjust to leave some carers unsupported as they will continue to be denied the opportunity to achieve the basic capabilities. Therefore, the state would be justified in performing such redistribution.

Nonetheless, payment from the state would also fail to challenge gender inequality; societal structure and gendered expectations would result in many women maintaining their caring roles. Accordingly, any form of payment can “confine carers (largely women) to it [the private sphere].”<sup>34</sup> Therefore, those wanting to support carers and simultaneously challenge gender inequality find themselves in conflict. As Lister notes:

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<sup>29</sup> M. Fineman *The Autonomy Myth* (n 2) 264

<sup>30</sup> M. Eichner *The Supportive State* (n 25) 81

<sup>31</sup> See chapter two page 43

<sup>32</sup> J. Rawls ‘Justice as Fairness’ (1958) 67 *The Philosophical Review* 164, 180

<sup>33</sup> N. Busby *A Right to Care?* (n 13) 89. See chapter two page 54

<sup>34</sup> C. Ungerson ‘Social Politics and the Commodification of Care’ (n 16) 376

we are torn between wanting to validate and support, through some form of income maintenance provision, the caring work for which women still take responsibility in the 'private' sphere and to liberate them from this responsibility so that they can achieve economic and political autonomy in the 'public' sphere.<sup>35</sup>

Fineman acknowledges this and develops a way to pay carers and challenge women's disadvantage in the public sphere. She advocates wider reliance upon corporation tax so employers financially support carers. Fineman reasons that employers are "totally dependent on caretaking labor and in no way self-sufficient or independent from caretaking," but are not playing their part in maintaining it.<sup>36</sup> To repay this debt, she argues that "the state could assess (and ultimately tax) the market institutions based on the imputed benefits they receive from uncompensated labor."<sup>37</sup> This would be a good system to adopt because it would ensure that unsympathetic employers, who do not support carers, would provide higher tax contributions. Conversely, employers who support caregivers would have to contribute less. Such a scheme may reduce the widespread discrimination against women because of their traditional caregiving role.<sup>38</sup> Employers who discriminate against women would not avoid the costs associated with employing caregivers, as any financial advantages they receive by discriminating would have to be repaid through tax anyway. Therefore, there would be no incentive to discriminate and the societal structures which limit women's roles would be challenged, to some extent.

Corporation tax avoidance and evasion has become a major political issue in the UK. The Conservative Government have vowed to save "around £5 billion...by tackling aggressive

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<sup>35</sup> R. Lister 'Dilemmas in Engendering Citizenship' paper presented at Crossing Borders Conference, University of Stockholm (1994) quoted in 'Social Politics and the Commodification of Care' (n 16) 376

<sup>36</sup> M. Fineman *The Autonomy Myth* (n 2) 94

<sup>37</sup> M. Fineman *The Autonomy Myth* (n 2) 286

<sup>38</sup> See chapter one page 3

tax avoidance and evasion by 2019/20,<sup>39</sup> and are currently consulting on how to penalise this.<sup>40</sup> Although currently unsubstantiated, this idea is similar to Fineman's proposal; both aim to redistribute the advantages that some institutions gain to the detriment of the most vulnerable members of society. This suggests that such a scheme could be implemented in the UK, albeit Fineman's suggestion would make this substantially more transformative.

However, Lewis and Giullari believe that it is unlikely that the state will ever attach enough value to caring work to demonstrate its importance.<sup>41</sup> The everyday nature of caring labour and the public/private divide makes it invisible, so it is easy for the state to avoid paying carers generously. This is evidenced by the minimal £62.10 payable weekly as carer's allowance in the UK. This is only available to those earning less than £110 a week,<sup>42</sup> and providing over thirty-five hours of care a week.<sup>43</sup> This demonstrates how the state undervalues caring labour; the most vulnerable carers, who are earning a limited amount whilst providing significant hours of caring labour, are provided with only this meagre level of support. The state is substantially undervaluing caring labour by failing to recognise its importance. To give carers with the most intensive responsibilities the support they need to achieve the basic capabilities, this level of support should be substantially increased. Only then will fairness for carers be achieved and the true value of their labour recognised.

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<sup>39</sup> M. Keep *Summer Budget 2015: A Summary (Updated)* (Briefing Paper 07251, House of Commons Library, 2015) 4

<sup>40</sup> The Conservative Government are consulting on strengthening civil deterrents and introducing civil sanctions for offshore tax evasion, and even introducing a criminal offence of failure to prevent the facilitation of evasion. (See HM Revenue and Customs *Tackling Offshore Tax Evasion: Civil Sanctions for Enablers of Offshore Evasion* (HM Revenue and Customs, 2015). HM Revenue and Customs *Tackling Offshore Tax Evasion: A New Corporate Criminal Offence of Failure to Prevent the Facilitation of Evasion* (HM Revenue and Customs, 2015). HM Revenue and Customs *Tackling Offshore Tax Evasion: Strengthening Civil Deterrents for Offshore Evaders* (HM Revenue and Customs, 2015)).

<sup>41</sup> J. Lewis, S. Giullari 'The Adult Worker Model Family, Gender Equality and Care: The Search for New Policy Principles and the Possibilities and Problems of a Capabilities Approach' (2005) 34 *Economy and Society* 76, 95

<sup>42</sup> Social Security (Invalid Care Allowance) Regulations 1976, reg. 8(1)

<sup>43</sup> Social Security (Invalid Care Allowance) Regulations 1976, reg. 4(1)

b) Formalised care

Caring labour “attracts compensation when performed in someone else’s household,” or in a professional setting.<sup>44</sup> Care provided in the latter, especially childcare, has grown in importance in the UK through successive governments’ investment. Accordingly, since 1997, access to formal childcare which is delivered by professionally trained staff has increased markedly to increase women’s employment.<sup>45</sup> The Conservative Government have plans to further extend access to free childcare for families with two working parents under the Childcare Bill 2015-16. This will provide thirty hours of free childcare for those under compulsory school age.<sup>46</sup> Although the current draft does not specify how working parents will be identified, it was suggested in the second reading of this Bill that parents will need to be working a minimum of eight hours a week to be eligible.<sup>47</sup>

Some reliance upon formalised care could challenge gender inequality. Research suggests that low cost, accessible and quality childcare should be “a top priority,” as women’s employment levels are generally higher when it is available.<sup>48</sup> This is because they are enabled to meet the fully committed worker model.<sup>49</sup> Formalised care also contests the prioritisation of the sexual family and its prescribed gendered roles.<sup>50</sup> This is because it defies the romanticised ideal of women’s caring role being “natural, universal and unchanging,” by recognising that caring labour is not always best performed within this unit.<sup>51</sup> Challenging the assignment of caring work to the private sphere thus enables women to access the workplace

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<sup>44</sup> K. Klare ‘Horizons of Transformative Labour Law and Employment Law’ (n 18) 19

<sup>45</sup> J. Lewis *Work Family Balance, Gender and Policy* (Edward Elgar, 2009) 153-154

<sup>46</sup> Childcare Bill (HL Bill 54), s. 1 and 2(a)

<sup>47</sup> HL Childcare Bill Deb 16<sup>th</sup> June 2015, second reading, c. 1083

<sup>48</sup> S. Fredman *Women and the Law* (Oxford University Press, 1997) 209

<sup>49</sup> C. McGlynn ‘Work, Family and Parenthood: The European Union Agenda’ in J. Conaghan, K. Rittich *Labour Law, Work and Family* (Oxford University Press, 2005) 223

<sup>50</sup> See chapter two page 33

<sup>51</sup> E. Nakano Glenn ‘Social Constructions of Mothering: A Thematic Overview’ in E. Nakano Glenn, G. Chang, L. Rennie Forcey *Mothering: Ideology Experience and Agency* (Routledge, 1994) 3

on more equal terms with men.<sup>52</sup> A final advantage to outsourcing care is that it challenges “traditional assumptions about what is economic behaviour and what is domestic unpaid work.”<sup>53</sup> It recognises that caring labour has economic value.<sup>54</sup>

Yet formalised care cannot be relied upon alone. This would unduly prioritise formalised caring relationships to the exclusion of caring relationships between family and friends. Informal carers would be denied the chance to nurture these relationships. Solely relying upon formalised care would also reinforce inequality in other ways. Firstly, the advantages noted above would only be relevant to women who can afford to transfer their caring responsibilities to others. Tronto describes this as “privileged irresponsibility.”<sup>55</sup> The Conservative Government’s plans to increase access to free childcare will challenge this, making formalised care more accessible to less affluent families. However, the eight working hours’ eligibility criterion has already been criticised in the House of Lords for failing to support parents performing precarious work. Baroness Jones of Whitchurch, a Labour Lord, argues that this will limit the effectiveness of the reform for precarious workers because of “their uncertain working patterns, where, for example, shifts are cancelled at short notice and the eight-hours criterion is not always met.”<sup>56</sup> Although the most vulnerable workers will be excluded, Baroness Evans of Bowes Park, a Conservative Lord, disregarded this concern. She simply restated that “the provisions in the Bill will enable parents to take up work or increase their hours at work so that they can support their families,” without acknowledging the problems many workers have with precarious work.<sup>57</sup> Therefore, although the Bill does represent progress, childcare may still be inaccessible to some working class parents.

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<sup>52</sup> E. Nakano Glenn ‘Social Constructions of Mothering’ (n 51) 3

<sup>53</sup> J. Herring *Caring and the Law* (n 15) 89-90

<sup>54</sup> V. Held ‘Care and the Extension of the Markets’ (2002) 17 *Hypatia* 19, 23

<sup>55</sup> J. Tronto *Moral Boundaries: A Political Argument for an Ethic of Care* (Routledge, 1993) 120

<sup>56</sup> HL Childcare Bill Deb 6<sup>th</sup> July 2015, 2<sup>nd</sup> sitting, c. 27

<sup>57</sup> HL Childcare Bill Deb (n 56) c. 27

Outsourcing care entirely would also problematically fail to challenge gender inequality. Women constitute the majority of paid carers.<sup>58</sup> This led Herring to note that “one of the ironies of modern life is that women’s increased opportunities in the ‘workplace’ have only been possible because other women have taken on the role of providing caring services.”<sup>59</sup> Therefore, women’s association with caring remains unchallenged.<sup>60</sup> Formalised caring work is also often undervalued and poorly paid in the UK,<sup>61</sup> providing limited chances for promotion and job progression.<sup>62</sup> Therefore, working class women in particular remain associated with caring work. As Macklin states, “the grim truth is that some women’s access to the high-paying, high-status professions is being facilitated through the revival of semi-indentured servitude.”<sup>63</sup> This could be resolved by better recognising the importance of formal carers by increasing their career prospects and pay.<sup>64</sup> However, this is unlikely to happen because formalised care work is undervalued, like informal care, despite the visibility of formalised care. Accordingly, overreliance upon outsourced care alone would further undermine fairness in this context by reinforcing the classed nature of caring relationships, thus restricting some people’s basic capabilities.

It is evident that providing payment for formal and informal carers alone would be unlikely to achieve fairness for carers as gendered and class inequalities would be reinforced. Although payment for both types of care is important, it has been widely recognised that the “core of

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<sup>58</sup> S. Fredman *Women and the Law* (n 48) 216

<sup>59</sup> J. Herring *Caring and the Law* (n 15) 4

<sup>60</sup> R. Crompton *Employment and the Family: The Reconfiguration of Work and Family Life in Contemporary Societies* (Cambridge University Press, 2006) 194

<sup>61</sup> V. Held ‘Care and the Extension of the Markets’ (n 54) 21

<sup>62</sup> S. Fredman *Women and the Law* (n 48) 216

<sup>63</sup> A. Macklin ‘On the Outside Looking in: Foreign Domestic Workers in Canada’ in W. Giles, S. Arat-Koc, *Maid in the Market: Women’s Paid Domestic Labor* (Fernwood Publishing, 1994) 34

<sup>64</sup> M. Fineman *The Autonomy Myth* (n 2) 286

gender inequality is the gender division of time and responsibilities for market work.”<sup>65</sup> Therefore, to achieve gender equality and advance carers’ wellbeing, it would be more beneficial to promote the institutional accommodation of carers.<sup>66</sup> I have already noted how the workplace is shaped around those in full-time continuous employment, which disadvantages carers. To enable carers to achieve the basic capabilities, the taxes recovered using Fineman’s model could be used to challenge this dominant employment model.<sup>67</sup> I will consider why and how this could be achieved in the remainder of this chapter. Such changes would need to be supported by formalised care. It is also important to reiterate that this would not be appropriate for those with the most intense caring responsibilities as they may not be able to participate within the workplace. Accordingly, as noted earlier, they would require generous state financial support for their caring work.

### **Paid work and the labour market**

As noted in chapter two, the public/private divide led to paid work and caring labour conflicting.<sup>68</sup> Work has traditionally been seen as something “typically occurring outside the home and done by someone holding a job.”<sup>69</sup> This meant that caring labour was erroneously not regarded as work. Also, the divide restricted women’s access to the workplace because of their association with caring labour. Despite women’s mass entry into the workplace, the fully committed worker model, based around someone whose sole focus is paid work, remains dominant. The workplace is still “based on the false premise that the public is fully insulated from the private.”<sup>70</sup> For many female workers, this has never been accurate,

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<sup>65</sup> I. Robeyns ‘Sen’s Capability Approach and Gender Inequality: Selecting Relevant Capabilities’ (2003) 9 *Feminist Economics* 61, 82

<sup>66</sup> M. Fineman *The Autonomy Myth* (n 2) 36

<sup>67</sup> N. Busby *A Right to Care?* (n 13) 89

<sup>68</sup> See chapter two page 33

<sup>69</sup> K. Klare ‘Horizons of Transformative Labour Law and Employment Law’ (n 18)10

<sup>70</sup> S. Fredman *Women and the Law* (n 48) 17

including those working within another's household, such as maids.<sup>71</sup> However, even for those who do enter separate spaces for providing care work and paid work, "what happens in one sphere influences the other...it is an illusion to think that complete separation can occur."<sup>72</sup>

Therefore, women's continuing association with caring responsibilities means that they are disadvantaged within the workplace. I noted in chapter two that women are more likely than men to reduce their hours or sacrifice their paid work altogether to provide care, which contributes towards the gender pay gap.<sup>73</sup> Also, women are treated as potential carers and discriminated against because they are presumed to be unable to fulfil the requirements of the workplace.<sup>74</sup> Single parents and women in poverty particularly struggle to reconcile these competing demands, so their paid work is often markedly affected.<sup>75</sup> These more vulnerable carers may be forced into precarious jobs, which as noted in chapter one, are distinguishable by "low wages, few benefits, the absence of collective representation, and little job security."<sup>76</sup>

I argue that to promote human flourishing, the workplace should be restructured to better accommodate those with caring responsibilities so their career progression is not negatively impacted. This would challenge the public/private divide as well as the separation of paid work and caring labour, which I noted in chapter two has maintained women's

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<sup>71</sup> S. Boyd 'Challenging the Public/Private Divide: An Overview' in S. Boyd *Challenging the Public/Private Divide: Feminism, Law and Public Policy* (University of Toronto Press, 1997) 12

<sup>72</sup> K. O'Donovan *Sexual Divisions in Law* (Weidenfeld and Nicolson, 1985) 160

<sup>73</sup> See chapter two page 26

<sup>74</sup> See chapter one page 3

<sup>75</sup> S. Fredman, J. Fudge 'The Legal Construction of Personal Work Relations and Gender' (2013) 7 *Jerusalem Review of Legal Studies* 112, 117

<sup>76</sup> J. Fudge, R. Owens *Precarious Work, Women and the New Economy: The Challenge to Legal Norms* (Bloomsbury, 2006) 12. See chapter one page 15.



disadvantage.<sup>77</sup> Such an approach would tackle the stereotypes and expectations of each gender, unlike paying carers.<sup>78</sup> All people would be recognised as being able to participate in both spheres. Men would be enabled to provide care and more importantly, women would be enabled to earn incomes more comparable to men.<sup>79</sup> An early aim of feminism was to allow women to access paid work because it provides “the best means of achieving economic independence.”<sup>80</sup> This aim remains important today because “paid work has the potential to become the universal platform for equal citizenship.”<sup>81</sup> As Held notes “it is liberating for women to be able to earn their own paychecks and to decide how to spend them.”<sup>82</sup> This is particularly important for carers, because as noted, many suffer financial hardship. Increasing access to paid work may also challenge the classed nature of care by providing women with genuine options other than providing care.<sup>83</sup>

In addition to securing women with an income, paid work further benefits women as "a forum to realize at least some of our aspirations, to form bonds with others, to serve society, and to project ourselves into the larger world beyond our own families and friends."<sup>84</sup> This is likely to be particularly important for carers, who sometimes find the ability to maintain their paid work identity fundamental to coping with their caring responsibilities.<sup>85</sup> As paid work can be a place of human flourishing, Robeyns identifies it as another basic capability that should be protected to achieve gender equality in post-industrialized Western societies.<sup>86</sup>

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<sup>77</sup> See chapter two page 33

<sup>78</sup> M. Eichner *The Supportive State* (n 25) 83

<sup>79</sup> M. Eichner *The Supportive State* (n 25) 82

<sup>80</sup> R. Lister ‘The Dilemmas of Pendulum Politics: Balancing Paid Work, Care and Citizenship’ (2002) 31 *Economy and Society* 520, 522

<sup>81</sup> V. Schultz ‘Life’s Work’ (2000) 100 *Columbia Law Review* 1881, 1885

<sup>82</sup> V. Held ‘Care and the Extension of the Markets’ (n 54) 20

<sup>83</sup> See chapter two page 39

<sup>84</sup> V. Schultz ‘Life’s Work’ (n 81) 1883

<sup>85</sup> R. Horton ‘Care-giving and Reasonable Adjustment in the UK’ in N. Busby, G. James *Families, Care-giving and Paid Work: Challenging Labour Law in the 21<sup>st</sup> Century* (Edward Elgar, 2011) 146. This is something Jess noted as important in chapter one page 8

<sup>86</sup> I. Robeyns ‘Sen’s Capability Approach and Gender Inequality’ (n 65) 81

However, she recognises that this capability, like caring labour, “cannot be seen as contributing unambiguously to the well-being of the worker.”<sup>87</sup> This is because these advantages hinge on paid work being decent work, which is a key agenda of the International Labour Organisation (ILO). According to the ILO, decent work includes four pillars; employment creation, guaranteeing rights at work, extending social protection and promoting social dialogue.<sup>88</sup> Some jobs, especially precarious ones, fall short of this. Nonetheless, paid work should be recognised as a capability. Jobs which are not decent and may not promote people’s wellbeing need to be changed to better meet the ILO standards. After all, decent paid work will play a key role in promoting fairness for carers.

As both care work and paid work are basic capabilities, it is vital that people can participate in both. Indeed, as Lewis and Guillari argue, to make people choose between paid work and care “has the hallmarks of tragedy.”<sup>89</sup> Enabling care work and paid work to be better combined could help to achieve human flourishing for carers. This is partly because it would provide them with an identity outside of caring, but also because it “recognizes the importance of care work without presuming that women must withdraw from the rest of the world to be good mothers or caretakers.”<sup>90</sup>

To achieve this, the public/private divide should be challenged. This could be done by replacing the fully committed worker model with a new norm; the “dually responsible worker.”<sup>91</sup> Fineman recognises that this would entail asking “how can we ensure the

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<sup>87</sup> I. Robeyns ‘Sen’s Capability Approach and Gender Inequality’ (n 65) 80

<sup>88</sup> International Labour Office *Independent Evaluation of the ILO’s Strategy for Coherent Decent Work Policies* (International Labour Organization, 2014) 1

<sup>89</sup> J. Lewis, S. Giullari ‘The Adult Worker Model Family, Gender Equality and Care’ (n 41) 98

<sup>90</sup> M. Eichner *The Supportive State* (n 25) 83

<sup>91</sup> M. Fineman *The Autonomy Myth* (n 2) 201

caretaker's right to work."<sup>92</sup> Therefore, the workplace would no longer be based around those who have no caring responsibilities, but recognise that all people do. Everyone would be provided with an equal opportunity to participate in both paid work and care. This would necessitate removing the structural factors which result in women providing care and challenge the associated disadvantage. Therefore, it would allow a person to "convert their assets (such as skills or capital) into positive outcomes through what they are able to be and do, that is through their 'functionings'."<sup>93</sup> The reality of caring relationships would also be recognised, as care is not presented "as a safety net in times of misfortune and transition but rather an on-going social process that demands our attention daily."<sup>94</sup>

Fineman argues that achieving the dually responsible worker model would necessitate creating and enforcing reconciliation legislation, including "flexible workweeks, job sharing without penalty and paid family leave."<sup>95</sup> This would make "nurturing and caretaking a central responsibility of the nonfamily arenas of life...[providing all with] an equal opportunity to engage in nurturing and caretaking."<sup>96</sup> It would also formally link "the concepts of 'worker' and 'carer'."<sup>97</sup> Such legislation should be made available to all people to avoid "heavy gender segregation in labour markets."<sup>98</sup> As noted, Fineman is writing in American context where such legislation is limited.<sup>99</sup> However, successive UK governments have introduced a plethora of reconciliation legislation since New Labour formed the Government in 1997.

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<sup>92</sup> M. Fineman *The Autonomy Myth* (n 2) 201

<sup>93</sup> N. Busby *A Right to Care?* (n 13) 90

<sup>94</sup> R. Crompton *Employment and the Family* (n 60) quoting Sevenhuijsen 2002, 138

<sup>95</sup> M. Fineman *The Autonomy Myth* (n 2) 287

<sup>96</sup> M. Fineman *The Autonomy Myth* (n 2) 201

<sup>97</sup> F. Devan 'Assessing the Use of Parental Leave by Fathers: Towards a Conceptual Framework' in B. Pepper, L. Den Dulk, A. van Doorne-Huiskes *Flexible Working and Organisational Change: The Integration of Working and Personal Life* (Edward Elgard, 2005) 263

<sup>98</sup> G. Esping-Andersen, D. Gallie, A. Hemerijck, J. Myles *Why We Need a New Welfare State* (Oxford University Press, 2002) 87

<sup>99</sup> See chapter one page 5

## Reconciliation legislation

Reconciliation legislation can have various aims including improving gender equality, children's welfare, business efficacy or increasing fertility rates.<sup>100</sup> Most of the early legislation introduced in the UK by New Labour focused upon mothers and parenting. The Maternity and Parental Leave Regulations 1999 extended maternity leave and introduced parental leave; the latter was mandated by the EU Parental Leave Directive.<sup>101</sup> These legislative changes aimed to remove obstacles to paid work and stop mothers relying on welfare.<sup>102</sup> This focus is reiterated in early definitions of family-friendly policies; in 2001 the Organisation for Economic Co-operation and Development (OECD) described them as “policies for child-care and for maternity.”<sup>103</sup> Likewise, Maher and her colleagues describe them as “those measures that extend both family resources and parental labour attachment.”<sup>104</sup> Indeed, the only legislative change introduced in this period which was not just for mothers was emergency leave; this was made available to a wide variety of carers under the Employment Relations Act 1999.<sup>105</sup>

It was in response to criticism of family-friendly policies that the New Labour Government renamed them work-life balance policies from 2001-10.<sup>106</sup> Lewis notes that this signals “the desire both to include those without care responsibility and to find new ways of managing

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<sup>100</sup> J. Lewis *Work Family Balance, Gender and Policy* (n 45) 71

<sup>101</sup> Parental Leave Directive 96/34

<sup>102</sup> R. Lister ‘Children (But Not Women) First: New Labour, Child Welfare and Gender’ (2006) 26 *Critical Social Policy* 315, 318

<sup>103</sup> Organisation for Economic Co-operation and Development *Employment Outlook 2001* (Organisation for Economic Co-operation and Development, 2001) 129

<sup>104</sup> J. Maher, J. Lindsay, S. Franzway ‘Time, Caring Labour and Social Policy: Understanding the Family Time Economy in Contemporary Families’ (2008) 22 *Work, Employment and Society* 547, 547

<sup>105</sup> S. 8 introduced this into Employment Rights Act 1996, s. 57A

<sup>106</sup> S. Macpherson ‘Reconciling Employment and Family Care-Giving: A Gender Analysis of Current Challenges and Future Directions for UK Policy’ in N. Busby and G. James *Families, Care-giving and Paid Work: Challenging Labour Law in the 21st Century* (Edward Elgar, 2011) 24

increasingly diverse workforces.”<sup>107</sup> However, this wider ambit was not reflected in the legislative changes, which continued to focus predominantly upon parenting. Maternity leave was extended,<sup>108</sup> ordinary paternity leave introduced,<sup>109</sup> as well as additional paternity leave,<sup>110</sup> and the right to request flexible working.<sup>111</sup> This latter entitlement was originally only available to parents, although subsequent changes made it available to carers,<sup>112</sup> and the Coalition Government’s (2010-15) Children and Families Act 2014 extended this again to all employees.<sup>113</sup> The 2014 Act also introduced shared parental leave, which makes fifty weeks of maternity leave shareable between mothers and fathers, or mother’s spouse, partner or civil partner as well as adopters and their partners.<sup>114</sup> Despite these subsequent changes, it is clear that the “plethora of legislative activity,” continued to primarily focus upon parenting rather than prioritising a work-life balance for all people.<sup>115</sup>

Further changes to this body of legislation have been proposed within the Carers (Leave Entitlement) Bill [HL] 2015-16. This is a Private Member’s Bill, introduced by the Liberal peer Baroness Tyler of Enfield which proposes a period of carers’ leave “to fulfil certain caring responsibilities in respect of dependants; and for connected purposes.”<sup>116</sup> At the time of writing there is limited detail about this, although the current draft of the legislation states that the determined period of leave would be available to those caring for both disabled and

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<sup>107</sup> J. Lewis *Work Family Balance, Gender and Policy* (n 45) 1

<sup>108</sup> Employment Act 2002, Work and Families Act 2006

<sup>109</sup> Employment Act 2002 s. 1

<sup>110</sup> Additional Paternity Leave Regulations 2010

<sup>111</sup> Employment Act 2002 s. 47

<sup>112</sup> Work and Families Act 2006 s. 80F

<sup>113</sup> s. 131

<sup>114</sup> Part 7

<sup>115</sup> G. James *The Legal Regulation of Pregnancy and Parenting in the Labour Market* (Routledge, 2009) 38

<sup>116</sup> Carers (Leave Entitlement) Bill (HL Bill 42)

sick dependents.<sup>117</sup> Therefore, carers' leave would be more in accordance with work-life policies although as noted in chapter one, it is unlikely to be enacted.<sup>118</sup>

Despite Fineman's optimism that reconciliation legislation could promote carers' accommodation in the workplace, the UK legislation has been widely criticised. This is partly because it does not fundamentally challenge the fully committed worker paradigm. Conaghan notes that reconciliation legislation does "not touch the essence of labour law," but instead intervenes at the margins.<sup>119</sup> Busby argues that even the terminology provides little reassurance of long term change; family-friendly or work-life legislation suggests that all other labour policies are inherently family or even life unfriendly.<sup>120</sup> The fully committed worker model is unchallenged as caring relationships can only impact upon the workplace in specific circumstances. Outside of these situations, the interdependent nature of caring relationships and paid work is obscured, despite the legislation demonstrating how intertwined they are.<sup>121</sup> This highlights a problem with reliance upon the law alone to effect change; Mossman notes that "legal method defines 'relevance' and accordingly excludes some ideas whilst admitting others."<sup>122</sup> Reconciliation legislation has excluded the fact that caring relationships may regularly impact upon paid work commitments. However, this exclusion is hard to challenge because of the perceived neutrality of the law.<sup>123</sup> This is despite feminist challenges which highlight that "law's neutrality is in fact the expression of gendered interests."<sup>124</sup> These problems have made some feminists sceptical about the law's ability to effect change or "influence deeply entrenched and deeply engendered social

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<sup>117</sup> Carers (Leave Entitlement) Bill (HL Bill 42), s. 1

<sup>118</sup> See chapter one page 6

<sup>119</sup> J. Conaghan 'Feminism and Labour Law' (n 14) 14

<sup>120</sup> N. Busby *A Right to Care?* (n 13) 49

<sup>121</sup> J. Conaghan 'Women, Work and Family: A British Revolution?' in J. Conaghan, R. Fischl, K. Klare *Labour Law in an Era of Globalization* (Oxford University Press, 2002) 72

<sup>122</sup> M. Mossman 'Feminism and Legal Method: The Difference it Makes' (1987) 3 *Wisconsin Women's Law Journal* 147, 164

<sup>123</sup> C. Smart *Feminism and the Power of Law* (Routledge, 1989) 14

<sup>124</sup> C. Smart *Feminism and the Power of Law* (n 123) 8

patterns.”<sup>125</sup> Smart argues that any legal challenge has to concede to the “very power that law may then deploy against women’s claims,” by excluding relevant concerns or presenting as neutral deeply problematic solutions which discount women’s experience.<sup>126</sup> She argues that “law must also be tackled at the conceptual level if feminist discourses are to take a firmer route.”<sup>127</sup> As reconciliation legislation fails to do this, it alone is unlikely to achieve a fundamental change to the workplace. Indeed, in the coming sections I will argue that Smart’s concerns are borne out by reconciliation legislation, so it has only a limited impact upon women’s lives.

a) Protecting only employees

One reason the reconciliation legislation has had a limited impact on carers is because non-employees are unable to access the protection. This excludes many of the most vulnerable workers from the support they require, including precarious workers. Indeed, these workers are denied much of the protection of labour law. As a result of this and their economic dependence, they may have to partake in “all but the most extreme forms of abusive employment arrangements.”<sup>128</sup> These relations are thus characterised “not by positive autonomy of the workers but rather by the absence of legal regulation and protection.”<sup>129</sup> Despite the disadvantages, Williams notes that the experiences of poor women in balancing their paid work and caring labour “continue to be largely invisible in policy debates.”<sup>130</sup> In this section I will show how the definition of employee in UK labour law has excluded many of the most vulnerable workers from the support they require.

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<sup>125</sup> S. Fredman *Women and the Law* (n 48) 367

<sup>126</sup> C. Smart *Feminism and the Power of Law* (n 123)5

<sup>127</sup> C. Smart *Feminism and the Power of Law* (n 123) 5

<sup>128</sup> A. Adams, M. Freedland, J. Prassl ‘The ‘Zero-Hours Contract’: Regulating Casual Work, or Legitimizing Precarity?’ (2015) University of Oxford Legal Research Paper Series (Paper no 00/2015) 3

<sup>129</sup> M. Freedland, N. Kountouris *The Legal Construction of Personal Work Relations* (Oxford University Press, 2011) 355

<sup>130</sup> L. Williams ‘Poor Women’s Work Experiences: Gaps in the ‘Work/Family Discussion’ in J. Conaghan, K. Rittich *Labour Law, Work and Family* (Oxford University Press, 2005) 198

The Social Security Contributions and Benefits Act 1992 regulates maternity pay and defines an employee as someone “gainfully employed in Great Britain...under a contract of service.”<sup>131</sup> This means that an employee works under a relation of authority and control. In *Ready Mixed Concrete (South East) Ltd. v Minister for Pensions and National Insurance*, it was determined that employees are considered to be under control if they do not have “the power of deciding the thing to be done, the means to be employed in doing it, the time when and the place where it shall be done.”<sup>132</sup> The Supreme Court recently confirmed the importance of this test in *Autoclenz Ltd v Belcher and others*, where it was decided that the workers were employees because they did not have control over the content of the work or working time.<sup>133</sup> However, control is not the only test relevant in determining if someone is an employee. MacKenna J confirmed that a multi-factor test is applicable in *Ready Mixed Concrete*.<sup>134</sup> In particular, he highlights that in an employment relationship, both employer and employee have mutual obligations, which was recently confirmed in *Windle and another v Secretary of State for Justice*.<sup>135</sup> Freedland notes that these mutual obligations are on a two-level structure.<sup>136</sup> The first is an exchange of service for remuneration, which was described in *Carmichael v National Power* as the “irreducible minimum of mutuality of obligation necessary to create a contract of service.”<sup>137</sup> The second tier includes the employee undertaking “an obligation to make himself available to render service, while the employer

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<sup>131</sup> s. 171(1)

<sup>132</sup> *Ready Mixed Concrete (South East) Ltd. v Minister for Pensions and National insurance* [1968] 2 Q.B. 497, 515. MacKenna J

<sup>133</sup> [2011] I.C.R. 1157

<sup>134</sup> The classic definition of an employee is “(i) the servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other's control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service.” (*Ready Mixed Concrete (South East) Ltd. v Minister for Pensions and National Insurance* [1968] 2 Q.B. 497, 515. MacKenna J). This has been recently confirmed in *Autoclenz Ltd v Belcher and others* [2011] I.C.R. 1157

<sup>135</sup> [2015] I.C.R. 156, [54]

<sup>136</sup> M. Freedland *The Contract of Employment* (Clarendon Press, 1976) 20

<sup>137</sup> *Carmichael v National Power* [1999] I.C.R. 1226, 1231 (Lord Irvine of Lairg LC)



undertakes to enable the employee to earn his remuneration.”<sup>138</sup> This second tier is therefore a promise by both parties to further performance. A third factor in determining employee status is that “the other provisions of the contract are consistent with its being a contract of service.”<sup>139</sup> This means that there can be no inconsistent terms within the contract which suggest that an employment relationship is not present. This invites tribunals to engage in a balancing act, determining whether there are more things within the relationship or contract which point to employee status or which oppose it.

All three of these factors may exclude precarious workers from employee status. They may be under the employer’s control whilst at work but casual workers have the theoretical freedom to refuse work, even if they are unable to practice this because of their vulnerable position. Therefore, precarious workers may not be deemed to be under the control of the potential employer. The theoretical ability to refuse work may also be problematic in showing that there is mutuality of obligations; the workers do not have to agree to future performance. This was the decisive factor in denying casual waiters employee status in the leading case of *O’Kelly v Trusthouse Forte plc*.<sup>140</sup> The waiters were under no obligation to offer their services on a regular basis, despite the fact that if they refused work, they could be punished by suspension or removed from the “regular casual” list. The reasoning was thus “unfortunate in that it ignored the practice and mutual dependence of the parties.”<sup>141</sup> This demonstrates that the mutual obligations factor has been used as a “prescriptive element, and as a test, to assess the presence of a contract of employment.”<sup>142</sup> This prioritises the potential employer too much, as it “leaves the question of the rights that the working relationship can attract

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<sup>138</sup> M. Freedland *The Contract of Employment* (n 136) 20

<sup>139</sup> *Ready Mixed Concrete (South East) Ltd. v Minister for Pensions and National Insurance* [1968] 2 Q.B. 497, 515. MacKenna J

<sup>140</sup> [1983] I.C.R. 728

<sup>141</sup> P. Leighton ‘Contract of Employment’ (1984) *Industrial Law Journal* 62, 65

<sup>142</sup> N. Countouris ‘Uses and Misuses of ‘Mutuality of Obligations’ and the Autonomy of Labour Law’ in A. Bogg, C. Costello, ACL. Davies, J. Prassl *The Autonomy of Labour Law* (Hart Publishing, 2015) 179

largely in the hands of the employer.”<sup>143</sup> Enabling the employer to decide whether there are mutual obligations makes it easier for them to avoid supporting workers in providing care. This validates Smart’s concern that legal changes will not effect change because the power of the law can be deployed against women.<sup>144</sup> This is because the legal test for mutuality of obligations has been set to prioritise those in power, who remain predominantly men, to the disadvantage of the more vulnerable people in the workplace, who remain women, especially those from lower socio-economic backgrounds. The law enables employers to discount women’s experience and deny them the support they need.<sup>145</sup>

More precarious workers are denied employee status because of an “increasing reluctance on the part of courts and tribunals to regard periods of intermittent employment as constituting continuous contacts of employment.”<sup>146</sup> This was demonstrated in *Carmichael v National Power plc*.<sup>147</sup> The House of Lords determined tour guides who worked on a casual basis were unable to show that they were employees. This was partly because neither the employer nor the workers intended “to have their relationship regulated by contract whilst...not working as guides.”<sup>148</sup> This decision may create a “significant hurdle” to workers on zero-hours contracts.<sup>149</sup> This is a category of precarious worker who “has no guarantee of any fixed minimum level of paid employment.”<sup>150</sup> These workers constitute 2.4% of those in paid work.<sup>151</sup> The potential break periods of paid work may demonstrate that there is insufficient mutuality of obligations for these workers to be classified as employees. However, this is not

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<sup>143</sup> S. Fredman, J. Fudge ‘The Legal Construction of Personal Work Relations and Gender’ (n 75) 118

<sup>144</sup> C. Smart *Feminism and the Power of Law* (n 123) 5

<sup>145</sup> C. Smart *Feminism and the Power of Law* (n 123) 5

<sup>146</sup> M. Freedland, N. Kountouris *The Legal Construction of Personal Work Relations* (n 129) 174

<sup>147</sup> [1999] I W.L.R. 2042

<sup>148</sup> [1999] I W.L.R. 2042, 2047, Lord Irvine

<sup>149</sup> A. Adams, M. Freedland, J. Prassl ‘The ‘Zero-Hours Contract’ (n 128) 11

<sup>150</sup> M. Freedland ‘The Segmentation of Workers’ Rights and Legal Analysis of Personal Work Relations: Redefining a Problem’ (2015) 36 *Comparative Labor Law and Policy Journal* 241, 255

<sup>151</sup> Office for National Statistics *Employee Contracts That Do Not Guarantee a Minimum Number of Hours: 2015 Update* (Office for National Statistics, 2015) 1

a problem in all cases, as in *St Ives Plymouth Ltd v Mrs D Haggerty*, Elias J noted that “a course of dealing, even in circumstances where the casual is entitled to refuse any particular shift, may in principle be capable of giving rise to mutual legal obligations in the periods when no work is provided.”<sup>152</sup> Therefore, “mutuality of obligation will... clearly not prove fatal for all claimants working under zero-hours contracts seeking to rely on their statutory rights.”<sup>153</sup> Yet, it is clear that if this factor continues to be applied in the “strict and narrow,” way demonstrated in *Carmichael and O’Kelly*, many will be denied employee status. Such an approach would again reinforce the power of the law to deny women support and would thus frustrate fairness in this context by undermining people’s capabilities to participate in both paid work and caring relationships.

The third factor for establishing employee status, that there are no inconsistent terms, also enables potential employers to deny precarious workers employee status. Clauses can be implemented which deny employment obligations. The majority of case law on such terms focuses upon substitution clauses, which requires the potential employee to organise for someone else to do their work, if they are unable. Such a clause was an issue in *Express and Echo Publications Ltd v Tanton*, where Peter Gibson LJ confirmed that “a person who...is not required to perform his services personally, then as a matter of law the relationship between the worker and the person for whom he works is not that of employee and employer.”<sup>154</sup> This again prioritises employers’ desires to avoid regulation over the potential worker’s need for labour law protection, showing how the law privileges the interests of the powerful. Indeed, this could be an example of a growing dynamic in labour law “whereby the various practical and legal actors involved in the conduct of regulation... contrive to deepen

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<sup>152</sup> *St Ives Plymouth Ltd v Mrs D Haggerty* [2008] WL 2148113 [1], [26]

<sup>153</sup> A. Adams, M. Freedland, J. Prassl ‘The ‘Zero-Hours Contract’ (n 128) 13

<sup>154</sup> *Express and Echo Publications Ltd v Tanton* [1999] I.C.R. 693, 699-700

the separation between marginal work relations and standard employee work relations.”<sup>155</sup>

Accordingly, the law is not only failing to effect change, it is actively undermining attempts to achieve fairness in this context by perpetuating vulnerable workers’ disadvantages. This is perhaps the clearest indicator that Smart’s concern, that the law will deploy its power against women’s claims, is well founded.<sup>156</sup>

Potential employers can also deny employee status through no mutuality clauses, such as in *Autoclenz Ltd v Belcher*.<sup>157</sup> The contract contained clauses expressly denying employee status.<sup>158</sup> These clauses were dismissed because they did not reflect the working arrangement in practice. Lord Clarke explained that “the question in every case is...what was the true agreement between the parties.”<sup>159</sup> It was also confirmed that the relative bargaining power of the parties should be considered in determining if the written agreement reflected the true agreement.<sup>160</sup> This is a positive step as “it prevents the obvious and deliberate abuse of a strong bargaining power to insert terms into written contracts with the sole intent of denying access to statutory rights.”<sup>161</sup> However, McClelland argues that this case was still a missed opportunity, as the court did not “identify the standards that should apply to the explicit and implicit dimensions of the employment relationship.”<sup>162</sup> Therefore, she fears that the courts will not adopt the more purposive approach but instead will fall back on the old tests, restricting employee status and labour law protection for precarious workers.

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<sup>155</sup> M. Freedland, N. Kountouris *The Legal Construction of Personal Work Relations* (n 129) 354

<sup>156</sup> C. Smart *Feminism and the Power of Law* (n 123) 5

<sup>157</sup> [2011] I.C.R 1157

<sup>158</sup> [2011] I.C.R 1157, 1160

<sup>159</sup> [2011] I.C.R 1157, 1167

<sup>160</sup> [2011] I.C.R 1157, 1168

<sup>161</sup> J. McClelland ‘A Purposive Approach to Employment Protection or a Missed Opportunity?’ (2012) 75 *Modern Law Review* 387, 435-6

<sup>162</sup> J. McClelland ‘A Purposive Approach to Employment Protection or a Missed Opportunity?’ (n 161) 436

Clearly, many factors within the test for employee status can deny precarious workers the protection of labour law and access to reconciliation legislation. This shows how using the law to advance change may be a flawed approach as accepting the power of the law can lead to it being used against women, who remain associated with precarious work.<sup>163</sup> As this work is also generally poorly paid, the test for employee status is an example of law's power being deployed against women from lower socio-economic backgrounds. This reflects concerns about reconciliation legislation promoting the interests of middle class women whilst exacerbating "the various social and economic woes suffered by the unemployed and the working poor."<sup>164</sup> The exclusion of precarious workers will reinforce class inequality by escalating the problems that some of those from lower economic classes face in balancing paid work and caring labour which may "threaten unemployment."<sup>165</sup> Accordingly, one clear reason that reconciliation legislation will not lead to a fundamental change to the workplace is that some of the most vulnerable workers are excluded.

It could be argued that women who are employees benefit from the reconciliation legislation and thus the law's power has not been deployed against all women. However, excluding non-employees detracts from all women, not just those participating in precarious work. Enabling employers to use their power to deny employee status and refuse support for carers encourages employers to only support workers whom they deem valuable. The fact that those in power "contrive to deepen the separation between marginal work relations and standard employee work relations," demonstrates this.<sup>166</sup> This has meant that men, who are deemed to be more committed to the workplace, are more likely to receive such support, whilst women

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<sup>163</sup> See chapter one page 15

<sup>164</sup> M. O'Brien Hylton ' "Parental" Leaves and Poor Women: Paying the Price for Time Off' (1990-91) 52 University of Pittsburgh Law Review 475, 518

<sup>165</sup> J. Herring *Caring and the Law* (n 15) 117

<sup>166</sup> M. Freedland, N. Kountouris *The Legal Construction of Personal Work Relations* (n 129) 354

who are deemed less reliable, may be denied it. This is deeply problematic as it will reinforce gender inequality and thus negatively impact upon all women.

Enabling employers to deny workers the protection of labour law creates another pertinent problem for all women. Labour law recognises that the employment relationship is about “more than just economic rights.”<sup>167</sup> It requires employers to recognise and respect the other aspects of their employees’ personal identity. Allowing employers to determine that people do not deserve this protection permits them to only measure someone’s worth according to their contribution to the workplace. Therefore, workers can be treated as a commodity. This means that workers are exposed “to market forces and...[are] more rather than less dependent upon their own efforts to ensure their well-being, all in the name of greater growth.”<sup>168</sup> This contravenes the very basic protection expected within the workplace; the concept that a worker is not a commodity is one of the founding principles of the ILO.<sup>169</sup> The lack of protection afforded to non-employees undermines the recognition of them as humans, equally worthy of protection. Although this trend could be devastating for all men and women, women’s actual or perceived inability to conform to male ideals in the workplace means that they are more likely to be deemed less valuable workers and suffer such inhuman treatment. Steps towards the commodification of labour will problematically further reinforce gender inequality; Rittich notes “the commitment to competitive, efficient labour markets should be expected to generate greater inequality both in general and along gender lines.”<sup>170</sup> This is because the idea of such a market model is that people are encouraged to either prioritise paid

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<sup>167</sup> G. Mundlak ‘Recommodifying Time: Working House of ‘Live-in’ Domestic Workers’ in J. Conaghan, K. Rittich *Labour Law, Work and Family* (Oxford University Press, 2005) 147

<sup>168</sup> K. Rittich ‘Equity or Efficiency: International Institutions and the Work/Family Nexus’ in J. Conaghan, K. Rittich *Labour Law, Work and Family* (Oxford University Press, 2005) 60

<sup>169</sup> ILO Declaration of Philadelphia: Declaration Concerning the Aims and Purposes of the International Labour Organisation (1994), (I)(a)

<sup>170</sup> K. Rittich ‘Equity or Efficiency’ (n 168) 71

work or not, “and suffer the consequences.”<sup>171</sup> Accordingly, the exclusion of non-employees will undermine the achievement of fairness for all women.

b) Prioritisation of the sexual family

Another reason reconciliation legislation has had a limited impact upon carers is the prioritisation of parents, the most valorised caring relationship. Carers are only entitled to request flexible working, emergency leave and, possibly in the future, carers’ leave.<sup>172</sup> These relatively few entitlements are in sharp contrast to the consistent improvements made to leave entitlements available to parents since 1997. Therefore, reconciliation legislation has not effected overall change because non-parents raising children and carers for other dependents, are overlooked. This is despite the fact that other collaborative care arrangements “occur as a matter of social fact.”<sup>173</sup> In addition to the 6 million people caring for an elderly, disabled or otherwise dependent adult, there are 2 million single parents. Others participate in shared mothering, where childcare is shared with other family members and the wider community, as described in chapter two.<sup>174</sup> 139,000 to 300,000 children are also being raised by kinship carers, who are non-parents, including relatives or friends, who care for children who would otherwise have entered the care system.<sup>175</sup> Yet, the body of reconciliation legislation provides limited support to these caring units, despite their vast numbers. Not only does this fail to reflect the “radical transformations already occurring within families,” it also denies these family units the workplace support needed.<sup>176</sup> Therefore, many carers will be unable to achieve the basic capabilities, undermining human flourishing and the importance of this invaluable care work.

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<sup>171</sup> K. Rittich ‘Equity or Efficiency’ (n 168) 71

<sup>172</sup> Carers (Leave Entitlement) Bill [HL] 2015-16

<sup>173</sup> J. McCandless, S. Sheldon ‘The Human Fertilisation and Embryology Act (2008) and the Tenacity of the Sexual Family Form’ (2010) 73 *Modern Law Review* 175, 198

<sup>174</sup> See chapter two page 40

<sup>175</sup> S. Nandy, J. Selwyn, E. Farmer, P. Vaisey *Spotlight on Kinship Care* (Buttle UK, 2011) 6

<sup>176</sup> G. James *The Legal Regulation of Pregnancy and Parenting in the Labour Market* (n 115) 64

These carers have been disadvantaged to prioritise the sexual family. The law has made support in the workplace dependent upon carers conforming to the sexual family ideal which has traditionally been venerated by the state.<sup>177</sup> Although this includes unmarried and same-sex parents, these relationships are like marriage in that they involve two people in a sexual union.<sup>178</sup> As Fineman notes, “by duplicating the privileged form, alternative relationships merely affirm the centrality of sexuality to the fundamental ordering of society and the nature of intimacy.”<sup>179</sup> This undermines the importance of care work performed outside the sexual family, which is predominantly performed by women. Accordingly, Smart’s concern that the law will deploy its power against women’s claims is further borne out.<sup>180</sup>

It could be argued that women providing care within the sexual family benefit from these legal changes and thus the law’s power has not been deployed against all women. However, this argument is flawed, like the similar argument considered in the exclusion of non-employees. Not only does the prioritisation of the sexual family restrict the support available to those providing care outside this form, it restricts the achievement of fairness for all carers by reinforcing gender inequality. As noted in chapter two, within the sexual family, the roles of mothers and fathers are “strictly prescribed.”<sup>181</sup> Women remain defined by their childcare role whilst the importance of “employment in displaying socially appropriate masculinity is unquestioned.”<sup>182</sup> This has led to women’s continued discrimination in the workplace, and men’s caring responsibilities are considered less important than paid work, so they “are

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<sup>177</sup> M. Fineman *The Neutered Mother, the Sexual Family and Other Twentieth Century Tragedies* (Routledge, 1995) 150

<sup>178</sup> These parents can access ordinary paternity leave, shared parental leave and could access the now repealed additional paternity leave. See chapters six page 188, 198 and seven page 211.

<sup>179</sup> M. Fineman ‘The Sexual Family’ in J. Jackson, M. Fineman, A. Romero *Feminist and Queer Legal Theory: Intimate Encounters, Uncomfortable Conversations* (Ashgate, 2013) 45

<sup>180</sup> C. Smart *Feminism and the Power of Law* (n 123) 5

<sup>181</sup> A. Diduck *Law’s Families* (Lexis Nexis, 2003) 23

<sup>182</sup> E. Dermott *Intimate Fatherhood: A Sociological Analysis* (Routledge, 2008) 41



subject to as much or more pressure than mothers to forgo any rights to leave which are offered to them.”<sup>183</sup> Therefore, although this body of legislation may seem to assist women providing care within the sexual family, as this reinforces gender inequality and restricts people’s ability to realise the basic capabilities, the law has deployed its power against women’s claims.<sup>184</sup>

Smart’s concerns are further illustrated by the weak rights given to non-parents. Indeed, analysis of the right to request flexible working and emergency leave, the only legislation currently available to non-parents, will demonstrate how the legislation not only fails to fundamentally change the nature of the workplace, but is often based upon a misunderstanding of care. This undermines caring relationships and prioritises paid work and employers’ needs. Therefore, this section will demonstrate how introducing reconciliation legislation alone will not implement the dually responsible worker model. Despite the legislative changes, the UK law still clearly focuses upon paid work first and foremost, rather than Fineman’s optimistic emphasis on “the caretaker’s right to work.”<sup>185</sup>

*i. Right to request flexible working*

The Employment Act 2002 introduced the right to request flexible working,<sup>186</sup> in response to the European Part-Time Workers Directive 1997.<sup>187</sup> This inserted Part 8A of the Employment Rights Act 1996, giving parents who are employees the right to request a change to “the hours he is required to work...the times when he is required to work [and] where...he is

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<sup>183</sup> S. Fredman ‘Reversing Roles: Bringing Men into the Frame’ (2014) 10 *International Journal of Law in Context* 442, 451

<sup>184</sup> C. Smart *Feminism and the Power of Law* (n 123) 5

<sup>185</sup> M. Fineman *The Autonomy Myth* (n 2) 201

<sup>186</sup> Employment Act 2002 s. 67

<sup>187</sup> Directive 97/81

required to work.”<sup>188</sup> This is now available to all employees,<sup>189</sup> after twenty-six weeks of continuous employment with the relevant employer.<sup>190</sup> The Children and Families Act 2014 introduced a duty for employers to “deal with the application in a reasonable manner” and to notify them within the “decision period” (three months, or the parties can agree to longer.)<sup>191</sup> Previously, there were several statutory business grounds that an employer could refuse the application on, including the burden of additional costs and detrimental impact on quality or performance.<sup>192</sup> Dealing with requests in a reasonable manner means that employers can still only reject requests on the same business grounds.<sup>193</sup> Once a request has been rejected, the employee is barred from making another request for twelve months.<sup>194</sup>

As the right to request flexible working provides employees with the chance to participate in the workplace “in non-standard forms, such as part-time and temporary work, or variable hours of work,”<sup>195</sup> it could benefit carers. Indeed, it has the potential:

to make real differences both to the ability of parents and carers to combine work and care, and to the ability of families to make genuine choices as to how and by whom care is to be undertaken.<sup>196</sup>

However, the legislation has not achieved its revolutionary potential. Instead, the right to request flexible working has been the subject of repeated criticism. James notes that it has not

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<sup>188</sup> Employment Rights Act 1996 s. 80F(1)(a)

<sup>189</sup> Children and Families Act 2014, s. 131

<sup>190</sup> Children and Families Act 2014, s. 131

<sup>191</sup> Children and Families Act 2014, s. 132(2) and (3)

<sup>192</sup> Employment Rights Act 1996, s. 80G(1)(b)

<sup>193</sup> Employment Rights Act 1996 s. 80G(1)(b)

<sup>194</sup> Employment Rights Act 1996 s. 80F(4)

<sup>195</sup> H. Collins ‘The Right to Flexibility’ in J. Conaghan, K. Rittich *Labour Law, Work and Family* (Oxford University Press, 2005) 104

<sup>196</sup> R. Horton ‘Care-Giving and Reasonable Adjustment in the UK’ (n 85) 139

been the “golden chalice to achieving a work/life balance that we might have anticipated.”<sup>197</sup> This is primarily because it is a weak right; it does not entitle carers to work flexibly.<sup>198</sup> Changes depend upon the employer’s willingness to adapt working hours. The retention of the business grounds for refusal means that if employers are unsympathetic to employees’ needs, they can easily reject requests. This is because “the grounds for refusal are fairly broad, and the employment tribunals have very little powers of enforcement so long as the procedure is followed.”<sup>199</sup> Accordingly, employers’ business needs are prioritised over employees’ caring needs. This problematically suggests that paid work is more important than caring labour. However, research suggests that the majority of requests for flexible working have been fulfilled; requiring employers to consider the request may force them to recognise that flexible working is indeed possible.<sup>200</sup> Therefore, for many employees, the weakness of the right might be unproblematic. Nonetheless, those with unsympathetic bosses may find that their ability to turn the basic capabilities into functionings is restricted.

The weak right is also liable to reinforce class inequality. Those in professional-managerial roles are more likely to have these requests accepted because employers may want to retain their skills.<sup>201</sup> In contrast, Williams describes how working class workers will be less likely to receive such support.<sup>202</sup> The eligibility requirements also problematically exclude those in unstable work from even making a request, which again will primarily be workers from the working classes.

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<sup>197</sup> G. James ‘The Work and Families Act 2006: Legislating to Improve Choice and Flexibility?’ (2006) 35 *Industrial Law Journal* 272, 277

<sup>198</sup> G. James ‘The Work and Families Act 2006: Legislating to Improve Choice and Flexibility?’ (n 197) 277

<sup>199</sup> G. James ‘The Work and Families Act 2006: Legislating to Improve Choice and Flexibility?’ (n 197) 277

<sup>200</sup> R. Suff *Flexible Working Policies And Practice: 2013 XpertHr Survey* (XpertHR, 2013)

<sup>201</sup> R. Crompton *Employment and the Family* (n 60) 213

<sup>202</sup> J. Williams *Reshaping the Work-Family Debate: Why Men and Class Matter* (Harvard University Press, 2010) 43

A third issue with the right to request flexible working is that if the request is accepted, there is a permanent change in the contract. Horton notes that this means that “it is thus not a useful right for accommodating fluctuating demands for care or the need for short-term intensive periods of caring or unpredictable time away from the workplace.”<sup>203</sup> Therefore, the right to request flexible working does not reflect the changing nature of caring relationships. Instead, it limits flexibility for employees, further undermining some people’s flourishing.

Finally, although the legislation enables employees to work part-time, it does not challenge its negative consequences, which often includes an immediate and significant reduction in wages.<sup>204</sup> Therefore, those who make use of the right to request flexible working are at risk of poverty.<sup>205</sup> In particular, this will affect women who constitute the majority of part-time workers because of their caring responsibilities.<sup>206</sup> The right to request flexible working may thus reinforce gender inequality by diminishing women’s income. This problem also highlights Conaghan’s concern that reconciliation legislation intervenes at the margins of labour law.<sup>207</sup> It does not challenge the workplace structure that continues to limit women’s progression and thus fails to challenge gender inequality. Due to these problems, Horton correctly argues that whilst the legislation does mark an improvement, “the right is unlikely to prove capable of effecting substantive change by making workplaces properly inclusive for working carers, or carers who wish or need to work.”<sup>208</sup>

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<sup>203</sup> R. Horton ‘Care-giving and reasonable adjustment in the UK’ (n 85) 140

<sup>204</sup> C. Lyonette, B. Baldauf, H. Behle *Quality Part-time Work: A Review of the Evidence* (Government Equalities Office, 2010) 8-9

<sup>205</sup> M. Chen *Progress of the World's Women 2005: Women, Work, & Poverty* (United Nations Publications, 2005) 9

<sup>206</sup> Office for National Statistics ‘Statistical Bulletin: UK Labour Market, July 2015’ (Office for National Statistics, 2015) 10

<sup>207</sup> C. Smart ‘Feminism and Labour Law’ (n 14) 14

<sup>208</sup> R. Horton ‘Care-Giving and Reasonable Adjustment in the UK’ (n 85) 140-1

*ii. Emergency leave*

The Employment Rights Act 1996 allows employees to take a reasonable amount of time off in order to care for a dependent or to make arrangements for the care of the dependent in an unexpected emergency.<sup>209</sup> Such unexpected emergencies include “when [the] dependent falls ill, gives birth or is injured or assaulted...the death of a dependent...[or] the unexpected disruption or termination of arrangements for the care of a dependant.”<sup>210</sup> Emergency leave is available to provide care to a wide variety of dependents, including the spouse, civil partner, child, parent or “a person who lives in the same household as the employee, otherwise than by reason of being his employee, tenant, lodger or boarder.”<sup>211</sup> Eligible dependents also include anyone who “reasonably relies on the employee” when they are ill, injured or assaulted.<sup>212</sup>

This legislation is potentially useful to carers. It reflects some understanding of caring relationships because it recognises that care needs are not constant and that it is not always possible to plan when care will be needed. The legislation is also beneficial because of the wide array of potential carers identified; this provides support to many people who provide care. Therefore, this legislation demonstrates the wide range of caring relationships reconciliation legislation can include. This wide range of carers identified may reflect the fact that this leave is only available in emergency situations. When people are in times of desperate need, it is important that they can rely on others for support that they may not want to receive care from on a more continuous basis. Likewise, it would be anticipated that more people could reasonably be relied upon to help someone in an emergency than would necessarily provide long-term care. Nonetheless, the wide range of potential carers identified

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<sup>209</sup> S. 57A

<sup>210</sup> Employment Rights Act 1996, s. 57A(1)(a)-(e)

<sup>211</sup> Employment Rights Act 1996, s. 57A (3)

<sup>212</sup> Employment Rights Act 1996, s. 57A (4)

reflects the idea that it is the provision of care which is important, not the relationship within which it is performed. This is a development that should be celebrated.

However, the fact that leave is only available in emergencies restricts the practical support afforded to the wide range of carers. This is because it makes no allowance for the fact that some of these care needs will be anticipated, such as after a planned operation. In *Qua v John Ford Morrison Solicitors* the Employment Appeals Tribunal upheld that “the section is dealing with something unforeseen,” denying carers support in foreseeable situations.<sup>213</sup> The fact that this leave is the only type available to carers demonstrates that the reconciliation legislation is based upon a misconception of care. Caring is a regular occurrence that should be readily and easily accommodated within the workplace.<sup>214</sup> Yet the legislation only recognises that caring labour is as important as paid work in emergencies. Thus, caring work is not consistently treated as a basic capability as its importance is underestimated. The fact that caring relationships are valuable to people and increase their wellbeing is also obscured by the legislation because in *Qua*, it was confirmed that emergency leave was not to be used by carers to provide the care, but to make alternative arrangements for the care.<sup>215</sup>

Accordingly, despite the legislation demonstrating the interdependent nature of caring relationships and paid work, emergency leave suggests that caring relationships should interfere as little as possible with paid work because they are less important. The proposed carers’ leave entitlement may supplement the emergency leave legislation and provide carers with the support they require.<sup>216</sup> Although it is unlikely to be enacted, carers’ leave would be beneficial to some carers. Yet it is evident that to achieve fairness in this context, such

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<sup>213</sup> [2003] I.C.R. 482 [21]

<sup>214</sup> See chapter two page 23

<sup>215</sup> [2003] I.C.R. 482 [21]

<sup>216</sup> Carers (Leave Entitlement) Bill [HL] 2015-16

entitlements should be markedly changed from the existing entitlements; it should better reflect the importance of caring relationships. Even with such changes, it is still questionable how much carers' leave would really promote fairness for carers. This is because it would still only intervene at the margins, allowing the caring relationship to impact in specific circumstances or times only.<sup>217</sup> It provides no prospect of long term change as when carers return to work after taking this leave, their responsibilities would again become secondary. Therefore, people's flourishing may not be particularly bolstered by such a legislative change.

### **Non-legal changes and the role of trade unions**

The current legislative provisions thus reflect Smart's concern that the legal changes will fail "to transform the quality of women's lives," because they concede too much power to the law.<sup>218</sup> Smart advocates "non-legal strategies" to achieve transformative change by allowing feminists to construct change in their own terms.<sup>219</sup> Such changes could benefit those balancing paid work and caring relationships as it has been found that "an organization's informal culture is more important than formal policies in influencing and shaping employee behaviour."<sup>220</sup> It is the informal culture which enables employees to actually access their entitlements without undermining their position at work, which is a concern for both men and women.<sup>221</sup> Trade unions could play a valuable role in changing the workplace due to their traditional role of promoting employees' wellbeing. Writing in the American context, Williams notes that "an alliance with unions remains an important, and underutilized,

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<sup>217</sup> J. Conaghan 'Feminism and Labour Law' (n 14) 14

<sup>218</sup> C. Smart *Feminism and the Power of Law* (n 123) 5

<sup>219</sup> C. Smart *Feminism and the Power of Law* (n 123) 5

<sup>220</sup> S. Eaton 'If You Can Use Them: Flexibility Policies, Organizational Commitment, and Perceived Performance' (2003) 42 *Industrial Relations: A Journal of Economy and Society* 145, 150

<sup>221</sup> S. Fredman 'Reversing Roles: Bringing Men into the Frame' (n 183) 451. See chapter one page 12

feminist strategy.”<sup>222</sup> UK trade unions may increasingly engage with the issue of reconciling paid work and caring labour because women are now significantly more likely to be trade union members than men.<sup>223</sup> Accordingly, the future of trade unions “depends on their ability to organize and represent a workforce that is increasingly female and non-white, [so] they can be expected to become more receptive to work/family issues than they were in the past.”<sup>224</sup>

Trade unions could promote informal change in a number of ways. Firstly, they could educate employees about their rights. The presence of a union is likely to increase workers’ knowledge about job sharing, paid leave and parental leave; awareness of the latter is increased by 22%.<sup>225</sup> This results in union members being more confident to use reconciliation policies without fear of discrimination, better enabling them to realise both basic capabilities.<sup>226</sup> A second reason trade unions could promote employees’ capabilities is by offering “important support to the tribunal system and to individual claimants, by providing effective advice and advocacy,” if employees are punished for using or wanting to use their entitlements.<sup>227</sup> This will be particularly important to women as they are more likely to be in low paid and insecure jobs, therefore “without the collective support of trade unions...are least likely to litigate claims.”<sup>228</sup> This support is likely to be even more valuable due to the 71% drop in the number of tribunal cases brought in April-June 2014 as compared to the same period in 2013.<sup>229</sup> This was due to changes made to the tribunals by the Coalition

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<sup>222</sup> J. Williams *Unbending Gender: Why Family and Work Conflict and What to do About it* (Oxford University Press, 2000) 240

<sup>223</sup> Department of Business, Innovation & Skills *Trade Union Membership 2014: Statistical Bulletin* (Department of Business, Innovation & Skills, 2015) 5

<sup>224</sup> J. Williams *Unbending Gender* (n 222) 62

<sup>225</sup> J. Budd, K. Mumford ‘Trade Unions and Family-Friendly Policies in Britain’ (2004) 37 *Industrial and Labor Relations Review* 204, 215

<sup>226</sup> J. Budd, K. Mumford ‘Trade Unions and Family-Friendly Policies in Britain’ (n 225) 219

<sup>227</sup> T. Colling ‘What Space for Unions on the Floor of Rights? Trade Unions and the Enforcement of Statutory Individual Employment Rights’ (2006) 35 *Industrial Law Journal* 140, 146

<sup>228</sup> J. Riley ‘Contracting for Work/Family Balance’ in J. Murray *Work, Family and the Law* (Federation Press, 2005) 184

<sup>229</sup> Ministry of Justice ‘Tribunals Statistics Quarterly: April to June 2014’ (Ministry of Justice, 2014) 2



Government, including introducing a fee to bring a claim and generally reducing the scope of protection for employees bringing claims to tribunals.<sup>230</sup> This is unlikely to be changed by the Conservative Government, which will result in the need for trade union support for many cases to even be brought to tribunal. Therefore, this role may become increasingly important in the future.

A third way trade unions could effect informal change in the workplace is highlighted by Williams, who suggests they could challenge the current focus upon paid work and reassert the importance of care. She argues that unions could reframe the reconciliation issue; rather than exposing worker's inability to be a good worker, unions should make caring relationships "an effective organizing issue," which empowers workers.<sup>231</sup> This would involve unions encouraging workers to place "the needs of their families over their employers' need for profit."<sup>232</sup> Such an informal change would enable employees to make use of the entitlements in practice by recognising the importance of care work. This would genuinely promote employees' capabilities, facilitating their meaningful participation in both paid work and caring relationships. Indeed, this could lead to trade unions encouraging employers to implement policies supporting carers themselves. After all, reconciliation policies do not have to be initiated by the law.<sup>233</sup> Workplaces where a trade union is recognised are already "statistically significantly more likely than other workplaces to have parental leave policies, special paid family leave, child care facilities, and job sharing

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<sup>230</sup> For further information on this see L. Dickens 'The Coalition Government's Reforms to Employment Tribunals and Statutory Employment Rights – Echoes of the Past' (2014) 45 *Industrial Relations Journal* 234

<sup>231</sup> J. Williams *Reshaping the Work-Family Debate* (n 202) 61

<sup>232</sup> J. Williams *Reshaping the Work-Family Debate* (n 202) 62

<sup>233</sup> This is emphasised in some descriptions of reconciliation policies. For example, Grandey describes them as "policies or programs designed to meet the family needs of employees, sponsored by the organization." (A. Grandey 'Family Friendly Policies: Organizational Justice Perceptions of Need-Based Allocations' in R. Cropanzano *Justice in the Workplace: From Theory to Practice* (Lawrence Erlbaum Associates, Vol 2, 2001) 148)

arrangements,” which complement the statutory provisions.<sup>234</sup> If trade unions reframed the reconciliation issue to promote caring relationships, this effect is likely to be further accentuated.

It is thus clear that trade unions could play a vital role in implementing informal change in the workplace to benefit carers. Yet trade unions’ potential role in effecting change in the workplace has been overlooked by many commentators. This may be because of their diminishing power. Bogg and Ewing note that trade union rights to represent members in the workplace are “now the subject of sustained attack by the government.”<sup>235</sup> The Trade Unions Bill 2015-16 continues this trend by introducing a double threshold to be met for strike action to be valid, which would make it harder to strike.<sup>236</sup> The current draft of the legislation requires that 50% of those being asked to strike turn out to vote.<sup>237</sup> The second hurdle is that 40% must back the strike in important public services.<sup>238</sup> This will include strikes in health, education, fire, transport, nuclear decommissioning and border security.<sup>239</sup> A host of other measures will supplement this main change, such as requiring two weeks’ notice to be given to employers of industrial action,<sup>240</sup> and the expiry of a mandate for industrial action four months after the ballot date.<sup>241</sup> This will mean that collective bargaining, which involves trade unions negotiating with employers, on behalf of employees, over employment terms, will continue to demise. This has become increasingly unnecessary as “employment contracts

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<sup>234</sup> J. Budd, K. Mumford ‘Trade Unions and Family-Friendly Policies in Britain’ (n 225) 212

<sup>235</sup> A. Bogg, K. Ewing *The Political Attack on Workplace Representation – A Legal Response* (Institute of Employment Rights, 2013) 4

<sup>236</sup> Trade Union Bill (HC Bill 58)

<sup>237</sup> Trade Union Bill (HC Bill 58), s. 2(1)

<sup>238</sup> Trade Union Bill (HC Bill 58), s. 3(1)

<sup>239</sup> Trade Union Bill (HC Bill 58), s. 3(2)(2E)

<sup>240</sup> Trade Union Bill (HC Bill 58), s. 7

<sup>241</sup> Trade Union Bill (HC Bill 58), s. 8

have become more formal and substantial components are derived now from individual rights set down in statute,” undermining the collectivist values of trade unions.<sup>242</sup>

However, trade unions’ roles have not been entirely undermined. In 2014, 25% of UK employees were in trade unions, which accounts for 6.4 million employees.<sup>243</sup> Although this is well below the peak of trade union membership of 13 million in 1979,<sup>244</sup> 27.5% of employees’ pay is affected by collective agreements.<sup>245</sup> These numbers are not insubstantial. The tribunal fees may see these numbers increase; the unaffordable fees may be a good recruitment tool for trade unions, where membership includes tribunal representation. For example, UNITE the union will pay the tribunal fees if the union runs the case, stating that “now more than ever it makes sense to belong to Unite, the union that stands up for members at work and offers a comprehensive legal service.”<sup>246</sup>

Furthermore, the individual rights contained in the substantial body of labour law legislation have been used by trade unions in a number of ways. Collings recognises that trade unions can use the statutes “as an instrument to pressure employers, to advance collective interests, and to recruit members or galvanise membership support.”<sup>247</sup> He further noted that “there was considerable evidence of negotiators referring to statutory minima and procedural mechanisms in bargaining gambit.”<sup>248</sup> Union negotiation “usually lifts [the] statutory minima in a flexible way thereby extending the impact, extent and legitimacy of expressed public

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<sup>242</sup> T. Colling ‘What Space for Unions on the Floor of Rights?’ (n 227) 142

<sup>243</sup> Department of Business, Innovation & Skills *Trade Union Membership 2014: Statistical Bulletin* (Department of Business, Innovation & Skills, 2015) 5

<sup>244</sup> Department of Business, Innovation & Skills *Trade Union Membership 2014* (n 243) 5

<sup>245</sup> Department of Business, Innovation & Skills *Trade Union Membership 2014* (n 243) 33

<sup>246</sup> Employment Law – need help? <http://www.unitetheunion.org/how-we-help/legal-services/employment-law-need-help/> accessed 07.09.2015

<sup>247</sup> T. Colling ‘What Space for Unions on the Floor of Rights?’ (n 227) 146

<sup>248</sup> T. Colling ‘What Space for Unions on the Floor of Rights?’ (n 227) 57

policy.”<sup>249</sup> For example, UNISON report that negotiations on flexible working at the London Borough of Merton led to core hours being dispensed with and replaced with “a commitment to necessary cover to provide a viable service to customers.”<sup>250</sup> This raised the statutory minima by creating a change to the whole workplace which was not just focused upon reducing working hours. This is a good example of trade unions achieving more transformative change than the legislation requires, which will better enable all people to achieve both capabilities of participating in paid work and caring relationships.

However, trade unions alone are unlikely to radically alter the workplace to accommodate carers. They represent a limited proportion of workers, so the capabilities of all will not be promoted. Trade unions now mainly represent professionals; so many working class carers will not receive the support they need to reconcile their caring and paid work commitments.<sup>251</sup> Therefore, reliance upon trade unions alone may further reinforce class inequalities. To achieve fairness for all carers, not just those in trade unions, workplace change should be supported by a body which represents all people; the state. The law is “one important manifestation of the state.”<sup>252</sup> Therefore, despite the problems with the reconciliation legislation, I argue that the law has a vital role to play in changing the workplace to achieve fairness for carers in addition to non-legal intervention.

### **Justifying a focus upon changing the law**

The law, including reconciliation legislation, should be harnessed to achieve change for a number of reasons. Firstly, the law will never have a neutral effect on carers. As Eichner explains, whether or not laws are formulated mindful of the effect they will have on families,

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<sup>249</sup> T. Colling ‘What Space for Unions on the Floor of Rights?’ (n 227) 160

<sup>250</sup> UNISON *Flexible Working: Making it Work* (UNISON, 2014) 26

<sup>251</sup> Department of Business, Innovation & Skills *Trade Union Membership 2014: Statistical Bulletin* (Department of Business, Innovation & Skills, 2015) 5

<sup>252</sup> M. Fineman *The Autonomy Myth* (n 2) xiv

they will “profoundly affect families’ caretaking abilities.”<sup>253</sup> Therefore, if the law is not harnessed to protect carers it may frustrate any attempts to achieve fairness in this context. On this basis, despite her scepticism, Fredman argues that the law should have a role in effecting change.<sup>254</sup> I agree that rather than allowing the law to continue to unfairly impact upon those balancing paid work and caring relationships, it should be used to promote carers’ basic capabilities.

Reconciliation legislation could achieve this, despite the problems noted. This is because the body of legislation does recognise that caring responsibilities do affect people’s ability to participate in the workplace by formally linking “the concepts of ‘worker’ and ‘carer’.”<sup>255</sup> Accordingly, these legislative changes do represent progress, yet the legislation has clearly been poorly executed within the UK. To remedy this, the legislation should come from a care centric vantage.<sup>256</sup> Busby notes that this changes the emphasis of the entitlements, so “the primary investigation becomes a consideration of the caring rights of employees,” rather than employees’ rights to care.<sup>257</sup> Care centric legislation would promote the importance of all caring relationships, including those performed by non-employees and those outside the sexual family.<sup>258</sup> It would also facilitate their ongoing impact in the workplace, recognising how caring needs can vary across caring relationships. Therefore, paid work and employers’ interests would not be prioritised over caring responsibilities, unlike in the emergency leave entitlement and the right to request flexible working. Such change would enable carers to actually use these entitlements, so care centric legislation may realise the dually responsible worker model in practice.

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<sup>253</sup> M. Eichner *The Supportive State* (n 25) 78

<sup>254</sup> S. Fredman *Women and the Law* (n 48) 367

<sup>255</sup> F. Devan ‘Assessing the Use of Parental Leave by Fathers’ (n 97) 263

<sup>256</sup> N. Busby *A Right to Care?* (n 13) 49

<sup>257</sup> N. Busby *A Right to Care?* (n 13) 50

<sup>258</sup> On care centric reconciliation legislation, see chapter one pages 10-12

A second reason carers would benefit from legal changes is because “by being binding, the law is better placed to influence behaviour and promote change.”<sup>259</sup> Reconciliation legislation could promote carers’ capabilities by setting a standard which all employers should meet, meaning that legislation could effect genuine change in the workplace. It would be inappropriate to leave this to individual employers because they “are subject to the vagaries of the economy.”<sup>260</sup> Therefore, they may just abandon supportive policies in recession periods or when demand for labour decreases. The state, by virtue of its universal membership, should act on behalf of the whole population by creating an environment which is capable of enhancing every worker’s capabilities.<sup>261</sup> Minimum standards should be set to ensure that those with caring responsibilities are always accommodated within the workplace.<sup>262</sup> However, it is clear that to really benefit carers, the standard should be set at a point where employers cannot avoid supporting them, unlike the right to request flexible working. This further highlights why legislative changes should be care centric.

A third reason the law should be used is because it is a symbolically important way of promoting carers’ capabilities. It has been noted that the law can transform the social value attached to childcare, but this extends to all caring relationships.<sup>263</sup> Although this reinforces the power of the law and presents the law as “the method to establish the truth of events,” which Smart warned against, it is a particularly important benefit in challenging workplace norms.<sup>264</sup> The law could be used to recognise that men are capable of providing care, thus

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<sup>259</sup> E. Caricciolo di Torella ‘Brave New Fathers for a Brave New World? Fathers as Caregivers in an Evolving European Union’ (2014) 20 *European Law Journal* 88, 91

<sup>260</sup> S. Fredman *Women and the Law* (n 48) 410

<sup>261</sup> N. Busby *A Right to Care?* (n 13) 35

<sup>262</sup> S. Fredman *Women and the Law* (n 48) 415

<sup>263</sup> R. de Silva de Alwis ‘Examining Gender Stereotypes in New Work/Family Reconciliation Policies: The Creation of a New Paradigm for Egalitarian Legislation’ (2011) 18 *Duke Journal of Gender Law and Policy* 305, 305

<sup>264</sup> C. Smart *Feminism and the Power of Law* (n 123) 10

directly tackling the ingrained stereotypes which currently restrain both men and women. As Lewis notes, “the existence of work and family balance policies can play an indirect role in legitimising the changes in the balance of paid and unpaid work that men and women aspire to, as well as a direct role in helping them to achieve their goals,” and thus challenge gender inequality.<sup>265</sup> Therefore, the symbolic importance of reconciliation legislation should be recognised.

Finally, Smart’s observation that feminist victories have been achieved “through existing mechanisms, for example through the discourse of rights or of welfare,” supports changing the law.<sup>266</sup> This is because Smart recognises that the law can realise some feminist aspirations. Likewise, Busby recognises that rather than rejecting the underpinning ideologies and functions of a state, it is more “productive to take a pragmatic view by seeking ways in which existing structures might be adapted and utilized.”<sup>267</sup> As this is somewhat easier, changes are more likely to be implemented, as Smart admits. Therefore, changing the current law would provide a more direct way of achieving fairness for carers in the workplace. Such quick resolution is vital, especially for those providing care for the elderly because their daily work is increasing in amount, and is set to continue increasing because of the ageing population.<sup>268</sup> Likewise, the number of kinship carers is also thought to be increasing.<sup>269</sup> Yet, the majority live in poverty,<sup>270</sup> and 60,000 “have dropped out of the labour market to bring up children,” due to the lack of support available.<sup>271</sup> Therefore, immediate changes are needed to support carers; many cannot afford to wait for improvements through non-legal intervention.

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<sup>265</sup> J. Lewis *Work Family Balance, Gender and Policy* (n 45) 71

<sup>266</sup> C. Smart *Feminism and the Power of Law* (n 123) 20

<sup>267</sup> N. Busby *A Right to Care?* (n 13) 4-5

<sup>268</sup> House of Lords Select Committee on Public Service and Demographic Change *Report of Session 2012-2013* (The Stationary Office, 2013) 7

<sup>269</sup> J. Selwyn, S. Nandy ‘Kinship Care in the UK: Using Census Data Estimate the Extent of Formal and Informal Care by Relatives’ (2014) 19 *Child and Family Social Work* 44, 46

<sup>270</sup> J. Selwyn, S. Nandy ‘Kinship Care in the UK’ (n 269) 50

<sup>271</sup> Grand Committee Children and Families Bill twelfth day, 20.11.13, Column GC448 Baroness Drake

Recourse should be made to the quickest way to improve carers' position which remains the law; otherwise carers will continue to be treated unfairly and will be unable to achieve the basic capabilities needed for a flourishing life.

### **Conclusion**

In this chapter, I have argued that to achieve fairness for carers, some state funded payment should be made available to carers. I have also argued that some outsourcing of care is vitally important if fairness is to be achieved in this context, because it will allow some women to participate in the workplace on more equal terms with men. However, this reinforces class inequality, so cannot be relied upon alone. Instead, achieving fairness for carers requires that the main emphasis is upon supporting carers in the workplace. This is because decent paid work is of vital importance to people's flourishing. Modifying the paid workforce also provides a chance to challenge gender inequality by allowing all people to achieve the basic capabilities of participating in paid work and caring relationships.

I then analysed how well the UK reconciliation legislation supports carers. This demonstrated that the body of legislation problematically undervalues caring relationships to prioritise paid work, employers' needs and the sexual family ideal. Also, making reconciliation legislation available to employees alone denies the most vulnerable workers the support they need to achieve the basic capabilities. Yet, I argued that rather than abandoning reconciliation legislation, it should be changed to provide carers with the support that they require. This body of UK legislation does represent progress and I agree with Fineman that such legislation could be used to promote the value of caring relationships.<sup>272</sup> However, this requires the

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<sup>272</sup> M. Fineman *The Autonomy Myth* (n 2) 201



legislation becoming care centric by focusing upon “the caring rights of employees.”<sup>273</sup> This would ensure that all caring relationships are valued as equally as paid work, including those provided by non-employees and outside the sexual family, and would recognise that caring responsibilities will regularly impinge upon paid work. However, I also noted the important role that trade unions can play in promoting caring relationships to supplement such legislative changes and achieve fairness for carers.

In chapter four, I will consider what could underpin the legislation instead of the sexual family ideal and how this would affect gender equality. I will also examine how non-employees could be protected by reconciliation legislation. This will demonstrate how care centric reconciliation legislation could be enacted to achieve fairness for carers.

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<sup>273</sup> N. Busby *A Right to Care?* (n 13) 50

## Chapter Four

### MAKING RECONCILIATION LEGISLATION CARE CENTRIC

#### Introduction

In this chapter, I will demonstrate how reconciliation legislation could challenge the unfair treatment carers' face. In chapter three, I noted that the existing entitlements available for all carers prioritise paid work and fail to adequately value caring labour.<sup>1</sup> To overcome this, legislation should be care centric.<sup>2</sup> Busby argues that this would require each legislative intervention to focus on the caring rights of workers, rather than workers' rights to care.<sup>3</sup> Therefore, the legislation should value all caring relationships. I will demonstrate three ways that this could be achieved: challenging gender inequality; class inequality; as well as the sexual family ideal. I will illustrate how each of these can be challenged within the body of reconciliation legislation to promote every person's paid work and caring capabilities.

Firstly, I will demonstrate how the sexual family underpinning could be challenged. In chapter two, I established that this inhibited fairness for carers by reinforcing gender inequality and excluding other caring relationships.<sup>4</sup> In this chapter, I will contend that this exclusionary ideal should be abandoned. The legislation should recognise that caring labour is important no matter who is providing the care; each caring relationship should be accommodated within the workplace and protected by reconciliation legislation. Accordingly, I will argue that the body of reconciliation legislation could be premised on Fineman's

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<sup>1</sup> See chapter three page 78

<sup>2</sup> See chapter three page 103

<sup>3</sup> N. Busby *A Right to Care? Unpaid Care Work in European Employment Law* (Oxford University Press, 2011) 50

<sup>4</sup> See chapter two page 33

caretaker-dependent unit.<sup>5</sup> This would enable both men and women to provide care and would thus challenge women's association with caring labour.

However, I will reason that formally equalising the workplace to allow all people to combine paid work and caring relationships is a necessary but insufficient condition to achieve gender equality. Societal expectations of gender roles will predominantly result in women continuing to care and men participating mainly in paid work. Rather than accept this unequal division of care, the achievement of fairness in accordance with the vision I outlined in chapter two, demands that labour law challenges the division of labour within the private sphere.<sup>6</sup> This is because many commentators have identified the division of care as one of the main causes of gender inequality.<sup>7</sup> To change the division of care, men should be encouraged to care. This alone will demonstrate that the gendered division of roles is a societal construct, rather than biologically determined.<sup>8</sup>

To encourage men to care I will argue that when appropriate, the leave available to provide childcare should only be available to two parents. Within the heterosexual family unit, the two potential caring roles are defined by gender: mother and father. Therefore, the legislation can make entitlements specific to each parent, which could encourage fathers to care. I will consider three ways men could be encouraged to provide care: non-transferable leave; leave available as default; or mandatory leave. Non-transferable leave is widely used in Scandinavian legislation. I will therefore rely upon a comparative analysis of legislation in Scandinavia to demonstrate how a period of non-transferable leave could increase men's

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<sup>5</sup> M. Fineman *The Autonomy Myth: A Theory of Dependency* (The New Press, 2004) 68

<sup>6</sup> See chapter two page 48

<sup>7</sup> J. Gornick, M. Meyers *Families that Work: Policies for Reconciling Parenthood and Employment* (Russell Sage Foundation, 2005) 70, J. Lewis *Work Family Balance, Gender and Policy* (Edward Elgar, 2009) 15, J. Lewis and M. Campbell 'UK Work/Family Balance Policies and Gender Equality, 1997-2005' (2007) 14 *International Studies in Gender, State and Society* 4, 5

<sup>8</sup> See chapter two page 27

uptake of caring roles. The final two types of leave have not been implemented in practice, so their potential will be examined theoretically.

However, for the legislation to reflect people's lived realities, leave entitlements cannot only be made available to those raising children in a two parent, heterosexual family. To protect the other units which provide childcare, I will argue that a more expansive definition of parenting is needed. This should include not only those in relationships like marriage, such as same-sex parents, but also those who are not raising children as a couple, including single parents and kinship carers.<sup>9</sup> I will demonstrate in this chapter how this could be achieved whilst challenging gender inequality.

Finally, to challenge the socio-economic inequality associated with caring labour, it is inappropriate to exclude non-employees from the reconciliation entitlements. This detrimentally impacts upon precarious workers, as noted in chapter three.<sup>10</sup> Care centric legislation would recognise that these workers' caring relationships are just as important as employees. To reflect this, I will draw upon Freedland and Kountouris' work to argue that reconciliation legislation should be based on the personal work contract.<sup>11</sup>

Although I will refer to emergency leave and the right to request flexible working, as introduced in chapter three, this chapter will be somewhat abstract because it will highlight changes that need to be made, but not apply them in practice.<sup>12</sup> I will apply these ideas in chapter five, six and seven, where the leave available to parents, the most advanced UK reconciliation legislation, will be examined to determine if it is care centric.

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<sup>9</sup> Kinship carers are defined in chapter one page 13

<sup>10</sup> See chapter three page 74

<sup>11</sup> M. Freedland, N. Kountouris *The Legal Construction of Personal Work Relations* (Oxford University Press, 2011)

<sup>12</sup> See chapter three pages 91-97

### **Challenging the tenacity of the sexual family ideal**

As noted in chapter three, parenting relationships have been prioritised within the UK reconciliation legislation and other caring relationships have been unfairly undervalued. To challenge this, the sexual family underpinning should be removed to more accurately reflect the “radical transformations already occurring within families.”<sup>13</sup> The legislation should recognise and legitimate the importance of all caring relationships and protect both men and women’s caring role to challenge gender inequality and to enable each person to flourish.

At first sight, the pre-existing caring relationships identified in the emergency leave legislation may provide such a basis. An employee can provide care for a spouse, civil partner, child, parent or “a person who lives in the same household as the employee, otherwise than by reason of being his employee, tenant, lodger or boarder,” or anyone who “reasonably relies on the employee” when they are ill, injured or assaulted.<sup>14</sup> This broad list recognises a wide range of caring relationships and is gender neutral. Yet it still prioritises certain relationships by expressly including the spouse, civil partner, child or parent, even though their caring role could be protected within the category of someone who “reasonably relies on the employee.” The prioritisation of familial relationships was confirmed in *MacCulloch Wallis Ltd v Moore*.<sup>15</sup> The Employment Appeals Tribunal determined that “it is self-evident we hold that attending a dying parent in hospital can fall within section 57(1)(a) and (b).”<sup>16</sup> This reflects and perpetuates the traditional association between care work and the family.<sup>17</sup> The caring role of someone “who lives in the same household as the employee,” is

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<sup>13</sup> G. James *The Legal Regulation of Pregnancy and Parenting in the Labour Market* (Routledge, 2009) 64

<sup>14</sup> Employment Rights Act 1996, s. 57A(3)-(4)

<sup>15</sup> EAT/51/02/TM

<sup>16</sup> *MacCulloch Wallis Ltd v Moore* (n 15) [28]

<sup>17</sup> N. Noddings *Starting at Home: Caring and Social Policy* (Cambridge University Press, 2002) 1

also specifically recognised.<sup>18</sup> The prioritisation of these carers is necessary because not all carers are entitled to emergency leave. Employers are granted discretion to refuse requests; they only have to protect the caring relationships of those who reasonably rely on the employee.<sup>19</sup> Therefore, employers can refuse requests for emergency leave if they deem someone is unreasonably relying upon the employee for care. This may include situations where the more traditional and prioritised family carers are available. Accordingly, to guarantee some people access to emergency leave, certain carers need to be prioritised.

This will not achieve fairness for carers, partly because there is no reason to suggest that these relationships better meet caring needs than any other. As Feder Kittay notes, “familial caregivers are as capable of neglect and abuse as strangers.”<sup>20</sup> Likewise, there is no clear reason to assume that people living together would better meet care needs or even be relied upon to provide care. It is certainly foreseeable that people may provide care to those they are not living with. This reflects a second problem with the prioritisation of certain relationships which is that it may not reflect the caring relationships happening in practice. For example, Herring argues that “the expectation of family care may be weakening,” relying upon evidence which suggests that parents do not want their children to feel obliged to care for them in their old age.<sup>21</sup> Accordingly, he suggests that many people may deem personal relationships more important than blood ties.<sup>22</sup> Likewise, Diduck argues that responsibility for care is increasingly negotiated “in a fluid, freely chosen way,” rather than assumed because of relationship status.<sup>23</sup> Prioritising certain caring relationships not only undermines

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<sup>18</sup> Employment Rights Act 1996, s. 57A(3)-(4)

<sup>19</sup> Employment Rights Act 1996, s. 57A(3)-(4)

<sup>20</sup> E. Feder Kittay ‘When Caring is Just and Justice is Caring: Justice and Mental Retardation’ in E. Feder Kittay, E. Feder *The Subject of Care: Feminist Perspectives on Dependency* (Rowman & Littlefield Publishers, 2002) 269

<sup>21</sup> J. Herring *Caring and the Law* (Hart, 2013) 38

<sup>22</sup> J. Herring *Caring and the Law* (n 21) 114-115

<sup>23</sup> A. Diduck *Law’s Families* (Lexis Nexis, 2003) 25-26

the importance of these other caring relationships, but failing to keep abreast of societal changes may also deny these carers practical support.

Therefore, to achieve fairness within this context, employers' discretion to support carers should be limited and certain caring relationships should no longer be prioritised. Fineman develops a new family model based around the caretaker-dependent unit, which reconciliation legislation could be premised upon.<sup>24</sup> Fineman acknowledges that the dependents in this model could be children, the elderly, or others in need of care. Likewise, the caretaker role could be performed by "a person who is (was) a Wife and mother, or a Husband and father, or neither of these persons, rather someone outside of the old Family models."<sup>25</sup> If this was the basis of reconciliation legislation, more fluid, dynamic and interactive personal caring relationships would be recognised as important and accommodated within the workplace, enabling them to flourish.<sup>26</sup> Also, as the caretaker-dependent unit is gender neutral, everyone would be enabled to participate in paid work and caring relationships.<sup>27</sup>

If the emergency leave legislation was premised upon the caretaker-dependent unit, the special protection afforded to the identified relationships would be removed, as would employers' discretion to support carers outside of the protected forms. This approach may be criticised; employers may argue it would be impossible to deal with in practice. It would be hard to determine who was in a caring relationship, unlike defined family relationships or those someone lives with, who are relatively easily identifiable. Therefore, employees may

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<sup>24</sup> M. Fineman *The Autonomy Myth* (n 5) 68

<sup>25</sup> M. Fineman *The Autonomy Myth* (n 5) 68

<sup>26</sup> M. Fineman 'The Vulnerable Subject: Anchoring Equality in the Human Condition' (2008) 20 *Yale Journal of Law and Feminism* 1, 5

<sup>27</sup> M. Fineman *The Autonomy Myth* (n 5) 68

claim they were part of a caretaker-dependent unit to take advantage of the entitlement to be absent from the workplace. To overcome this, a method of identifying carers is needed.

Some carers are already identifiable by their entitlement to carer's allowance. However, reliance upon this to identify carers would be problematic.<sup>28</sup> Eligibility is determined, at the time of writing, upon the carer providing at least thirty-five hours a week of care, and earning less than £110 a week after tax.<sup>29</sup> Therefore, this is only available to the most vulnerable carers; those with a heavy caring load and limited paid work commitments. Entitlement to reconciliation legislation should be much more inclusive than this.

Identifying carers is not an insurmountable problem. Parents will have documentation available to show their caring responsibilities, including a certificate confirming the due date, the birth certificate, parental responsibility agreement,<sup>30</sup> or order.<sup>31</sup> I suggest that other carers could be identified through use of the growing carer's passport scheme. For example, the Ipswich Hospital Trust have invoked a scheme whereby the main carer for an ill patient is identified by a medical professional and issued with a carer's passport, which gives them more flexibility, access and support within the hospital.<sup>32</sup> Similar schemes are being applied around the UK, mainly for those caring for someone with dementia.<sup>33</sup> With some small changes, such documentation could simply be shown to employers to confirm caring responsibilities. The changes would include issuing passport to all carers, regardless of the

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<sup>28</sup> C. O'Brien 'Confronting the Care Penalty: The Case for Extending Reasonable Adjustment Rights Along the Disability/Care Continuum' (2012) 34 *Journal of Social Welfare and Family Law* 5, 18

<sup>29</sup> <https://www.gov.uk/carers-allowance/eligibility> accessed 10.08.2015

<sup>30</sup> Children Act 1989, s. 4(1)(b), 5(1)(b), 6(1)(a)

<sup>31</sup> Children Act 1989, s. 4(1)(c), 5(1)(c), 6(1)(b), s12(2) and (2A)

<sup>32</sup> The Ipswich Hospital NHS Trust *Family Carer's Passport* (The Ipswich Hospital NHS Trust, 2014) 3

<sup>33</sup> See for example, Imperial College Hospital ([http://www.imperial.nhs.uk/aboutus/news/news\\_048026](http://www.imperial.nhs.uk/aboutus/news/news_048026) accessed 10.08.2015), Royal Surrey County Hospital NHS Foundation Trust (F. Wright *Carer Passport for Family Members* (Royal Surrey County Hospital NHS Foundation Trust, 2013)), Leicestershire Partnership NHS Trust *LPT Marks Carers Week With The Launch of Carer's Passport* (Leicestershire Partnership NHS Trust, 2014)).



dependent's ailment and enabling more than one carer for each dependent to access a passport. This would not be too arduous for employers, as evidenced by a similar scheme already running at British Telecom. Employees can have carer's passports which describe the nature of their caring responsibilities and the adjustments they might need in the workplace.<sup>34</sup> A similar non-binding passport is also used in the civil service.<sup>35</sup> Therefore, reliance upon carer's passports would protect carers and accord with business' demands.

However, this would not be appropriate to determine eligibility for emergency leave. As the entitlement is for such a short period of leave and is for unexpected emergencies, limiting access to those with a carer's passport or proof of parental responsibility, would totally undermine its purpose. Instead, emergency leave should be made available to all people. Evidence of caring responsibility would only be needed when carers are accessing entitlements which have a significant impact on their paid work commitments.

### **The caretaker-dependent unit and gender equality**

Replacing the sexual family underpinning of reconciliation legislation with the caretaker-dependent unit would symbolically demonstrate that men could provide care and enable them to do so. However, it is unlikely to lead to men providing more care. Fineman herself notes that it is unlikely to affect gendered roles because it is gender neutral.<sup>36</sup> She illustrates this by noting that men and women's equal access to the paid workplace has not changed the gendered division of labour in the United States. Women have retained the primary caring role. The same is true in the UK. Despite formal equality, women's working patterns remain different to men's to accommodate caring labour; 42% of working women work part-time

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<sup>34</sup> M. O'Brien 'Work-Family Balance Policies' in Family-Oriented Policies for Poverty Reduction, Work-Family Balance and Intergenerational Solidarity (United Nations Department of Economic and Social Affairs Division for Social Policy and Development, --) 117

<sup>35</sup> <https://www.foryoubyyou.org.uk/helping-you/caring/carers-passport> accessed 10.08.2015

<sup>36</sup> M. Fineman *The Autonomy Myth* (n 5) 179

compared to only 13% of working men.<sup>37</sup> As noted in chapter two, the gendered difference in work patterns is in part explained by people's moral and socially negotiated views about right and proper behaviour.<sup>38</sup> Workplace structures reinforce this and further inhibit both men and women from acting outside their gendered expectations.

On the same basis, it is argued that women would remain more likely than men to use reconciliation entitlements constructed around the caretaker-dependent unit. For example, if elderly parents require care and someone was required to work more flexibly to provide it, it is much more likely that a daughter, daughter-in-law, or other female relative would do so, after the spouse.<sup>39</sup> This is partly because their wages are likely to be easier to sacrifice. Also, they will probably have provided the majority of childcare for their own children, so are liable to have a caring orientation.<sup>40</sup> The same would be true in many other situations where caring labour is needed. Accordingly, using the caretaker-dependent unit as the foundation of reconciliation legislation would not encourage men to provide care.

Fineman does not consider this unequal division of care an issue. She argues that men should have a "choice unfettered by institutional restraints" to care, but if they choose not to, society can do no more.<sup>41</sup> Coaxing men into caring merely makes "more and more concessions to the unequal state of affairs," whereby the private sphere bears the burdens of care.<sup>42</sup> Fineman's argument thus suggests that applying the caretaker-dependent unit to reconciliation

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<sup>37</sup> Office for National Statistics *Statistical Bulletin: UK Labour Market, July 2015* (Office for National Statistics, 2015) 10

<sup>38</sup> A. Barlow, S. Duncan 'Supporting Families? New Labour's Communitarianism and the 'Rationality Mistake': Part 1' (2000) 22 *Journal of Social Welfare and Family Law* 23, 35

<sup>39</sup> J. Dwyer, R. Coward 'A Multivariate Comparison of the Involvement of Adult Sons Versus Daughters in the Care of Impaired Parents' (1991) 46 *Journal of Gerontology* 259, 259

<sup>40</sup> See chapter three page 116. Noddings explains that "people who are directly responsible for the care of others... will likely develop a moral orientation that is well described as an *ethic of care*." "The caring orientation arises at home and seems to flourish in those who (even when well educated) remain responsible for the direct care of others." (N. Noddings *Starting at Home* (n 17).

<sup>41</sup> M. Fineman *The Autonomy Myth* (n 5) 202

<sup>42</sup> M. Fineman *The Autonomy Myth* (n 5) 202-203

legislation is enough. However, I will argue that the unequal division of care should be challenged to achieve fairness for carers.

a) Encouraging men to care

Men should be encouraged to care to challenge gender inequality. If men do not provide care, then employers would have limited incentives to modify the workplace to better accommodate carers. This is because men would still be perceived as reliable and dependable employees without caring responsibilities. As employers would not need to accommodate carers, workplace change would be dependent upon highly prescriptive legislation requiring drastic action. Such legislation is unlikely to be implemented by this or any future government because labour law is now “a key instrument of economic policy,” focusing upon reducing employers’ costs.<sup>43</sup> Therefore, the workplace will remain unchanged. The only way to tackle gender inequality would be for women to become more like men by focusing primarily upon paid work. Yet this is problematic. There is a limit as to how much women can become masculinised in their approach to work because of their reproductive functions.<sup>44</sup> Children are “a social necessity,”<sup>45</sup> and many men and women still desire to have them.<sup>46</sup> Therefore, women will continue to bear children. If men’s working patterns are not altered then pregnancy will continue to exact costs for women. Despite being prohibited, pregnancy-related discrimination remains widespread, as noted in chapter one.<sup>47</sup> Encouraging women to become more like men will not alleviate this discrimination, but make it worse by

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<sup>43</sup> J. Conaghan ‘Feminism and Labour Law: Contesting the Terrain’ in A. Morris, T. O’Donnell *Feminist Perspectives on Employment Law* (Cavendish, 1999) 27

<sup>44</sup> G. Esping-Andersen, D. Gallie, A. Hemerijck, J. Myles *Why We Need a New Welfare State* (Oxford University Press, 2002) 95

<sup>45</sup> S. Fredman *Women and the Law* (Oxford University Press, 1997) 179

<sup>46</sup> G. Esping-Andersen, D. Gallie, A. Hemerijck, J. Myles *Why We Need a New Welfare State* (n 44) 95

<sup>47</sup> Maternity Action estimates that 60,000 women leave the workplace each year due to pregnancy-related dismissals. See chapter one page 3

emphasising their different reproductive roles. Maintaining the breadwinner model will merely reinforce pregnancy as a reason “for stigma and exclusion from public life.”<sup>48</sup>

A second problem with achieving gender equality by encouraging women to become more focused upon paid work is that it discounts the fact that dependency needs should be met. Due to the problems identified in chapter three with outsourcing care in its entirety, people should be able to provide informal care.<sup>49</sup> Therefore, not everyone can become fully focused upon paid work. Due to gendered expectations and societal structures, women are likely to remain the main providers of care work. Therefore, if a gender neutral entitlement like Fineman’s caretaker-dependent unit underpinned all reconciliation legislation, women’s association with caring would be reinforced. This would perpetuate discrimination against women in the workplace, negatively affecting all women.<sup>50</sup> Also, reinforcing gendered expectations would deny many men the practical ability to prioritise caring relationships.<sup>51</sup> Men’s association with paid work would put men under pressure to forgo any reconciliation entitlement. Therefore, both men and women would continue to be denied the chance to realise the basic capabilities and thus flourish.<sup>52</sup>

Basing all reconciliation legislation on the caretaker-dependent unit would thus merely perpetuate gendered stereotypes and reinforce gender inequality; a criticism levelled at all gender neutral entitlements.<sup>53</sup> Realising fairness in this context is thus dependent upon challenging the powerful ideologies and stereotypes which restrict people’s ability to

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<sup>48</sup> S. Fredman *Women and the Law* (n 45) 179

<sup>49</sup> See chapter three page 71

<sup>50</sup> See chapter one page 3

<sup>51</sup> I noted in chapter three, page 90, that men are under pressure to forgo any entitlement because of their association with paid work (S. Fredman ‘Reversing Roles: Bringing Men into the Frame’ (2014) 10 *International Journal of Law in Context* 442, 451).

<sup>52</sup> See chapter two page 55

<sup>53</sup> C. McKinnon ‘Feminism, Marxism, Method and the State: Toward Feminist Jurisprudence’ (1983) 8 *Signs* 635, 638

participate in both paid work and caring relationships. This requires caring responsibilities being more fairly distributed between men and women. Therefore, men should be encouraged to care. Only when men provide more caring labour will gendered expectations be highlighted as socially constructed. After all, “it is not that men are incapable of caring,” merely that they are treated differently when they do.<sup>54</sup> Men caring will also challenge gender discrimination in the workplace. When men are using their reconciliation entitlements to provide care, no employees would be perceived to be entirely reliable workers. There would accordingly be less reason to discriminate against women, enabling women to participate in paid work on a more equal basis with men. Accordingly, it is only when men start caring that all people will have the genuine opportunity to achieve the basic capabilities.

Encouraging men to care will be by no means an easy task, partly because the gendered stereotypes are widely accepted to be natural.<sup>55</sup> Therefore, instant equality in care work and paid work cannot be expected. Nonetheless, I argue that encouraging men to partake in caring is not a “dead end,” as Fineman suggests.<sup>56</sup> Instead, it should be recognised that tackling gender inequality by encouraging men to care should be part of a long-term strategy. Once some men start using their reconciliation entitlements and deviate from the fully committed worker paradigm to provide caring labour, more men will be encouraged to do the same. This is reflected in research carried out on leave entitlements for parents. Doucet reports that having taken parental leave themselves, many fathers “encourage other men in the workplace to take at least some parental leave.”<sup>57</sup> Further research found that there is “strong evidence for substantial peer effects in program participation in both workplace and family

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<sup>54</sup> D. Morgan *Family Connections: An Introduction to Family Studies* (Polity Press, 1996) 101-102

<sup>55</sup> M. Fineman *The Neutered Mother, the Sexual Family and Other Twentieth Century Tragedies* (Routledge, 1995) 150. See chapter two page 27.

<sup>56</sup> M. Fineman *The Autonomy Myth* (n 5) 171

<sup>57</sup> A. Doucet ‘Dad and Baby in the First Year: Gendered Responsibilities and Embodiment’ (2009) 624 *Annals of the American Academy of Political and Social Science* 78, 94

networks.”<sup>58</sup> Some men taking leave leads to more men doing so, because there is less uncertainty about the consequences.<sup>59</sup> The research found that this peer effect increased over time, “with each subsequent birth exhibiting a snowball effect in response to the original reform.”<sup>60</sup> These changes are likely to further breakdown gendered stereotypes in the future, as sons raised in families with a more egalitarian division of childcare and household labour will “be more likely to be ‘involved’ fathers themselves.”<sup>61</sup> Likewise, recent research has found that women raised by mothers who participate in the paid workforce are “more likely to be employed, more likely to hold supervisory responsibility...and earn higher hourly wages than women whose mothers were home full time.”<sup>62</sup> Accordingly, once men start providing care, gender inequality and stereotypes will be persistently and increasingly challenged. Men’s caring role therefore should be encouraged straightaway to achieve the long term aim of gender equality.

b) Justifying labour law’s role

Labour law should play a key role in encouraging men to provide caring labour. It may seem that this is outside the scope of labour law, which focuses upon the paid work relationship and treats “men *and* women as if they are atomised economic actors, neglecting how they combine in families to support each other and their children.”<sup>63</sup> In addition, as already noted, Conaghan argues that since the 1980s, labour law has increasingly focused upon reducing employers’ costs rather than promoting employees’ interests.<sup>64</sup> This economic focus is

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<sup>58</sup> G. Dahl, K. LØken, M. Mogstad ‘Peer Effects In Program Participation’ (2014) 104 *American Economic Review* 2049, 2050

<sup>59</sup> G. Dahl, K. LØken, M. Mogstad ‘Peer Effects In Program Participation’ (n 58) 2051

<sup>60</sup> G. Dahl, K. LØken, M. Mogstad ‘Peer Effects In Program Participation’ (n 58) 2051

<sup>61</sup> A. Hattery *Women, Work and Family: Balancing and Weaving* (Sage, 2001) 28

<sup>62</sup> K. McGinn, M. Ruiz Castro, E. Long Lingo *Mums the Word! Cross-National Effects of Maternal Employment on Gender Inequalities at Work and at Home* (Working Paper 15-094, Harvard Business School, 2015) 4

<sup>63</sup> P. Ackers ‘Reframing Employment Relations: The Case for Neo-Pluralism’ (2002) 33 *Industrial Relations Journal* 1, 5

<sup>64</sup> J. Conaghan ‘Feminism and Labour Law’ (n 43) 27

inconsistent with traditional understandings of labour law. Kahn-Freund, one of the most influential writers of labour law noted that:

the main object of labour law has always been, and we venture to say always will be, to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship.<sup>65</sup>

Collective bargaining and trade unions were highlighted as vitally important in achieving this. However, Freedland and Kountouris argue that this “has receded to being a largely symbolical or totemic ideal rather than a comprehensive statement of labour law.”<sup>66</sup> The mission of labour law has changed over time, evidenced by the declining role of trade unions in the UK, as described in chapter three.<sup>67</sup> Freedland and Kountouris further question the validity of this classical ideal because it excludes too many vulnerable workers who actually need the protection of labour law.<sup>68</sup> This was evidenced in chapter three, as I highlighted how precarious workers are excluded from the protection of labour law, despite their vulnerability in the UK workforce. Therefore, Freedland and Kountouris argue that the protection of labour law needs to be extended to other workers, as I will consider at page 147. Nonetheless, it is still clearly accepted that workers require protection. Freedland and Kountouris just recognise that this is not only needed in the employment relationship. Therefore, it remains appropriate for labour law to rectify the differing power relations between those involved in paid work. Indeed, because the collective force of trade unions is diminishing, labour law legislation should play a key role in countervailing this inequality.

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<sup>65</sup> P. Davies, M. Freedland *Kahn-Freund's Labour and the Law* (Stevens & Sons, 1983) 18

<sup>66</sup> M. Freedland, N. Kountouris *The Legal Construction of Personal Work Relations* (n 11) 438

<sup>67</sup> See chapter three page 100

<sup>68</sup> M. Freedland, N. Kountouris *The Legal Construction of Personal Work Relations* (n 11) 437

Busby notes that if labour law is to redress the imbalance of power, the nature and source of the inequality needs identification.<sup>69</sup> This requires “recognition of paid work’s place within its wider socio-economic environment.”<sup>70</sup> It has become clear in the last two chapters that women and carers face disadvantage and discrimination in the workplace because they are often unable, or perceived as unable, to conform to the fully committed worker standard.<sup>71</sup> Therefore, women’s association with care diminishes their power in workplace relationships, increasing the imbalance of power between employer and employee. If labour law is to counteract the inequality of bargaining power, then the division of caring labour should be challenged so women are no longer associated with care work.<sup>72</sup> This argument corresponds with Freedland and Kountouris’ argument that labour law should be more transformative and acknowledge the interface between the workplace and care, which I will analyse in depth from page 147.<sup>73</sup>

A second reason that labour law should intervene to challenge the gendered division of care is because labour law has already impacted upon it by reinforcing women’s association with caring. The first legislation addressing maternity mandated that women who had given birth within the last four weeks were to be expelled from employment.<sup>74</sup> In the 1920s, marriage bans automatically dismissed women from employment upon entering marriage. These were justified because it was reasonable to expect women’s main duty was caring for her home.<sup>75</sup> Even more modern legislation, which recognised that women were continuing to be active in the workplace, reinforced these ideas. For example, rudimentary maternity provisions were

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<sup>69</sup> N. Busby *A Right to Care?* (n 3) 72-73

<sup>70</sup> N. Busby *A Right to Care?* (n 3) 73

<sup>71</sup> J. Williams *Unbending Gender: Why Family and Work Conflict and What to Do About It* (Oxford University Press, 2000) 70

<sup>72</sup> P. Davies, M. Freedland *Kahn-Freund’s Labour and the Law* (n 65) 18

<sup>73</sup> M. Freedland, N. Kountouris *The Legal Construction of Personal Work Relations* (n 11) 35

<sup>74</sup> The Factory and Workshop Act 1891, s. 17

<sup>75</sup> *Short v Poole Corporation* [1926] Ch. 26



introduced by the Employment Protection Act 1975, which included rights to maternity leave, maternity pay and a right to return to work after the leave.<sup>76</sup> A right for fathers to take paid leave was not introduced until 2002.<sup>77</sup> Therefore, labour law has reinforced women's caring role, which has undermined women's equal position with men in the workplace. Labour law should play a role in remedying this by actively encouraging men to participate in caring where possible. As the body of reconciliation legislation has been the main way people have been helped to combine their paid work and caring responsibilities, this legislation should be harnessed to promote men's caring role.<sup>78</sup>

c) How can men be encouraged to care

Gender inequality will only be challenged if men and women's different positions within the family and workplace are recognised. Rather than concealing these differences under gender neutral legislation, I argue that the legislation should acknowledge and respond to them. Therefore, to promote men's caring role, I contend that the caretaker-dependent unit should not be the basis of all reconciliation legislation. It would not challenge gender inequality so women would continue to perform most of the caring roles. Instead, I suggest that some of the reconciliation legislation, namely the legislation which permits parents to care for their children, should reflect the lived realities of those providing childcare within the UK by making leave available primarily to parents. This is because it would provide legislators with the practical opportunity to encourage men to care. Care could only be provided by one of two identifiable people. Within the heterosexual family units, which raise 77% of dependent children within the UK, this is either the mother or father.<sup>79</sup> Due to these gendered titles, each

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<sup>76</sup> S. Fredman *Women and the Law* (n 45) 166 and 182

<sup>77</sup> Employment Act 2002, s. 1-2

<sup>78</sup> G. James *The Legal Regulation of Pregnancy and Parenting in the Labour Market* (n 13) 110

<sup>79</sup> Office for National Statistics *Statistical Bulletin: Families and Households, 2014* (Office for National Statistics, 2015) 8

parent can be identified within the reconciliation legislation and encouraged to use their entitlement. Therefore, the reconciliation legislation provides legislators with a unique opportunity to actively encourage men to care.

There is a conflict here, between challenging gender equality by encouraging men to care and promoting each caring relationship as equally important. However, I argue that it would be justified to use the predominance of the heterosexual family to promote men's caring role. This would be consistent with my argument that fairness should be promoted for carers, as justice principles dictate that gender equality should be a priority.<sup>80</sup> Also, it is important to note that I am not advocating that the legislation should reflect an ideological vision of the sexual family as the place of care, by prioritising the heterosexual family within the reconciliation legislation. As noted in chapter two, this is deeply problematic because it reinforces women's association with caring whilst undermining the importance of this work.<sup>81</sup> Instead, I suggest that the legislation should reflect people's lived realities. Therefore, I will argue that the legislation should make leave available only to two heterosexual parents, when appropriate, as a means to an end, to encourage men to provide care. At page 133, I will consider how other family forms could be protected within the reconciliation legislation to supplement the entitlements available to heterosexual parents.

I noted in chapter one that parents have various entitlements to leave from the workplace to provide care.<sup>82</sup> To encourage men to access such leave and provide care, it would be appropriate for the legislation to allocate certain entitlements to each parent. This would mean both the mother and father would have their own standalone entitlement to leave, which would challenge gender inequality in a number of ways. Firstly, it would challenge the

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<sup>80</sup> See chapter two page 52

<sup>81</sup> See chapter two page 33

<sup>82</sup> See chapter one page 5

romanticised vision of mothering which has led to women's caring role being prioritised. Caring would no longer be seen "as an innate characteristic of women and therefore a natural determinant of women's social possibilities and roles."<sup>83</sup> Instead, the legislation would recognise that men could care too and protect their caring role. Secondly, women would be granted more equal access to the workplace with men because "parental leave schemes that allocate some part of the leave for mothers and some for fathers will do better at avoiding statistical discrimination against women."<sup>84</sup> This is because women's association with care would be challenged, as either parent would be presented as equally likely to take some leave. Therefore, employers would have no reason to discriminate against women.<sup>85</sup> Men's access to leave would obligate all employers to accommodate caring relationships, changing the workplace. Accordingly, women would also be better enabled to achieve the basic capability of participating within decent paid work. This means that both men's and women's flourishing would be promoted.

However, employers report that men may not take leave, even when it is their own entitlement. This is because they fear appearing uncommitted to the workplace and negatively affecting their job prospects.<sup>86</sup> As Fredman notes, "fathers are subject to as much or more pressure to forego any rights to leave which are offered to them."<sup>87</sup> This is because they are not associated with caring labour and therefore they are not expected to take leave. To combat this, informal change in the workplace is needed, as noted in chapter three. Trade unions could play a key role in achieving this. In particular, if they reframed the issue of

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<sup>83</sup> P. Bowden *Caring: Gender-Sensitive Ethics* (Routledge, 1997) 8

<sup>84</sup> L. Barclay 'Liberal Daddy Quotas: Why Men Should Take Care of the Children, and How Liberals Can Get Them to Do It' (2011) 28 *Hypatia* 163, 170

<sup>85</sup> On extent of discrimination see chapter one page 3

<sup>86</sup> C. Wolff *Paternity and Adoption Leave: The 2010 Survey* <http://www.xperthr.co.uk/survey-analysis/paternity-and-adoption-leave-the-2010-survey/99728/> accessed 31.03.2014

<sup>87</sup> S. Fredman 'Reversing Roles: Bringing Men into the Frame' (2014) 10 *International Journal of Law in Context* 442, 451

reconciliation of care and paid work, unions could encourage workers to place “the needs of their families over their employers’ need for profit.”<sup>88</sup> This would hugely promote men’s practical ability to use their entitlements. However, I also noted in chapter three that these informal changes should supplement legislative change. This is partly because legislation will set basic standards for everyone, unlike trade unions, and would thus be capable of achieving overall change.

If legislation is to encourage men to actually use their entitlements, it should respond to men’s breadwinner role and association with paid work. Although any changes would be enacted for both parents to be non-discriminatory, the legislation should overcome men’s and women’s different positions within the family to increase men’s practical usage of reconciliation entitlements. This would include making leave available at a relatively high rate of pay to respond to men’s breadwinner role. Research suggests that low levels of payment will discourage men in particular from using their entitlements.<sup>89</sup> This is because the costs of raising a child are considerable, making men’s often larger income indispensable. Likewise, research suggests that men are more likely to take leave when it is available flexibly.<sup>90</sup> This is because it enables them to find the best balance between providing care and maintaining their vital income. Therefore, to respond to men’s breadwinner role and encourage them to use leave, entitlements should give them options in how it is taken.

Yet, even a high level of payment and flexibility may not be enough to encourage many men to access their entitlements. Even when men can access a high rate of pay for leave, some still

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<sup>88</sup> J. Williams *Reshaping the Work-Family Debate: Why Men and Class Matter* (Harvard University Press, 2010) 62

<sup>89</sup> E. Carricolo Di Torella ‘New Labour, New Dads – The Impact of Family-Friendly Legislation on Fathers’ (2007) 36 *Industrial Law Journal* 318, 325

<sup>90</sup> E. Carricolo Di Torella ‘New Labour, New Dads’ (n 89) 325

do not take it.<sup>91</sup> This shows how powerful and restricting gendered ideologies are; even when there are limited practical reasons for men not taking leave, they are still hesitant to do so. This reflects research by Barlow and Duncan who found that parents' do not determine childcare responsibilities as rational economic actors.<sup>92</sup> Instead their choices are influenced and often restricted by their moral and socially negotiated views. It is thus clear that if men are to use their entitlements, which will challenge the restrictive gendered expectations and gender discrimination, care centric leave entitlements should be almost unavoidable.

d) Three ways to encourage men's usage of leave

There are three ways legislation could make men's usage of leave almost inevitable. I will consider each in turn. Each subsequent entitlement will make it harder for men to not take the leave. Encouraging men's caring role will be dependent upon each proposal being implemented in complementary ways and being paid at an income-related rate to account for men's breadwinner role.

i. *Non-transferable leave*

Firstly, men could be encouraged to take leave by introducing a non-transferable entitlement, so leave was available on a "use it or lose it" basis.<sup>93</sup> This means that if the leave is not taken, it is simply lost as no one else can access it. There are many potential advantages to this type of entitlement. Firstly, a reserved period of leave would resist the prioritisation of mothers' caring role by recognising that fathers are equally capable of providing care.<sup>94</sup> Secondly, fathers would be provided with a "realistic opportunity and encouragement...to become

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<sup>91</sup> C. Wolff *Paternity and Adoption Leave: The 2010 Survey* (n 86). This will be analysed in more depth in chapter five.

<sup>92</sup> A. Barlow, S. Duncan 'Supporting Families?' (n 38) 35

<sup>93</sup> J. Gornick, M. Meyers 'Creating Gender Egalitarian Societies: An Agenda for Reform' (2008) 36 *Politics and Society* 313, 331

<sup>94</sup> A. Kotsadam, H. Finseraas 'The State Intervenes in the Battle of the Sexes: Casual Effects of Paternity Leave' (2011) 40 *Social Science Research* 1611, 1612

involved in a very practical and more holistic way in care-giving.”<sup>95</sup> Most importantly, this opportunity would likely to lead to men actually taking leave.<sup>96</sup> This is demonstrated by the success of a period of non-transferable leave in Scandinavian countries, where such an entitlement has been widely introduced. For example, in Norway the number of fathers taking leave soared from 4% to 90% after it was introduced.<sup>97</sup> This indicates that fathers’ parenting role can be increased through government planning.<sup>98</sup> Sweden first introduced non-transferable leave in 1995. In 2002, both mothers’ and fathers’ reserved periods of leave were increased to sixty days. Men’s usage of this leave is reportedly seen as “a core responsibility of being a parent,” due to extensive advertising campaigns.<sup>99</sup> By 2011, 44% of those taking parental leave were men.<sup>100</sup> This has resulted in the number of parents sharing leave equally also slowly increasing to 12.7%.<sup>101</sup> This transformative effect upon gender stereotypes led De Silva De Alwis to describe non-transferable leave as “fatherhood by gentle force,” as it encourages fathers to assert their “equal rights and duties to caregiving.”<sup>102</sup>

Concerns remain about whether leave being taken by fathers will really challenge gendered expectations. This is because in Sweden, amongst full-time employed fathers, “there is a peak

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<sup>95</sup> G. James ‘Mothers and Fathers as Parents and Workers: Family-Friendly Employment Policies in an Era of Shifting Identities’ (2009) 31 *Journal of Social Welfare and Family Law* 271, 276

<sup>96</sup> R. De Silva De Alwis ‘Examining Gender Stereotypes in New Work/Family Reconciliation Policies: The Creation of a New Paradigm for Egalitarian Legislation’ (2011) 18 *Duke Journal of Gender Law and Policy* 305, 326

<sup>97</sup> Equality and Human Rights Commission *Response to BIS Consultation on Draft Regulation, Choice for Families: Additional Paternity Leave and Pay* (Equality and Human Rights Commission, 2009) 5

<sup>98</sup> J. Thompson ‘Family and Medical Leave for 21<sup>st</sup> Century?: A First Glance at California’s Paid Family Leave Legislation’ (2004) 12 *University of Miami Business Law Review* 72, 100

<sup>99</sup> S. Harris-Short ‘Building a House Upon Sand: Post-Separation Parenting, Shared Residence and Equality - Lessons from Sweden’ (2011) 23 *Child and Family Law Quarterly* 344, 360

<sup>100</sup> A. Duvander, L. Haas, C. Philip Hwang ‘Sweden’ in P. Moss *11<sup>th</sup> International Review of Leave Policies and Related Research 2015* (International Network on Leave Policies and Research, 2015) 316

<sup>101</sup> A. Duvander, L. Haas, C. Philip Hwang ‘Sweden’ (n 100) 316

<sup>102</sup> R. De Silva De Alwis ‘Examining Gender Stereotypes in New Work/Family Reconciliation Policies’ (n 96) 326

in leave-taking at age two to three of the youngest child.”<sup>103</sup> Therefore, fathers tend to take leave in the less labour intensive periods of childcare. Men’s and women’s childcare accordingly remains different. Further research found that fathers tend to take leave around the summer and Christmas holidays.<sup>104</sup> Accessing leave when there are other incentives to be absent from the workplace may suggest that fathers’ use their entitlement for other ends than providing childcare. Although this is far from ideal, this research should not restrict the implementation of non-transferable leave in the UK. This is partly because, despite these problems, Harris-Short notes that Sweden’s parental leave policy has led to “a significant cultural shift...in Swedish society in both attitudes and practices towards gender, work and parenting.”<sup>105</sup> She relies on evidence which shows that motherhood now has little impact upon women’s employment rates in Sweden and many men report restricting their paid work to provide childcare. This is further demonstrated by the increasing number of parents sharing their leave entitlements equally. In addition, it is the fact that fathers are actually taking leave which is important; men’s access to leave will obligate all employers to accommodate caring relationships, causing the workplace to change and challenging manifest injustice.

*ii. Default leave*

Analysis of non-transferable entitlements shows that more could be done to incentivise men’s uptake of leave, especially in the more labour intensive periods after childbirth, to further challenge gender inequality. Gheaus and Robeyns suggest that fathers should be allocated “leave when they inform their employers of the due date of the birth.”<sup>106</sup> This would make

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<sup>103</sup> O. Sullivan, S. Coltrane, L. McAnnally, E. Altintas ‘Father-Friendly Policies and Time-Use Data in a Cross-National Context: Potential and Prospects for Future Research’ (2009) 624 *The Annals of the American Academy* 234, 246

<sup>104</sup> J. Ekberg, R. Eriksson, G. Friebel ‘Parental leave — A Policy Evaluation of the Swedish “Daddy-Month” Reform’ (2013) 97 *Journal of Public Economics* 131, 137

<sup>105</sup> S. Harris-Short ‘Building a House Upon Sand’ (n 99) 361

<sup>106</sup> A. Gheaus, I. Robeyns ‘Equality-Promoting Parental Leave’ (2011) 42 *Journal of Social Philosophy* 173, 184

men taking leave the default position.<sup>107</sup> They would be able to opt out of this, but active steps would need to be taken. To apply leave as default, the entitlement needs to come into force at an identifiable and specific time. Therefore, it would only really be appropriate after childbirth, making this a good supplementary entitlement to non-transferable leave.

Gheaus and Robeyns identify two reasons why this would encourage men to take leave.

Firstly, choosing an option other than the default would result in increased costs. These could be financial, time or even psychological, as a decision would have to be made “in which there is already a choice being made as the default.”<sup>108</sup> Secondly, men’s usage of leave would be “understood as the option that society or the government holds to be morally or prudently most worthwhile.”<sup>109</sup> Therefore, making leave the default position would send a strong signal that men are expected to provide care and would challenge the limiting gendered expectations. It would also “strongly encourage him to learn the necessary hands-on caring skills for newborns,” so men may be further encouraged to use their non-transferable entitlements.<sup>110</sup> This may in turn promote more long-term equality in parenting by making men more willing and able to provide childcare. The advantages of making leave available to men as default are likely to increase over time, even though men could still avoid taking leave. This is because it would encourage men to take leave, which would motivate more to do the same in the future due to the snowball effect noted earlier.<sup>111</sup> Therefore, taking leave after childbirth should be the default position for both parents.

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<sup>107</sup> A. Gheaus, I. Robeyns ‘Equality-Promoting Parental Leave’ (n 106) 184

<sup>108</sup> A. Gheaus, I. Robeyns ‘Equality-Promoting Parental Leave’ (n 106) 184

<sup>109</sup> A. Gheaus, I. Robeyns ‘Equality-Promoting Parental Leave’ (n 106) 184

<sup>110</sup> A. Gheaus, I. Robeyns ‘Equality-Promoting Parental Leave’ (n 106) 184

<sup>111</sup> See chapter three page 119



iii. *Mandatory leave*

A final way that men's caring role could be promoted is by making a period of leave mandatory for both parents.<sup>112</sup> Fredman proposes this in part to equalise entitlement with mothers, as I will demonstrate in chapter five,<sup>113</sup> but she also argues that it could "achieve the kind of cultural change which has remained elusive so far."<sup>114</sup> Mandatory leave would further realise the benefits of default leave, recognising that men can provide care as well as women, challenging the powerful stereotypes. Also, enabling men to develop childcare skills and bond with the child may encourage them to make use of further entitlements in the future.

Such an approach may be criticised because it requires some "sacrifice of individual choice."<sup>115</sup> However, I suggest that this more drastic way of encouraging men to take leave would be justified. Firstly, as noted in chapter two, choice in caring relationships is a misnomer.<sup>116</sup> Few people can freely choose how they provide care, so there is not really any choice to be sacrificed. Secondly, this would be the most effective way of encouraging men to provide care and challenge gender inequality in the workplace. As men and women would both have to take leave, employers could never punish them for doing so and would have no reason to discriminate against women. Therefore, mandatory leave would be the most effective way of challenging the gendered stereotypes which currently restrict people's realisation of the basic capabilities. This would enable people to pursue the capabilities which mattered most to them, promoting the long term recognition of each person as a dignified, free being who shapes his or her own life in co-operation and reciprocity with others.<sup>117</sup>

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<sup>112</sup> S. Fredman 'Reversing Roles: Bringing Men into the Frame' (n 87) 451

<sup>113</sup> See chapter five page 155

<sup>114</sup> S. Fredman 'Reversing Roles: Bringing Men into the Frame' (n 87) 451

<sup>115</sup> A. Gheaus, I. Robeyns 'Equality-Promoting Parental Leave' (n 106) 174

<sup>116</sup> See chapter two page 28-33

<sup>117</sup> M. Nussbaum *Women and Human Development: The Capabilities Approach* (Cambridge University Press, 2000) 72

Accordingly, mandatory leave would be an important step towards achieving fairness for carers.

However, extensive periods of mandatory leave would not be justified; this would intrude too much on people's autonomy. Therefore, it would be appropriate for a relatively short period of mandatory leave to be made available, the exact length of which I will consider in chapter six.<sup>118</sup> Also, just like default leave, mandatory leave would have to come into force at an identifiable and specific time. Therefore, it could only be applied at childbirth.

Encouraging men to take leave requires all three types of entitlement. At childbirth, a short period of leave should be made mandatory, followed by a longer period of leave which is available as default. To encourage men to take leave after this, a period of non-transferable leave should be introduced. In chapters six and seven, I will analyse the UK reconciliation legislation available to fathers to determine how closely it accords to the model I have developed.

It is important to reiterate that I am not advocating the prioritisation of the heterosexual family within the reconciliation legislation. Instead, I suggest that the sexual family basis should be used as an expedient measure to encourage men to provide care. If and when gendered stereotypes have been successfully challenged, people could determine how they reconcile their work commitments, free from gendered expectations. The sexual family would not need to underpin the reconciliation legislation and could be replaced by Fineman's caretaker-dependent unit.

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<sup>118</sup> See page 195

### **A more expansive definition of parenting**

I have already noted that caring needs are being met in diverse ways in the UK.<sup>119</sup> This includes childcare, which is not always provided by heterosexual couples.<sup>120</sup> Each of these caring relationships is equally important and the reconciliation legislation should reflect that. Therefore, the sexual family basis should not exclude other family forms. These should be protected in addition to heterosexual parents to achieve fairness within the definition adopted in chapter two.<sup>121</sup> This would reflect a more expansive definition of parenting, including same-sex parents, single parents and kinship carers. In this section, I will analyse how the legislation could promote fairness for these three caring units and how such a definition could be enacted alongside the entitlements for those parenting within the heterosexual family.

#### a) Same-sex parents

A growing number of children are being raised by same-sex parents. Although they are raising less than 1% of dependent children in the UK, reconciliation legislation should acknowledge their caring roles and offer them the same protection as heterosexual parents.<sup>122</sup> The provision of care within these relationships promotes children's welfare in the same way as care provided within heterosexual relationships and as such, they should be treated as equally important.<sup>123</sup> Indeed, the only disadvantage of being raised by same-sex parents that children report is other people's prejudices about their family life.<sup>124</sup> Recognising and legitimising this family type would thus remove any disadvantage they suffer.

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<sup>119</sup> See chapter three 40

<sup>120</sup> J. McCandless, S. Sheldon 'The Human Fertilisation and Embryology Act (2008) and the Tenacity of the Sexual Family Form' (2010) 73 *Modern Law Review* 175, 187

<sup>121</sup> See chapter two page 48

<sup>122</sup> Office for National Statistics *Statistical Bulletin: Families and Households, 2014* (n 79) 6

<sup>123</sup> C. Ball 'Lesbian and Gay Families: Gender Nonconformity and the Implication of Difference (2005) 4 *Dukeminier Awards: Best Sexual Orientation Law Review* 1, 17

<sup>124</sup> A. Fairclough 'Growing up with a Lesbian or Gay Parent: Young People's Perspectives' (2008) 16 *Health and Social Care in the Community* 521, 525

In the UK, heterosexual and same-sex parents' entitlements have already been equalised. The entitlements available to fathers can be accessed by the mother's or adopter's partner, civil partner or spouse as well (as noted in the introduction, these parents will be referred to as 'recognised co-parents').<sup>125</sup> Gay men raising children are also entitled to the same length of leave through adoption leave whether the child is adopted,<sup>126</sup> or if the parents apply for a parental order.<sup>127</sup> This is obviously positive recognition of the importance of childcare provided within same-sex relationships.

This recognition may also further challenge gender inequality by "degendering parenting, reconceptualising family, and reworking masculine [and feminine] gender roles."<sup>128</sup> This is because leave entitlements made available to each parent are more likely to be used by same-sex parents, as research suggests that these relationships are more egalitarian.<sup>129</sup> This use of the entitlements would demonstrate that there is no need for care to be divided along gendered lines.

Although promoting same-sex parents' entitlements to reconciliation legislation is important, this does not reflect a revolutionary expansion of parenting. The leave provisions could be allocated in the same way I advocated for heterosexual parents; a short period of mandatory leave, a longer period of default leave and a supplementary entitlement to non-transferable

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<sup>125</sup> Paternity and Adoption Leave Regulations 2002, reg. 8(2)(b)-(c). Shared Parental Leave Regulations 2014, reg. 3(1). See chapter one page 7

<sup>126</sup> Employment Rights Act 1996, s. 75A(1)

<sup>127</sup> Employment Rights Act 1996, s. 75A(8)

<sup>128</sup> S. Schacher, C. Auerbach, L. Bordeaux Silverstein 'Gay Fathers Expanding the Possibilities for us All' (2005) 1 *Journal of GLBT Family Studies* 31, 31

<sup>129</sup> See M. Sullivan 'ROZZIE AND HARRIET?: Gender and Family Patterns of Lesbian Coparents' (1996) 10 *Gender and Society* 474, A. Goldberg, M. Perry-Jenkins 'The Division of Labor and Perceptions of Parental Roles: Lesbian Couples Across the Transition to Parenthood' (2007) 24 *Journal of Social and Personal Relationships* 297, S. Okin 'Sexual Orientation, Gender and Families: Dichotomizing Differences' (1996) 11 *Hypatia* 30, 43, F. Tasker, S. Glombok *Growing Up in a Lesbian Family: Effects on Child Development* (Guilford Press, 1998). G. Dunne 'What Difference Does 'Difference' Make? Lesbian Experience of Work and Family Life' in J. Seymour and P. Bagguley (eds), *Relating Intimacies: Power and Resistance* (Macmillan, 1999) 189. K. Matos *Modern Families: Same- and Different-sex Couples Negotiating at Home* (Families and Work Institute, 2015) 4

leave for each parent. This is because the extension of legislative recognition to same sex families reproduces the sexual family ideal; there is still a presumption that children will be raised by two parents in a sexual relationship. Protection has merely been extended to relationships analogous to the traditional married couple, or “marriage-like.”<sup>130</sup> Accordingly, “the centrality of sexuality to the fundamental ordering of society and the nature of intimacy,” has simply been confirmed.<sup>131</sup> A more fundamental change is required to challenge the traditional conception of parenting and recognise those providing childcare outside of a dyadic sexual relationship. This would reflect the fact that there can no longer be a presumption “that children will be raised by a couple.”<sup>132</sup>

b) Single parents

There are currently 2 million single parents in the UK, which accounts for 25% of all families with dependent children.<sup>133</sup> Of these, 91% are women.<sup>134</sup> Some of these parents may provide childcare equally in a shared care arrangement, in which case they could access leave in the same way as those caring within the sexual family. This would enable them both to care and bond with the child and would further challenge gender inequality. However, such shared care arrangements rarely happen in practice in the UK. As Harris-Short recognises, equal parenting is not expected or realised when parenting in intact families.<sup>135</sup> Therefore, when most parents separate, one parent continues to perform the majority of the childcare.<sup>136</sup> Accordingly, most single parents are providing childcare outside the sexual family norm.

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<sup>130</sup> A. Diduck ‘Shifting Familiarity’ (2005) 58 *Current Legal Problems* 235, 248

<sup>131</sup> M. Fineman ‘The Sexual Family’ in J. Jackson, M. Fineman, A. Romero *Feminist and Queer Legal Theory: Intimate Encounters, Uncomfortable Conversations* (Ashgate, 2013) 45

<sup>132</sup> J. McCandless, S. Sheldon ‘The Human Fertilisation and Embryology Act (2008) and the Tenacity of the Sexual Family Form’ (n 120) 187

<sup>133</sup> Office for National Statistics *Statistical Bulletin: Families and Households, 2014* (n 79) 5

<sup>134</sup> Office for National Statistics *Statistical Bulletin: Families and Households, 2014* (n 79) 5

<sup>135</sup> S. Harris-Short ‘Building a House upon Sand’ (n 99) 362

<sup>136</sup> S. Harris-Short ‘Resisting the March Towards 50/50 Shared Residence: Rights, Welfare and Equality in Post-Separation Families’ (2010) 32 *Journal of Social Welfare and Family Law* 257, 263

Most single parents would accordingly be disadvantaged by the introduction of periods of leave being reserved for each parent. They would be unable to access the same period of leave as those caring within the sexual family. This would be unfair to the children, who would be denied parental care for a significant period. It would also undermine single parents' achievement of flourishing, as they would not be granted the same opportunity to participate in both paid work and caring labour. This would cause manifest injustice because single parents are already likely to face particular hardships in balancing their paid work and caring responsibilities as they lack a partner to share these responsibilities with.<sup>137</sup> Therefore, they are likely to be overwhelmed by their dual commitments.

If fairness is to be achieved for single parents, reconciliation legislation should account for the circumstances in which they provide childcare. There are two ways this could be achieved. Firstly, single parents could be enabled to access all the leave as their own entitlement. This would be available to any parent, regardless of gender, who is responsible for providing the majority of childcare. Although this would give children raised by single parents the same chance to be cared for as those raised within the sexual family, this would be problematic. Long periods of leave are associated with lower employment and lower labour earnings in the short term as well as long term career deterioration.<sup>138</sup> Therefore, a long period of leave may undermine single parents' flourishing, especially in the paid workplace. Also, because the majority of these single parents are women, this would only reinforce gender inequality. The pay gap would not be reduced as gendered expectations and discrimination against women would be reinforced.

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<sup>137</sup> S. Fredman, J. Fudge 'The Legal Construction of Personal Work Relations and Gender' (2013) 7 *Jerusalem Review of Legal Studies* 112, 117

<sup>138</sup> R. Lalive, J. Zweimüller 'How Does Parental Leave Affect Fertility and Return to Work? Evidence from Two Natural Experiments' (2009) 124 *The Quarterly Journal Economics* 1363, 1372

The second and better option would be for the legislation to recognise and protect the collaborative care arrangements that “occur as a matter of social fact.”<sup>139</sup> These arrangements may include grandparents helping to care for their grandchildren or siblings sharing their childcare responsibilities, for example. Accordingly, it would better reflect “shared mothering,” which I noted in chapter two involves responsibility for providing childcare being shared with other family members as well as the wider community.<sup>140</sup> To support these existing caring units, it would be appropriate for one of these carers to be eligible to take the leave reserved for the father or the recognised co-parent. The single parent would be able to nominate another worker who is expecting to have the main responsibility for childcare to take the remaining leave, which would otherwise be unused. These potential carers could include grandparents, aunts or uncles, siblings, friends or anyone close to the parent. The legislation would not have to identify these potential carers; the single parent would just have to identify them as the other main carer. For single parents that have no one to transfer this to, they should be entitled to the whole length of leave in their own right.

Such legislation would significantly widen the definition of parenting, better reflecting Fineman’s caretaker-dependent unit and recognising that each caring relationship is equally valuable. These carers may want to access the leave to help the mother readjust back to the workplace. Also, many of these people would already be providing care and might have benefited from the opportunity to better reconcile this caring work with their paid work obligations.

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<sup>139</sup> J. McCandless, S. Sheldon ‘The Human Fertilisation and Embryology Act (2008) and the Tenacity of the Sexual Family Form’ (n 120) 198

<sup>140</sup> E. Nakano Glenn ‘Social Constructions of Mothering: A Thematic Overview’ in E. Nakano Glenn, G. Chang, L. Rennie Forcey *Mothering: Ideology Experience and Agency* (Routledge, 1994) 6. See chapter two page 40

This would promote fairness for carers in a number of ways. All caring relationships would be recognised as being of equal importance, not just childcare provided by parents. Also, the legislation would be transformative because it would acknowledge the caring relationships which are already occurring, challenging the prioritisation of the sexual affiliation in reconciliation legislation. These carers would be enabled to flourish as they would be supported in the caring work which they are already doing.

Recognising other carers would also benefit the single parent. It may reduce the exhaustion felt by single parents as they would be able to rely on someone else for support. This would better enable them achieve the basic capability of participating in paid work, giving them a greater opportunity to ensure financial security for themselves and their family as well as flourish in their own right. As they would be less exhausted and receive more support, they are also more likely to be able to give their childcare responsibilities more attention, further increasing their flourishing. Overall, this would enable single parents to participate in both capabilities in a meaningful way, rather than just subsisting in both. It would also improve children's welfare as they would receive better care. Furthermore, their family unit would be legitimised, which would benefit children of single parents in the same way noted for children of same-sex parents.<sup>141</sup>

However, the proposed scheme could undermine the mandatory, default and non-transferable entitlement I proposed should be available for parents. Indeed, the inherent uncertainty in the scheme proposed risks undermining fathers' usage of leave as mothers could transfer the entitlement to someone else. Yet, I suggest that these problems could be overcome and that the two schemes could run concurrently. To share the leave with another carer, single parents

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<sup>141</sup> See chapter four page 133



would just have to confirm to the other carers' employer that they will be accessing the entitlement. They would also have to confirm that the father or the recognised co-parent would not be using the entitlement. However, there would be complications if one parent argues that they are equally sharing childcare and thus should be able to access the leave, yet the mother or primary parent disagrees and would rather share the entitlement with another carer. Although it is expected such situations would be very rare, as few people would be expected to want to take leave unless they aimed to be involved in the child's life, provision should be made to solve such a conflict. It would be most appropriate for the father or recognised co-parent to access the leave, in accordance with the default position. If the mother or primary parent contests this, a decision should be reached by an independent body. This could not be either an employer or employment tribunal as they are not well placed to make judgements about the division of care within the private sphere. However, the family law courts are. Indeed, they are accustomed to making decisions about how childcare needs should be met. Therefore, if a mother or primary carer wanted to contest the leave going to the father or their recognised co-parent, they would have to bring an application to the family law courts. The relevant employers would then simply have to conform to the court's decision. Accordingly, the uncertainty inherent in the scheme proposed could be overcome so that it would correspond with the measures needed to achieve gender equality.

Therefore, recognising a more expansive definition of parenting would promote fairness for single parents. However, this provision would probably not challenge gender inequality because it would be gender neutral. Therefore, because women's wages are likely to be easier to sacrifice and they are likely to have developed a caring orientation already, the single parent is most likely to transfer the entitlement to woman.<sup>142</sup> Although this may reinforce

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<sup>142</sup> As explained in this chapter pages 116

gendered stereotypes, this would be justified in this instance to provide single parents with the support they require and to recognise the role that other people are already playing in providing childcare.

c) Kinships carers

There are a growing number of children in the UK being raised by kinship carers. It is estimated that between 139, 000 to 300,000 children are being raised by relatives or friends.<sup>143</sup> The care provided within these relationships benefits the whole of society. Social services are aided when kinship carers are available because it increases the choices of placement available and can help children avoid entering the care system.<sup>144</sup> Children can also potentially benefit from receiving kinship care because they have a greater chance of placement stability and attachment, especially after children enter adulthood.<sup>145</sup> However, kinship carers are amongst the most vulnerable carers; the majority live in poverty.<sup>146</sup> 60,000 “have dropped out of the labour market to bring up children.”<sup>147</sup> Therefore, they particularly struggle to reconcile their paid work and caring commitments.

The achievement of fairness for carers is therefore also dependent upon these families being adequately supported. They should be able to access the same entitlements to leave as parents. This would result in the adoption of a much wider definition of parenting which would again reflect Fineman’s caretaker-dependent unit. This would acknowledge the importance of these caring relationships, recognising that care provided by non-parents can

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<sup>143</sup> S. Nandy, J. Selwyn, E. Farmer, P. Vaisey *Spotlight on Kinship Care* (Buttle UK, 2011) 6

<sup>144</sup> E. Farmer, S. Moyers *Kinship Care: Fostering Effective Family and Friends Placements* (Jessica Kingsley Publishers, 2008) 13-15

<sup>145</sup> E. Farmer, S. Moyers *Kinship Care* (n 144) 15

<sup>146</sup> J. Selwyn, S. Nandy ‘Kinship Care in the UK: Using Census Data Estimate the Extent of Formal and Informal Care by Relatives’ (2014) 19 *Child and Family Social Work* 44, 50

<sup>147</sup> Grand Committee Children and Families Bill twelfth day, 20.11.13, Column GC448 Baroness Drake

be equally as good as or even better than care provided by parents.<sup>148</sup> Expanding the definition of parenting would also reduce the likelihood of kinship carers being forced into poverty by enabling them to better maintain a workplace connection.

If kinship carers are providing care as a couple, then leave should be accessible in the same way described for heterosexual parents. However, if kinship carers are providing this care on their own, or with the support of someone who is not their partner, then they should be able to access this leave in the same way as single parents.

Therefore, the maintenance of the sexual family underpinning for some reconciliation legislation does not mean those caring outside it have to be treated unfairly. Instead, reconciliation legislation can accommodate a variety of caring relationships and challenge gender inequality where appropriate. I will consider how such care centric legislation could be applied in the UK in chapters five, six and seven.

### **Challenging class inequality by including non-employees**

Finally, economic inequality disadvantages carers, as noted in chapter two.<sup>149</sup> I argued in chapter three that to promote people's basic capabilities whilst avoiding reinforcing class inequality, it is vital that the state redistributes assets through structural change to the workplace to better advantage carers.<sup>150</sup> Those in lower economic classes face more structural constraints in the workplace as they receive less support from employers. This is an area where trade unions could play a vital role in supporting employees who are denied the necessary support to achieve both basic capabilities, as noted in chapter three.<sup>151</sup> However,

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<sup>148</sup> See chapter four page 112

<sup>149</sup> See chapter two page 39

<sup>150</sup> See chapter three page 73

<sup>151</sup> See chapter three page 97

trade unions are unlikely to assist the more vulnerable precarious workers, who are likely to be part of the lower economic classes, because such work is associated with low levels of payment. Not only are these workers denied labour law protection, including access to reconciliation legislation because they are not employees, they also often lack collective representation.<sup>152</sup> To promote a focus on the caring rights of workers and thus become care centric, reconciliation legislation should be made available to a wider category of paid worker which includes precarious workers. This would not only provide them with the necessary support they require to achieve the basic capabilities but would also challenge the predominantly middle class focus of the current body of UK reconciliation legislation.<sup>153</sup> In this section, I will consider possible categories of paid worker which could underpin the legislation.

Reconciliation legislation should not be promoted over all other labour law protections; minimum wage and equal pay protection, for example, would also hugely benefit precarious workers by ensuring that they are fairly compensated for their labour. Although I am focusing upon the protection afforded by reconciliation legislation, achieving fairness for precarious workers would be dependent upon the appropriate category being applied to all labour law protections.

a) Expanding protection to workers or those under a contract to personally do work

A first potential category is that of ‘workers.’<sup>154</sup> This has already been used in the UK to create a class of workers in between employees and the self-employed who are still provided the basic protection of labour law, including rights to a minimum wage, working time, no

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<sup>152</sup> J. Williams *Reshaping the Work-Family Debate* (n 88) 42. See chapter three page 74

<sup>153</sup> See chapter three page 87

<sup>154</sup> Employment Rights Act 1996, s. 230(3)

arbitrary deductions from wages and equal treatment.<sup>155</sup> The definition of workers is contained in the Employment Rights Act 1996 and includes employees and those who undertake “to do or perform personally any work or services for another party... whose status is not... client or customer of any profession or business undertaking carried on by the individual.”<sup>156</sup> In *Hospital Medical Group Ltd v Westwood*, it was confirmed that in most situations, the integration test should be adopted to determine if someone is a worker, although the Court of Appeal refused to give guidance on a uniform approach.<sup>157</sup> Maurice Kay LJ explains that the integration test focuses upon “indicative factors such as... integration in the business of the other party to the contract.”<sup>158</sup> Workers are thus those who are an integral part of the business. By extending basic labour law protections to those in subordinate and dependent working relationships which are similar to employment, the worker category has been increasingly used to protect vulnerable workers from harmful or abusive working relationships. Therefore, to achieve fairness for precarious workers, eligibility for reconciliation legislation could be extended to all workers.

However, the case law limited this categorisation’s potential in promoting fairness in this context. In *Byrne Brothers v Baird*, it was confirmed that assessing if someone is a worker “will involve all or most of the same considerations as arise in drawing the distinction between a contract of service and a contract for services.”<sup>159</sup> Mr Justice Lanstaff states that “the focus must be upon whether or not there is some obligation upon an individual to work, and some obligation upon the other party to provide or pay for it.”<sup>160</sup> This test shows that mutuality of obligations remains important, which will undermine protection of precarious

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<sup>155</sup> G. Davidov ‘Who is a Worker?’ (2005) 34 Industrial Law Journal 57, 58

<sup>156</sup> Employment Rights Act 1996 s. 230(3)(b)

<sup>157</sup> [2013] I. C. R. 415, 427

<sup>158</sup> *Hospital Medical Group Ltd v Westwood* (n 157) 426

<sup>159</sup> [2002] I.C.R. 667, 677

<sup>160</sup> [2006] I.R.L.R 181 [55]. Confirmed in *Hospital Medical Group Ltd v Westwood* ([2013] I.C.R. 415. [20])

workers. As Davies notes, it imposes “a potentially impossible hurdle,” for precarious workers because of their theoretical ability to refuse work or intermittent work contracts.<sup>161</sup> Also, it leaves “the question of the rights that the working relationship can attract largely in the hands of the employer,” enabling them to deny workers even the basic labour law protections.<sup>162</sup> Therefore, making reconciliation legislation accessible to workers would not ensure that precarious workers could access them as many of the same criticisms of the test for employee status which I criticised in chapter three, are relevant.<sup>163</sup> However, there is reason to think that mutuality of obligations will become a less important part of the integration test in the future. The Employment Appeal Tribunal has recently confirmed that the test is only relevant in determining employee status in *Windle and another v Secretary of State for Justice*.<sup>164</sup> Therefore, more precarious workers may be able to claim worker status in the future.

Nonetheless, fairness for precarious workers may be more achievable if the reconciliation entitlements are extended to another category of worker, where mutuality of obligations has never been considered an issue. In this regard, I examine those working under a contract to personally do work. These paid workers are protected within anti-discrimination law. The Equality Act 2010 entitles employees, apprentices and those working under “a contract personally to do work,”<sup>165</sup> to all the protection detailed in chapter five of the Equality Act 2010, including equal pay,<sup>166</sup> pregnancy and maternity rights (not including pay),<sup>167</sup> as well as protection from harassment,<sup>168</sup> and unfair dismissal.<sup>169</sup> Despite those working under a

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<sup>161</sup> A. C. L. Davies ‘The Contract for Intermittent Employment’ (2007) 36 Industrial Law Journal 102, 105

<sup>162</sup> S. Fredman, J. Fudge ‘The Legal Construction of Personal Work Relations and Gender’ (n 137) 118

<sup>163</sup> See chapter three pages 81-89

<sup>164</sup> [2015] I.C.R. 156, [54]

<sup>165</sup> S. 83(2)(a)

<sup>166</sup> Equality Act 2010, s. 64

<sup>167</sup> Equality Act 2010, s. 72

<sup>168</sup> Equality Act 2010, s. 40

<sup>169</sup> Equality Act 2010, s. 39(4)(c)

personal work contract recently being equated with workers in *Windle*, this may still include more precarious workers, especially those on zero-hour contracts.<sup>170</sup> This is because they may be deemed to work under a personal work contract as they are required to do the work themselves.<sup>171</sup> Therefore, this definition could be used as a basis for reconciliation legislation.

However, the transformative potential of the definition has not been realised. In *Jivraj v Hashwani*, a personal work contract was found to necessarily entail a subordinate relationship, despite this not being included within the legislation.<sup>172</sup> McCrudden argues that the Supreme Court's focus upon "subordination as a proxy for a particular type of vulnerability," reflected labour law considerations rather than the more fundamental anti-discrimination concerns.<sup>173</sup> This resulted in the arbitrators in this case being excluded from the protection because they were not working under a personal work contract. This is disappointing because it has limited the scope of protection afforded to those working under a personal work contract.<sup>174</sup> By restricting its application to those in a subordinate relationship, Freedland and Kountouris note that the Supreme Court's decision serves to create an "empty box," because the notion of "employment under a contract personally to do work" merely includes the traditional concept of employee.<sup>175</sup> This case has arguably been superseded by the Supreme Court's decision in *Clyde & Co LLP and another v Bates van Winkelhof*, in which Lady Hale explains that "while subordination may sometimes be an aid to distinguishing workers from other self-employed people, it is not a freestanding and universal

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<sup>170</sup> [2015] I. C. R. 156, [50]

<sup>171</sup> R. Harwood 'The Dying of the Light': The Impact of the Spending Cuts, and Cuts to Employment Law Protections, on Disability Adjustments in British Local Authorities' (2014) 29 *Disability and Society* 1511, 1512

<sup>172</sup> [2011] UKSC 40

<sup>173</sup> C. McCrudden 'Two Views of Subordination: The Personal Scope of Employment Discrimination Law in *Jivraj v Hashwani*' (2012) 41 *Industrial Law Journal* 30, 50

<sup>174</sup> C. McCrudden 'Two Views of Subordination' (n 173) 39

<sup>175</sup> M. Freedland, N. Kountouris 'Employment Equality and Personal Work Relations – A Critique of *Jivraj v Hashwani*' (2012) 41 *Industrial Law Journal* 56, 58

characteristic of being a worker.”<sup>176</sup> Subordination is therefore not applicable all the time. Although this clearly marks progress, the issue of subordination remains a determinant of employee status in some instances; *Jivraj* was differentiated on the grounds that the subordination test was used to determine if the arbitrators were workers or “people who were dealing with clients or customers on their own account.”<sup>177</sup> Therefore, these criticisms remain relevant, albeit in more limited circumstances.

Further problems with the subordination test stem from the fact that it does not reflect the reality of atypical workers. Often, their working relationship cannot be accommodated within “a single bilateral connection across which alone all rights and responsibilities are held to flow.”<sup>178</sup> Indeed, the subordination test obscures “the complex interactions between the many different personal work relations and labor market statuses that women engage in throughout their lives.”<sup>179</sup> To really protect vulnerable workers, labour law needs to focus upon the “multi-faceted set of work relations, both at any one time and over their life course,” as a source of disadvantage, not just subordination.<sup>180</sup> This would of course include a focus upon caring relationships as a potential source of vulnerability in the workplace. As I argued earlier, caring responsibilities affect people’s ability to engage in the paid workplace.<sup>181</sup> Single parents and women in poverty who particularly struggle to reconcile these competing demands, often find their paid work is markedly affected by their other work commitments.<sup>182</sup> Indeed, this is one major factor why women are overrepresented in precarious work. Therefore, to really protect precarious workers, labour law should recognise

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<sup>176</sup> [2014] UKSC 32, [39]

<sup>177</sup> *Clyde v Bates van Winklehof* (n 176) [32]

<sup>178</sup> M. Freedland, N. Kountouris *The Legal Construction of Personal Work Relations* (n 11) 370

<sup>179</sup> S. Fredman, J. Fudge ‘The Legal Construction of Personal Work Relations and Gender’ (n 137) 112

<sup>180</sup> S. Fredman, J. Fudge ‘The Legal Construction of Personal Work Relations and Gender’ (n 137) 116

<sup>181</sup> See chapter one page 3

<sup>182</sup> S. Fredman, J. Fudge ‘The Legal Construction of Personal Work Relations and Gender’ (n 137) 117



how each person engages in different work simultaneously and how these affect one another, rather than focusing upon subordination in employment relationships alone.

b) Personal work contract

Recognising the multi-faceted nature of work obligations, Freedland and Kountouris have developed the concept of the personal work contract without confining it to the “dependent or subordinate employment relationship.”<sup>183</sup> They suggest a transformative change to labour law where protection is focused around the worker’s situation.<sup>184</sup> This means that the focus is not upon someone’s momentary employment status or commitment to one employer, but instead is “upon his or her personal work profile in a larger and more time-extended sense.”<sup>185</sup>

Recognising the ongoing commitment that those in precarious work make to the workplace, they suggest that labour law protections should be “dependent upon the working person’s accumulation of entitlement from engagement in one or more personal work contracts or relations over defined periods of time.”<sup>186</sup> This can be accrued in periods of unpaid work too, which they suggest includes care work.<sup>187</sup> Caring labour is thus recognised as productive work, as I argued was necessary in chapter three.<sup>188</sup> Applying this to the reconciliation legislation would mean that eligibility would not be determined by the commitment to one particular employer. Instead, workers would be entitled to support in balancing their paid work and caring relationships if they had accrued commitment to any of these types of work. This would ensure that many of those in precarious work would be able to access these provisions so their caring relationships could be accommodated within the workplace.

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<sup>183</sup> M. Freedland, N. Kountouris ‘Employment Equality and Personal Work Relations’ (n 175) 65

<sup>184</sup> M. Freedland, N. Kountouris *The Legal Construction of Personal Work Relations* (n 11) 339

<sup>185</sup> M. Freedland, N. Kountouris *The Legal Construction of Personal Work Relations* (n 11) 367

<sup>186</sup> M. Freedland, N. Kountouris *The Legal Construction of Personal Work Relations* (n 11) 368

<sup>187</sup> M. Freedland, N. Kountouris *The Legal Construction of Personal Work Relations* (n 11) 340

<sup>188</sup> See chapter three page 65

In practical terms, those working as employees would experience no change as their employers would continue to facilitate their access to the reconciliation legislation. Those not engaging in paid work would also remain unable to access this protection as they would not need it. Therefore, the only difference for employers would be that they would have to accommodate access to reconciliation entitlements for those with the requisite commitment to any type of work. This would mean that eligibility requirements in reconciliation legislation would become redundant in determining who can access them. Those returning to work after providing care who do not meet eligibility requirements, such as the twenty-six weeks of continuous employment with the employer to request flexible working,<sup>189</sup> would still be entitled to the right to request flexible working and emergency leave, as well as the leave specifically available to parents if applicable. Precarious workers would also be able to access these entitlements if they had shown commitment to any type of work. This focus upon the worker rather than the employer would demonstrate that the caring labour of all workers is important, not just employees. It would also make the legislation care centric, as the primary focus of the legislation would be on the caring relationships of workers.<sup>190</sup>

It may be deemed unfair to make individual employers meet the extra costs of accommodating these workers' access to the reconciliation entitlements. Also, it may not always be possible to find an employer to enforce these protections against. Fredman and Fudge note that in such situations, workers' financial support could be provided by "shared sources of responsibility, including the State, mutual funds which spread the cost among all parties involved and even private insurance."<sup>191</sup> This would ensure that all those engaging in paid work would be entitled to accommodation within the workplace. It would also ensure that employers did not perceive carers as potentially costly workers, which may lead to

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<sup>189</sup> Children and Families Act 2014, s. 131

<sup>190</sup> N. Busby *A Right to Care?* (n 3) 50

<sup>191</sup> S. Fredman, J. Fudge 'The Legal Construction of Personal Work Relations and Gender' (n 137) 119

discrimination. Therefore, this would provide genuine protection to those in precarious work. I suggest that the widespread need for this support, because caring responsibilities can affect everyone, means that the financial support should come from a body which acts for all members of society. Therefore, the state would be best placed to provide the necessary support to achieve fairness in this context by supporting precarious workers.

Freedland and Kountouris note that such a system could be problematic because it could “be thought to exert a potentially deregulatory thrust, by requiring the worker to build up gradually to entitlements to protections.”<sup>192</sup> To restrict this they draw upon the capabilities approach to highlight how labour law could establish strong protections.<sup>193</sup> As explained in chapter two, the capabilities approach is an account of minimum core social entitlements, below which activity is no longer considered human functioning.<sup>194</sup> Freedland and Kountouris draw on this to demonstrate that all those in personal work relations should be protected by “a number of positive rights and duties aimed at enhancing the human and social capital of workers regardless of whether or not there is contract.”<sup>195</sup> Thus, they argue that the rationale of labour law should change to focus upon “a set of positive claims which workers have to certain kinds of qualities of treatment, rather than being seen as a burden upon employers.”<sup>196</sup> By highlighting that each worker should be entitled to the protection of labour law, the capabilities approach would undermine any attempts to deregulate the protection of the personal work contract. Indeed, if the focus of labour law became promoting individuals’ capabilities, employers’ attempts to deny this could be punished by the courts and tribunals, rather than accepted as they are currently. To complement this, Freedland and Kountouris

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<sup>192</sup> M. Freedland, N. Kountouris *The Legal Construction of Personal Work Relations* (n 11) 369

<sup>193</sup> Freedland and Kountouris also draw upon dignity and stability, which are beyond the scope of this thesis.

<sup>194</sup> M. Nussbaum *Women and Human Development* (n 117) 6. See chapter two page 54

<sup>195</sup> M. Freedland, N. Kountouris *The Legal Construction of Personal Work Relations* (n 11) 377

<sup>196</sup> M. Freedland, N. Kountouris *The Legal Construction of Personal Work Relations* (n 11) 372

argue that stability needs to be part of all personal work contracts.<sup>197</sup> This is because it is “the best way to guarantee...a commitment to the enhancement of workers’ capabilities on the part of the state and employers alike.”<sup>198</sup> One key way to achieve stability is to provide workers with the protection of labour law as this “provides a particularly useful stabilizer especially in respect of...temporary and casual workers.”<sup>199</sup> Therefore, attempts to deregulate the personal work contract could be halted by promoting workers’ capabilities and stability in paid work, which would help to promote fairness for precarious workers.

The fact that discrimination law has extended protection to those in personal work contracts demonstrates that such a legislative provision could be used throughout labour law; despite *Jivraj v Hashwani* demonstrating that English law is now “considerably further away from the normatively advocated position than...thought was the case.”<sup>200</sup> As Freedman and Kountouris have demonstrated that this broader definition of the personal work contract could have achieved fairness for precarious workers, this case is even more unsatisfactory.

However, *Clyde & Co LLP* may indicate a change towards Freedland and Kountouris’ ideal; certainly, more workers may be deemed to be working under a personal work contract.<sup>201</sup> If all workers are to be able to achieve their basic capabilities, this test needs to be even less prescriptive. It also needs to be used more widely than just non-discrimination laws.

Reconciliation legislation and other basic labour law protections should be applicable to this wider category of workers, not just employees or those in subordinate relationships.

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<sup>197</sup> M. Freedland, N. Kountouris *The Legal Construction of Personal Work Relations* (n 11) 381

<sup>198</sup> M. Freedland, N. Kountouris *The Legal Construction of Personal Work Relations* (n 11) 382

<sup>199</sup> M. Freedland, N. Kountouris *The Legal Construction of Personal Work Relations* (n 11) 381

<sup>200</sup> C. McCrudden ‘Two Views of Subordination’ (n 173) 54

<sup>201</sup> (n 176) [39]

## Conclusion

In this chapter, I have argued that the law and labour law in particular have a vital role to play in achieving fairness for carers. Although reconciliation legislation alone will not achieve this, it is clearly a vital tool that should be used to promote change and support workers with caring responsibilities. I have highlighted ways in which the reconciliation legislation could promote carers' basic capabilities of participating within paid work and caring relationships by becoming care centric.

Firstly, the sexual family ideal should be replaced by the caretaker-dependent unit to promote the value of all caring relationships. However, this should not be applied throughout because it will reinforce gendered stereotypes and expectations. Therefore, to challenge gender inequality by promoting men's caring role, I have argued that the leave entitlements to provide childcare should reflect people's lived realities. This means that it would be appropriate for leave to only be available to two parents when two parents provide childcare. However, this cannot exclude other carers from accessing the leave. Therefore, the leave for parents would need to be supplemented by entitlements for single parents and kinship carers. Finally, I have argued that the protection of labour law and reconciliation legislation should be extended to all those working under a personal work contract. This would enable precarious workers to access the entitlements. These workers remain associated with low levels of payment. Therefore, this would go some way in challenging class inequality. This would promote fairness for all carers and enable them to achieve both basic capabilities of paid work and caring relationships.

Although some of these ideas might seem outside the current scope of labour law, I have argued that they do correspond with the traditional ideals upon which labour law is based. I

have also demonstrated how they fit into Freedland and Kountouris' transformative vision of labour law, which acknowledges caring responsibilities as important work.

As this chapter has identified how the legislation could achieve fairness for carers in accordance with the definition adopted in chapter two, but has not applied it in practice, it has been somewhat abstract.<sup>202</sup> I will apply these principles in chapters five, six and seven, where I will analyse leave available to parents, the most developed type of legislation. As parents' leave entitlements have been consistently improved upon since 1998, there is an expectation that this reconciliation legislation should be the closest to achieving Fineman's ideal of adequately valuing caring relationships and accommodating them within the workplace. Certainly, as parenting is the most valorised caring relationship, the legislation should be the most care centric.

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<sup>202</sup> See chapter two page 48

## Chapter Five

### MATERNITY, ADOPTION AND PARENTAL LEAVE: PROMOTING PARENTS' CARING RELATIONSHIPS AS A CAPABILITY?

#### Introduction

In this chapter, I will analyse maternity, adoption and parental leave to consider if they achieve fairness for parents by providing them with an opportunity to actively participate in both the paid workplace and caring relationships. In particular, I will analyse how these parenting relationships are valued within the reconciliation legislation. As the “exemplar of the caretaker-dependent relationship,” parents have been the main beneficiaries of the UK body of reconciliation legislation.<sup>1</sup> The original focus was upon mothering, the most romanticised caring relationship.<sup>2</sup> From 1997, New Labour aimed to remove obstacles to paid work and keep mothers from relying upon welfare, as noted in chapter three.<sup>3</sup> Therefore, the leave available to mothers, as either maternity,<sup>4</sup> or gender neutral parental leave,<sup>5</sup> is the most developed in the UK. Adoption leave was introduced in 2002 and is very similar to maternity leave.<sup>6</sup>

As these three leave entitlements are the most developed and protect the most valorised caring relationships, they should theoretically go some way towards recognising the value of caring labour. Therefore, they should be care centric and promote fairness for parents.<sup>7</sup>

Achieving fairness in accordance with the definition adopted in chapter two, requires that all

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<sup>1</sup> M. Fineman *The Autonomy Myth: A Theory of Dependency* (The New Press, 2004) 304.

<sup>2</sup> See chapter two page 23

<sup>3</sup> R. Lister ‘Children (But Not Women) First: New Labour, Child Welfare and Gender’ (2006) 26 *Critical Social Policy* 315, 318

<sup>4</sup> Employment Relations Act 1999, Employment Act 2002, Work and Families Act 2006

<sup>5</sup> Maternity and Parental Leave Regulations etc.1999, The Parental Leave (EU Directive) Regulations 2013

<sup>6</sup> Employment Act 2002

<sup>7</sup> See chapter three page 103

people are able to achieve both basic capabilities of participating within paid work and caring relationships.<sup>8</sup> In accordance with my arguments in chapter four, I will analyse how these entitlements promote the importance of all caring relationships and challenge the socio-economic disadvantages of caring. I will also examine how the legislation deals with gendered stereotypes and expectations.

However, despite their potential, this chapter will show how maternity, adoption and parental leave fail to adequately recognise the importance of parents' active caring role. Parenting relationships are not adequately valued. Regardless of the numerous changes, the legislation has failed to make caring relationships a central part of the workplace. In particular, the experiences of parents performing precarious work have been overlooked; their parenting is deemed to have less value.<sup>9</sup> The legislation also reinforces gendered expectations rather than challenges them. Therefore, the legislation actively undermines the achievement of fairness in this context. Accordingly, Fineman's vision of accommodating caring relationships within the workplace has not been realised in the UK.<sup>10</sup> The legislation undervalues caring labour, even that provided in the most valorised caring relationships of mothering and parenting. Paid work commitments and the needs of employers are prioritised, which merely reinforces the unfair treatment of carers.

## **Maternity leave**

### a. Development

Maternity leave is the most developed of all the leave legislation in the UK. The first legislation regarding pregnant women and the workforce was the Factory and Workshop Act 1891, which "simply mandated expulsion from the work-force, by prohibiting employers in

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<sup>8</sup> See chapter two page 48

<sup>9</sup> See chapter three page 87

<sup>10</sup> See chapter three 91-97



factories or workshops from employing women within four weeks of giving birth to a child.”<sup>11</sup> After this, women were deterred from entering the workplace.<sup>12</sup> Rudimentary protection to help pregnant women remain in the paid workforce was first introduced by the Employment Protection Act 1975, which included rights to maternity leave, maternity pay and a right to return to work after the leave.<sup>13</sup> However, these rights became increasingly inaccessible after their introduction; the threshold requirement was increased from six months’ service to two years, or five years if the mother worked part-time.<sup>14</sup> It was not until the Pregnant Workers Directive 1992 was implemented by the Trade Union Reform and Employment Rights Act 1993 that maternity leave was reinvigorated, making fourteen weeks of leave available to all employees regardless of the length of service with their employer.<sup>15</sup> This was called ordinary maternity leave. The inclusion of additional maternity leave ensured a maximum of forty weeks was available to those who had accrued two years of employment. The Work and Families Act 2006 removed this distinction between lengths of service and the leave available, so all pregnant employees are now entitled to both ordinary and additional maternity leave.<sup>16</sup> The length of maternity leave has also been extended; twelve months of leave are currently available.<sup>17</sup> The Maternity and Parental Leave Regulations etc. 1999 fleshes out the entitlement, making two weeks leave after childbirth compulsory.<sup>18</sup> The contract of employment continues throughout maternity leave, enabling women to return to the same job at the end of the leave.<sup>19</sup> However, “if it is not reasonably practicable for the employer to permit her to return to that job,” after additional maternity leave, then she is entitled to “another job which is both suitable for her and appropriate for her to do in the

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<sup>11</sup> S. Fredman *Women and the Law* (Oxford University Press, 1997) 182

<sup>12</sup> See S. Fredman *Women and the Law* (n 11) 182

<sup>13</sup> S. Fredman *Women and the Law* (n 11) 166 and 182

<sup>14</sup> S. Fredman *Women and the Law* (n 11) 183

<sup>15</sup> Directive 92/85/EEC

<sup>16</sup> Work and Families Act 2006, chpt. 18, s. 1

<sup>17</sup> Employment Relations Act 1999, Maternity and Parental (Amendment) Regulations 2002, reg. 8, Work and Families Act 2006, s. 1(1)

<sup>18</sup> The Maternity and Parental Leave Regulations etc. 1999, reg. 8

<sup>19</sup> The Maternity and Parental Leave Regulations etc. 1999, reg. 18(1)

circumstances.”<sup>20</sup> Keep in touch days have also been introduced to help women return to the workplace, by allowing them to return for ten days during their maternity leave without ending it.<sup>21</sup>

If certain eligibility requirements are met, mothers who are employees are now entitled to nine months of paid leave and the remaining thirteen weeks are unpaid. The rate of pay is income-related for the first six weeks only, during which time the new mother can claim 90% of her wages. After that, she is entitled to statutory maternity pay, which is currently £139.58 a week, or if it is less, 90% of her earnings. The Social Security Contributions and Benefits Act 1992 sets out the eligibility requirements for statutory maternity pay; women must have ceased working and have been earning a sufficient amount to have paid National Insurance contributions.<sup>22</sup> Employees must provide twenty-one days’ notice to the employer.<sup>23</sup> Also, women must have been employed by their employer for a continuous period of at least twenty-six weeks at the fourteenth week before the expected week of childbirth.<sup>24</sup> The state meets the majority of the costs, as employers can reclaim statutory maternity pay from the state through deductions in their PAYE and National Insurance contributions. Employers in companies with over twenty employees can recover 92% of statutory maternity pay.<sup>25</sup> Small employers can reclaim more and the amount reclaimable changes each year; at the time of writing, they can reclaim 103%.<sup>26</sup>

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<sup>20</sup> The Maternity and Parental Leave Regulations etc. 1999, reg. 18(2)

<sup>21</sup> The Maternity and Parental Leave Regulations etc. 1999, reg. 12A

<sup>22</sup> Social Security Contributions and Benefits Act 1992, s. 164(2)(b)

<sup>23</sup> Social Security Contributions and Benefits Act 1992, s. 164(4)(b)

<sup>24</sup> Social Security Contributions and Benefits Act 1992, s. 164(2)(a)

<sup>25</sup> Social Security Contributions and Benefits Act 1992, s. 168(1)(a)

<sup>26</sup> A small company is identified as a company whose total National Insurance contributions for the qualifying tax year do not exceed a set amount, currently £45,000, (The Statutory Maternity Pay (Compensation of Employers) and Miscellaneous Amendment Regulations 1994, reg. 2(1))

If women are not eligible for statutory maternity pay, they can claim maternity allowance through the Benefits Agency.<sup>27</sup> Thirty-nine weeks of maternity allowance is payable at £139.58 a week or 90% of their earnings if that is less. To be eligible, mothers must have been “engaged in employment or as an employed or self-employed earner” for any part of twenty-six weeks of the last sixty-six weeks.<sup>28</sup> They also must have also been earning over the maternity allowance threshold, which is currently at least £30 a week, over any thirteen week period.<sup>29</sup>

b. The positive aspects

Maternity leave is an important entitlement which benefits women and society generally by recognising women’s childbearing role. It has important health benefits for the mother, allowing her a chance to prepare for and recover from childbirth.<sup>30</sup> The long period of leave available should more than accommodate this, as Foubert’s review of the medical literature suggests that only six to eight weeks of leave is needed to recover from pregnancy.<sup>31</sup> This highlights a second advantage of maternity leave; it provides mothers with a chance to care for their child in one “of the most care labour-intensive periods of parenting.”<sup>32</sup> Accordingly, maternity leave also recognises the social value of childcare; the care of children is so important that it justifies a (poorly) paid break from employment.<sup>33</sup> Therefore, James notes that childcare is recognised as a public concern.<sup>34</sup>

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<sup>27</sup> Social Security Contributions and Benefits Act 1992, s. 35

<sup>28</sup> Social Security Contributions and Benefits Act 1992, s. 35(1)(b)

<sup>29</sup> Social Security (Maternity Allowance) (Earnings) Regulations 2000, reg. 5(a)

<sup>30</sup> S. Kammerman, P. Moss *The Politics of Parental Leave Policies: Children, Parenting, Gender and the Labour Market* (Policy Press, 2011) 1

<sup>31</sup> P. Foubert *The Legal Protection of the Pregnant Worker in the European Community* (Kluwer International Law, 2002) quoted in I. Robeyns ‘Should Maternity Leave be Expanded?’ (2012) 6 *Ethics and Social Welfare* 206, 208

<sup>32</sup> I. Robeyns ‘Should Maternity Leave be Expanded?’ (2012) 6 *Ethics and Social Welfare* 206, 208

<sup>33</sup> R. Owens ‘Reproducing Law’s Worker: Regulatory Tensions in the Pursuit of “Population, Participation and Productivity”’ in C. Arup *Labour law and Labour Market Regulation: Essays on the Construction, Constitution and Regulation of Labour Markets and Work Relationships* (Federation Press, 2006) 420

<sup>34</sup> G. James *The Legal Regulation of Pregnancy and Parenting in the Labour Market* (Routledge, 2009) 43

Another key reason maternity leave is vital is because it is necessary to equalise women's and men's access to the workplace. This is partly because "to achieve equality in the workplace, there may need to be some inequality in this particular employee benefit," in recognition of women's childbearing role.<sup>35</sup> Maternity leave may further promote women's role in the workplace because it has been linked to improved retention and recruitment of female employees.<sup>36</sup> This is important not only for individual women, who would otherwise be disadvantaged because of their biologically determined role, but also for society as a whole. There is widespread agreement that female employment is crucial for the long-term future of a country.<sup>37</sup> As James notes "the promotion of women's participation in the labour market is also viewed as crucial to the promotion of the country's economic prosperity."<sup>38</sup> This explains the introduction of keep in touch days too, as research suggests that their use increases the likelihood of women returning to the paid workforce.<sup>39</sup>

### c. The limitations

Although the long twelve months of maternity leave appears generous, it has been criticised for reinforcing the idea that childcare is the mother's responsibility.<sup>40</sup> Indeed, as most mothers recover in six to eight weeks from childbirth, most will take the majority of leave, about ten months, to provide childcare.<sup>41</sup> Even those who face more serious problems after childbirth, "such as depression, that may limit daily activities for months," will remain

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<sup>35</sup> V. Gordon *Maternity Leave: Policy and Practice* (CRC Press, 2013) 26

<sup>36</sup> S. Bevan, S. Dench, P. Tamkin and J. Cummings *Family Friendly Employment: The Business Case* (Institute for Employment Studies, 1999) 1

<sup>37</sup> J. Maher, J. Lindsay, S. Franzway 'Time, Caring Labour and Social Policy: Understanding the Family Time Economy in Contemporary Families' (2008) 22 *Work, Employment and Society* 547, 548

<sup>38</sup> G. James 'Law's Response to Pregnancy/Workplace Conflicts: A Critique' (2007) 15 *Feminist Legal Studies* 167, 170

<sup>39</sup> J. Chanfreau, S. Gowland, Z. Lancaster, E. Poole, S. Tipping, M. Toomse *Maternity and Paternity Rights and Women Returners Survey 2009/10* (Department for Work and Pensions, 2011) 43

<sup>40</sup> S. Fredman 'Reversing Roles: Bringing Men into the Frame' (2014) 10 *International Journal of Law in Context* 442, 442

<sup>41</sup> P. Foubert *The Legal Protection of the Pregnant Worker in the European Community* (n 31)

entitled to a significant period of leave to provide childcare.<sup>42</sup> Therefore, the legislation fails to distinguish pregnancy, which is only experienced by women, from parenthood, which is gender neutral. Gender inequality will be further reinforced if women use their whole entitlement to maternity leave, as this may lead to them suffering in the workplace. Long periods of leave are associated with lowering employment, lower labour earnings in the short term and long term career deterioration.<sup>43</sup> Therefore, the twelve months available as maternity leave may actually hinder gender equality. Indeed, Caracciolo di Torella recognises that this “cemented the two-sphere structure,” of men working in the public sphere and women caring in the private sphere.<sup>44</sup> Steps have been taken to change this; shared parental leave has been introduced, which enables mothers to transfer fifty weeks of leave to the father or their partner. This may enable some parents to share the care more equally and will be analysed in chapter seven.

Other problems with the legislation reflect a criticism Fredman made over two decades ago; the legislation’s “focus is entirely workplace orientated as it assumes that the main issue is a women’s inability to do her work, thereby ignoring the positive medical and social reasons for leave.”<sup>45</sup> This comment remains pertinent today. The long length of leave has not meant that caring labour is better valued; even mothers, who provide care in the most celebrated caring relationship, are denied a genuine opportunity to flourish. I will demonstrate this by first assessing the entitlements available to non-employees or those who do not meet the minimum service requirements for statutory maternity pay. This will demonstrate that care

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<sup>42</sup> P. McGovern, B. Dows, D. Gjerdingen, C. Gross, S. Kenney, L. Ukestad, D. McCaffrey, U. Lundberg ‘Postpartum Health of Employed Mothers 5 Weeks After Childbirth’ (2006) 4 *Annals of Family Medicine* 159, 160

<sup>43</sup> R. Lalive, J. Zweimüller ‘How Does Parental Leave Affect Fertility and Return to Work? Evidence from Two Natural Experiments’ (2009) 124 *The Quarterly Journal Economics* 1363, 1372

<sup>44</sup> E. Caracciolo di Torella ‘Brave New Fathers for a Brave New World?’ (2014) 20 *European Law Journal* 88, 97

<sup>45</sup> S. Fredman ‘A Difference with Distinction: Pregnancy and Parenthood Reassessed’ (1994) 110 *Law Quarterly Review* 106, 113

provided by those who lack the requisite workplace commitment is particularly undervalued. Secondly, I will demonstrate that even the caring labour of those who are eligible for all the support available, namely employees who meet the minimum service requirements, remains undervalued.

*i. Prioritisation of employees*

Maternity leave's workplace focus is demonstrated by the entitlement only being available to employees. Non-employees are only entitled not to be discriminated against because of their pregnancy.<sup>46</sup> Therefore, the recovery from pregnancy and childbirth as well as the childcare performed by female employees is deemed more important than that of other workers.

Indeed, the recovery and care work of non-employees is treated as so unimportant even in the most esteemed caring relationship of mother and child, that it cannot justify an interruption to their paid work responsibilities. Therefore, maternity leave does not recognise the importance of all caring relationships and the work they entail, preventing the achievement of fairness for mothers.<sup>47</sup>

The requirement of employee status will mainly restrict those in precarious work from accessing maternity leave, further obscuring fairness for parents. As noted in chapter three, these workers already “face steep hurdles in balancing work and family.”<sup>48</sup> Excluding them from accessing maternity leave makes it even harder for these vulnerable workers to achieve both basic capabilities of participating in caring relationships and paid work. Therefore, prioritising care provided by employees not only undermines the importance of care as a

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<sup>46</sup> Equality Act 2010, s. 18

<sup>47</sup> See chapter two page 48

<sup>48</sup> J. Williams *Reshaping the Work-Family Debate: Why Men and Class Matter* (Harvard University Press, 2010) 42. See chapter three page 81

basic capability, but also reinforces socio-economic inequality, further obscuring fairness in this context.

Non-employees will also be unable to access statutory maternity pay. In addition, employees that do not meet the minimum eligibility requirements, including those who have not been employed by their employer for a continuous period of at least twenty-six weeks at the fourteenth week before the expected week of childbirth, are denied access to statutory maternity pay.<sup>49</sup> However, most women are not denied all financial support. Both workers and employees who do not meet the minimum service requirements may be entitled to maternity allowance. 11% of mothers who were in paid work before childbirth accessed maternity allowance in 2009/10.<sup>50</sup> The difference between statutory maternity pay and maternity allowance is that the latter does not provide mothers with the opportunity to earn more than £139.58 a week, whereas statutory maternity pay is paid at 90% of the mother's income for the first six weeks.

There are two problems with maternity allowance. Firstly, 11% of the most disadvantaged workers who were in paid work before childbirth did not even receive this lower level of support.<sup>51</sup> Such women do not receive any of the benefits of maternity leave; the lack of pay undermines their recovery time and their chance to provide childcare. The fact that so many women access no financial support highlights how much caring labour is undervalued, even in the most privileged caring relationship. It demonstrates that it is not protected as a basic capability in the UK. Also, as this predominantly excludes those in precarious work, who are

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<sup>49</sup> Social Security Contributions and Benefits Act 1992, s. 164(2)(a)

<sup>50</sup> M. O'Brien, A. Koslowski, M. Daly 'United Kingdom' in P. Moss *11<sup>th</sup> International Review of Leave Policies and Related Research 2015* (International Network on Leave Policies and Research, 2015) 336

<sup>51</sup> M. O'Brien, A. Koslowski, M. Daly 'United Kingdom' (n 50) 336

likely to be socio-economically disadvantaged, fairness in this context is undermined as class inequality is reinforced.

Secondly, although maternity allowance demonstrates that childcare is a public concern, the low level of payment reflects how undervalued childcare remains. Described as “pitiful,” the level of pay is less than the minimum wage.<sup>52</sup> This clearly demonstrates that mothers’ caring labour is considered to be of less value than paid work. In contrast, the importance of mothers’ paid workforce participation is emphasised within the legislation. This is evidenced by the fact that statutory maternity pay is only available to employees who have been employed for twenty-six weeks. This means that the levels of financial support mothers receive, or if they receive any at all, is determined by their commitment to the workplace. Accordingly, the work of caring for a new born child is not always deemed equally important, even though each mother is performing life sustaining and labour intensive work.

The prioritisation of employees demonstrates that maternity leave is not care centric. Making statutory maternity pay and even maternity leave irrelevant to some mothers has actively impeded social justice by disproportionately affecting women in unstable work.

*ii. Implementing the personal work contract*

To achieve fairness in this context, the legislation should no longer prioritise paid work but become more care centric. This would mean that all mothers’ caring labour should be recognised as equally important. To achieve this, the legislation should respond to the changing nature of the workplace and protect vulnerable mothers in precarious work. This could be achieved by extending eligibility to maternity leave and statutory maternity pay to

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<sup>52</sup> G. James *The Legal Regulation of Pregnancy and Parenting in the Labour Market* (n 34) 43



all those working under personal work contracts. Therefore, the legislation should implement Freedland and Kountouris' work as developed in chapter four.<sup>53</sup> In this section, I will recap their basic model and apply this to maternity leave. Freedland and Kountouris argue that labour law protection should not be determined by someone's momentary employment status or commitment to one employer. Instead, they suggest that this should depend on someone's "personal work profile in a larger and more time-extended sense."<sup>54</sup> This means that entitlement to maternity leave and statutory maternity pay would be available to any mother who has accumulated commitment to any type of work, including paid work or caring labour.<sup>55</sup> To ensure that this approach would not lead to a deregulatory thrust, Freedland and Kountouris argue that the legislation should also focus upon promoting individuals' capabilities.<sup>56</sup> Therefore, the legislation would aim to achieve each mother's flourishing. Any attempts by employers to deny this would be challengeable at employment tribunals.

Of course, maternity leave will be of little use to those who are not in paid work, but extending eligibility for maternity leave to those working under a personal work contract would hugely benefit those in precarious work. They would be provided with the necessary protection to recover from pregnancy and bond with the child. In addition, this would mean that precarious workers, as well as employees who do not meet the minimum eligibility requirements, would be entitled to statutory maternity pay. However, this may present a problem for those in precarious work that have no identifiable employer. In such a situation, as noted in chapter four, the state should meet the costs.<sup>57</sup> The state is already responsible for paying maternity allowance, so this change would simply mean that the state would have to

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<sup>53</sup> M. Freedland, N. Kountouris *The Legal Construction of Personal Work Relations* (Oxford University Press, 2011) See chapter four page 147-151

<sup>54</sup> M. Freedland, N. Kountouris *The Legal Construction of Personal Work Relations* (n 53) 367

<sup>55</sup> M. Freedland, N. Kountouris *The Legal Construction of Personal Work Relations* (n 53) 340

<sup>56</sup> M. Freedland, N. Kountouris *The Legal Construction of Personal Work Relations* (n 53) 369

<sup>57</sup> See chapter four page 148

increase its payment to include six weeks of income-related leave. This small change would result in the importance of all caring labour being recognised, which would promote fairness for mothers. However, employers may fear that their costs would increase as they would have to meet the extra costs of making statutory maternity pay available to those who have not shown the requisite commitment to their workplace. Again, these concerns would be placated as the state could meet the costs of those who are ineligible for statutory maternity pay, which would only involve them increasing the pay already being provided. Therefore, it would be appropriate to maintain the eligibility requirements, but they would only be used to determine if the state or the employer would pay for the leave taken.

Determining the level of income-related payment for those working under a personal work contract could be done using the same test applied in the maternity allowance legislation. The average weekly wage is determined by the first thirteen weeks during the sixty-six week period in which the worker is paid over £30 per week, which is then simply divided by thirteen.<sup>58</sup> This enables the aggregation of their earnings from different jobs within these weeks.<sup>59</sup> Therefore, this same test could be used to calculate the income-related pay that would be made available for all those working under a personal work contract.

These seemingly small changes would nonetheless revolutionise mothers' workplace protection as the legislation would focus upon the worker rather than the employer.

Protecting those working under a personal work contract would vitally demonstrate that caring labour, no matter who performs it, is as important as paid work. It would provide all mothers with the opportunity to flourish by achieving the basic capabilities of participating in paid work and caring labour.

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<sup>58</sup> Social Security (Maternity Allowance) (Earnings) Regulations 2000, reg. 6(1)(b)

<sup>59</sup> Social Security (Maternity Allowance) (Earnings) Regulations 2000, reg. 4

iii. *Statutory maternity pay and maternity leave still undermines fairness*

Enabling all mothers to access the same protection as employees will, however, not achieve fairness for mothers. This is partly because many mothers underuse their entitlement to maternity leave; the average length is only thirty-nine weeks.<sup>60</sup> Research suggests that women often feel pressurised to return because of financial need.<sup>61</sup> Although this may mean that gender inequality is not reinforced as much, the fact that the leave entitlement is partly unusable in practice demonstrates other problems within the legislation, namely that paid work remains prioritised over caring relationships. This is mainly evidenced by statutory maternity pay being paid at the same low rate as maternity allowance after the first six weeks of income-related leave, and the final twelve weeks of unpaid leave. Not only does this low level of payment undervalue childcare, but Fredman argues it is also the central manifestation of the low priority given to maternity leave.<sup>62</sup> Indeed, the low level of payment is a key reason why most women are unable to access leave for a significant period of time, which is demonstrated by the underuse of the unpaid last twelve weeks.<sup>63</sup>

However, the statute sets a minimum standard; employers can provide more generous entitlements. 45% of employers have voluntarily chosen to increase maternity pay, so the financial constraints are less onerous for some women.<sup>64</sup> This may be provided through contract by employers who recognise that the benefits of valuing mothers' caring labour outweigh the increased costs. This is because better paid maternity leave is linked to

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<sup>60</sup> M. O'Brien, A. Koslowski, M. Daly 'United Kingdom' (n 50) 336

<sup>61</sup> D. Yaxley, L. Vinter, V. Young *Working Paper Series no 41-Dads and their Babies: The Mothers' Perspective* (Manchester, 2005) 6

<sup>62</sup> S. Fredman *Women and the Law* (n 11) 199

<sup>63</sup> M. O'Brien, A. Koslowski, M. Daly 'United Kingdom' (n 50) 336

<sup>64</sup> C. Wolff *How Employers Manage Maternity Leave: The 2012 XperthR survey* (IRS, 2012) <http://www.xperthr.co.uk/article/112706/the-cost-span-of-span-classhighlightmaternity-span-span-classhighlightleave--the-2012-xperthr-survey.aspx?searchwords=costs+of+maternity+leave#sub2> visited 8.2.13

increased retention.<sup>65</sup> Also, trade unions may use collective bargaining to create more generous entitlements. Although employers' extra support should be celebrated, this only values the caring labour of some mothers, more likely those who are skilled workers. Women in unskilled jobs are less likely to receive enhanced maternity pay.<sup>66</sup> Most working class mothers will therefore only be able to access the low level of statutory maternity pay. This affects their ability to take maternity leave. Research has found that single mothers and those on lower incomes are the least likely to take extended maternity leave.<sup>67</sup> This evidence corroborates James' argument that maternity leave is only "likely to be of use to those with little outgoings and/or a partner who is able to financially maintain the family expenses whilst the mother is on low paid or unpaid leave."<sup>68</sup>

This practical exclusion of poorly paid mothers from taking maternity leave is manifestly unjust as it denies support to those who need it most. Working class mothers' caring labour is already likely to particularly disadvantage them in the workplace. Williams notes that often women in lower paid jobs find themselves in a vicious cycle, where "their efforts to meet crucial family responsibilities jeopardized the jobs that were essential for supporting their families."<sup>69</sup> Therefore, these women in particular need to be able to access maternity leave in practice. The level of statutory maternity pay should be increased to achieve fairness in this context.

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<sup>65</sup> The Women's Business Council *Getting On and Branching Out Evidence Paper: Transitions in Work, Flexible Working and Maternity* <[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/85554/evidence4.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/85554/evidence4.pdf)> accessed 18.04.2014, 7

<sup>66</sup> R. Crompton *Employment and the Family: The Reconfiguration of Work and Family Life in Contemporary Societies* (Cambridge University Press, 2006) 106

<sup>67</sup> J. Chanfreau, S. Gowland, Z. Lancaster, E. Poole, S. Tipping, M. Toomse *Maternity and Paternity Rights and Women Returners Survey 2009/10* (n 39) 33

<sup>68</sup> G. James *The Legal Regulation of Pregnancy and Parenting in the Labour Market* (n 34) 42

<sup>69</sup> J. Williams *Reshaping the Work-Family Debate* (n 48) 43

The low level of payment available for maternity leave may also undermine the take up of other provisions, including keep in touch days. Although they have been found to increase the likelihood of women returning to the paid workforce, keep in touch days have been underused.<sup>70</sup> This might be as a result of the chronic underpayment that some women receive for these workdays, as employers only have to pay them the low flat rate of statutory maternity pay. Although some employers may pay a higher rate, James argues that the low level of statutory support reflects how poorly society values the work of people who are perceived as encumbered workers.<sup>71</sup> As soon as women become mothers, they become less valuable workers, not worthy of full payment. Employers may argue that they have already had to pay someone to cover the mother's role. Therefore, they should not be obliged to pay the mother for a job that is already being done. However, the use of keep in touch days must be agreed upon by both employee and employer.<sup>72</sup> It is assumed that employers would only agree to the mother returning for a shorter period if there was work to be done or if they thought it would be valuable for them to readjust before returning permanently. Employers might also question if mothers returning for just a day would really do enough to deserve full pay. However, even if employees take time to readjust back into the workplace, this is still work. After all, if keep in touch days are not taken, this adjustment period would simply occur when the employee returned to work, when the mother would receive full payment. As a result, I suggest that there is no reason that keep in touch days should be so poorly paid. This work is clearly of value and should be remunerated at the contractual level.

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<sup>70</sup> J. Chanfreau, S. Gowland, Z. Lancaster, E. Poole, S. Tipping, M. Toomse *Maternity and Paternity Rights and Women Returners Survey 2009/10* (n 39) 41-43

<sup>71</sup> G. James *The Legal Regulation of Pregnancy and Parenting in the Labour Market* (n 34) 43

<sup>72</sup> Maternity and Parental Leave Regulations 1999, reg. 12A(6)

iv. *Raising statutory maternity pay*

Many commentators have argued that the rate of statutory maternity pay should be increased to recognise that childcare is as equally valuable as paid work. This would also enable more women to take extended maternity leave, especially those on lower incomes, in precarious work and single parents. For example, Fredman states that at an absolute minimum, fourteen weeks of leave should be paid at 100% of the mother's wages.<sup>73</sup> James also argues that a shorter period of leave, paid at an income-related level, may be more useful to mothers.<sup>74</sup> The Committee of Women's Rights and Gender Equality of the European Parliament proposed amendments to the Pregnant Workers Directive to make twenty weeks of leave available paid at 100% of the mother's wages.<sup>75</sup> This proposal was rejected by the Council of the European Union because of the costs involved.<sup>76</sup> The Equality and Human Rights Commission calculated that making eighteen weeks of maternity leave paid at 90% income replacement available to all employees would cost £2.704 billion, increasing the costs by £1.016 billion.<sup>77</sup> UK employers also reported concerns about covering some of the increased costs if the rate of statutory maternity pay was increased.<sup>78</sup> History suggests that such concerns were well founded as employers could reclaim 100% of statutory maternity pay before the Pregnant Workers Directive was introduced in 1994. The amount reclaimable was then decreased to 92% to deal with the costs of implementation.

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<sup>73</sup> S. Fredman *Women and the Law* (n 11) 208

<sup>74</sup> G. James *The Legal Regulation of Pregnancy and Parenting in the Labour Market* (n 34) 42

<sup>75</sup> Committee of Women's Rights and Gender Equality *Second Report on the Proposal for a Directive of the European Parliament and of the Council amending Council Directive 92/85/EEC on the introduction of measures to encourage improvements in the safety and health at work of pregnant workers and workers who have recently give birth or are breastfeeding (COM(2008)0637 – C6-0310/2008/0193(COD))*, 05.03.10 Amendment 64

<sup>76</sup> Council of the European Union (2010) 'Press Release, 3053rd Council Meeting: Employment, Social Policy, Health and Consumer Affairs', 17323/1/10 REV 1-PRESSE 331-PR CO 439. [https://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/lisa/118254.pdf](https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/lisa/118254.pdf)> accessed 18.09.2015, 9-10

<sup>77</sup> Equality and Human Rights Commission *Policy Briefing: EU Pregnant Workers Directive* <<http://www.equalityhumanrights.com/legal-and-policy/european-policy/eu-pregnancy-directive/>> accessed 16.04.2014, 13

<sup>78</sup> Department for Business Innovation & Skills *Summary of Responses to Consultation on European Commission Proposal to Amend the Pregnant Workers Directive* (Department for Business Innovation & Skills, 2010) 7

However, the costs of increasing statutory maternity pay could be justified as employers would receive numerous benefits. For example, by enabling all women to return to the workplace when they are ready, employees may be more enthusiastic upon their return, improving the quality of their work.<sup>79</sup> In addition, increasing statutory maternity pay would decrease other costs for employers and the state by enabling parents to return to the workplace when they and the child are ready. This would reduce parents' guilt or worry, which would encourage women to remain in the workplace. Therefore, better paid maternity leave is linked with increased employee retention, so employers' replacement costs would be reduced.<sup>80</sup> Encouraging more women to remain in the workplace and in jobs matching their ability would also decrease the costs caused by the underuse of women in the paid workforce. These are estimated to be between £18 and £23 billion a year.<sup>81</sup> This is partly because the huge number of women (around 2.2 million) who cite family and home responsibilities as reasons for not entering the paid workforce would be reduced.<sup>82</sup> Therefore, if more women were encouraged to remain in the workplace and retain appropriate jobs for their skill level, then the relatively small costs of increasing maternity pay would be recoverable though increased National Insurance payments and the other benefits of having more women in the workplace.

Improving maternity pay would also reduce employers' costs by decreasing the number of sick days taken. This is because research has found that reconciliation policies reduce absence for sickness.<sup>83</sup> Absence from work due to sickness costs the UK a vast amount of

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<sup>79</sup> Equality and Human Rights Commission *Response of the Equality and Human Rights Commission to the Consultation on Modern Workplaces* (2011) 13-14

<sup>80</sup> The Women's Business Council *Getting On and Branching Out Evidence Paper* (n 65) 7

<sup>81</sup> Equality and Human Rights Commission *Policy Briefing: EU Pregnant Workers Directive* (n 77) 12

<sup>82</sup> G. James 'Law's Response to Pregnancy/Workplace Conflicts' (n 38) 169-170

<sup>83</sup> S. Bevan, S. Dench, P. Tamkin and J. Cummings *Family Friendly Employment* (n 36) 3

money; estimates range from over £14 billion,<sup>84</sup> to £29 billion per year.<sup>85</sup> Women are more likely to be absent from work due to sickness than men, which means that women's sickness will constitute much of these costs.<sup>86</sup> This reflects the fact that women are more likely to report "physical health problems, physical work demands and work fatigue," partly because women may be better at recognising problems and going to the doctor for treatment.<sup>87</sup> However, the number of sick days is also likely to be affected by women's continued association with care. I already noted in chapter two that the provision of care can lead to deterioration of mental and physical health, which may increase the amount of time women have to take out of the workplace.<sup>88</sup> Also, research found that the more young children a woman has, the more sick days she is likely to take.<sup>89</sup> Therefore, the number of sick days could be reduced if women are enabled to access enough maternity leave to allow them to recover fully from childbirth, reducing the huge costs employers currently face. By reducing these employers' losses, the relatively small costs of improving maternity pay would be cost effective.

Despite the costs being justifiable, I argue that it was right that the proposals to increase maternity pay were rejected. This is because increasing the level of payment for maternity leave alone would undermine attempts to equalise women's access to the workplace. Some income-related leave should always be reserved for mothers to recover from pregnancy and childbirth, but Foubert's review of the medical literature shows that this does not need to be

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<sup>84</sup> Confederation of British Industries *Fit For Purpose: Absence and Workplace Health Survey* (CBI, 2013) 11

<sup>85</sup> Number of Sick Days Falling, But UK Still Takes Most in the World <http://www.xperthr.co.uk/news/number-of-sick-days-falling-but-uk-still-takes-most-in-the-world/116902/> accessed 18.04.2014

<sup>86</sup> Office for National Service *Full Report: Sickness Absence in the Labour Market* (Office for National Statistics, 2014) 4

<sup>87</sup> Anonymous 'Women Take Almost 50 per cent More Sick Leave Than Men' (2008) 42 *Irish Medical Times* 45, 45

<sup>88</sup> See chapter two page 21

<sup>89</sup> A. Hendrickson Eagly, L. Lorene Carli *Through the Labyrinth: The Truth About How Women Become Leaders* (Harvard Business Press, 2007) 58



anywhere near twelve months.<sup>90</sup> Robeyns suggests that to make any paid period of leave after the eight week period of recovery from childbirth available only to mothers is discrimination.<sup>91</sup> Either parent could provide this care. Making twenty weeks of income-related leave available to women alone would only have bolstered the gender inequality that the long length of maternity leave perpetuates, as men would have continued to be denied the opportunity to achieve the basic capability of providing care. Therefore, this would have constituted discrimination against men.

Making twenty weeks of income-related leave available to women alone would also disadvantage women. It would have reinforced women's association with caring. Thus, discrimination in the workplace would have been perpetuated as women would continue to be viewed as less reliable workers, likely to be absent from the workplace. This would have particularly detrimentally impacted upon mothers, who are already widely discriminated against in the workplace; as many as 54,000 pregnant women are forced out of paid work each year, as noted in chapter one.<sup>92</sup> I further noted in chapter one that this disadvantages all women in the workplace, not just mothers and is a major contributor to the wide gender pay gap.<sup>93</sup> Increasing the level of payment for maternity leave alone would have only reinforced this discrimination and perpetuated inequality.

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<sup>90</sup> P. Foubert *The Legal Protection of the Pregnant Worker in the European Community* (n 31)

<sup>91</sup> I. Robeyns 'Should Maternity Leave be Expanded?' (n 32) 208

<sup>92</sup> Equality and Human Rights Commission *Pregnancy and Maternity-Related Discrimination and Disadvantage: First Findings: Surveys of Employers and Mothers* (Crown, 2015) 9. See chapter one page 3

<sup>93</sup> See chapter one page 3

Accordingly, Robeyns suggests that the remaining twelve to fourteen weeks of the income-related leave that were suggested by the European Parliament should have been made available to either parent.<sup>94</sup> This would have enabled either parent to:

meet the need the newborn baby has to be with...[their] parents, and for the new parents to get adapted to the new baby in their life, and to ease the enormous strain which most parents experience in the first months of their baby's life.<sup>95</sup>

In addition, it would have better recognised the importance of all caring relationships, not just the mother-child relationship and avoided reinforcing gendered roles. Such a proposal has not been considered in the UK, but various governments have demonstrated a growing awareness of the importance of other parenting roles, as I will consider now.

### **Adoption leave**

#### a) Development

The Employment Act 2002 introduced twelve months of adoption leave.<sup>96</sup> This is available to a single adopter, or if the child is being adopted by a couple, whichever parent is nominated.<sup>97</sup> The entitlement mirrors maternity leave, in that an adoptive parent is entitled to twenty-six weeks ordinary adoption leave, a further twenty-six weeks as additional adoption leave and nine months of pay. However, when it was first introduced, there were significant differences between maternity and adoption entitlements. Adopters had to have been “continuously employed for a period of not less than 26 weeks ending with the week in which

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<sup>94</sup> Robeyns suggests that four weeks are needed before birth for women alone because she is writing from a Dutch perspective where women must take four weeks leave before the childbirth. Therefore, she suggests that eight-ten weeks would be made available to mothers alone, and the remainder should be made available to both parents. However, writing in a UK context, where women are not required to take any leave before the child is born, means that more of the twenty weeks of income-related leave should be made available to fathers or mothers' partners.

<sup>95</sup> I. Robeyns 'Should Maternity Leave be Expanded?' (n 32) 208

<sup>96</sup> Paternity and Adoption Leave Regulations 2002, regs. 15 and 20

<sup>97</sup> Paternity and Adoption Leave Regulations 2002, reg. 2(1), (4)

he was notified of having been matched with the child,” to access any leave.<sup>98</sup> Adopters were also not entitled to six weeks of income-related pay. Instead, the whole nine months of paid leave was paid at the low flat statutory rate, currently £139.58 a week, or if it is less, 90% of their earnings.<sup>99</sup>

These entitlements have recently been equalised. The Paternity and Adoption Leave (Amendment) Regulations 2014 repealed the eligibility requirements and made adoption leave a day one entitlement for employees.<sup>100</sup> Adopters can now also access six weeks of income-related pay in the same way birth mothers can.<sup>101</sup> Furthermore, the Children and Families Act 2014 extended entitlement to adoption leave to those applying for parental orders.<sup>102</sup> These transfer legal rights from the birth mother to the parents in a surrogacy arrangement. Therefore, parents who have a child through surrogacy are also entitled to adoption leave.

b) The positive aspects

The introduction of adoption leave represents important progress. It recognises the vitally important care work provided by adoptive parents, many of whom give children a second chance.<sup>103</sup> The importance of this caring labour is further demonstrated by the recent legislative changes. Equalising the entitlement with maternity leave shows that the care

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<sup>98</sup> Paternity and Adoption Leave Regulations 2002, reg. 15(2)(b).

<sup>99</sup> Social Security Contributions and Benefits Act 1992, s. 171ZN(2E)

<sup>100</sup> Paternity and Adoption Leave (Amendment) Regulations 2014, reg. 7

<sup>101</sup> Children and Families Act 2014, s. 124 amended Social Security Contributions and Benefits Act 1992, s. 171ZE(2E)(b)

<sup>102</sup> Employment Rights Act 1996, s. 75A(8). Amended by Children and Families Act 2014 s. 122(1)

<sup>103</sup> M. Maher ‘Adoption: The Opportunity to Give a Child a Second Chance Deserves Health and Social Support’ (2001) 322 British Medical Journal 1556, 1556

provided in this family setting is now treated as equally important as the romanticised birth mother relationship.<sup>104</sup>

The significant period of leave available demonstrates that it is not just mothers who can provide childcare. Instead, the legislation recognises that any parent is capable. This enables parents to act outside their gendered expectations; within heterosexual families, fathers can access the long period of leave to provide care so mothers can prioritise paid work. It also legitimises childcare provided by gay parents, as it recognises that families are not dependent upon a mother providing care. Indeed, without adoption leave, they would be denied the support they need to raise children. Enabling those who become parents through surrogacy to access this entitlement further extends this support. As noted in chapter four, this may challenge gender inequality by “degendering parenting, reconceptualising family, and reworking masculine gender roles.”<sup>105</sup> However, as less than 1% of dependent children in the UK are being raised in these families, this impact may be somewhat limited.<sup>106</sup> Nonetheless, the legislation represents progress because it has responded to the various ways in which people become parents. Therefore, adoption leave reflects a more transformative vision of the family.

### c) The limitations

Despite the progress, there are still problems with adoption leave. Firstly, it ignores the “unique experiences and obstacles [adoptive parents face] as they transition to

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<sup>104</sup> N. Busby *A Right to Care? Unpaid Care Work in European Employment Law* (Oxford University Press, 2011) 43

<sup>105</sup> S. Schacher, C. Auerbach, L. Bordeaux Silverstein ‘Gay Fathers Expanding the Possibilities for us All’ (2005) 1 *Journal of GLBT Family Studies* 31, 31

<sup>106</sup> Office for National Statistics *Statistical Bulletin: Families and Households, 2014* (Office for National Statistics, 2015) 6

parenthood.”<sup>107</sup> These differences and challenges include the increased likelihood of having a child of different racial, ethnic or cultural identity, or with emotional or psychological difficulties.<sup>108</sup> By not acknowledging these differences, James criticises the entitlement for failing “to engage with the challenges of adopting.”<sup>109</sup> She further notes that rather than deal with the unique situation adopters face, the legislation “constructs this type of parenting to fit a mould of parenting which is thought to exist when women give birth.”<sup>110</sup>

Another problem is that despite the legislation recognising the growing numbers of ways people undertake childcare, whether via surrogacy or adoption, the legislation is still limited to protecting parents. Kinship carers are not entitled to adoption leave.<sup>111</sup> This is despite the fact that many of them will experience the same problems faced when adopting a child, including having a child who is older or has psychological difficulties. The legislation’s failure to accommodate these carers is thus problematic. Also, it is unjustified because the care work they are providing is equally as important. Indeed, as I noted in chapter four it has countless benefits for the whole of society.<sup>112</sup>

Adoption leave also excludes those who are not employees. The support adoptive parents receive remains dependent upon their workplace commitment, which disregards the equally important caring labour. Also, like maternity leave, it is more likely to exclude working class parents and thus reinforce class inequality. Non-employees who adopt are actually entitled to less support than mothers in the same situation, as there is no equivalent to maternity

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<sup>107</sup> K. McKay, L. Ross ‘The Transition to Adoptive Parenthood: A Pilot Study of Parents Adopting in Ontario, Canada’ (2010) 32 *Children and Youth Services Review* 604, 604

<sup>108</sup> K. McKay, L. Ross ‘The Transition to Adoptive Parenthood’ (n 107) 604

<sup>109</sup> G. James ‘The Work and Families Act 2006: Legislation to Improve Choice and flexibility?’ (2006) 35 *Industrial Law Journal* 272, 274

<sup>110</sup> G. James ‘The Work and Families Act 2006’ (n 109) 274

<sup>111</sup> As noted in chapter one page 14, these are non-parents, including relatives or friends, who care for children who would otherwise have entered the care system.

<sup>112</sup> See chapter four page 140

allowance. Financial support is available, but this is paid by the adoption agency, and is only payable “where it is necessary to ensure that the adoptive parent can look after the child; where the child needs special care...by reason of illness, disability, emotional or behavioural difficulties or the continuing consequences of past abuse or neglect.”<sup>113</sup> Therefore, the payment is discretionary, as is the amount payable; there is no set entitlement to a prescribed period of pay as there is for mothers who are non-employees. To make this fairer and recognise the equally valuable caregiving of non-employee adopters, again it would be appropriate for the legislation to extend protection to those working under a personal work contract, which could be applied in the same way as described for maternity leave.<sup>114</sup>

Despite the introduction of some income-related payment, statutory adoption pay remains poorly paid. The achievement of fairness for parents is dependent upon increasing the level of payment. Also, the long length of leave available for only one parent is problematic because it requires that one parent takes on the primary caring role, just like maternity leave. Yet, adoptive parents can also transfer fifty weeks of leave as shared parental leave, like mothers. This may be particularly useful for those parenting in more egalitarian relationships, including same-sex parents.<sup>115</sup> Again, I will consider this in detail in chapter seven.

## **Unpaid parental leave**

### a. The development

Gendered stereotypes and expectations have been challenged by the introduction of parental leave. This was introduced in the Employment Relations Act 1999, implementing the EU Parental Leave Directive.<sup>116</sup> The Directive granted employees an individual entitlement of

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<sup>113</sup> Adoption Support Services Regulations 2005, reg. 8(2)

<sup>114</sup> See chapter five page 162

<sup>115</sup> See chapter four page 134

<sup>116</sup> 96/34/EC

three months parental leave to care for a child until they reach eight years of age.<sup>117</sup> An updated Directive came into force in March 2013 and was implemented into UK law by the Parental Leave (EU Directive) Regulations 2013.<sup>118</sup> The main change was to increase the amount of leave available to four months.<sup>119</sup> One of these months must be non-transferable “to promote equal opportunities and equal treatment between men and women.”<sup>120</sup> These are the minimum requirements and the implementation is left to the discretion of Member States who can impose service qualifications of up to a year,<sup>121</sup> as well as provisions for postponing leave.<sup>122</sup>

In the UK, employees are entitled to parental leave if they have at least one year’s continuous employment and if they have or expect to have “parental responsibility” for a child, defined in the Children Act 1989.<sup>123</sup> Eligible employees are entitled to eighteen weeks’ leave,<sup>124</sup> “for the purpose of caring for that child.”<sup>125</sup> This was previously only available before the child’s fifth birthday, but has recently been extended until a child reaches eighteen.<sup>126</sup> Whilst taking parental leave, employees have the right not to be dismissed or subjected to any detriment by their employer.<sup>127</sup> A collective or workforce agreement which is consistent with the key elements of the regulations can be incorporated into individual contracts of employment or can operate “by reference.”<sup>128</sup> When a collective or workforce agreement is not incorporated into employment contracts, the Regulations contain a default parental leave scheme in

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<sup>117</sup> Parental Leave Directive 96/34/EC, clause 2(1)

<sup>118</sup> 2010/18/EC

<sup>119</sup> Parental Leave Directive 2010/18/EU, clause 2(2)

<sup>120</sup> Parental Leave Directive 2010/18/EU, clause 2

<sup>121</sup> Parental Leave Directive 2010/18/EU, clause 3(1)(b)

<sup>122</sup> Parental Leave Directive 2010/18/EU, clause 3(1)(c)

<sup>123</sup> The Maternity and Parental Leave etc. Regulations 1999, reg. 14

<sup>124</sup> Reg. 14(1)

<sup>125</sup> Reg. 13(1)

<sup>126</sup> Reg. 15

<sup>127</sup> Regs. 19 and 20

<sup>128</sup> Sch. 16

schedule two which automatically comes into operation.<sup>129</sup> The default scheme entitles parents to four weeks' unpaid leave per year per child.<sup>130</sup> Notice must be given twenty-one days in advance.<sup>131</sup> Parental leave can also be postponed for up to six months at the employer's request.<sup>132</sup>

b. The positive aspects

Parental leave acknowledges the long term commitment of parenting, extending entitlement to leave past the first year of the child's life. The recent extension of the upper age limit to eighteen represents further progress in this regard.<sup>133</sup> Also, those raising children outside the sexual family are recognised in the legislation, as parental leave is available to anyone with parental responsibility, not just parents. Therefore, kinship carer, some of the most disadvantaged carers, can access this leave. Indeed, this is the only entitlement available to parents that kinship carers can access.

Most importantly, parental leave could potentially challenge the unequal division of labour encouraged by the long period of maternity and adoption leave. This is because rather than focusing solely upon mothers, parental leave gives anyone with parental responsibility an individual right to leave. Therefore, parental leave "visibly puts a value on parenting," not motherhood or fatherhood.<sup>134</sup> This could potentially effect a cultural change by dismantling the gendered approach to parenting that remains dominant in the UK, giving parents some choice and flexibility over their childcare decisions. Evans and Pupo recognise that if fathers or other parents actually take the leave, a pathway to greater equality in childcare and

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<sup>129</sup> Maternity and Parental Leave etc. Regulations 1999, sch. 2

<sup>130</sup> Sch. 2, reg. 8

<sup>131</sup> Sch. 2, reg. 3(b)

<sup>132</sup> Sch. 2, reg. 6(1)

<sup>133</sup> The Maternity and Parental Leave etc. (Amendment) Regulations 2014, reg. 4

<sup>134</sup> H. Wilkinson, I. Briscoe *Parental Leave: The Price of Family Values* (Demos, 1996) 17



employment will be presented to families with two parents.<sup>135</sup> Indeed, this could already be happening because research suggests that there is currently no statistical difference between men's and women's uptake of this leave.<sup>136</sup> Evans and Pupo recognise that this advantage of gender equality is only really available to partnered women, as allowing parents to divide childcare between them necessitates that there is more than one parent who can provide care.<sup>137</sup> Therefore, although the leave could assist single parents, it is again mostly beneficial to those who are parenting in conformance with the sexual family ideal.

c. The limitations

Despite men's and women's more equal uptake, parental leave has not led to greater equality in childcare and employment. This is because the entitlement has been underused by both mothers and fathers, as only 11% of parents with a child under six reported taking leave in 2012.<sup>138</sup> Therefore, as I argued in chapter four, gender neutral entitlements have not led to men making must use of reconciliation entitlements.<sup>139</sup> However, this may be the least problematic outcome, as Caracciolo di Torella notes that the current entitlement to parental leave "at its best...will remain unused, and at its worst, it will entrench existing stereotypes on parents' different roles."<sup>140</sup> This is because the legislation particularly devalues parental care. The Coalition Government (2010-15) applied the new EU Directive in a minimalist way which reaffirmed that paid work and employers' needs are more important than caring relationships. Indeed, I will demonstrate that parental leave particularly undervalues caring

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<sup>135</sup> P. Evans, N. Pupo 'Parental Leave: Assessing Women's Interests' (1993) 6 *Canadian Journal of Women and the Law* 402, 412

<sup>136</sup> S. Tipping, J. Chanfreau, J. Perry, C. Tait *The Fourth Work-Life Balance Employee Survey* (Department for Business, Innovation and Skills, 2012) 106

<sup>137</sup> P. Evans, N. Pupo 'Parental Leave: Assessing Women's Interests' (n 135) 407

<sup>138</sup> S. Tipping, J. Chanfreau, J. Perry, C. Tait *The Fourth Work-Life Balance Employee Survey* (n 136) 6

<sup>139</sup> See chapter four page 117

<sup>140</sup> E. Caracciolo di Torella 'Brave New Fathers for a Brave New World?' (n 44) 98

labour, even more than the maternity entitlements, which explains why parents' uptake has been so low.

The minimalistic application of the EU Directive is demonstrated by the retention of the maximum one year length of service qualification.<sup>141</sup> This minimum service requirement is much longer than is required for the adoption or maternity entitlements. It demonstrates how childcare provided after their first birthday is clearly deemed less important, as it is harder to access a break from employment. Again, this is likely to particularly exclude poorly paid parents as they are less likely to be in stable employment. The minimalist interpretation also means that parental leave is not available part-time or more flexibly, which the Directive stated was an option.<sup>142</sup> Introducing this flexibility may have increased men's uptake of leave because research has shown that inflexibility discourages fathers from taking leave due to their usual breadwinner role.<sup>143</sup>

The lack of payment further highlights the Coalition Government's minimalist application of the Directive. Although the statute imposes a minimum standard, and employers might confer more generous entitlements either through contracts or as a result of trade unions' collective bargaining, the lack of payment has been highlighted as the main problem with parental leave.<sup>144</sup> This is because the lowly paid and vulnerable carers are less likely to receive such generous entitlements, particularly undermining their usage. This includes kinship carers, even though this is the only entitlement for which they are eligible. The lack of pay fails to account for the increased financial commitments kinship carers face. Also, the majority of

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<sup>141</sup> Clause 2(3)(b)

<sup>142</sup> Parental Leave Directive 2010/18/EU, clause 3(1)(1)(a)

<sup>143</sup> E. Carricolo Di Torella 'New Labour, New Dads – The Impact of Family-Friendly Legislation on Fathers' (2007) 36 *Industrial Law Journal* 318, 325

<sup>144</sup> E. Caracciolo di Torella 'Brave New Fathers for a Brave New World?' (n 44) 98

kinship carers live in poverty, so many will be unable to afford to take this leave.<sup>145</sup> Baroness Massey of Darwen, a Labour member of the House of Lords, noted that without access to leave, “we are pushing them [kinship carers] into a life of dependency on benefits and severe poverty.”<sup>146</sup> Another Labour member of the House of Lords, Baroness Drake, further highlighted that the lack of payment available for kinship carers “conveys that kinship carers have less value or make a lesser contribution than other carers of children.”<sup>147</sup>

Despite the EU not specifying that leave should be paid, most countries now have paid leave; only Greece, Ireland, Spain and the UK provide unpaid parental leave. It is notable that the UK is the only one of these countries which has not needed to be bailed out in the European debt crisis since 2009, which suggests it should be the most able to provide financial support to parents. Such assistance would promote parents’ flourishing and value caring relationships, partly because it would recognise the ongoing commitment of parenting. This is obscured by payment only being available for leave taken in a child’s first year, which suggests that childcare performed in this period is more important. It would also promote men’s caring, as their traditional breadwinning role means that men’s usage of parental leave is likely to be particularly undermined. To challenge this and enable fathers to actually access parental leave, it should be made available at an income-related level of payment.<sup>148</sup>

The default scheme also prioritises employers’ needs over the caring relationships of their employees. Employers can postpone the employee’s request for up to six months, which may

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<sup>145</sup> J. Selwyn, S. Nandy ‘Kinship Care in the UK: Using Census data Estimate the Extent of Formal and Informal Care by Relatives’ (2014) 19 *Child and Family Social Work* 44, 50

<sup>146</sup> HL Children and Families Bill Deb 20<sup>th</sup> November 2013, twelfth day, col. GC448

<sup>147</sup> HL Children and Families Bill Deb (n 146) col. GC448

<sup>148</sup> M. Kilkey ‘New Labour and Reconciling Work and Family Life: Making it Fathers’ Business’ (2006) 5 *Social Policy and Society* 167, 169

render the leave redundant if it is necessary for a specific event or time.<sup>149</sup> Also, the leave is not available flexibly as an “employee may not take parental leave in a period other than the period which constitutes a week's leave.”<sup>150</sup> The Court of Appeal interpreted this provision very strictly in *Rodway v New Southern Railways Ltd.*<sup>151</sup> A father's request of one day's parental leave was refused on the grounds that leave must be taken in multiples of a week. He took the day off regardless and thus received an official warning. He argued this constituted a detriment.<sup>152</sup> This argument was rejected as the court found that parental leave was clearly intended to be available in weeklong periods. Caracciolo di Torella and Weldon-Johns have criticised the decision because it denies parents the flexibility needed to deal with childcare.<sup>153</sup> This is particularly likely to deter fathers from taking leave because fathers remain more likely to be the primary breadwinner, so they will be less able to sacrifice a week's wages to provide care, especially if only a short period of leave is required.<sup>154</sup>

Although unpaid emergency leave is available to parents,<sup>155</sup> a gap in the legislation clearly remains as parents may require leave for periods of less than a week in situations which are not emergencies. Collective and workforce agreements have filled this gap for some employees and provided parents with the flexibility they require. For example UNISON negotiated that local government workers can take leave in periods as short as half a day.<sup>156</sup> To give parents a genuine chance to take leave and flourish in their caring relationships, I argue that such provisions should be made available to all parents.

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<sup>149</sup> Sch. 2, reg. 6(1)

<sup>150</sup> Sch. 2, reg. 7

<sup>151</sup> [2005] I.C.R. 1162

<sup>152</sup> Employment Rights Act 1996, s. 47C

<sup>153</sup> E. Caracciolo di Torella 'New Labour, New Dads' (n 143) 325 and M. Weldon-Johns 'The Additional Paternity Leave Regulations 2010: A New Dawn or More "Sound-Bite" Legislation?' (2011) 33 *Journal of Social Welfare & Family Law* 25, 27-28

<sup>154</sup> E. Caracciolo di Torella 'New Labour, New Dads' (n 143) 325

<sup>155</sup> See discussion in chapter two page 95

<sup>156</sup> UNISON *Parental Leave Factsheet* [www.unison.org.uk/file/Parental%20Leave%20Factsheet.doc](http://www.unison.org.uk/file/Parental%20Leave%20Factsheet.doc) accessed 31.01.13

## Conclusion

This chapter has charted the development of maternity and adoption leave. It was proposed that as mothering is the most valorised caring relationship and adoption has become synonymous with this, these leave entitlements would best recognise the value of caring labour and make it a central aspect of society, according to Fineman's vision.<sup>157</sup> However, this chapter has demonstrated that the legislation has failed to do so and that caring relationships have been undervalued generally. Instead, paid work and employers' needs have been prioritised.

Although maternity leave has recognised the importance of childbearing and women's reproductive function, enabling them to access the workplace on more equal terms with men, I argued that the legislation still fails to adequately value care provided by mothers. This was demonstrated by the low level of payment available, which clearly ascribes less value to caring labour than paid work. Mothers' care is also undervalued because the legislation remains focused primarily upon their workforce participation, as the level of support is dependent upon their employment status. This excludes many working class parents, especially those in precarious work. Adoption leave is problematic for many of the same reasons. Despite recent legislative amendments which equalise entitlement with maternity leave, the entitlement continues to undermine the importance of caring work. This is demonstrated not only by the same low level of payment, but also by the total exclusion of non-employees and kinship carers. Therefore, it is clear that these entitlements are far from care centric. Accordingly, parents are denied the opportunity to achieve both basic

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<sup>157</sup> M. Fineman *The Autonomy Myth* (n 1) 201

capabilities of participating within the paid workforce and in caring relationships during the first year of childcare.

Finally, I analysed unpaid parental leave. Although this superficially acknowledges the importance of both parents' caring role, analysis of this leave demonstrated care provided after the child's first year is particularly undervalued. Even though the support given to parents in a child's first year is unsatisfactory, it is much better than that provided to parents afterwards. This was demonstrated by the minimalist application of the EU Directives, which has included making the leave unpaid and enforcing a year's minimum eligibility requirement.

With the exception of maternity allowance, these entitlements are only available to employees. This limits precarious workers access to the support that they require. To achieve fairness for parents, I have argued that the personal work contract should underpin each of these entitlements so these workers can access the support they require. Implementing this would require maintaining the minimum service requirements to determine whether the state or employer should financially support the worker using their entitlement. However, the unduly long length applied to access parental leave should be reduced in line with the requirements for maternity and adoption pay.

The main problem with the legislation is thus that caring work is undervalued and paid work prioritised. To achieve fairness in this context, reconciliation legislation should recognise the importance of caring work as a basic capability. In addition, more effort needs to be made to encourage other parents to provide care. Maternity and adoption leave reinforces gender inequality because a long period of leave is reserved for one parent alone. Even with adoption

leave, women will remain more likely to access this leave in heterosexual relationships. Parental leave has not changed this because it has been so widely underused. Therefore, to enable each person to flourish by achieving their basic capabilities of participating within paid work and caring labour, it is clear that entitlements need to be created for fathers or mothers' partners or adopters' partners. The body of reconciliation legislation has increasingly recognised and particularly aimed to encourage these parenting roles, especially fathers, which I will consider in chapters six and seven.

## Chapter Six

### HOW THE UK RECONCILIATION LEGISLATION ENCOURAGES FATHERS TO PROVIDE CARE: ORDINARY AND ADDITIONAL PATERNITY LEAVE

#### Introduction

In this chapter, I will examine the leave made specifically available to fathers and the mother's or adopter's partner. I will consider if the legislation has provided them with a genuine chance to actively participate in caring relationships. Since 2002, concerted legislative efforts have been made to encourage men's caring role, the first of which was ordinary paternity leave.<sup>1</sup> I will therefore analyse this first in this chapter. Then I will consider additional paternity leave, which aimed to increase fathers' access to leave.<sup>2</sup> This has now been repealed by the Children and Families Act 2014 and replaced by shared parental leave, which will be analysed in chapter seven.<sup>3</sup> Analysis of additional paternity leave remains relevant, however, because shared parental leave aims to promote fathers' caring roles using a very similar legislative model to additional paternity leave. Indeed, shared parental leave is effectively just a more generous version of additional paternity leave.<sup>4</sup> Therefore, an analysis of additional paternity leave will help to determine the likely impact of shared parental leave.

As ordinary paternity leave aims to increase men's caring role, this entitlement should theoretically be care centric; it should go some way to recognising the value of caring labour and make it a central aspect of society. The same should have been true for additional

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<sup>1</sup> Employment Act 2002

<sup>2</sup> Additional Paternity Leave Regulations 2010

<sup>3</sup> Children and Families Act 2014, s. 125

<sup>4</sup> See chapter seven page 211



paternity leave. Accordingly, I will analyse how men's parenting labour is valued within the reconciliation legislation in comparison to mothers' care, as analysed in chapter five.

Each of these entitlements is available not only to fathers, but to the mother's or adopter's partner as well. I will refer to these throughout as recognised co-parents, as explained in chapter one.<sup>5</sup> However, the majority of parents eligible for this leave will be fathers, as 77% of dependent children within the UK are raised by heterosexual family units.<sup>6</sup> Therefore, these entitlements could challenge the division of care within families by actively encouraging men to take on caring roles and deconstructing the gendered ideologies, as I argued care centric legislation should in chapter four.<sup>7</sup> I will also consider how effective the body of reconciliation legislation has been in achieving a fair distribution of paid work and caring responsibilities between men and women. However, analysis of the leave made available for fathers will demonstrate that this has not been achieved. Although all caring relationships are undervalued in the reconciliation legislation, men's caring role is particularly undervalued by the law when compared to the support available for mothers. Mothers' caring roles are prioritised to the detriment of fathers and recognised co-parents. As caring labour remains valued along gendered lines, men are not being afforded a genuine opportunity to realise the basic capability of participating in caring relationships.<sup>8</sup> Thus, human flourishing is obscured.<sup>9</sup>

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<sup>5</sup> See chapter one page 7

<sup>6</sup> Office for National Statistics *Statistical Bulletin: Families and Households, 2014* (Office for National Statistics, 2015) 8

<sup>7</sup> See chapter four pages 117-120

<sup>8</sup> As Sen explains, basic capabilities are the things a person needs to "lead the kind of lives they value – and have reason to value" (A. Sen *Development as Freedom* (Oxford University Press, 1999) 18). In the second chapter, drawing upon the work of Robeyns, I argued that the ability to participate in both the paid workforce and within caring relationships are basic capabilities within the UK. (I. Robeyns 'Sen's Capability Approach and Gender Inequality: Selecting Relevant Capabilities' (2003) 9 *Feminist Economics* 61, 76-78) If people are unable to achieve both of these capabilities, this is manifestly unjust.

<sup>9</sup> As noted in chapter two page 55, flourishing focuses upon people's wellbeing through their self-realisation, personal growth, pleasure and enjoyment.

To achieve fairness for parents, I argued in chapter four that the personal work contract should underpin all reconciliation legislation.<sup>10</sup> However, both of these entitlements are only available to employees. This is problematic because it demonstrates that each entitlement focuses upon the importance of paid work. Also, the lack of support still reinforces gendered expectations. This is because maternity allowance is the only support available to non-employees. Therefore, it is only women who are entitled to any support, irrespective of their employment status. To avoid repetition, I will not explain how the personal work contract should underpin each entitlement. Instead, as it would be applied in the same way described for maternity leave in chapter five, I will simply refer back to that.<sup>11</sup> This includes maintaining the minimum service requirements to determine whether the state or employer should financially support the worker taking paternity leave.

### **Ordinary paternity leave**

#### **a. Development**

In recognition of fathers' caring role the Employment Act 2002,<sup>12</sup> amended the Employment Rights Act 1996 to introduce ordinary paternity leave at the same time as adoption leave.<sup>13</sup> The Paternity and Adoption Leave Regulations 2002 introduces the detailed provisions and makes two weeks leave available to eligible fathers.<sup>14</sup> The leave is also available to mothers<sup>15</sup> or adopters' spouses, partners or civil partners who expect to have the main responsibility (apart from the mother) for childcare.<sup>16</sup> To be eligible, parents must have been employed for a minimum period of continuous employment of twenty-six weeks at the

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<sup>10</sup> See chapter four pages 147-151

<sup>11</sup> See chapter five page 162

<sup>12</sup> S. 1

<sup>13</sup> S. 80A

<sup>14</sup> The Paternity and Adoption Leave Regulations 2002, Reg. 4(2)(b)(i)

<sup>15</sup> (n 14) Reg. 4(2)(b)(ii) and(c)(ii)

<sup>16</sup> (n 14) Reg. 8(2)(b)(-)(c)

relevant week (fifteen weeks before the expected week of birth).<sup>17</sup> The leave must be taken within eight weeks of childbirth.<sup>18</sup> Like women taking ordinary maternity leave, those on paternity leave have a right to return to the same job,<sup>19</sup> with conditions no less favourable than they would have been if they had not taken the leave.<sup>20</sup> Paternity leave is paid at the low, flat rate of statutory maternity pay, yet research has found that 52% of employers offer improved paternity leave, which mostly involves increasing the level of payment available.<sup>21</sup>

b. The positive aspects

Paternity leave is important for a number of reasons. It recognises that all parents can provide care, not just mothers. Accordingly, all parents are provided with an opportunity to participate in both paid work and caring relationships. In particular, the introduction of paternity leave recognises fathers' caring role. This is because the majority of parents using the leave will be fathers.<sup>22</sup> Therefore, the main advantage of the legislation is that it challenges the gendered stereotypes that the long period of maternity leave has reinforced by acknowledging men's caring role.

As the entitlement is available to the father or recognised co-parent, the legislation can actually encourage men to take leave and provide childcare, as noted in chapter four.<sup>23</sup>

Research suggests that this has been achieved, as 91% of fathers take some leave when their child is born.<sup>24</sup> This not only shows that men want to participate in this period of childcare, but also that paternity leave has led to practical change, as the workplace has become

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<sup>17</sup> (n 14) Reg. 4(2)(a) and 8(2)(a)

<sup>18</sup> (n 14) Reg. 5(2) and 9(2)

<sup>19</sup> (n 14) Reg. 13(1)

<sup>20</sup> (n 14) Reg. 14

<sup>21</sup> C. Wolff *Paternity and Adoption Leave: The 2010 Survey* <http://www.xperthr.co.uk/survey-analysis/paternity-and-adoption-leave-the-2010-survey/99728/> accessed 31.03.2014

<sup>22</sup> Office for National Statistics *Statistical Bulletin: Families and Households, 2014* (n 6) 8

<sup>23</sup> See chapter four page 123

<sup>24</sup> J. Chanfreu, S. Gowland, Z. Lancaster, E. Poole, S. Tipping, M. Toomse *Maternity and Paternity Rights Survey and Women Returners Survey 2009/10* (Department for Work and Pensions, 2011) 151

accustomed to accommodating fathers taking paternity leave. Gendered stereotypes are liable to be increasingly dismantled because men's take up of this leave is liable to encourage more men to engage in caring, as I argued in chapter four.<sup>25</sup> Therefore, because paternity leave is actually being used by fathers, it may be an important step towards achieving fairness for carers.

c. The limitations

The legislation is still problematic despite the progress demonstrated by the introduction and the large uptake of paternity leave. This is because those eligible for paternity leave are treated as secondary parents and their care work is particularly undervalued when compared to mothers' care. Therefore, rather than challenging gendered stereotypes, "the idea that mothers rather than fathers are the primary carers," is reinforced by the paternity leave legislation.<sup>26</sup>

The very short period of paternity leave is the most obvious way paternal care is treated as being of secondary importance to maternal care, as mothers are entitled to twelve months of leave.<sup>27</sup> The vastly unequal leave entitlement for mothers and fathers resulted in the UK legislation being criticised as the most unequal in Europe.<sup>28</sup> Paternity leave "provides the father with a brief insight into the ecstasy of parenthood and an opportunity to adjust to his additional domestic responsibilities, only to be catapulted back into full-time work."<sup>29</sup>

Mothers are clearly expected to provide the majority of childcare, with the father or

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<sup>25</sup> See chapter four page 119

<sup>26</sup> E. Caracciolo di Torella 'New Labour, New Dads – The Impact of Family Friendly Legislation on Fathers' (2007) 36 *Industrial Law Journal* 318, 322

<sup>27</sup> See chapter five page 155

<sup>28</sup> Equality and Human Rights Commission *Working Better: Meeting the Changing Needs of Families, Workers and Employers in the 21<sup>st</sup> Century* (Equality and Human Rights Commission, 2009) 8

<sup>29</sup> G. James 'All That Glitters is not Gold: Labour's Latest Family-Friendly Offerings' (2003) 3 *Web Journal of Current Legal Issues*

recognised co-parent performing a merely supportive role. This is further evidenced by the legislation stating that the leave must be used to “care for the child and support the mother.”<sup>30</sup> James argues that stating that fathers’ roles are to support mothers “unreassuringly grounds the legislation in an implicitly gendered narrative constructing the burden of childcare as a principally female task.”<sup>31</sup> Even in families where gendered stereotypes are less defined, e.g. same-sex family units, the language suggests that there is a hierarchy of parents; the mother should always be the primary carer and anyone else should merely assist them.<sup>32</sup> One parent is also prioritised in the adoptive parents’ entitlement to paternity leave, which is still available to support the adopter, even though adopters do not require the support to recover from pregnancy and childbirth.<sup>33</sup> Therefore, one parent’s caring role is prioritised without any justification. This merely reinforces the idea that in any relationship, one person should be more focused upon childcare and the other on paid work. Accordingly, the language suggesting leave is to support a parent should be avoided. Instead, it should be made clear that paternity leave is to be used to provide childcare, just like maternity and adoption leave.

By enabling only those in stable employment to access the leave, the eligibility requirements further reflect the middle class focus of reconciliation legislation I noted in chapter three.<sup>34</sup>

These requirements also demonstrate that the legislation clearly prioritises the paid work commitments of fathers and recognised co-parents, more than their caring responsibilities.

This is demonstrated by the fact that, only employees are entitled to paternity leave. Care provided by non-employees is again treated as of lesser importance. Again, like maternity

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<sup>30</sup> Employment Rights Act 1996, s. 80A (1)

<sup>31</sup> G. James *The Legal Regulation of Pregnancy and Parenting in the Labour Market* (Routledge, 2009) 44

<sup>32</sup> On departing from gendered stereotypes within same-sex relationships, see M. Sullivan ‘ROZZIE AND HARRIET?: Gender and Family Patterns of Lesbian Coparents’ (1996) 10 *Gender and Society* 474, A. Goldberg, M. Perry-Jenkins ‘The Division of Labor and Perceptions of Parental Roles: Lesbian Couples Across the Transition to Parenthood’ (2007) 24 *Journal of Social and Personal Relationships* 297, S. Okin ‘Sexual Orientation, Gender and Families: Dichotomizing Differences’ (1996) 11 *Hypatia* 30, 43

<sup>33</sup> Employment Rights Act 1996, s. 80B (1)

<sup>34</sup> See chapter three page 87

leave, this is liable mainly to exclude those in precarious work and thus will hinder attempts to achieve social justice. This will be further thwarted by the minimum length of service requirement. James notes that this merely creates a divide between parents who can and who cannot take the leave.<sup>35</sup> Only those who have demonstrated dedication and commitment to their paid work are eligible to actively participate in childcare. As noted earlier, this could exclude many precarious workers. Some employers may argue that these requirements are fair, as they should not have to accommodate employee's leave if they have not demonstrated any commitment to the workplace. Also, employers may claim that they need to be certain they can rely upon their employees.<sup>36</sup> However, I contend that such arguments are problematic and should not affect the legislation for two reasons. Firstly, they prioritise and protect the employer, who is the more powerful party. This is contrary to the fundamental aims of labour law which should aim to protect the weaker parties in the employment relationship, as noted in chapter four.<sup>37</sup> Therefore, the eligibility requirements should not be used to prioritise employers' needs to the detriment of employees' caring relationships.

The eligibility requirement also reinforces gender inequality, which is the second reason employer's arguments are problematic. Maternity leave is a day one right for female employees.<sup>38</sup> This vitally protects women's workforce connection throughout childbirth and the recovery from pregnancy. But the introduction of an eligibility requirement for parents other than mothers reinforces a clear hierarchy of parenting relationships; mothers' caring roles are primary. As fathers within heterosexual couples remain the most likely to use

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<sup>35</sup> G. James 'The Work and Families Act 2006: Legislation to Improve Choice and Flexibility?' (2006) 35 *Industrial Law Journal* 272, 275

<sup>36</sup> E. Jordan, A. Thomas, J. Kitching, R. Blackburn *Employment Regulation: Part B: Employer Perceptions of Maternity and Paternity Leave and Flexible Working Arrangements* (Department for Business, Innovation and Skill, 2014) 23

<sup>37</sup> P. Davies, M. Freedland *Kahn-Freund's Labour and the Law* (Stevens & Sons, 1983) 18. See chapter four page 120

<sup>38</sup> See chapter five page 155

paternity leave, this hierarchy reaffirms the gendered division of care. Therefore, the eligibility requirements perpetuate workplace gender discrimination as employers continue to view men as more reliable workers and less likely to take leave than women. This is highly problematic because as previously noted, women's workplace participation is crucial for all of society,<sup>39</sup> as well as for promoting each woman's own sense of flourishing, as noted in chapter three. Therefore, along with other commentators, I argue that paternity leave should be a day one right like maternity leave.<sup>40</sup> This is because it would challenge gender inequality which takes precedence over the employers' somewhat negligible concerns.

A third way that caring relationships are undervalued within the paternity leave legislation concerns the minimal pay available. The low level of payment has been subjected to many of the critiques levelled at statutory maternity pay. In addition, paternity pay has been criticised because there is no income-related pay, which "draws an unnecessary and arbitrary distinction between maternity and paternity leave, thereby according a lower value to paternal care and suggesting that it is a secondary or supplementary right."<sup>41</sup> Not only does this undervalue paternal care, it may also undermine fathers' take up of paternity leave. This is because income-related leave has been highlighted as a pivotal factor in fathers' decisions to take leave.<sup>42</sup> The high proportion of fathers taking leave after childbirth may suggest that this is not really a problem in the UK. However, 34% of fathers take less than two weeks

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<sup>39</sup> G. James 'Law's Response to Pregnancy/Workplace Conflicts: A Critique' (2007) 15 *Feminist Legal Studies* 167, 170

<sup>40</sup> G. James 'Mothers and Fathers as Parents and Workers: Family-Friendly Employment Policies in an Era of Shifting Identities' (2009) 31 *Journal of Social Welfare and Family Law* 271, 276, M. Weldon-Johns 'The Additional Paternity Leave Regulations 2010: A New Dawn or More 'Sound-Bite' Legislation' (2011) 33 *Journal of Social Welfare and Family Law* 25, 28

<sup>41</sup> M. Weldon-Johns 'The Additional Paternity Leave Regulations 2010: A New Dawn or More 'Sound-Bite' Legislation' (2011) 33 *Journal of Social Welfare and Family Law* 25, 28

<sup>42</sup> J. Lewis, M. Campbell 'UK Work/Family Balance Policies and Gender Equality 1997-2005' (2007) 14 *Social Politics: International Studies in Gender, State and Society* 4, 14. See chapter four 123-127

paternity leave and 18% of fathers take other paid leave entitlements at childbirth.<sup>43</sup>

Caracciolo di Torella's research highlights that some men use paid annual leave to avoid the financial detriment caused by taking paternity leave.<sup>44</sup> Even 40% of employers who offer an increased level of paternity pay suggest that financial restrictions affect men's decision to take paternity leave.<sup>45</sup> Accordingly, the level of statutory paternity pay can impact the take up of paternity leave and deter fathers' usage. The gender pay gap remains wide, so in heterosexual families men are likely to continue to earn more than their female partners.<sup>46</sup> The costs of raising a new-born child are considerable, so that the generally higher income of fathers is indispensable for many heterosexual families. Therefore, making paternity pay income-related would not only challenge the prioritisation of mothers' care, but it would enable more men to access leave for longer periods, building upon the progress already made.

d. Improving ordinary paternity leave

To combat the restrictions fathers and recognised co-parents face as well as challenge the gendered division of labour, I will argue that the legislation should be changed in line with my arguments in chapter four.<sup>47</sup> This would necessitate that fathers' entitlement was equalised with mothers, so all parents can access six weeks leave paid at 90% of their income.<sup>48</sup> This has been advocated by charities such as Working Families,<sup>49</sup> and Fawcett,<sup>50</sup> as

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<sup>43</sup> M. O'Brien, A. Koslowski, M. Daly 'United Kingdom' in P. Moss *11<sup>th</sup> International Review of Leave Policies and Related Research 2015* (International Network on Leave Policies and Research, 2015) 337

<sup>44</sup> E. Caracciolo di Torella 'New Labour, New Dads' (n 26) 32

<sup>45</sup> C. Wolff *Paternity and Adoption Leave* (n 21)

<sup>46</sup> Office for National Statistics *Annual Survey of Hours and Earnings, 2014 Provisional Results* (Office for National Statistics, 2014) 10

<sup>47</sup> See chapter four page 127-133

<sup>48</sup> See chapter five page 156

<sup>49</sup> "The UK's leading work-life balance organisation...[which] helps working parents and carers and their employers find a better balance between responsibilities at home and work"

[www.workingfamilies.org.uk/about-us](http://www.workingfamilies.org.uk/about-us) accessed 25.08.2014, Working Families *Children and Families Bill – Second Reading Briefing* (2013) 3 <http://www.workingfamilies.org.uk/articles/pdf/article/455> accessed 07.03.13

<sup>50</sup> "The UK's leading charity of women's equality and rights – at home, at work and in public life"

[www.fawcettsociety.org.uk](http://www.fawcettsociety.org.uk) accessed 25.08.2014, Fawcett *Fawcett Society Briefing: Second Reading of the Children and Families Bill in the House of Commons* (2013) 2 <http://www.fawcettsociety.org.uk/wp->



well as scholars such as James.<sup>51</sup> Increasing the level of payment available would be an important step in encouraging men to take leave because, as noted in chapter four, it would account for men's primary breadwinner role.<sup>52</sup> The gendered division of labour makes it harder for men to sacrifice their wages in practice. Making the payment for paternity leave income-related would overcome this. I suggest that six weeks would be an appropriate period because it gives parents a genuine opportunity to bond and gain some experience in caring for their child. This would be symbolically important in demonstrating that all parental care is equally important. As it is an individual, non-transferable period of leave, it would also promote fathers' caring role due to its "use it or lose it" basis, which I identified to be a way of increasing men's participation in chapter four.<sup>53</sup> To achieve fairness for parents, this entitlement would have to be available to those working under a personal work contract, which could be implemented in the same way as maternity leave.<sup>54</sup>

Yet, employers report that men may not take leave, even when it is better paid and non-transferable, because they fear it will negatively affect their job prospects.<sup>55</sup> This is because taking leave is linked to being uncommitted to the workplace. Therefore, I argue that further reform is necessary. This may include informal changes promoted by trade unions, as I examined in chapter three.<sup>56</sup> However, legislative changes are more important because they will promote all people's caring role. Firstly, the six weeks should be made available as default. This would encourage fathers and recognised co-parents to take leave because they would have to take active steps to avoid it, as considered in chapter four.<sup>57</sup> Yet, to encourage

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<content/uploads/2013/03/Fawcett-Briefing-for-the-Second-Reading-of-the-Children-and-Families-Bill.pdf>  
accessed 09.03.13

<sup>51</sup> G. James *The Legal Regulation of Pregnancy and Parenting in the Labour Market* (n 31) 109

<sup>52</sup> See chapter four page 127

<sup>53</sup> See chapter four page 127

<sup>54</sup> See chapter five page 162

<sup>55</sup> C. Wolff *Paternity and Adoption Leave* (n 21) See chapter four page 125

<sup>56</sup> See chapter three page 97

<sup>57</sup> See chapter four pages 129-131

even more men to take leave, Fredman argues paternity entitlements should be equalised with maternity leave by making two weeks of paternity leave compulsory after childbirth. This was proposed by the European Parliament:

to ensure that men will not be made, on account of social pressure, to forgo their entitlement. A signal should be sent to the labour market to the effect that men too have to spend time away from the workplace and their job when they have children.<sup>58</sup>

As noted in the chapter four, such a change would have ensured men took leave and would have transformed the workplace more than the current entitlement.<sup>59</sup> It thus would have “achieve[d] the kind of cultural change which has remained elusive so far.”<sup>60</sup> Unfortunately, this proposal was later rejected by the Council of the European Union in 2010.<sup>61</sup>

This focus upon promoting men’s caring role cannot justify other caring relationships being excluded.<sup>62</sup> To ensure that single parents are not disadvantaged, the six week period of leave should be made available to be transferred to another carer who the primary parent identifies as having the main caring responsibility for the child. However, such leave is unlikely to challenge gender inequality, because single parents are most likely to share the leave with a female carer due to the gendered expectations analysed in chapter four.<sup>63</sup> This means that there would be no need for any period of leave to be mandatory. It could however be available on default as soon as the employer is informed about the impending caring responsibilities. The legislation would not have to highlight each potential carer, but the

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<sup>58</sup> Draft European Parliament Legislative Resolution on the Proposal for a Directive of the European Parliament and of the Council on Amending Council Directive 92/85/EEC 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 ([COM\(2008\)0637](#) – C6-0340/2008 – [2008/0193\(COD\)](#)) Amendment 19

<sup>59</sup> See chapter four page 131

<sup>60</sup> S. Fredman ‘Reversing Roles: Bringing Men into the Frame’ (2014) 10 *International Journal of Law in Context* 442, 451

<sup>61</sup> Council of the European Union (2010) ‘Press Release, 3053rd Council Meeting: Employment, Social Policy, Health and Consumer Affairs’, 17323/1/10 REV 1-PRESSE 331-PR CO 439. [https://www.consilium.europa.eu/uedocs/cms\\_data/docs/pressdata/en/lsa/118254.pdf](https://www.consilium.europa.eu/uedocs/cms_data/docs/pressdata/en/lsa/118254.pdf)> accessed 18.09.2015, 9

<sup>62</sup> See chapter four page 133

<sup>63</sup> See chapter four page 116

parent would have to confirm to the carer's employer that the leave is being taken by the carer. Indeed, I suggest that this would be easy to implement and would not require a huge departure from the current legislation. This is because eligibility is premised upon fathers having "responsibility for the upbringing of the child,"<sup>64</sup> or the partner having "the main responsibility (apart from any responsibility of the mother) for the upbringing of the child."<sup>65</sup> This provision suggests that maternity leave could be transferred to someone other than the parent. The legislation could have simply added another provision stating that those without a partner could transfer the leave to another person who will have the main responsibility for the upbringing. The only change needed would be removal of the requirement of being the father or recognised co-parent in the added section, which would have had minimal impact upon employers.<sup>66</sup> Alternatively, if a single parent had no one to transfer the entitlement to, they should be able to access the whole period of leave as their own entitlement.

A progressive entitlement like six weeks of income-related leave for fathers has not been introduced in the UK. This is in part because extending leave at an income-related level will increase costs for the state and employers.<sup>67</sup> Successive governments have instead aimed to extend fathers' entitlement to leave in other ways. The first attempt was additional paternity leave which I will analyse now. However, in chapter seven, I will demonstrate that the costs of improving paternity leave could be limited with some minimal changes and also justified, much in the same way the increased costs of maternity pay were in chapter five.<sup>68</sup>

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<sup>64</sup> reg. 4(2)(c)(i)

<sup>65</sup> reg. 4(2)(c)(ii) and 8(2)(c)

<sup>66</sup> reg. 4(2)(b)(ii), (c)(ii) and reg. 8(2)(b)(-c)

<sup>67</sup> Government assessments suggest merely extending paternity leave by four weeks, without increasing the level of payment available, would cost both employers and the state an additional £37.2 million a year (Department for Business, Innovation and Skills *Modern Workplaces: Shared Parental Leave and Pay Administration Consultation – Impact Assessment* (Department for Business, Innovation and Skills, 2013) 14). To make this income-related would of course further increase costs.

<sup>68</sup> See chapter seven page 243 and chapter five 169

## **Additional paternity leave**

### **a. Development**

In response to criticism about the vastly unequal leave available for mothers and fathers, the New Labour Government (1997-2010) implemented a power in the Work and Families Act 2006 to introduce the Additional Paternity Leave Regulations 2010. This has since been repealed.<sup>69</sup> This enabled eligible mothers to transfer up to twenty-six weeks of maternity leave, statutory maternity pay, maternity allowance,<sup>70</sup> or adoption leave or statutory adoption pay,<sup>71</sup> to the father or recognised co-parent, twenty weeks after the child was born.<sup>72</sup> Therefore, the first twenty weeks of leave remained ring-fenced for mothers or adopters only. Although the documentation focused upon the importance of fathers, additional paternity leave was made available to the same parents who are entitled to ordinary paternity leave; the spouse, partner or civil partner of the mother<sup>73</sup> or adopter, who expected to have the main responsibility (apart from the mother) for caring for the child.<sup>74</sup> When transferred, the leave was renamed additional paternity leave. To access additional paternity leave, the father or recognised co-parent must have been employed continuously with the employer for twenty-six weeks at the week “preceding the 14th week before C’s expected week of birth.”<sup>75</sup> The mother or adopter must have returned to work or be treated as if they had returned to work.<sup>76</sup> Parents taking additional paternity leave were entitled to all the same employment protection as mothers and adopters on additional maternity or adoption leave.<sup>77</sup>

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<sup>69</sup> This has been recently removed by the Children and Families Act 2014, which will be analysed in chapter seven.

<sup>70</sup> Additional Paternity Leave Regulations 2010, reg. 4(5)(a)

<sup>71</sup> Additional Paternity Leave Regulations 2010, reg. 14(4)(a)

<sup>72</sup> Additional Paternity Leave Regulations 2010, regs. 5(1) and 15(1)

<sup>73</sup> Additional Paternity Leave Regulations 2010, reg. 4(2)(c)-(d)

<sup>74</sup> Additional Paternity Leave Regulations 2010, reg. 14(2)(c)-(d)

<sup>75</sup> Additional Paternity Leave Regulations 2010, reg. 4(2)-(3)

<sup>76</sup> Additional Paternity Leave Regulations 2010, reg. 4(5) and 14(4)(b)

<sup>77</sup> Additional Paternity Leave Regulations 2010, reg. 27

b. The positive aspects

Building upon ordinary paternity leave, the Additional Paternity Leave Regulations 2010, aimed to give “fathers more opportunity to be involved in the upbringing of their child.”<sup>78</sup> The Equality and Human Rights Commission noted that the proposals were in the “right direction of travel of more leave for fathers and to support more fathers’ involvement in caring.”<sup>79</sup> The introduction of additional paternity leave certainly did mark an improvement by reducing the vast gap between leave entitlement for mothers and fathers.

Another positive aspect of additional paternity leave was that it was expressly available to enable parents to care for the child.<sup>80</sup> The leave was not available to support the mother, unlike ordinary paternity leave. This was beneficial in two ways. Firstly, fathers and recognised co-parents were not presented as secondary parents, but as capable of providing childcare. Secondly, making some maternity leave transferable to care for the child recognised that it has a dual purpose; to enable women to recover from childbirth and pregnancy, as well as to provide childcare. When the leave is taken to provide childcare, it does not need to be gender specific as both men and women are capable of caring. Additional paternity leave did not impact upon women’s entitlement to leave to recover from childbirth and pregnancy which are the biological differences that need to be protected. Indeed, women retained full autonomy to determine when to return to work under the legislation. Therefore, the introduction of additional paternity leave represented progress as it enabled women to share the leave they would have taken to care for the child. Pregnancy and parenthood were thereby distinguished. Thus, the gendered stereotypes which are reinforced by the long length of maternity leave were challenged.

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<sup>78</sup> Department for Trade and Industry *Choice and Flexibility: Additional Paternity Leave and Pay: Government Response to Consultation* (Department for Trade and Industry, 2006) 3

<sup>79</sup> Equality and Human Rights Commission *Response to BIS Consultation on Draft Regulation, Choice for Families: Additional Paternity Leave and Pay* (EHRC, 2009) 2

<sup>80</sup> Additional Paternity Leave Regulations 2010, reg. 6(2)(b)

Therefore, additional paternity leave had the potential to challenge gender inequality if men used this entitlement. However, the Additional Paternity Leave Regulations 2010 had a limited impact. The take up of additional paternity leave was very low; the Trade Union Congress found that less than 0.6% of fathers have actually used any additional paternity leave.<sup>81</sup> Recent research found that there was a “stark contrast between the high take-up of ordinary (paid) paternity leave and the very low take-up of the additional paternity leave.”<sup>82</sup> I will argue that this is because the legislation failed to give fathers and recognised co-parents a genuine chance to take this leave. This discussion will highlight how the new entitlement to shared parental leave, which replaced additional paternity leave, should be changed to enable men to flourish by participating in caring relationships.

c. The limitations

i. *Exclusionary eligibility requirements*

One reason additional paternity leave was not widely used was because it excluded so many parents. The eligibility requirements made many mothers ineligible to transfer their entitlements. The Equal Opportunities Commission estimated four in ten mothers are unemployed when they give birth.<sup>83</sup> The fathers and recognised co-parents raising children within these families were, at most, able to access two weeks of ordinary paternity leave. Also, although mothers and adopters who were in work were eligible to transfer their entitlement to the father or recognised co-parent, they could only transfer it to an employee who met the minimum service requirements.<sup>84</sup> Non-employees were thus denied the

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<sup>81</sup> <<http://www.tuc.org.uk/workplace-issues/just-one-172-fathers-taking-additional-paternity-leave>> accessed 27.04.2014

<sup>82</sup> S. Welfare *Paternity Pay and Leave: XpertHR Survey 2014* (XpertHR, 2014)

<sup>83</sup> Equal Opportunities Commission *Response to DTI Consultation Work and Families: Choice and Flexibility – Additional Paternity Leave and Pay* (2006) 4

<sup>84</sup> Additional Paternity Leave Regulations 2010, regs. 4(1) and 14(1)

opportunity to access the support, even though they needed it the most to participate in caring relationships. Fairness for parents would have been achieved if the entitlement had been accessible to more working class parents by protecting those working under a personal work contract, applied in the way described for maternity leave in chapter five.<sup>85</sup>

*ii. Prioritisation of mothers' care*

A key reason fathers and recognised co-parents were denied the chance to take leave was that mothers' caring role remained prioritised. This was evidenced by the retention of the same eligibility requirements for ordinary paternity leave, which meant fathers and recognised co-parents had to demonstrate commitment to the paid workplace to access the leave. The paid work commitments of men were thus treated as more important than their caring relationships. In contrast, women are entitled to some support as a day one right. Accordingly, the legislation prioritised mothers' care and reinforced gendered stereotypes.

Fathers' and recognised co-parents' eligibility was also reliant upon the mother being entitled to maternity leave, statutory maternity pay or maternity allowance.<sup>86</sup> Likewise, an adopter must have been eligible for adoption leave or statutory adoption pay.<sup>87</sup> Mothers further mediated the father's or recognised co-parent's entitlement as they had to consent to them accessing additional paternity leave.<sup>88</sup> Therefore, additional paternity leave was not a standalone, non-transferable right to leave, which I argued was necessary to encourage men to provide care in chapter four.<sup>89</sup> Indeed, I suggested that this would be the least effective way of encouraging men to provide care, yet even this relatively modest entitlement was not introduced. Instead, their caring role was treated as an adjunct to mothers. The focus of the

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<sup>85</sup> See chapter five page 162

<sup>86</sup> Additional Paternity Leave Regulations 2010, reg. 4(5)(a)

<sup>87</sup> Additional Paternity Leave Regulations 2010, reg. 14(4)(a)

<sup>88</sup> Additional Paternity Leave Regulations 2010, regs. 6(2)(c) and 16(2)(c)

<sup>89</sup> See chapter four page 127

legislation was not upon the individual parent, but more upon the mother and even more on the workplace. Therefore, men were not afforded a “realistic opportunity and encouragement...to become involved in a very practical and more holistic way in care-giving during the first year.”<sup>90</sup> Accordingly, the Additional Paternity Leave Regulations 2010 were correctly criticised for being sound-bite legislation, as they had “all the positive publicity and appearance of a novel and innovative right, but in reality offer[ed] little of substance for the majority of working families.”<sup>91</sup>

*iii. Reinforcing mothers’ gatekeeper role*

Prioritising mother’s caring role also meant that the legislation reinforced “mothers as gatekeepers of fathers’ participation in care,” because the mother could determine the caring role of the father or recognised co-parent.<sup>92</sup> The gatekeeping role of mothers suggests that some fathers’ caring role is restricted and defined first and foremost by the relationship that the mother wants with the child.<sup>93</sup> Reinforcing mothers’ gatekeeping role not only maintained gendered expectations, but also problematically blamed women for the unequal division of labour. Additional paternity leave gave mothers the only real choice in how the leave was shared, so any resulting inequality was their own fault. This was a significant problem because there are many reasons why women may not want to transfer their leave. One huge constraint was the level of payment. Research has found that payment “remains a strong predictor of whether or not fathers will utilize leave, with the majority of fathers identifying this as the main reason for continuing to work.”<sup>94</sup> As additional paternity leave could be accessed twenty weeks after the child was born, mothers entitled to both statutory maternity pay and maternity allowance could only transfer twenty weeks payable at the flat statutory

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<sup>90</sup> G. James ‘Mothers and Fathers as Parents and Workers’ (n 40) 276

<sup>91</sup> M. Weldon-Johns ‘The Additional Paternity Leave Regulations 2010’ (n 41) 25. (see chapter one page 12)

<sup>92</sup> M. Weldon-Johns ‘The Additional Paternity Leave Regulations 2010’ (n 41) 34

<sup>93</sup> B. Featherstone *Contemporary Fathering: Theory, Policy and Practice* (Policy Press, 2009) 96

<sup>94</sup> M. Weldon-Johns ‘The Additional Paternity Leave Regulations 2010’ (n 41) 28



rate. Those eligible for statutory maternity pay could also transfer the remaining unpaid leave.<sup>95</sup> This low level of payment would have particularly deterred fathers from taking leave because, as previously noted, men are likely to be the main breadwinner and thus would be unable to sacrifice their wage to access leave.

Few employees would have received extra support from their employer to access the leave as only 11% of employers increased the payment available for additional paternity leave.<sup>96</sup> This is obviously much smaller than the 45% of employers who increase the level of payment for maternity leave.<sup>97</sup> Therefore, not only are men's incomes harder to sacrifice, but they were also likely to be eligible for less financial support whilst taking leave, making it even harder for many women to transfer their leave. Even though this reinforced gendered expectations, paying those taking additional paternity leave less than maternity leave was found to be non-discriminatory by an Employment Tribunal in *Shuter v Ford Motor Company Ltd.*<sup>98</sup> In this case, Mr Shuter took additional paternity leave whilst working at Ford, which was paid at the statutory rate, whilst Ford paid women on maternity leave 100% of their wages for twelve months. He argued he was subject to direct and indirect sex discrimination. Both claims were rejected. The claim of direct discrimination was rejected because the tribunal found that a woman on maternity leave was the wrong comparator to those taking additional paternity leave. This was because the two were substantially different; those on maternity leave "will have been pregnant, given birth, and is likely to have cared for the child since birth and possibly breastfeed it."<sup>99</sup> It was further noted that additional paternity leave did not change

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<sup>95</sup> Additional Paternity Leave Regulations 2010, regs. 5(1) and 15(1)

<sup>96</sup> S. Welfare *Paternity Pay and Leave* (n 82)

<sup>97</sup> C. Wolff *How Employers Manage Maternity Leave: The 2012 XpertHR survey* (IRS, 2012)

<http://www.xperthr.co.uk/article/112706/the-cost-span-of-span-classhighlightmaternity-span-span-classhighlightleave--the-2012-xperthr-survey.aspx?searchwords=costs+of+maternity+leave#sub2> visited 8.2.13

<sup>98</sup> ET/3203504/2013

<sup>99</sup> *Shuter v Ford* (n 98) [89]

maternity leave, which still aimed to protect the health and safety of mothers.<sup>100</sup> Similar arguments were made in dismissing the indirect discrimination claim. Although the tribunal accepted that Ford's actions did constitute indirect discrimination, this was found justifiable because it arose out of maternity leave, which treats women more favourably "because the leave arises in connection with pregnancy and childbirth."<sup>101</sup> It was further justified because of Ford's ambition of promoting women's workplace participation.<sup>102</sup>

Although the increased payment available for mothers should be celebrated as it may indeed promote women's workplace participation, the arguments for not extending this level of payment to those taking additional paternity leave are problematic. This is because the reasoning adopted by the tribunal again highlighted how mothers' care remains prioritised. Firstly, the tribunal erred in referring to the likelihood of mothers having "cared for the child since birth," as a reason why mothers are different from fathers or recognised co-parents. The mother's role in caring for the child from birth is not due to an inherent biological difference, but exists because of societal structure and gendered constructions, as noted in chapter two.<sup>103</sup> The tribunal's reasoning also undermined the purpose of additional paternity leave by reinforcing women's reproductive and caring role. As noted above, the legislation represented progress as it enabled women to recover from the gender specific childbirth and pregnancy, and then share the leave deemed to be for childcare, which can be gender neutral. Accordingly, when Mrs Brook (the mother) had transferred her leave to her husband, she demonstrated her full recovery from pregnancy, childbirth and possibly breastfeeding, and was no longer in need of the gender specific protection. Yet the tribunal undermined her autonomy by highlighting the biological differences between herself and her husband, even

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<sup>100</sup> *Shuter v Ford* (n 98) [91]

<sup>101</sup> *Shuter v Ford* (n 98) [101]

<sup>102</sup> *Shuter v Ford* (n 98) [98]-[101]

<sup>103</sup> See chapter two page 33-43

though she clearly no longer deemed them important. This not only undermined the mother's individual choice by restricting their ability to transfer leave, but also reinforced traditional gendered expectations and denied people the chance to act outside of them.

In addition to the financial disincentives, women's willingness to transfer leave may be restrained by the wider societal context. Decisions about childcare are not always made by "rational actors striving for economic gain," as "policies interact with culture to influence women's (and men's) choices about managing work and family."<sup>104</sup> Therefore, another reason mothers may have been anxious to transfer their leave was because of disadvantages in the workplace. As noted in the introduction, recent research by the Equality and Human Rights Commission finds that a large proportion of pregnant women are discriminated against in the workplace; it was suggested that 54,000 were pushed out of the workplace and 100,000 women experienced harassment.<sup>105</sup> This may result in women delaying or being completely deterred from returning to the workforce, making it unlikely that these women would have wanted to transfer their leave. Their willingness to transfer leave may have been further inhibited by gendered expectations.<sup>106</sup>

Same-sex parents might have better used this entitlement because research suggests that their relationships are more egalitarian and less constrained by the gendered expectations, as noted in chapter four.<sup>107</sup> However, there is no empirical research to support this assertion, an issue I will return to in chapter nine.<sup>108</sup>

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<sup>104</sup> M. Budig, J. Misra, I. Boeckmann 'The Motherhood Penalty in Cross-National Perspective: The Importance of Work-Family Policies and Cultural Attitudes' (2012) 19 *Social Politics* 163, 164

<sup>105</sup> See chapter one page 3

<sup>106</sup> P. Evans, N. Pupo 'Parental Leave: Assessing Women's Interests' (1993) 6 *Canadian Journal of Women and the Law* 402, 417

<sup>107</sup> See chapter four page 134

<sup>108</sup> See chapter nine page 303

iv. *Prioritising the sexual family ideal*

A final problem with the Additional Paternity Leave Regulations 2010 was that the heterosexual family was explicitly prioritised; the legislation aimed to give “fathers more opportunity to be involved in the upbringing of their child,” to ensure that “every child gets the best start to life.”<sup>109</sup> Fathers’ caring role was thus seen as complimentary to mothers’. I argued in chapter four that this could be justified to encourage men to provide care, as it would be the best way to challenge gender inequality.<sup>110</sup> However, the legislation was merely sound-bite; it superficially encouraged fathers’ caring role, but did not give men a genuine chance to use their leave and has not challenged gender inequality. Therefore, the prioritisation of the heterosexual family was entirely unjustified.

Also, I argued that encouraging fathers to care within heterosexual families would never justify overlooking all other childcare relationships.<sup>111</sup> Unfortunately, bar same-sex parents, this is exactly what happened. As only those raising children in “marriage-like,” families were entitled to additional paternity leave, the regulations merely duplicated and prioritised the sexual family.<sup>112</sup> Neither ordinary nor additional paternity leave accounted for the other collaborative care arrangements that “occur as a matter of social fact.”<sup>113</sup> In particular, lone parents received no extra support from the entitlement to additional paternity leave. As these are already some of the most vulnerable parents, who face particular struggles to reconcile their paid work and caring commitments, their flourishing may have been undermined by their exclusion from both paternity leave entitlements. To include lone parents and encourage their flourishing, the leave could have been made transferable to a carer, nominated by the

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<sup>109</sup> Department for Trade and Industry *Choice and Flexibility: Additional Paternity Leave and Pay* (n 78) 3-4

<sup>110</sup> See chapter four page 123

<sup>111</sup> See chapter four page 133

<sup>112</sup> A. Diduck ‘Shifting Familiarity’ (2005) 58 *Current Legal Problems* 235, 248. See chapter four page 90

<sup>113</sup> J. McCandless, S. Sheldon ‘The Human Fertilisation and Embryology Act (2008) and the Tenacity of the Sexual Family Form’ (2010) 73 *Modern Law Review* 175, 198

single parent, who is expecting to have the main responsibility for childcare, in the same way described for ordinary paternity leave.

v. *Hope for the future from the Court of Justice of the European Union?*

It is clear that additional paternity leave, although focusing upon the provision of care within the heterosexual family unit, did not challenge gender inequality or achieve fairness for parents. Even the least effective way of encouraging men to provide care that I identified in chapter four was not introduced (making leave non-transferable and making the payment income-related).<sup>114</sup> The prioritisation of mothers' care meant that fathers and recognised co-parents were denied a genuine opportunity to take any leave. It did not challenge the idea that there should be a primary carer; an idea further reinforced by the long length of maternity and adoption leave. Therefore, additional paternity leave failed to provide either parent with the chance to achieve the basic capabilities of participating in paid work and caring relationships.

However, there is reason for hope that shared parental leave will be different. A recent case determined by the Court of Justice of the European Union (CJEU) suggests that leave which makes eligibility dependent upon another's, such as additional paternity leave, may be deemed contrary to the principle of equal treatment. In *Roca Alvarez v Sesa Start Espana ETT SA*, the CJEU recognised that if a father:

can only enjoy this right [leave to provide childcare] but not be the holder of it, [this] is liable to perpetuate a traditional distribution of the roles of men and women by keeping men in a role subsidiary to that of women in relation to the exercise of their parental duties.<sup>115</sup>

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<sup>114</sup> See chapter four page 127

<sup>115</sup> *Roca Alvarez v Sesa Start Espana ETT SA* Case C-104/09 [2010] ECR I-08661, [36]

Accordingly, it found that making entitlement to leave dependent upon the mother's eligibility was contrary to the principle of equal treatment and that employed fathers should be able to access the leave as their own entitlement.<sup>116</sup>

James argues that this decision should be celebrated from a gender equality perspective as “it endorses a model of (more) equal parenting...it promotes a model of family relationships that provide children with the potential for more contact with their fathers.”<sup>117</sup> It also means that additional paternity leave could have been judged to be discriminatory because fathers and recognised co-parents could take additional paternity leave, but they were not the holders of the right. Therefore, this decision should mean that shared parental leave does not make fathers and recognised co-parents dependent upon the mothers' eligibility. In chapter seven, I will examine whether the CJEU's judgement has caused a change in the legislative approach.

## **Conclusion**

Although chapter five highlighted how mothers' caring labour is undervalued within the reconciliation legislation, examination of the leave available to fathers and recognised co-parents demonstrated that these relationships are valued even less. Although both ordinary and additional paternity leave were introduced to allow fathers to access some leave when a child was born, which recognised that it is not only mothers who can provide care, mothers' caring labour remains prioritised in this legislation. The value accorded to caring relationships within this body of legislation occurs along gendered lines. This was demonstrated by the short period of ordinary paternity leave and that the leave is available to fathers not only to provide care, but to support the mother as well. Additional paternity leave also devalued fathers' and recognised co-parents' caring labour by not giving them a

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<sup>116</sup> *Roca Alvarez v Sesia Start Espana* (n 115) [39]

<sup>117</sup> G. James 'Forgotten Children: Work-Family Reconciliation in the EU' (2012) 34 *Journal of Social Welfare and Family Law* 363, 371

standalone entitlement to leave. Instead, their entitlement was mediated through the mothers' eligibility and consent. Both entitlements further undermined fathers' and recognised co-parents' caring labour by imposing a minimum service requirement which highlighted that their primary role was within the workplace. Also, neither entitlement enabled fathers nor recognised co-parents to access income-related leave, which is available in statutory maternity pay.

To challenge this, I suggest that a period of six weeks leave paid at an income-related level should be available for fathers and recognised co-parents as a default entitlement at childbirth. Two weeks of this should be mandatory to effectively encourage men to take leave, challenge the gendered division of care and achieve change within the workplace. For this legislation to be non-discriminatory, the same entitlement should be made available to mothers. To encourage men to provide care after this period, it is not enough to simply make maternity or adoption leave transferable to the recognised co-parent. Instead, they should have their own non-transferable entitlement to leave. Otherwise fathers and recognised co-parents will not be given a genuine opportunity to achieve the basic capability of participating in caring relationships, as few will be able to access this leave in practice.

In this chapter, I have also demonstrated how a more expansive definition of parenting could be adopted in addition to these changes, to ensure that those caring outside the sexual family are not excluded. In particular, I showed how single parents could enable another carer, who expects to have responsibility for childcare, to access the leave reserved for fathers and recognised co-parents. I also demonstrated how this could be achieved for kinship carers.

In chapter seven, I will consider the newest addition to the UK body of reconciliation legislation, the Children and Families Act 2014 which introduced shared parental leave. The 2014 Act provided the Coalition Government with an opportunity to thoroughly overhaul the current leave provisions in the way suggested. The legislator could accommodate the diversity of modern parenting “in ways that promotes genuine choices and substantive gender equality.”<sup>118</sup>

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<sup>118</sup> G. James *The Legal Regulation of Pregnancy and Parenting in the Labour Market* (n 31) 41



## Chapter Seven

### ENCOURAGING FATHERS TO CARE: THE CHILDREN AND FAMILIES ACT 2014 AND SHARED PARENTAL LEAVE

#### Introduction

The UK reconciliation legislation has recently been amended by Part Seven of the Children and Families Act 2014 which inserts chapter 1B into part 8 of the Employment Rights Act 1996 and introduced shared parental leave.<sup>1</sup> This enables eligible mothers or adopters to transfer fifty weeks of maternity or adoption leave once compulsory maternity leave ends.<sup>2</sup> This can be transferred to the father or a mother's,<sup>3</sup> or adopter's,<sup>4</sup> spouse, civil partner or partner.<sup>5</sup> Therefore, the twenty-six weeks of maternity leave that was transferable as additional paternity leave, has been extended and this lesser entitlement abolished.<sup>6</sup> In this chapter, I will analyse how shared parental leave builds upon the earlier legislation.

The Coalition Government (2010-15) had a chance to create a more care centric piece of reconciliation legislation which could achieve Fineman's ideal of accommodating caring relationships within the workplace.<sup>7</sup> The legislation certainly had a progressive aim, as the Coalition Government intended to encourage more fathers to take leave to provide childcare. If this notoriously challenging aim could be achieved, gender inequality would be contested as I argued in chapter four.<sup>8</sup> Therefore, shared parental leave could promote fairness in accordance with the vision I outlined in chapter two, by enabling all people to participate

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<sup>1</sup> The Children and Families Act 2014 covers many issues. I will focus upon shared parental leave, contained within part 7 of the Act alone.

<sup>2</sup> The Maternity and Adoption Leave (Curtailed of Statutory Rights of Leave) Regulations 2014, regs. 6(2)(a) and 10(2)(b)

<sup>3</sup> The Shared Parental Leave Regulations 2014, reg. 5

<sup>4</sup> The Shared Parental Leave Regulations 2014, reg. 21

<sup>5</sup> The Shared Parental Leave Regulations 2014, reg. 3(1)

<sup>6</sup> Children and Families Act 2014, s.125

<sup>7</sup> See chapter one page 5

<sup>8</sup> See chapter four page 119

within paid work and caring relationships.<sup>9</sup> I will examine this radical aim first in this chapter. In addressing the legislation's effectiveness, I will analyse the likelihood of fathers using this entitlement. Accordingly, although the legislation is available to adopters in the same way, much of the discussion will focus upon mothers and fathers, especially when I examine Government documentation or discussion.

I will conclude that although shared parental leave does represent further progress, it is unlikely to achieve its ambitious aims. This is partly because many of the problematic requirements from additional paternity leave have been retained, including eligibility requirements, the low level of payment and the need for the mother's or adopter's consent. Each of these demonstrates that mothers' caring labour remains prioritised. Therefore, fathers or recognised co-parents will not be encouraged to take leave to provide childcare. I will also argue that the legislation fails to achieve another of its aims; to make leave available more flexibly. I will demonstrate this by showing how some of the provisions, which seem supportive, still prioritise employers over employees' caring needs and thus are of little practical use. Therefore, I will argue that the legislation is unsatisfactory because it fails to meet its own aims. Shared parental leave is thus simply more sound-bite legislation.<sup>10</sup> It appears positive, but it is another missed opportunity that will fail to challenge gender inequality or achieve fairness for parents.

In the remainder of this chapter, I will analyse three proposals made during the legislative process which were rejected: part-time shared parental leave; a period of non-transferable leave; and the extension of the definition of parenting. Relying upon a comparative analysis of legislation in Scandinavia, I will demonstrate how the first two of these proposals could

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<sup>9</sup> See chapter two page 48

<sup>10</sup> M. Weldon-Johns 'The Additional Paternity Leave Regulations 2010: A New Dawn or More "Sound-Bite" Legislation?' (2011) 33 *Journal of Social Welfare and Family Law* 25, 25. (see chapter one page 12)

have increased men's take up of leave, granted parents further flexibility, and supported parents on low incomes. The third proposal, to extend the definition of parenting, would have recognised and protected the caring relationships which already occur in the UK. Therefore, the enactment of each of these proposals would have made shared parental leave more care centric by challenging gender and socio-economic inequality as well as the sexual family underpinning, as outlined in chapter four. Accordingly, in addition to the Coalition Government's own aims, the legislation could have achieved the vision of fairness outlined in chapter two.<sup>11</sup>

### **The development of shared parental leave**

#### a) Promoting fathers' caring role

Shared parental leave aims to create a society where work and family complement one another, by challenging the assumption that mothers should be the primary caregivers.<sup>12</sup> According to the *Modern Workplaces Consultation* which preceded the legislation, this is to be achieved by enabling “working fathers to take a more active role in caring for their children and [for] working parents to share the care of their children.”<sup>13</sup> The active involvement of both parents in caring for children is defined in the consultation as “shared parenting.”<sup>14</sup> Therefore, one of the main aims of shared parental leave is to enable and encourage fathers to take more leave after childbirth. The Coalition Government identified many benefits to increasing fathers' involvement in the earlier stages of childcare, including improving “children's educational and emotional development in later life.”<sup>15</sup> They further noted that shared parenting would support women in maintaining a strong attachment to the

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<sup>11</sup> See chapter two page 48

<sup>12</sup> Department for Business Innovation and Skills *Consultation on Modern Workplaces: Flexible Parental Leave, Flexible Working, Working Time Regulations, Equal Pay* (Crown, 2011) 14-15

<sup>13</sup> Department for Business, Innovation and Skills *Modern Workplaces Consultation: Government Response to Flexible Parental Leave Proposals* (Department for Business, Innovation and Skills, 2012) 3

<sup>14</sup> Department for Business, Innovation and Skills *Modern Workplaces Consultation* (n 13) 9

<sup>15</sup> Department for Business, Innovation and Skills *Modern Workplaces Consultation* (n 13) 7

workplace; if men spend more time caring, women will have more time to participate in the workplace. Therefore, the Coalition Government acknowledged that such leave could challenge gender inequality by reducing “the ‘gender penalty’ that women suffer from taking time out of the workplace with their children.”<sup>16</sup>

Shared parental leave was therefore enacted and fleshed out in The Shared Parental Leave Regulations 2014 to promote shared parenting.<sup>17</sup> This enables eligible women to curtail their entitlement to maternity leave, statutory maternity pay or maternity allowance “at least one day after the end of the compulsory maternity leave period,” and transfer their remaining maternity leave and pay entitlement into shared parental leave.<sup>18</sup> As compulsory maternity leave is two weeks, fifty weeks of maternity leave can be transferred.<sup>19</sup> The same period of adoption leave can be transferred.<sup>20</sup> Fathers or recognised co-parents are therefore entitled to fifty-two weeks leave, less the amount of maternity or adoption leave taken.<sup>21</sup> Mothers and adopters remain entitled to fifty-two weeks of maternity leave if they choose not to transfer it. This makes leave arrangements more flexible by providing parents with “more choice in how they care for their children.”<sup>22</sup>

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<sup>16</sup> Department for Business, Innovation and Skills *Modern Workplaces Consultation* (n 13). It is important to note that in another context, family law, shared parenting has been subject of much debate. Riley criticises the equal parenting ideal as it assumes that parents are equally positioned within family life, ignoring the disparate situations of men and women within the heterosexual family because of the gendered division of labour (D. Riley “The Serious Burdens of Love” Some Questions on Child-Care, Feminism and Socialism’ in L. Segal *What is To Be Done about the Family? Crisis in the Eighties* (Penguin, 1983) 153). By failing to account for this, Fineman argues that enforcing shared parenting upon separation results in a “legal system that empowers fathers” (M. Fineman *The Neutered Mother, the Sexual Family and Other Twentieth Century Tragedies* (Routledge, 1995) 83). This is because when equal parenting is enforced upon separation, the role of the primary caregiver and the knowledge they have gained, is ignored to ensure that fathers, or the secondary caregiver, receive their entitlement to time with their children.

<sup>17</sup> Children and Families Act 2014, s. 117

<sup>18</sup> The Maternity and Adoption Leave (Curtailed of Statutory Rights of Leave) Regulations 2014, reg. 6(2)(b)

<sup>19</sup> The Maternity and Adoption Leave (Curtailed of Statutory Rights of Leave) Regulations 2014, reg. 10(2)(b)

<sup>20</sup> The Shared Parental Leave Regulations 2014, reg. 22(1)(b)

<sup>21</sup> The Employment Rights Act 1996, s.75F(2) and s. 75H(2)

<sup>22</sup> Department for Business, Innovation and Skills *Modern Workplaces: Government Response on Flexible Parental Leave* (Crown, 2012) 9

Payment for leave is available for thirty-nine weeks minus the number of week's statutory maternity pay,<sup>23</sup> adoption pay,<sup>24</sup> or maternity allowance<sup>23</sup> that have been paid to the mother or adopter.<sup>25</sup> When transferred, this is simply renamed statutory shared parental pay. Parents must give notice and evidence of their entitlement to both their employers to access the payment.<sup>26</sup> However, there is no income related pay available for shared parental leave; it is only payable at £139.58 a week, or if it is less, 90% of the parents' earnings.<sup>27</sup> As two weeks of maternity leave are compulsory, mothers eligible for statutory maternity pay or allowance can transfer a maximum of thirty-seven weeks of pay at this low, flat rate. Those who are eligible can also transfer the remaining thirteen weeks of unpaid maternity leave.

b) Promoting flexibility

A further aim of the Coalition Government was that shared parental leave would provide more flexibility and promote wider choices for working parents.<sup>28</sup> In this regard, shared parental leave can be taken concurrently.<sup>29</sup> Parents can also request that the leave is taken in non-continuous periods.<sup>30</sup> Each parent can take leave in up to three non-continuous blocks,<sup>31</sup> if they give their "employer a written notice which sets out the start and end dates of each period of shared parental leave requested in that notice."<sup>32</sup> In response to such a request, employers can consent, propose alternative dates, or refuse without proposing alternative dates.<sup>33</sup> If the request is rejected, the leave can be taken in one continuous block.<sup>34</sup>

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<sup>23</sup> The Shared Parental Leave Regulations 2014, reg. 6(2)

<sup>24</sup> The Shared Parental Leave Regulations 2014, reg. 22(2)

<sup>25</sup> The Shared Parental Leave Regulations 2014, reg. 6(3)

<sup>26</sup> The Statutory Shared Parental Pay Regulations 2014, regs. 6(1)-(3), 7(1)-(3), 19(1)-(3) and 20(1)-(3)

<sup>27</sup> The Statutory Shared Parental Pay Regulations 2014, reg. 40(1)

<sup>28</sup> Department for Business, Innovation and Skills *Government Response on Flexible Parental Leave* (n 22) 3

<sup>29</sup> The Shared Parental Leave Regulations 2014, reg. 7(5)

<sup>30</sup> Children and Families Act 2014, s. 75F(8)

<sup>31</sup> The Shared Parental Leave Regulations 2014, reg. 16(1)

<sup>32</sup> The Shared Parental Leave Regulations 2014, reg. 12(1) and (2)

<sup>33</sup> The Shared Parental Leave Regulations 2014, reg. 14(2)

<sup>34</sup> The Shared Parental Leave Regulations 2014, reg. 14(4)

However, the original consultation made it clear that this need for flexibility should not result in women being forced to return to the paid workforce before they were ready. The important role that maternity leave plays in protecting women, by enabling them to recover physically from pregnancy and childbirth was highlighted within the consultation.<sup>35</sup> The Coalition Government thus aimed to promote flexibility without undermining the protection provided by maternity leave. These two aims, of both protecting women and providing flexibility, did conflict. The original consultation suggested that eighteen weeks' leave would be reserved for mothers to allow them to physically and emotionally recover from giving birth.<sup>36</sup> However, the Coalition Government disregarded this recommendation to provide mothers "with more choice."<sup>37</sup> Therefore, parents' choice was clearly prioritised over new mothers' perceived need for protection.

c) Notice and eligibility requirements

To transfer their leave, mothers or adopters must declare that they consent "to the amount of leave which [the parent or adoptive partner] intends to take."<sup>38</sup> To be entitled, fathers and recognised co-parents must declare to both employers that they are the father of the child, or their relationship with the mother,<sup>39</sup> or adopter.<sup>40</sup> Fathers and recognised co-parents must also have been employed by their respective employer for twenty-six weeks by the fifteenth week before the expected week of childbirth,<sup>41</sup> or when they are notified of the match for adoption.<sup>42</sup> In each case this is described as the continuity of employment test. Parents' eligibility is also dependent upon the mother or adopter being "engaged in employment as an

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<sup>35</sup> Department for Business Innovation and Skills *Consultation on Modern Workplaces* (Crown, 2011) 17

<sup>36</sup> Department for Business Innovation and Skills *Consultation on Modern Workplaces* (n 35) 17

<sup>37</sup> Department for Business, Innovation and Skills *Government Response on Flexible Parental Leave* (n 22) 18

<sup>38</sup> The Shared Parental Leave Regulations 2014, regs. 9(3)(b)(iii) and 25(3)(b)(iii)

<sup>39</sup> The Shared Parental Leave Regulations 2014, regs. 8(3)(b)(iii) and reg. 9(3)(a)(iii)

<sup>40</sup> The Shared Parental Leave Regulations 2014, regs. 24(3)(b)(iii) and reg. 25(3)(a)(iii)

<sup>41</sup> The Shared Parental Leave Regulations 2014, regs. 5(2)(a), 35(1) and (3)(a)

<sup>42</sup> The Shared Parental Leave Regulations 2014, regs. 21(2)(a), 35(1) and (3)(b)

employed or self-employed earner for any part of the week in the case of at least 26 of the 66 weeks immediately preceding the calculation week.”<sup>43</sup> This is named the employment and earnings test. These are the same eligibility requirements for maternity allowance, which I analysed in chapter five.<sup>44</sup>

Mothers or adopters can also access shared parental leave if the father or recognised co-parent transfers the leave to them. This is dependent upon both parents declaring their eligibility and consent to the other parent’s employer.<sup>45</sup> However, not all mothers eligible to transfer their maternity entitlements can access shared parental leave. Mothers or adopters must be an employee who meets the continuity of employment test; they must have been employed by the same employer for at least twenty-six weeks by the fifteenth week before the expected week of childbirth.<sup>46</sup> In contrast, the eligibility requirements for fathers or the recognised co-parents to transfer shared parental leave become less onerous. They must only pass the employment and earnings test which means they must have “been engaged in employment as an employed or self-employed earner for any part of the week in the case of at least 26 of the 66 weeks immediately preceding the calculation week.”<sup>47</sup>

To access any shared parental leave, parents must give eight weeks’ notice,<sup>48</sup> unless the child is born early, when the notice requirements for birth parents will be treated as satisfied if notice is given as soon as reasonably practicable after childbirth.<sup>49</sup> Each parent must also provide written notice of “the start and end dates of each period of shared parental leave

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<sup>43</sup> The Shared Parental Leave Regulations 2014, regs. 5(3)(a), 21(3)(a) and 36(1)(a)

<sup>44</sup> See chapter five page 157

<sup>45</sup> The Shared Parental Leave Regulations 2014, regs. 8(3) and 24(3)

<sup>46</sup> The Shared Parental Leave Regulations 2014, regs. 4(2)(a) and 20(2)(a)

<sup>47</sup> The Shared Parental Leave Regulations 2014, regs. 4(3)(a), 20(3)(a) and 36(1)(a)

<sup>48</sup> The Shared Parental Leave Regulations 2014, regs. 8(1), 9(1), 24(1) and 25(1)

<sup>49</sup> The Shared Parental Leave Regulations 2014, reg. 17(2)(a)

requested in that notice.”<sup>50</sup> Parents can change the periods of leave that they each intend to take by amending their start and end dates three times.<sup>51</sup>

These notice requirements are fairly prescriptive, which may deter some parents from taking leave. However, parents can vary the eight weeks’ notice to change the amount of leave each parent intends to take.<sup>52</sup> Parents can make unlimited variations to their notice to alter the amount of leave they will take, as long as both provide a written indication as to when they intend to take the leave, a description of the notice given to each employer about the leave and pay they intend to use, and a declaration from the other parent that they agree.<sup>53</sup> However, this freedom is limited in practice because parents can only change the start and end dates of each period of shared parental leave three times. Therefore, the notice requirements remain fairly arduous.

### **The positive aspects of shared parental leave**

Shared parental leave does mark an improvement upon the body of reconciliation legislation previously available to parents. It recognises that either parent is capable of caring, which symbolically challenges the restrictive gendered stereotypes examined in chapter two.<sup>54</sup> Also, the ambitious aim of changing the division of labour in the private sphere may actually achieve the benefits identified by the Coalition Government of challenging gender equality and promoting children’s wellbeing.<sup>55</sup> In addition, the legislation highlights the need for workplace change to accommodate both parents’ caring relationships with their children. The emphasis upon changing both the workplace and private sphere would reflect the dually

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<sup>50</sup> The Shared Parental Leave Regulations 2014, regs. 12(1)-(2) and 28(1)-(2)

<sup>51</sup> The Shared Parental Leave Regulations 2014, regs. 16(1) and 32(1)

<sup>52</sup> The Shared Parental Leave Regulations 2014, regs. 11(1)-(2) and 27(1)-(2)

<sup>53</sup> The Shared Parental Leave Regulations 2014, regs. 11(3),(6) and 27(3),(6)

<sup>54</sup> See chapter two page 37

<sup>55</sup> Department for Business, Innovation and Skills *Modern Workplaces Consultation* (n 13) 7



responsible worker model and thus has the potential to achieve fairness for parents, as I argued in chapter three.<sup>56</sup>

It is however important to note that these benefits will only be realised if men actually use shared parental leave. If not, employers will not have to accommodate carers, as men will continue to be ideal workers. Therefore, women will continue to be associated with caring labour. Accordingly, shared parental leave “may serve to institutionalize women’s disadvantage in the labour market.”<sup>57</sup> A key consideration in this chapter will therefore be whether the legislation does more than just enable men to care and instead, positively encourages them to take leave, as I argued was necessary in chapter four.<sup>58</sup>

Another positive aspect of shared parental leave is its flexibility, which may encourage men to take leave. Research has shown that inflexibility discourages fathers from taking leave due to their usual breadwinner role.<sup>59</sup> Therefore, I contend that the Coalition Government’s decision to make fifty weeks of maternity leave transferable and thus prioritise flexibility over the need for mothers’ protection was defensible. The short period of reserved leave avoids prescriptively determining when women should recover from childbirth, instead recognising that “the needs of some women may be different.”<sup>60</sup> In addition, I assert that women are adequately protected by the legislation as enacted. All women remain entitled to fifty-two weeks of maternity leave, statutory maternity pay or maternity allowance; they do not have to transfer any of it. Therefore, if women do need more time to recover from pregnancy and childbirth, they can simply not transfer their entitlement. Accordingly, despite

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<sup>56</sup> See chapter three page 76

<sup>57</sup> P. Evans, N. Pupo ‘Parental Leave: Assessing Women’s Interests’ (1993) 6 *Canadian Journal of Women’s Interests* 402, 412

<sup>58</sup> See chapter four pages 117-120

<sup>59</sup> E. Carricolo Di Torella ‘New Labour, New Dads – The Impact of Family-Friendly Legislation on Fathers’ (2007) 36 *Industrial Law Journal* 318, 325

<sup>60</sup> Department for Business, Innovation and Skills *Government Response on Flexible Parental Leave* (n 22) 18

some arguing that a longer period should have been reserved for mothers,<sup>61</sup> the Coalition Government was right to prioritise flexibility.

By prioritising choice, the legislation also challenges gender inequality. It builds upon additional paternity leave by further distinguishing gender specific pregnancy from gender neutral parenthood, as analysed in chapter six.<sup>62</sup> Shared parental leave enables more of the leave which is used to provide childcare to be shared between the parents.<sup>63</sup> Therefore, this better reflects the dually responsible worker model. Although this flexibility is vitally important for birth mothers, it is even more so for adoptive parents. As they do not require leave to recover from childbirth and pregnancy, this leave is available just to provide childcare. Therefore, reserving a long period of leave to one person would be entirely unjustified. However, the Coalition Government's decision to reserve two weeks is validated to reflect their partner's two week entitlement to ordinary paternity leave.

The other legislative changes which promote flexibility in shared parental leave are also positive as they may promote the achievement of shared parenting. Concurrent leave would help families where the mother is particularly physically affected by pregnancy and childbirth and is unable to provide childcare or return to paid work. It could also be useful to parents of children with special needs, who may require more attention and care. As I noted in chapter

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<sup>61</sup> The Equality and Human Rights Committee (EHRC) consider the protection provided by maternity leave to be essential; in response to the original proposal that eighteen weeks of leave should be reserved for mothers, they recommended that this was extended to twenty-six weeks. The EHRC advocated this period because as maternity leave can be taken from eleven weeks before the expected birth, an eighteen week leave period may mean women are returning to work when the child is only a few weeks old. The EHRC proposed that this would be appropriate if the choice was made freely, but research suggests that new mothers feel pressure to return to work sooner than they would ideally choose. (Equality and Human Rights Commission *Response of the Equality and Human Rights Commission to the Consultation on Modern Workplaces* (Equality and Human Rights Commission, 2011) 13-14)

<sup>62</sup> See chapter six page 220

<sup>63</sup> Department for Business, Innovation and Skills *Government Response on Flexible Parental Leave* (n 22) 18

five, adoptive parents are more likely to raise these children, so they may particularly benefit from concurrent leave.<sup>64</sup>

Non-continuous periods of leave are another breakthrough idea.<sup>65</sup> This will enable parents to maintain a more participative connection to the paid workplace whilst taking leave. It also could benefit employers, whom the Coalition Government recognised are increasingly concerned about the long period of maternity leave.<sup>66</sup> These concerns reflect the finding that leave is most costly for employers when it is taken for more than six continuous months.<sup>67</sup> Although the research does not explain why, I propose that the increased costs are due to replacement expenses, which are the most costly part of maternity leave for employers.<sup>68</sup> Therefore, enabling parents to take leave in shorter, non-continuous periods would benefit employers by reducing expenditure.

### **The limitations of the new legislation**

Despite these positive changes, the expected uptake of shared parental leave is very low; the Coalition Government predicted only 2-8% of fathers will use any.<sup>69</sup> The Fatherhood Institute Chief Executive suggests that this is optimistic, predicting that only 2% of fathers will take any leave.<sup>70</sup> Therefore, the legislation is a long way from achieving the transformative ambition of shared parenting. Employers will continue to rely upon men as ideal workers, so

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<sup>64</sup> See chapter five page 174

<sup>65</sup> 2014 Act (n 6), s. 75F(8)

<sup>66</sup> Department for Business, Innovation and Skills *Government Response on Flexible Parental Leave* (n 22) 10

<sup>67</sup> Fatherhood Institute *Fatherhood and the Childhood and Families Taskforce: A Briefing by the Fatherhood Institute* (Fatherhood Institute, 2010) 5

<sup>68</sup> C. Wolff *The Cost of Maternity Leave: The 2012 XpertHR Survey* (IRS, 2012). However, some employers did not spend any money at all on replacement costs and instead re-organised the work so it can be done by other employees.

<sup>69</sup> Department for Business, Innovation and Skills *Modern Workplaces: 'Shared Parental Leave' and Pay Administration Consultation – Impact Assessment* (Crown, 2013) 4

<sup>70</sup> Children and Families Bill Deb 7<sup>th</sup> March 2013, 4<sup>th</sup> sitting, col. 137. The Fatherhood Institute is the “UK’s fatherhood think-and-do-tank,” aiming towards “a society that gives all children a strong and positive relationships with their father and any father-figures; supports both mother and fathers as earners and carers; and prepares boys and girls for a future shared role in caring for children.”  
<http://www.fatherhoodinstitute.org/about-the-fatherhood-institute/> accessed 32.07.14

women will remain associated with caring labour. Therefore, as with earlier developments, in practice the legislation is likely to reinforce rather than challenge gender inequality.

A key reason the uptake of shared parental leave is expected to be so low is because the legislation merely makes leave available to both parents. This may be enough to encourage parents in more egalitarian families to share leave, including same-sex parents, as noted in chapter four.<sup>71</sup> However, I further noted that men parenting in heterosexual families underuse reconciliation entitlements due to gendered expectations, discrimination in the workplace and the gender pay gap.<sup>72</sup> Therefore, the Coalition Government's premise that making leave available to both parents will encourage men to take leave is flawed. In this section, I will examine further reasons why shared parental leave is likely to be so underused by fathers.

a) Eligibility requirements

i. *Continuity of employment test for fathers and recognised co-parents*

One reason shared parental leave is expected to be widely underused is the eligibility requirements. As noted, fathers and recognised co-parents are only entitled to take shared parental leave if they are an employee who meets the continuity of employment test.<sup>73</sup> This is problematic for two reasons. Firstly, retention of the same minimum service requirements for both ordinary and additional paternity leave prioritises mothers' and adopters' caring role. This is because they remain the only parent eligible to take any leave as a day one right in employment, as analysed in chapter five.<sup>74</sup> Therefore, mothers and adopters are presented as the primary carer, which undermines the Coalition Government's attempt to promote fathers' caring role.

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<sup>71</sup> See chapter four page 134

<sup>72</sup> See chapter four pages 115-117 and chapter six page 200

<sup>73</sup> The Shared Parental Leave Regulations 2014, regs. 5(2)(a), 21(2)(a) and 35(1) and (3)

<sup>74</sup> See chapter five page 155

Secondly, the retention of the eligibility requirements is problematic because it will unduly restrict access to shared parental leave. The issue was discussed as the Bill went through Parliament. Lucy Powell, a Labour MP for Central Manchester and at the time, the Shadow Minister for Children and Childcare, noted that the eligibility requirements will result in only 36% of families with new-born children being able to access shared parental leave.<sup>75</sup> This widespread exclusion undermines the Coalition Government's aim to encourage shared parenting. This may also perpetuate social injustice because the eligibility requirements reflect a middle class focus and are likely to disproportionately exclude parents in low-paid, precarious work, who are often denied employee status.<sup>76</sup> These families already face particular hardship in achieving the basic capabilities of paid work and caring responsibilities and thus, they should receive extra legislative support, rather than be excluded. To overcome this and achieve fairness for these parents, those eligible for maternity or adoption leave, statutory maternity or adoption pay, or maternity allowance, should be entitled to transfer their entitlement to a parent working under a personal work contract. This would remove the minimum service requirement and enable any parent who has accumulated commitment to any type of work, including any paid work or caring labour, to access shared parental leave.<sup>77</sup> The personal work contract could be applied to shared parental leave in the same way noted in chapter five.<sup>78</sup> This would mean that the employee's length of service would remain relevant, but rather than determining eligibility, this would only be used to determine if the state or employer was responsible for meeting the costs of the leave.

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<sup>75</sup> Children and Families Bill Deb 23<sup>rd</sup> April 2013, 17<sup>th</sup> sitting, col. 700

<sup>76</sup> See chapter three page 87

<sup>77</sup> M. Freedland, N. Kountouris *The Legal Construction of Personal Work Relations* (Oxford University Press, 2011) 340. See chapter five pages 147-151

<sup>78</sup> See chapter five page 162

Jo Swinson, a former Liberal Democrat MP was responsible for shared parental leave when she was employed as the Minister for Employment Relations and Consumer Affairs in the Department for Business, Innovation and Skills as well as the Women and Equalities Minister. She defended the eligibility requirements in the parliamentary debates, stating that if shared parental leave had been a day one right, women might have felt compelled to take less maternity leave when they were still physically and emotionally vulnerable from childbirth.<sup>79</sup> However, I suggest that it is not clear why removing the minimum service requirement for fathers and recognised co-parents would pressurise women to return to work. The pressure is not going to disappear once fathers or recognised co-parents have been in the workplace for a specified time. Also, all women remain entitled to twelve months of maternity leave. The minimum service requirement is therefore unlikely to relieve mothers from any pressure to return to the workplace.

The main reason that mothers do report feeling pressurised to return to work is the financial strains of raising a child combined with the loss of their wages whilst on maternity leave.<sup>80</sup> As the Coalition Government did not even consider increasing the level of payment, I contend that Swinson's explanation does not accurately reflect the main reason for retaining the eligibility requirements. Instead, I suggest that the Coalition Government aimed to protect employers' interests. This is demonstrated in Swinson's further explanation for the retention of the continuity of employment test: it "gives employers a greater degree of certainty that any new employee they take on will not immediately be absent from the workplace on shared

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<sup>79</sup> Children and Families Bill Deb (n 75) col. 705

<sup>80</sup> Equality and Human Rights Commission *Response of the Equality and Human Rights Commission to the Consultation on Modern Workplaces* (Equality and Human Rights Commission, 2011) 13-14. As noted in chapter five, this is evidenced by the vast underuse of the last three months of maternity leave, which is unpaid (M. O'Brien, A. Koslowski, M. Daly 'United Kingdom' in Moss P, *11<sup>th</sup> International Review of Leave Policies and Related Research 2015* (International Network on Leave Policies and Research, 2015) 336). See chapter five page 165

parental leave.”<sup>81</sup> Not only does this prioritise paid work and employers’ interests over caring relationships, but her explanation also risks legitimising workplace discrimination against women of childbearing age. This is because some employers may reason that women of childbearing age could be immediately absent from the workplace because there is no minimum eligibility requirement for maternity leave. Therefore, some employers may remain or “become wary of hiring women.”<sup>82</sup> In contrast, men provide certainty that they will not be immediately absent from paid work as they cannot access any leave unless they have been employed for twenty-six weeks. By acknowledging that employers need this reliability, which women of childbearing age cannot provide, Swinson tacitly accepts discrimination against women when hiring. She does not expressly acknowledge this, but the retention of the minimum service requirement means that the Coalition Government emphasised that it is only women who will “let down” employers by taking leave after only a short period of employment. Therefore, I argue that the Coalition Government’s reasoning reinforces gender discrimination in the workplace, undermining attempts to achieve gender equality and fairness for parents.

If shared parental leave had been made available to all those working under a personal work contract, gender discrimination when hiring would have been challenged. This is because all workers would have been presented as potential carers who may need to take leave. It also would have provided both parents with a genuine chance to participate in paid work and caring relationships, thus promoting fairness in this context.

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<sup>81</sup> Children and Families Bill Deb (n 75) col. 706

<sup>82</sup> J. Williams *Unbending Gender: Why Family and Work Conflict and What to do About it* (Oxford University Press, 2000) 70

ii. *Mediating fathers' and recognised co-parents' entitlement*

Fathers and recognised co-parents are also only able to access shared parental leave if the mother consents,<sup>83</sup> and has “been engaged in employment as an employed or self-employed earner for any part of the week in the case of at least 26 of the 66 weeks immediately preceding the calculation week.”<sup>84</sup> Therefore, as was the case with additional paternity leave, fathers’ and recognised co-parents’ caring roles are mediated through mothers’ entitlement.<sup>85</sup> This further limits the number of families who can access shared parental leave and prioritises mothers’ care. The devaluing of fathers’ caring role in this way is problematic because the legislation was introduced after the case of *Roca Alvarez v Sesa Start Espana ETT SA*, which I analysed in chapter six.<sup>86</sup> In this case, the Court of Justice of the European Union (CJEU) rightly recognised that if a father:

can only enjoy this right but not be the holder of it, [this] is liable to perpetuate a traditional distribution of the roles of men and women by keeping men in a role subsidiary to that of women in relation to the exercise of their parental duties.<sup>87</sup>

Accordingly, the CJEU found such legislation to be contrary to the principle of equal treatment. Therefore, the Coalition Government introduced legislation which could be deemed discriminatory and unlawful.

iii. *Mothers' access to shared parental leave*

A final reason the eligibility requirements are problematic is that they change if fathers or recognised co-parents want to transfer leave back to the mother or adopter. As noted earlier, some mothers will be able to transfer their maternity leave to create shared parental leave, but will not be able to access it themselves. This is because they do not meet the continuity of

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<sup>83</sup> The Shared Parental Leave Regulations 2014, reg. 8(3)(b)(iii)

<sup>84</sup> The Shared Parental Leave Regulations 2014, regs. 5(2)(a), 5(3)(a) and 36(1)(a)

<sup>85</sup> See chapter six page 201-206

<sup>86</sup> *Roca Alvarez v Sesa Start Espana ETT SA* Case C-104/09 [2010] ECR I-08661

<sup>87</sup> *Roca Alvarez v Sesa Start Espana* (n 86) [36]. See chapter six page 207



employment test.<sup>88</sup> The eligibility requirements for fathers and recognised co-parents also change, as they must pass the less demanding “employment and earnings test.”<sup>89</sup> This may be an attempt to make the legislation formally equal; a parent’s eligibility for shared parental leave is determined by them passing the continuity of employment test and the other parent satisfying the employment and earnings test. Nonetheless, this achieves nothing in practice other than excluding some mothers from accessing shared parental leave, denying some families genuine flexibility. There is no logical reason why mothers or adopters who transfer their own entitlement should not be able to access it again. After all, employers will have already accommodated their leave once; doing so again would cause only minimal inconvenience. The different eligibility requirements are also very confusing, which is liable to deter parents from accessing shared parental leave. Therefore, the eligibility requirements are highly problematic.

b) Limited payment

Another reason the expected uptake of shared parental leave is so low is the unchanged rate of payment. This is liable to undermine take up of shared parental leave by men, single parents and those in low paid, precarious work, as they are unlikely to be able to afford to do so. A recurring theme throughout chapter six was that men’s take up of leave is reliant upon provision of income-related payment.<sup>90</sup> This is because they remain more likely to be the breadwinner in heterosexual families. However, no account was made for this as fathers and co-parents are only able to access leave paid at the low, flat statutory rate. If fathers or recognised co-parents take any of the first six weeks of leave, any income-related leave is lost. Families will lose out financially where the mother or adopter is earning above the

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<sup>88</sup> The Shared Parental Leave Regulations 2014, regs. 4(2)(a) and 20(2)(a)

<sup>89</sup> The Shared Parental Leave Regulations 2014, regs. 4(3)(a), 20(3)(a) and 36(1)(a)

<sup>90</sup> See chapter six page 193

statutory minimum.<sup>91</sup> Therefore, the legislation has an “inbuilt financial penalty.”<sup>92</sup> Few men will be able to afford to take this leave as within most heterosexual families, men’s wages are needed and thus are less likely to be sacrificed.

Shared parental leave is thus likely to only incentivise men to take the leave in heterosexual families where the woman is the main breadwinner. Some research shows that the number of female breadwinners is rising: 2.2 million working mothers are now the family breadwinners in the UK, constituting 30% of all working mothers.<sup>93</sup> However, these figures are misleading. They include single parent families, where the mother is the only breadwinner. Of the 2 million lone parents in the UK, 91% are women.<sup>94</sup> 65.7% of these single mothers with dependent children are in paid work.<sup>95</sup> Therefore, at least half of these female breadwinners are in this role because they are the only provider. These families are excluded from using shared parental leave. As a result, only about 1 million women will be in a financial position to transfer any of their leave entitlement.

Increasing the level of payment would have been an important step towards promoting parents’ flourishing.<sup>96</sup> It would have enabled more men to access shared parental leave and challenge gender inequality. It also would have challenged social class inequality as single parents and those in low paid, precarious work would have been better enabled to access longer periods of leave in practice. This is because it would have reduced the financial

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<sup>91</sup> M. Baird, M. O’Brien ‘Dynamics of Parental Leave in Anglophone Countries: The Paradox of State Expansion in Liberal Welfare Regimes’ (2015) 18 *Community, Work & Family* 198, 211

<sup>92</sup> M. Baird, M. O’Brien ‘Dynamics of Parental Leave in Anglophone Countries’ (n 91) 211

<sup>93</sup> D. Ben-Galim, S. Thompson *Who’s Breadwinning? Working Mothers and the New Face of Family Support* (Institute for Public Policy Research, 2013) 2

<sup>94</sup> Office for National Statistics *Statistical Bulletin: Families and Households, 2014* (Office for National Statistics, 2015) 5

<sup>95</sup> Office for National Statistics *Families in the Labour Market, 2014* (Crown, 2014) 5

<sup>96</sup> See chapter two page 55

pressure which forces many to return to work.<sup>97</sup> Therefore, parents would have been granted a genuine chance to turn their capabilities of both participating in paid work and caring relationships, into functionings.<sup>98</sup> This would have recognised each parent as a dignified, free being, in accordance with Sen’s conception of justice, as considered in chapter two.<sup>99</sup>

Increasing the level of payment also would have better recognised the importance and value of caring relationships. It would have demonstrated that caring labour is a basic capability, equally as important as paid work. Accordingly, increasing the level of payment would have made the legislation more care centric and thus challenged the unfair treatment of carers. However, the Coalition Government unsurprisingly did not fully consider increasing the “pitiful” level of payment at any stage of the legislative process.<sup>100</sup> Although this was expected as the Coalition Government were implementing this change in a period of austerity, it is still disappointing.

As only a small number of employers increased payment for additional paternity leave, it is not expected that many employers will voluntarily increase the rate of shared parental pay either.<sup>101</sup> This is because they are very similar, transferable entitlements. However, the publicity surrounding this new legislation may result in more cases challenging employers’ disparate support for men and women taking leave, like *Shuter v Ford Motor Company Ltd* which I analysed in chapter six.<sup>102</sup> Although tribunals will not have to follow the judgement in *Shuter* because it concerned additional paternity leave and it was a first instance, non-binding decision, the reasoning adopted suggests that different levels of payment would

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<sup>97</sup> See chapter six page 194

<sup>98</sup> See chapter two page 55

<sup>99</sup> See chapter two page 54

<sup>100</sup> G. James *The Legal Regulation of Pregnancy and Parenting in the Labour Market* (Routledge, 2009) 43

<sup>101</sup> *Shuter v Ford Motor Company Ltd* ET/3203504/2013. See chapter six page 203

<sup>102</sup> *Shuter v Ford* (n 101)

require detailed justification. Employers are unlikely to be able to justify lower levels of payment for men on the grounds that it would be too expensive. This would represent progress as decisions would not be entirely focused upon employers' interests. Therefore, future tribunal decisions may result in some changes in the workplace. Yet this may lead to employers levelling down entitlements. To avoid this, the legislation should be underpinned by the capabilities approach so each individual's capabilities are promoted. Accordingly, this further bolsters my argument in chapter four that to achieve fairness for carers, labour law should be underpinned by the personal work contract as developed by Freedland and Kountouris.<sup>103</sup>

c) Lack of genuine flexibility

As shared parental leave is available concurrently and for non-continuous periods, the legislation could in theory promote flexibility. However, few parents are likely to use leave in this way. Taking leave concurrently is likely to be unpopular because it would result in the leave entitlement being used over a short time frame. Also, the unchanged level of payment will mean few parents can afford to take the leave concurrently. This may undermine the usage of concurrent leave even by those who I identified might benefit from it, including mothers affected by pregnancy and childbirth, and parents of children with special needs.<sup>104</sup> Consequently, this change will not increase flexibility.

Non-continuous periods of leave may also be underused because the legislation gives employers the option to simply refuse the preferred dates without justification.<sup>105</sup> The needs of employers are obviously important and inevitably, some employers will have to reject

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<sup>103</sup> M. Freedland, N. Kountouris *The Legal Construction of Personal Work Relations* (n 77) 372. See chapter four page 147

<sup>104</sup> See chapter seven page 220

<sup>105</sup> The Shared Parental Leave Regulations 2014, regs. 13(2)(c) and 30(2)(c)

requests because it would be impossible to hire a replacement employee for non-continuous periods. However, I suggest that the legislation unduly prioritises employers. The legislation reiterates that paid work is more important than caring labour and undermines the latter's importance. Therefore, shared parental leave may be relatively inflexible in practice which will discourage parents, especially men, from accessing it.

I contend that the legislation should have required employers to consider requests for non-continuous periods of leave in a reasonable manner. Such a duty would have been similar to the duty imposed on them when they receive a request for flexible working.<sup>106</sup> Although this would not mean guaranteed acceptance of all requests, it would have fostered dialogue between the parties. This would have encouraged compromise as employers would have needed to consider whether non-continuous blocks of leave would have been practicable. This could have promoted flexibility for many employees as such deliberation leads to the majority of requests for flexible work being fulfilled.<sup>107</sup> Requiring employers to justify their decision would also have meant that employers' unreasonable decisions could have been challenged in employment tribunals. To assist employees with unsupportive employers, the tribunals should have been enabled to examine the reasonableness of the decision and whether it was necessary for the employer to reject the request. Tribunals would not have needed to base their findings upon the business grounds identified in the flexible working legislation.<sup>108</sup>

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<sup>106</sup> Children and Families Act 2014, s. 132(2) and (3). See chapter two page 91-95

<sup>107</sup> R. Suff *Flexible Working Policies and Practice: 2013 XpertHR Survey* (XpertHR, 2013). See chapter three page 93

<sup>108</sup> R. Horton 'Care-Giving and Reasonable Adjustment in the UK' in N. Busby and G. James *Families, Care-Giving and Paid Work: Challenging Labour Law in the 21<sup>st</sup> Century* (Edward Elgar, 2011) 140

### **Achieving fairness**

It is clear that shared parental leave is unlikely to achieve the Coalition Government's aims of encouraging men to care. The legislation continually demonstrates how fathers' caring role is of secondary importance to their paid work commitments and employers' needs. This is highlighted especially by the eligibility requirements and the limited level of payment. The prioritisation of paid work also frustrates the practical flexibility of shared parental leave. These problems mean that not only will the legislation fail to challenge gender inequality, but it will also deny working class parents the support they need to achieve the basic capabilities of participating within paid work and caring labour. Therefore, shared parental leave is not care centric, as expanded upon in chapter four. It is just more sound-bite legislation. Like additional paternity leave, it has "all the positive publicity and appearance of a novel and innovative right, but in reality offer[s] little of substance for the majority of working families."<sup>109</sup>

In chapter four, I argued that care centric legislation should also value caring relationships outside of the sexual family.<sup>110</sup> Although leave could be reserved for those caring within the sexual family to challenge gender inequality, it cannot exclude other carers.<sup>111</sup> However, this is exactly what has been enacted by the shared parental leave legislation. The leave can only be shared between two people who are either in a sexual relationship or are the parents of the child. Those caring outside the sexual family will not receive the support, which undervalues their caring labour. This is unjustified because the Coalition Government did not use the sexual family underpinning to ensure men provide care. Therefore, the Government were not justified in prioritising the sexual family.

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<sup>109</sup> M. Weldon-Johns 'The Additional Paternity Leave Regulations 2010' (n 10) 5

<sup>110</sup> See chapter four page 133

<sup>111</sup> See chapter four page 133

Throughout the legislative process, progressive proposals were made which could have achieved fairness for parents by challenging gender and socio-economic inequality as well as the sexual family underpinning. These included making shared parental leave available part-time, introducing a non-transferable period of leave for fathers and recognised co-parents, and increasing access to those caring outside the sexual family. Some of these proposals were praised as “a breakthrough,” in the parliamentary debates.<sup>112</sup> This description was justified because each proposal would have made shared parental leave more care centric and tackled injustice in accordance with my argument in chapter four. Yet each of these breakthrough ideas was rejected. In the next section, I will examine the reasons for this and demonstrate why each proposal would have been an important step in achieving fairness as defined in chapter two.<sup>113</sup>

a) Part-time leave

i. *The potential benefits*

In the consultation it was suggested that leave could be taken in periods of days, as opposed to weeklong blocks. This would have allowed leave to be taken part-time, enabling parents to combine their paid work whilst caring for their child. This would have promoted fairness for parents in a number of ways. Firstly, making leave available part-time would have been consistent with the Coalition Government’s main aim of encouraging men to participate in childcare. This is partly because research suggests that men are more likely to take leave when it is flexible, as previously noted in chapter four.<sup>114</sup> Also, men could have accessed leave without sacrificing their entire income. I have recognised throughout this thesis that men’s traditional breadwinner role makes it harder for heterosexual families to sacrifice the

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<sup>112</sup> HL Children and Families Bill Deb 20<sup>th</sup> November 2013, twelfth day, col. GC431

<sup>113</sup> See chapter two page 48

<sup>114</sup> See chapter four page 93. M. Kilkey ‘New Labour and Reconciling Work and Family Life: Making it Fathers’ Business’ (2006) 5 Social Policy and Society 167, 169

father's incomes. Part-time leave could have made shared parental leave a viable financial option for families by enabling fathers and recognised co-parents to supplement their low level of shared parental pay with a part-time income.<sup>115</sup> A comparative analysis of Norway, where parents can also “combine all or part of the parental money period with part-time work,” after the first six weeks of leave, demonstrates that men do make use of this flexibility.<sup>116</sup> In 2014, 25% of eligible fathers in Norway took their father's quota part-time.<sup>117</sup> Further research details how some fathers have taken leave part-time to share childcare with other family members to save money.<sup>118</sup> Therefore, taking leave part-time is clearly an appealing option for some fathers in Norway. Even those who did not take leave part-time because it did not suit their family's needs, were able to consider it as an option. Therefore, families would have been afforded choice, which would have empowered both parents to participate within paid work and caring relationships in a way which suits them.

Other advantages were noted in the parliamentary debates by Lisa Nandy, a Labour Member of Parliament for Wigan who was then Shadow Minister for Civil Society. She recognised that making leave available part-time would have positively impacted upon women's ability to continue in the workforce in a productive and healthy way after childbirth.<sup>119</sup> She reasoned that making leave available part-time would have reduced the financial pressure to return to work, as mothers would have been able to maintain some of their income whilst taking leave. Being able to return to work when they were ready would make it less likely that mothers would leave to meet their caring responsibilities. This remains a real concern because as

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<sup>115</sup> Department for Business Innovation and Skills *Consultation on Modern Workplaces* (n 35) 20

<sup>116</sup> B. Brandth, E. Kvande 'Norway' in P. Moss *11<sup>th</sup> International Review of Leave Policies and Related Research 2015* (International Network on Leave Policies and Research, 2015) 247

<sup>117</sup> B. Brandth, E. Kvande 'Norway' (n 116) 250. A father's quota is a period of parental leave which is reserved for fathers alone. This will be considered in greater detail at page 238.

<sup>118</sup> B. Brandth, E. Kvande 'Reflexive Fathers: Negotiating Parental Leave and Working Life' (2002) 9 *Gender, Work and Organization* 186, 198

<sup>119</sup> Children and Families Bill Deb (n 75) col. 712



noted in chapter five, 2.2 million women cite family and home responsibilities as reasons for not entering the paid workforce.<sup>120</sup>

Nandy further explained that “part-time leave and part-time pay may have significant benefits for families...on low incomes who would like to extend the time that they can spend at home, but cannot afford to have no income.”<sup>121</sup> This is because parents would have been able to supplement their low level of shared parental pay with a part-time income. Therefore, part-time leave would have provided those on lower wages a genuine chance to access a significant period of leave.<sup>122</sup>

These three benefits demonstrate that making leave available part-time would have been an important step in making UK reconciliation legislation care centric. It would have challenged the misconception that caring labour is less important than paid work and promoted people’s capabilities. Its introduction would also have been cost effective as parents could have accessed better paid leave without increasing state expenditure.<sup>123</sup> The Chief Executive of the Fatherhood Institute noted in a House of Commons Public Bill Committee that such a change would have been the “perfect model” to allow parents to actively participate in caring relationships and paid work, whilst the UK’s financial situation did not allow for remuneration to be increased.<sup>124</sup>

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<sup>120</sup> G. James ‘Law’s Response to Pregnancy/Workplace Conflicts: A Critique’ (2007) 15 *Feminist Legal Studies* 167, 169-170

<sup>121</sup> Children and Families Bill Deb (n 75) col. 712

<sup>122</sup> See chapter four page 93

<sup>123</sup> Fatherhood Institute ‘Stick to Your Guns Over Parenting Leave Reform, FI Urges Government (2012) 6 <https://www.google.com/url?q=http://www.fatherhoodinstitute.org/2012/parenting-leave-how-would-the-fatherhood-institute-want-it-to-work/parentingleavepressrelease02072012-final/&sa=U&ei=i147UYm5M9PY7Ab-yIDIAQ&ved=0CAoQFjAB&client=internal-uds-cse&usq=AFQjCNGT7WbUSIIyTTpKAq1PnSjGvyXKlg> accessed 09.03.13

<sup>124</sup> Children and Families Bill Deb (n 70) col. 137

ii. *The problematic reasons for rejection*

The limited costs of such a scheme make the Coalition Government's rejection of part-time shared parental leave surprising and Swinson was forced to defend the decision in the parliamentary debates. She reasoned that making leave available part-time would have been too complex to calculate as "payroll systems operate on that kind of weekly basis, and so we would be asking for significant change in terms of administration."<sup>125</sup> This reasoning was also evident in the House of Lords debates.<sup>126</sup> However, this justification for rejecting part-time leave is problematic for two reasons. Firstly, the focus upon reducing employers' burdens demonstrates the Coalition Government's prioritisation of paid work and fails to acknowledge the importance of caring relationships. Secondly, in the House of Lords, the argument that part-time leave would be an administrative burden was not widely agreed upon. Lord Stevenson of Balmacara, a Labour Lord and Shadow Spokesperson for Business, Innovation and Skills, disagreed with the argument. He explained that he "still do[es] not quite get why it is so difficult to calculate pay in terms of less than a week," because "if you can calculate what it costs per hour to employ somebody, you can presumably also make the system flexible enough to allow them to work in less-than-week blocks."<sup>127</sup> In highlighting the implausibility of Swinson's argument, Lord Stevenson's reasoning shows how desperate the Coalition Government was to promote employer's interests, as they are prioritised even when they are unfounded and are far outweighed by potential benefits for carers.

Swinson further defended her argument by reference to the existing keep in touch days, which she argued could "effectively be used to work part time on return to work, over a period of a few weeks."<sup>128</sup> She reasoned that "solutions already exist, then, for parents who

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<sup>125</sup> Children and Families Bill Deb (n 75) col. 713

<sup>126</sup> HL Children and Families Bill Deb (n 112) col. GC424

<sup>127</sup> HL Children and Families Bill Deb (n 112) col. GC423

<sup>128</sup> Children and Families Bill Deb (n 75) col. 713

want to work part time while on shared parental leave.”<sup>129</sup> Accordingly, the only way the Coalition Government helped parents in this regard was to extend each of their entitlement to twenty keep in touch days.<sup>130</sup> However, I contend that this will not be anywhere near as beneficial to parents as part-time leave. This is because it will not allow parents to supplement the low level of statutory pay. As explained in chapter five, keep in touch days have been criticised for undervaluing the work of parents because they are paid at the low, flat rate of statutory pay.<sup>131</sup> Therefore, using keep in touch days will not enable parents to supplement their income whilst accessing leave, which will severely limit all parents, but especially men’s usage of the entitlement. Also, without the part-time level of payment, the financial pressures that compel parents to return to work will not be reduced, so those on lower incomes will remain unable to take extended periods of leave. Introducing part-time leave would therefore have been more likely to achieve shared parenting than keep in touch days, which demonstrates the problematic nature of Swinson’s reasoning.

In sum, I would argue that no convincing reason explained why part-time leave was rejected. Employers’ interests were unjustifiably protected and promoted over the achievement of shared parenting and fairness for parents. Accordingly, Baroness Lister of Burtersett, a Labour Lord correctly noted that the rejection merely exposed the fact “that there is no political will to inject this important element of flexibility into the parental leave schemes.”<sup>132</sup>

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<sup>129</sup> Children and Families Bill Deb (n 75) col. 713

<sup>130</sup> The Shared Parental Leave Regulations 2014, reg. 37(2)

<sup>131</sup> See chapter five page 156

<sup>132</sup> HL Children and Families Bill Deb (n 112) col. GC422

b) Non-transferable leave for fathers and recognised co-parents

To challenge gender inequality and achieve fairness in this context, shared parental leave needed to not just enable men to take leave, but actively encourage them to do so.<sup>133</sup> As I argued in chapter six, a default period of six weeks' income-related leave, with two weeks of mandatory leave, would have encouraged men's involvement in care.<sup>134</sup> In this regard, the Coalition Government disappointingly did not implement any changes to the paternity leave entitlement. However, the Coalition Government did propose a four week period of non-transferable leave in the consultation.<sup>135</sup> I noted in chapter four that such an entitlement would be the best way to encourage men to take leave after the labour intensive first weeks of childcare.<sup>136</sup> Therefore, this proposal represented progress, even though a six week period of leave at childbirth would have been more transformative. Such an entitlement would have resisted the prioritisation of mothers' caring role by recognising that fathers and recognised co-parents are equally capable of providing care.<sup>137</sup> Indeed, they would have been provided with a "realistic opportunity and encouragement...to become involved in a very practical and more holistic way in care-giving during the first year."<sup>138</sup>

Most beneficially, the Scandinavian experience suggests that this would have actually led to men taking leave.<sup>139</sup> As noted in chapter four, the number of parents sharing leave equally in Sweden has slowly increased to 12.7%.<sup>140</sup> Such figures are in stark contrast to the 2-8% of

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<sup>133</sup> See chapter four pages 117-120

<sup>134</sup> See chapter six page 195

<sup>135</sup> Department for Business Innovation and Skills *Consultation on Modern Workplaces* (n 35) 22

<sup>136</sup> Chapter four page 131

<sup>137</sup> See chapter four page 127

<sup>138</sup> G. James 'Mothers and Fathers as Parents and Workers: Family-Friendly Employment Policies in an Era of Shifting Identities' (2009) 31 *Journal of Social Welfare and Family Law* 271, 276

<sup>139</sup> See chapter four page 127-129

<sup>140</sup> A. Duvander, L. Haas, C. Philip Hwang 'Sweden' in P. Moss *11<sup>th</sup> International Review of Leave Policies and Related Research 2015* (International Network on Leave Policies and Research, 2015) 316

fathers predicted to access any shared parental leave in the UK.<sup>141</sup> The expected uptake is so low partly because a period of non-transferable leave for fathers was rejected. Instead, the Children and Families Act 2014 includes the power to extend paid paternity leave.

*i. The problematic power to extend paternity leave*

The 2014 Act states that statutory paternity pay will be available for “such number of weeks, not exceeding the prescribed number of weeks, within the qualifying period, as he may choose in accordance with regulations.”<sup>142</sup> As clarified in the Explanatory Notes, this gives “the Secretary of State power to set the number of weeks of statutory paternity pay in regulations subject to a minimum of 2 weeks.”<sup>143</sup>

Introducing this power is preferential to totally rejecting the extension of fathers’ and recognised co-parents’ entitlement to leave. However, even if this power is enforced, it is unlikely to be as effective as the Scandinavian legislation because of one important distinction; the power would not entitle parents to income-related payment. Powell did propose in the parliamentary debates that at least four weeks should be paid at 90% of income.<sup>144</sup> However, this suggestion was rejected. The power in the 2014 Act will only make a longer length of paternity leave available at the low flat rate of statutory paternity pay; £139.58 a week, or if it is less, 90% of their earnings. Therefore, even if the power is used, it is unlikely to be as transformative as the Scandinavian legislation. Due to their traditional breadwinner role, the low level of payment may make accessing this leave a practical impossibility for many men in the UK.<sup>145</sup>

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<sup>141</sup> Department for Business, Innovation and Skills *Modern Workplaces: ‘Shared Parental Leave’ and Pay Administration Consultation* (n 69) 4

<sup>142</sup> S. 123(3)(a). Introduced into Social Security Contributions and Benefits Act 1992, s. 171ZE(2)(b)

<sup>143</sup> Explanatory Notes Children and Families Act 2014, [626]

<sup>144</sup> Children and Families Bill Deb (n 75) cols. 729-30

<sup>145</sup> See chapter page 126

Delaying the extension of leave for fathers and recognised co-parents was widely criticised. When asked what would make the most difference to the Children and Families Bill (as it was then), the Chief Executive of the Fatherhood Institute answered “the daddy quota.”<sup>146</sup> Working Families also suggested that fathers’ own rights should be extended.<sup>147</sup> The Coalition Government justified the rejection of this entitlement on the basis that having numerous different types of leave would increase confusion and costs.<sup>148</sup> However, if the Coalition Government really did not consider employers able to handle this, the power to extend paternity leave would never have been introduced. Therefore, the reasoning is problematic. It suggests that the main reason the Government did not immediately extend paternity leave was the inevitable economic costs of the leave.<sup>149</sup> In the parliamentary debates, Swinson noted that introducing even an additional two weeks paternity leave was estimated to cost £10 million a year and extending the statutory level of paternity pay to accompany this would cost an additional £16.4 million a year.<sup>150</sup> She also recognised that to make this leave income-related would cost considerably more. However, I have already noted that for UK legislation to be as effective at encouraging men to take leave as its Scandinavian counterparts, these higher costs need to be met.<sup>151</sup> In the following sections, I will argue firstly that the estimated costs of income-related leave could have been reduced. More importantly, I will then contend that these costs would have been justified because of the potential economic and social benefits. Such benefits include the promotion of shared

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<sup>146</sup> This is how the period of non-transferable leave was commonly referred to within the parliamentary debates. Children and Families Bill Deb (n 70) col. 139

<sup>147</sup> Working Families *Children and Families Bill – Second Reading Briefing* (2013) 2 <http://www.workingfamilies.org.uk/articles/pdf/article/455> accessed 07.03.13. Working Families are “the UK’s leading work-life balance organisation...[which] helps working parents and carers and their employers find a better balance between responsibilities at home and work” [www.workingfamilies.org.uk/about-us](http://www.workingfamilies.org.uk/about-us) accessed 25.08.2014

<sup>148</sup> Department for Business, Innovation and Skills *Government Response on Flexible Parental Leave* (n 22) 20

<sup>149</sup> Department for Business, Innovation and Skills *Government Response on Flexible Parental Leave* (n 22) 20

<sup>150</sup> Children and Families Bill Deb (n 75) col. 731

<sup>151</sup> M. Kilkey ‘New Labour and Reconciling Work and Family Life’ (n 114) 169

parenting, which rendered the Government's decision to focus solely upon costs inappropriate.

*ii. Reducing the costs of non-transferable leave*

A simple way to reduce costs would have been to decrease the level of income-related pay from 90% in all the reconciliation entitlements. Research conducted by Warren et al suggests that 80% income replacement would be enough for parents to be satisfied; one parent reported that at this level of pay, “you’d hardly notice the difference.”<sup>152</sup> This has been supported by international research which suggests that income replacement should be between 60-80% of income to encourage take up.<sup>153</sup> Indeed, when the period of non-transferable leave was first introduced in Sweden, the level of income replacement decreased from 90% to 80%, but this “had little if any effect,” upon uptake of leave.<sup>154</sup> Thus, I argue that 80% would have been an appropriate level of income replacement for most families. This decrease would have enabled leave to be extended for a longer period.

The costs could have been further reduced by capping the pay available. Again, this would be appropriate in all the entitlements which are paid at an income-related level. This would have promoted fairness for parents by ensuring that the majority of the increased costs did not benefit the highest earners. This was a warranted concern of Swinson and would have been indefensible.<sup>155</sup> The scarce resources would have disproportionately promoted the caring roles of employees who already generally receive more employer support in balancing their

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<sup>152</sup> T. Warren, E. Fox, G. Pascall ‘Innovative Social Policies: Implications for Work-Life Balance Among Low-Waged Women in England’ (2009) 16 *Gender Work and Organization* 126, 142

<sup>153</sup> Equality and Human Rights Commission *Response to BIS Consultation on Draft Regulation, Choice for Families: Additional Paternity Leave and Pay* (Equality and Human Rights Commission, 2009) 5

<sup>154</sup> J. Ekberg, R. Eriksson, G. Friebel ‘Parental Leave — A Policy Evaluation of the Swedish “Daddy-Month” Reform’ (2013) 97 *Journal of Public Economics* 131, 140

<sup>155</sup> Children and Families Bill Deb (n 75) col. 731

paid work and caring obligations.<sup>156</sup> However, introducing a cap on the pay available would have ensured that those in lower paid work would have been the main beneficiaries of this expenditure. This would have been necessary because lower paid workers are less likely to be supported by their employers when balancing paid work and caring responsibilities, so are often practically unable to access leave.<sup>157</sup> Nordic countries also cap the pay available on leave.<sup>158</sup> In Sweden, the upper ceiling of parental leave pay changes yearly but is consistently high.<sup>159</sup> In 2015, SEK333, 750 or £24,873.50 is available yearly for parents.<sup>160</sup> This is only slightly below the national average earnings of £26,206.54.<sup>161</sup> Therefore, Swedish parents are provided enough income to comfortably live on whilst taking leave, but those on lower incomes particularly benefit from the expenditure.

However, capping the level of payment available may have impacted upon take up of leave by some parents. Research suggests that Swedish fathers' share of the leave increases with income up to the ceiling,<sup>162</sup> but the greater economic loss of earnings over the ceiling does seem "to inhibit fathers' use."<sup>163</sup> However, this could reflect personal choice as further Swedish research found that fathers with higher incomes consider themselves able to afford to take the leave.<sup>164</sup> Therefore, some of these fathers simply choose not to take the leave. I would thus suggest that capping the level of payment would have been justified in the UK. As long as the cap had been set at a high level of wage replacement, similarly to the Swedish

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<sup>156</sup> See chapter three page 39

<sup>157</sup> See chapter three page 36

<sup>158</sup> P. Moss *International Review of Leave Policies and Related Research 2010: Employment Relations Research Series 115* (Department for Business, Innovation and Skills, 2010) 99, 140, 175, 223

<sup>159</sup> A. Lindström 'Gender Bias in Parental Leave: Evidence from Sweden' (2013) 34 *Journal of Family Economic Issues* 235, 237

<sup>160</sup> A. Duvander, L. Haas, C. Philip Hwang 'Sweden' (n 140) 311

<sup>161</sup> OECD Data: Sweden <<https://data.oecd.org/sweden.htm#profile-jobs>> accessed 17.07.15

<sup>162</sup> M. Bygren, A. Duvander 'Parents' Workplace Situation and Fathers' Parental Leave Use' (2006) 68 *Journal of Marriage and Family* 363, 366

<sup>163</sup> M. Bygren, A. Duvander *Who Takes Care of the Children? Couples Workplace Situation and Their Division of Parental Leave* (Swedish Social Insurance Agency, 2005) 9

<sup>164</sup> M. Bygren, A. Duvander *Who Takes Care of the Children?* (n 163) 8



legislation, families would have been provided with a decent living wage and the legislation would have been fair. Also, by decreasing the potential costs, it would have been more feasible for the Government to introduce a period of non-transferable, income-related leave. To equalise entitlements, such changes would also have to be made to maternity and adoption leave. Again, as this would have reduced overall costs, this would have made a period of non-transferable, income-related leave for fathers more feasible.

*iii. Justifying the costs of non-transferable leave*

Such changes would not eliminate all the costs of non-transferable income-related leave. Yet, as I argued in chapter five in relation to increasing maternity pay, these costs would have been economically justifiable.<sup>165</sup> This is because if men took more leave, costs would have been reduced in other areas. This would include decreasing the huge losses caused by the underutilisation of women within the paid workplace, estimated to cost between £18 and £23 billion a year.<sup>166</sup> If men had been encouraged to take leave, then more women would have been enabled to stay in the workplace as “the more time fathers spend caring for small children, the more time women have for participation in the work force, which reduces their marginalization and its economic effects.”<sup>167</sup> This may also result in fewer women taking extended periods of maternity or adoption leave. As research suggests that leave which is taken for more than six months is the most costly to employers, this would result in their costs also being reduced.<sup>168</sup> Employers’ replacement costs may be further reduced because policies supporting caring relationships are associated with increased employee loyalty and

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<sup>165</sup> See chapter five page 169

<sup>166</sup> Equality and Human Rights Commission *Policy Briefing: EU Pregnant Workers Directive* (Equality and Human Rights Commission, 2010) 12

<sup>167</sup> L. Barclay ‘Liberal Daddy Quotas: Why Men Should Take Care of the Children, and How Liberals Can Get Them to Do It’ (2011) 28 *Hypatia* 163, 168

<sup>168</sup> Fatherhood Institute *Fatherhood and the Childhood and Families Taskforce* (n 67) 5

retention.<sup>169</sup> Finally, reconciliation policies have been linked to reduced absence for sickness within the paid workforce.<sup>170</sup> As stated in chapter five, estimates of the costs of sick days range from over £14 billion,<sup>171</sup> to £29 billion per year.<sup>172</sup> These costs may have been decreased because parents would have returned to the workplace when both they and the child were ready, rather than because of financial need.

Introducing income-related non-transferable leave for fathers or recognised co-parents could also have achieved important social benefits, which a focus upon economic costs alone disregards. Of these social benefits, the most important is that gender inequality would have been challenged as men would have been actively encouraged to take leave to provide care. This may have gone some way to achieving the goal of shared parenting. In addition, McColgan noted back in 2000 that such an entitlement would have “implications not only for women’s aspirations to equality, but also for the relationships which develop between fathers and children.”<sup>173</sup> As already stated, it would reduce discrimination against women in the workplace. Children’s welfare also could have been promoted as better parental relationships would be encouraged. Even if this is not immediately economically beneficial, it is of vital importance because caring relationships are valuable. They should be protected as a basic capability to promote fairness for parents and enable them to flourish.

Therefore, the Coalition Government’s cost analysis was inappropriate. It was unjustifiable to reject a period of income-related non-transferable leave without equal consideration of the

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<sup>169</sup> Department for Business Innovation & Skills *Summary of Responses to Consultation on European Commission Proposal to Amend the Pregnant Workers Directive* (Department for Business Innovation & Skills, 2010) 7

<sup>170</sup> S. Bevan, S. Dench, P. Tamkin and J. Cummings *Family Friendly Employment: The Business Case* (Institute for Employment Studies, 1999) 3

<sup>171</sup> Confederation of British Industries *Fit For Purpose: Absence and Workplace Health Survey* (CBI, 2013) 11

<sup>172</sup> <http://www.xperthr.co.uk/news/number-of-sick-days-falling-but-uk-still-takes-most-in-the-world/116902/> accessed 18.04.2014. See chapter five page 169

<sup>173</sup> A. McColgan ‘Family Friendly Frolics? The Maternity and Parental Leave etc. Regulations 1999’ (2000) 29 *Industrial Law Journal* 125, 141

important social benefits, especially as steps could have been taken to reduce the costs. Rather than implementing the power to extend paternity leave, the Coalition Government should have implemented its proposal to introduce a period of non-transferable leave. To have been really transformative, this should have been in addition to the six week period of leave advocated in chapter six.<sup>174</sup>

c) Caring outside the sexual family

Achieving fairness for carers is finally dependent upon supporting all caring relationships. As I argued in chapter four, reconciliation legislation should implement a more expansive definition of parenting which reflects Fineman's caretaker-dependent unit to complement efforts to challenge gender inequality.<sup>175</sup> This would recognise the value of each and every caring relationship, reflecting the "radical transformations already occurring within families."<sup>176</sup> In doing so, it would enable each person to flourish by achieving their basic capabilities of participating within paid work and caring relationships. Shared parental leave presented an opportunity to achieve just this. In the House of Commons and House of Lords debates, a more expansive definition of parenting was suggested in two exceptional situations; where the mother cannot provide care and the father or mother's partner is ineligible for shared parental leave; and when childcare is met by kinship carers.<sup>177</sup> Examining both these situations will demonstrate why limiting support to parents within the sexual family undermines the achievement of fairness for carers within the workplace. I will further argue that an expansive definition of parenting, if enacted, could have promoted fairness for carers in other, less exceptional circumstances. Enabling single parents to transfer some of their leave to another carer would have legitimated the caring practices already

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<sup>174</sup> See chapter six page 194

<sup>175</sup> See chapter four page 133

<sup>176</sup> G. James *The Legal Regulation of Pregnancy and Parenting in the Labour Market* (n 100) 64

<sup>177</sup> Children and Families Bill Deb (n 75) col. 725

occurring.<sup>178</sup> This would have promoted flourishing by providing more people with a genuine opportunity to participate meaningfully in paid work and caring responsibilities.

*i. Transferring leave when mothers cannot provide care*

Lord Stevenson of Balmacara proposed that families who would not qualify for shared parental leave should be able to transfer their maternity leave to another person, in exceptional circumstances.<sup>179</sup> The circumstances envisioned were when the mother was unable to provide care because she was incapacitated, very ill or died during childbirth. He suggested that leave could be transferred to “a grandparent, an aunt, an uncle or even the father if he would not normally qualify.”<sup>180</sup> Lord Stevenson’s suggestion highlighted a gap in the legislation; if mothers in such families are unable to care, no one else is able to access a substantive period of paid leave to provide childcare. As recognised within the debates, the children within these families will potentially suffer because they might be denied attention and care. Lord Stevenson’s proposal to allow leave to “be allocated to someone else,” would have provided each child with a chance to be cared for in their first year. Therefore, the legislation would have been care centric, recognising the importance of childcare.<sup>181</sup>

His proposal was very quickly dismissed in both the House of Commons and the House of Lords. In the Commons, Swinson stated that “the clue is in the name: parental leave is about sharing leave between working parents – the mother and the father – or, in some circumstances, the mother and her partner.”<sup>182</sup> The legislation makes a small concession, enabling fathers to take the leave in situations where the mother dies, when both parents

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<sup>178</sup> As noted in chapter four page 135

<sup>179</sup> HL Children and Families Bill Deb (n 112) col. GC419

<sup>180</sup> HL Children and Families Bill Deb (n 112) col. GC419

<sup>181</sup> Children and Families Bill Deb (n 75) col. 707

<sup>182</sup> Children and Families Bill Deb (n 75) col. 709

would have been entitled to shared parental leave.<sup>183</sup> However, this does not fill the gap Lord Stevenson identified, as the 64% of families with new-born children who will not qualify for the entitlement will receive no support in these exceptional circumstances.<sup>184</sup> Also, Swinson made it clear that even when the mother dies, “we do not expect entitling parties who are not parents to share parental leave.”<sup>185</sup> Accordingly, she reaffirmed that even when the sexual family cannot provide care, the leave can only be shared by parents. Therefore, this provision denies each child the same opportunity to be cared for. I would argue that the Coalition Government prioritised the shoring up of the sexual family at the expense of children’s interests.

Swinson defended this decision by focusing upon the importance of increasing the involvement of fathers in caring.<sup>186</sup> Viscount Younger of Leckie, a Conservative Lord reasserted in the House of Lords that the legislation aims to encourage “greater paternal involvement.”<sup>187</sup> As noted in chapter four, limiting childcare to the sexual family can be justifiable because it provides legislators with the best opportunity to challenge the gendered division of care.<sup>188</sup> However, the Government’s reasoning in these particular debates was invalid for two reasons. Firstly, the suggested amendment was limited only to transferring leave in exceptional circumstances, so the leave would have been primarily available to parents. Accordingly, the legislation still could have challenged gender inequality by encouraging fathers to care within appropriate family units. The suggested amendment would only have deviated from this to the extent necessary to protect families in need. Secondly, this chapter has demonstrated that the Coalition Government made only a tokenistic

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<sup>183</sup> The Shared Parental Leave Regulations 2014, schedule 1(1)

<sup>184</sup> Children and Families Bill (n 75) col 700

<sup>185</sup> Children and Families Bill Deb (n 75) col. 709

<sup>186</sup> Children and Families Bill Deb (n 75) col. 709

<sup>187</sup> HL Children and Families Bill Deb (n 112) col. GC420

<sup>188</sup> See chapter four pages 123-127

commitment to encouraging fathers and recognised co-parents to provide care. As shared parental leave did not challenge gender inequality, the Government were not justified in denying support to those caring outside the sexual family. This proposal should have been enacted.

*ii. Supporting kinship carers*

The then Labour opposition also proposed that shared parental leave should be available to kinship carers in the House of Commons.<sup>189</sup> As explained in chapter three, these are non-parents, including relatives or friends, who care for children who otherwise would have entered the care system. As this is a transferable entitlement, it would be dependent upon kinship carers being entitled to adoption leave, as I argued was necessary in chapter five.<sup>190</sup> Extending entitlement to these carers would have reflected a much wider definition of parenting and Fineman's caretaker-dependent unit. It also would have acknowledged the importance of these caring relationships and reduced the likelihood of kinship carers being forced into poverty.<sup>191</sup> Therefore, kinship carers also would have been able to flourish.

Once again the Government's response to this proposal was problematic. Swinson argued that "our focus must be on supporting the people who take on the care from the care system."<sup>192</sup> Of course those caring for children within the care system need support as reflected by adoption leave.<sup>193</sup> But Swinson does not make it clear why this means kinship carers do not require support and should not be entitled to leave. Her argument may reflect the fact that adoptive parents are rightly included within the traditional definition of parenting, yet kinship carers are excluded. However, in both situations, vitally important

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<sup>189</sup> Children and Families Bill Deb (n 75) col. 725

<sup>190</sup> See chapter five page 175

<sup>191</sup> See chapter four page 140

<sup>192</sup> Children and Families Bill Deb (n 75) col. 728

<sup>193</sup> Employment Rights Act 1996, s. 75A-B

caring labour is being provided. Both clearly require support and accommodation in the workplace to be able to flourish and achieve both basic capabilities of participating in paid work and caring labour. It is unjust that the important and society benefitting work provided by kinship carers was disregarded. Therefore, Swinson erred in promoting only those who take on care from the care system; kinship carers should be entitled to this support.

*iii. Supporting single parents*

Although not identified in the parliamentary debates as another circumstance in which deviating from the sexual family would have been appropriate, I suggest that single parents could also have benefited from being able to transfer their shared parental leave to another person in non-exceptional circumstances. This would have provided much needed support to single parents, who often face particular hardships in balancing their paid work and caring responsibilities. This is because they lack a partner with whom to share these responsibilities so they are more likely to be overwhelmed by their dual commitments. Many would therefore have benefitted from the ability to use shared parental leave with any worker who the mother identified as expecting to have the main responsibility for children in the first year, as I argued in chapter four.<sup>194</sup> This could have been implemented in the same way I described for ordinary paternity leave.<sup>195</sup> Indeed, as I argued in the case of ordinary paternity leave, this would not require a huge departure from the current Regulations as eligibility is still premised upon parents having “the main responsibility for the care of C (apart from the responsibility of M).”<sup>196</sup> The only change needed would have been to remove the requirement of being the father or the mothers’ or adopters’ spouse, civil partner or partner, which would have had minimal impact upon employers.<sup>197</sup>

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<sup>194</sup> See chapter four pages 135-140

<sup>195</sup> See chapter six page 196

<sup>196</sup> The Shared Parental Leave Regulations 2014, regs. 5(2)(b) and 21(2)(b)

<sup>197</sup> The Shared Parental Leave Regulations 2014, reg. 3(1) and reg. 21(1)

## Conclusion

Shared parental leave, the Coalition Government's contribution to the reconciliation legislation, does represent progress. Symbolically, it takes a step towards equalising parents' caring role. It also provides parents with greater flexibility in how they take leave, although this is limited in practice. However, it is unlikely to achieve the Coalition Government's aim of encouraging shared parenting. The Government itself acknowledged that the expected uptake of shared parental leave by fathers is extremely low. I have argued throughout that this is because employers' needs continue to be prioritised over the caring needs of families. This has been demonstrated by the retention of some of the problematic parts of the previous legislation, including the eligibility requirements and limited level of payment. The prioritisation of employers' needs was further demonstrated by the lack of flexibility parents are afforded in practice. This means that the legislation fails to provide parents with a genuine chance to participate meaningfully in paid work and caring relationships. While fathers may well wish to care, shared parental leave is yet more sound-bite legislation that does not provide them with a realistic opportunity to do so.

Even this most recent and progressive piece of reconciliation legislation fails to achieve Fineman's ideal of adequately valuing caring relationships and accommodating them within the workplace.<sup>198</sup> Indeed, the problems within the 2014 Act reiterate my argument that to value caring relationships and challenge gender inequality, it is not enough to simply introduce reconciliation legislation. The legislation should also come from a care centric vantage.<sup>199</sup> The proposals for part-time leave and a period of income-related, non-transferable leave would have challenged gender and class inequality. Therefore, shared parental leave

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<sup>198</sup> M. Fineman *The Autonomy Myth: A Theory of Dependency* (The New Press, 2004) 201

<sup>199</sup> N. Busby *A Right to Care? Unpaid Care Work in European Employment Law* (Oxford University Press, 2011) 49



could have been care centric and promoted fairness for parents. As these proposals were rejected, the legislation is thus yet another missed opportunity.

Shared parental leave would have been a genuine breakthrough if it had not solely focused upon those caring within the sexual family during the first year of a child's life. The definition of parenting should have been expanded to include the childcare practices which are already occurring as a matter of social fact.

To further promote fairness in accordance with the vision I outlined in chapter two, and actually value all caring relationships, the legislation also could have protected all those with caring responsibilities.<sup>200</sup> After all, it is not only in the first year of a child's life that care is needed; people's dependency needs will vary throughout their lifetime.<sup>201</sup> Those providing care at any stage are performing important work and thus should be accommodated in the workplace. Therefore, if the legislation had aimed to help all carers actively participate in both paid work and caring relationships, it would have been an important step towards giving "care its rightful place at the centre of all human activity."<sup>202</sup> I will consider how this could have been achieved in more detail in the chapter eight.

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<sup>200</sup> See chapter two page 48

<sup>201</sup> See chapter two page 43

<sup>202</sup> N. Busby *A Right to Care?* (n 199) 44

## Chapter Eight

### A RIGHT TO CARE: CONSOLIDATING THE UK RECONCILIATION LEGISLATION

#### Introduction

The previous three chapters have demonstrated how the reconciliation entitlements available to parents, the “exemplar of the caretaker-dependent relationship,” do not achieve fairness within the definition adopted in chapter two.<sup>1</sup> Nonetheless, parents still receive substantially more support than those providing care for an elderly, disabled or otherwise dependent person in the UK. These carers are only entitled to emergency leave and the right to request flexible working, both of which were analysed in chapter three.<sup>2</sup> It is possible, but unlikely, that they will also be entitled to carers’ leave under the Private Member’s Carers (Leave Entitlement) Bill 2015-16.<sup>3</sup> The limited number of available entitlements demonstrates that caring relationships are inadequately valued. Yet, as noted in chapter two, these carers often face severe problems.<sup>4</sup> If these are to be overcome so carers can flourish, they too require “institutional accommodation or non-economic resources to assist in their labour.”<sup>5</sup> In this chapter, I will consider how the workplace could be modified to achieve fairness for other carers.

One important step in valuing these carers is adequately recognising the value of parenting. As the paradigm caring relationship, this sets a precedent for other caring relationships as

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<sup>1</sup> See chapter two page 48

<sup>2</sup> See chapter three pages 91-97

<sup>3</sup> (HL Bill 42)

<sup>4</sup> See chapter two page 21

<sup>5</sup> M. Fineman *The Autonomy Myth: A Theory of Dependency* (The New Press, 2004) 36

“models for adult caring have tended to be borrowed from childcare.”<sup>6</sup> Therefore, implementing the changes suggested in chapters five, six and seven would promote all carers’ capabilities. Yet it should be acknowledged that this would not negate carers’ needs for specific support. Entitlements for carers cannot simply replicate parents’ entitlements because these relationships are different in a number of ways. Firstly, there is not one identified form of these caring relationships in which caring needs are mainly met, unlike the sexual family ideal which still provides the majority of childcare.<sup>7</sup> Secondly, childcare is expected to get less labour intensive over time as the child grows up, but the same is not true in other caring relationships. Indeed, caring needs may grow over time, especially for those caring for people with degenerative diseases such as dementia. Finally, caring responsibilities may not start at an obviously identifiable time, like childbirth or adoption. Specific protection for parents would remain necessary to deal with these periods of high intensity caring labour. However, as those caring for other dependents may deal with fluctuating caring needs, or the needs that slowly increase over time, it is clear that they may need different types of support.

Entitlements like the proposal for carers’ leave would thus be justified and could help some carers by enabling them to access leave in periods of intense caring labour, such as after an operation. Yet leave entitlements result in caring responsibilities being only momentarily prioritised; upon return to the workplace, they again become secondary. For all carers to flourish, including parents, these incremental entitlements to leave should be supplemented by ongoing workplace support. The need for this is reflected in carers’ own accounts of what would help them in the workplace; they identify practical help with stress management, the opportunity to connect with other employees in similar situations, emergency care support

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<sup>6</sup> P. Beresford *What Future for Care?* (Joseph Rowntree Foundation, 2008) 2  
<http://www.jrf.org.uk/sites/files/jrf/2290.pdf> accessed 04.07.2013

<sup>7</sup> Office for National Statistics *Statistical Bulletin: Families and Households, 2014* (Office for National Statistics, 2015) 8

arranged by their employer and flexible leave policies.<sup>8</sup> Therefore, to adequately support carers, labour law should provide ongoing care centric support which modifies the workplace, in recognition that care does not just impact upon workers in isolated incidents.<sup>9</sup>

In this regard, this chapter will focus upon Busby's development of a right to care within the European Union (EU) legal order. She recognises that genuine change in the context of balancing paid work and caring relationships is dependent on "recognition of the need to 'join up' disparate aspects of the EU."<sup>10</sup> She particularly draws upon anti-discrimination law to make a transformative proposal which could justify the changes identified. I will analyse her proposal and consider how it could promote fairness for carers in the UK. Yet Busby notes that the EU has restricted competence because of its founding objectives as an economic entity. Although this has led to conflict with the social goals, "it is simply not possible for the EU to detach itself from the very foundations on which it is based."<sup>11</sup> Also, Busby notes that integration on economic levels remains important in challenging disadvantage and discrimination in the workplace.

UK governments do not face such restrictions and thus could implement a more progressive right to care than the EU. A UK right could promote social goals and challenge the gendered division of care in the private sphere. However, despite the limiting effect of the EU's economic basis, it has been more progressive than the UK in promoting carers' wellbeing. Indeed, I will note in this chapter that it is EU laws which have initiated many of the more transformative changes to the UK body of reconciliation legislation. Therefore, the UK is

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<sup>8</sup> Carers UK and Employers for Carers *Supporting Employees Who are Caring for Someone with Dementia* (Carers UK and Employers for Carers, 2014) 12

<sup>9</sup> J. Conaghan 'Women, Work and Family: A British Revolution?' in J. Conaghan, R. Fischl, K. Klare *Labour Law in an Era of Globalization* (2002, Oxford University Press) 72

<sup>10</sup> N. Busby *A Right to Care? Unpaid Care Work in European Employment Law* (Oxford University Press, 2011) 130

<sup>11</sup> N. Busby *A Right to Care?* (n 10) 4

unlikely to use its potential to implement a transformative right to care. Nonetheless, I will consider how a right to care could be implemented in the UK because it could effectively promote fairness for carers within the definition adopted in chapter two.<sup>12</sup> Adopting Busby's model, I too will draw on anti-discrimination laws and consider the addition of carers as a protected characteristic under the Equality Act 2010. Extension of the duty of reasonable adjustment to better protect carers will also be analysed. Finally, I will examine how a right to care would unify the UK body of reconciliation legislation and highlight necessary changes.

As these proposals are unlikely to be implemented, my work may be deemed utopian. It envisages a world "where life is better than in our present-day reality, the place we would want to live if we could live anywhere."<sup>13</sup> The better world imagined is one where carers no longer bear the costs of caring needs alone, but are supported by both employer and the state. I will defend my thesis against charges of utopianism, arguing that such proposals are still important as they provide an opportunity to critique the existing structure as well as consider how it could be improved. There is still a long way to go to achieve fairness in this context, but this thesis has highlighted some steps that should be taken towards achieving this important goal.<sup>14</sup>

### **A right to care**

Busby develops a right to provide care alongside paid employment. This aims to promote gender equality by better valuing women's work, both paid and unpaid, as well as

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<sup>12</sup> See chapter two page 48

<sup>13</sup> R. Harding 'Imagining a Different World: Reconsidering the Regulation of Family Lives' (2010) 22 *Law and Literature* 440, 441

<sup>14</sup> S. Fredman *Women and the Law* (Oxford University Press, 1997) 416

contributing “towards the normalization of atypical work arrangements.”<sup>15</sup> She considers this applicable to: parents; relatives or partners of the disabled or terminally ill; or those providing elder care.<sup>16</sup> Her argument is based upon the understanding that the need for care is universal; caring labour is “central to our individual and collective well-being.”<sup>17</sup> Therefore, those providing care should be supported and treated as equally productive and valuable members of society as non-carers. As a right is something “we view as being central to our individual and collective well-being,” recognising a right to care would elevate the status of caring labour.<sup>18</sup> Indeed, it would acknowledge that caring labour is of fundamental importance to all people’s lives. Busby argues that if the right operates effectively, this recognition would enable women’s full participation in the workplace as well as justify the development of welfare rights for carers who are unable to participate in paid work.<sup>19</sup> This recognition would also ensure that the focus was upon counteracting inequality of bargaining power in the workplace, the main aim of labour law discussed in chapter four.<sup>20</sup>

Busby develops a right to care within the EU legal order because of its “specific potential” in this context, emphasising article 33(2) of the Charter of Fundamental Rights of the EU. This states that to “reconcile family and professional life, everyone shall have the right to protection from dismissal for a reason connected with maternity and the right to paid maternity leave and to parental leave following the birth or adoption of a child.” This prioritises parenting relationships and only enforces what is already available at EU level; paid leave for mothers and unpaid parental leave.<sup>21</sup> Therefore, it has been criticised as:

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<sup>15</sup> N. Busby *A Right to Care?* (n 10) 182

<sup>16</sup> N. Busby *A Right to Care?* (n 10) 11

<sup>17</sup> N. Busby *A Right to Care?* (n 10) 8

<sup>18</sup> N. Busby *A Right to Care?* (n 10) 8

<sup>19</sup> N. Busby *A Right to Care?* (n 10) 67

<sup>20</sup> See chapter four page 120

<sup>21</sup> Protection from paid maternity leave is available under the Pregnant Workers Directive 92/85EEC. Unpaid parental leave is enforced under Parental Leave Directive 2010/18/EC.

at best it entrenches an outdated notion of family responsibilities as, predominantly, a *woman's* issue and at worst it severely undermines the notion of reconciliation as a fundamental right.<sup>22</sup>

Nonetheless, Busby notes that this “in theory at least, [provides] a fundamental right to reconcile family and professional life.”<sup>23</sup> Yet she recognises that this will be only realised by proactive interpretation by the Court of Justice of the European Union (CJEU). This body could make article 33(2) of the Charter of Fundamental Rights truly transformative because of its “position at the forefront of the development of Europe’s social dimension.”<sup>24</sup>

To develop the right to care, Busby draws upon the capabilities approach.<sup>25</sup> As explained in chapter two, the capabilities approach measures each person by their capability to “lead the kind of lives they value – and have reason to value.”<sup>26</sup> Busby notes that it recognises that “one may be well-off in terms of income and wealth and yet unable to function well in the workplace, because of burdens of care-giving at home.”<sup>27</sup> On the contrary, people could be “poorly paid at work due to an association...with care-giving and thus vulnerable in market terms but, nevertheless, in receipt of valuable contributions to personal well-being such as the love of those for whom the care is provided.”<sup>28</sup>

To effectively implement a right to care, Busby draws on the capabilities approach in two ways, which reflect the work of Nussbaum and Sen respectively.<sup>29</sup> Firstly, she employs it to construct a right to care. She recognises that “Nussbaum’s advocacy for a set of constitutional

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<sup>22</sup> E. Caracciolo di Torella ‘Is There a Fundamental Right to Reconcile Work and Family Life in the EU?’ in N. Busby, G. James, *Families, Care-giving and Paid Work: Challenging Labour Law in the 21<sup>st</sup> Century* (Edward Elgar Publishing, 2011)

<sup>23</sup> N. Busby *A Right to Care?* (n 10) 133

<sup>24</sup> N. Busby *A Right to Care?* (n 10) 133

<sup>25</sup> For discussion of capabilities approach, see chapter two page 54

<sup>26</sup> A. Sen *Development as Freedom* (Oxford University Press, 1999) 18.

<sup>27</sup> M. Nussbaum *Sex and Social Justice* (Oxford University Press, 1999) 192

<sup>28</sup> N. Busby *A Right to Care?* (n 10) 35

<sup>29</sup> See discussion in chapter two page 54-60

guarantees does at least establish a basis on which policy might be grounded.”<sup>30</sup> Busby does not engage with the capabilities Nussbaum identifies, as she suggests that in the EU context, the basic capabilities have already been specified in the “constitutional promises of the Treaties and the corresponding fundamental principles of EU law.”<sup>31</sup> Accordingly, Busby argues that in implementing a right to care, the existing EU body of law should be built upon.

By advocating the inclusion of a right to care within this body of law, Busby thus contends that support for caring relationships should be one of these “fundamental values in which we should all be able to depend on regardless of transient but dominant political ideology or economic circumstance.”<sup>32</sup> Therefore, although she does not expressly acknowledge caring work as a capability, as I have done in chapter two, this does suggest that Busby recognises care as such.<sup>33</sup> Indeed, much of her work is grounded upon the importance of care; she argues that caring labour’s “right place [is] at the centre of all human activity.”<sup>34</sup> She further notes that “it is these relationships that bind us together and that give us our sense of identity and belonging.”<sup>35</sup> This again accords with Nussbaum’s development of the capabilities approach who stresses the importance of identifying capabilities to develop policies.<sup>36</sup>

The second way Busby draws on the capabilities approach is as an evaluative framework, which accords more closely with Sen’s work.<sup>37</sup> Sen’s conception of the capabilities approach focuses upon “distributive considerations by providing an ‘evaluative space’ within which judgements about individual well-being and social policies can be made.”<sup>38</sup> In this context,

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<sup>30</sup> N. Busby *A Right to Care?* (n 10) 189

<sup>31</sup> N. Busby *A Right to Care?* (n 10) 189

<sup>32</sup> N. Busby *A Right to Care?* (n 10) 189

<sup>33</sup> See chapter two page 57

<sup>34</sup> N. Busby *A Right to Care?* (n 10) 44

<sup>35</sup> N. Busby *A Right to Care?* (n 10) 44

<sup>36</sup> See chapter two page 55

<sup>37</sup> N. Busby *A Right to Care?* (n 10) 37

<sup>38</sup> N. Busby *A Right to Care?* (n 10) 37-38



the overarching right to care would provide the evaluative space to determine how carers' wellbeing could be promoted by uniting the relevant strands of EU law which affect carers. These include gender equality, labour and social welfare. In addition, Busby recognises that a substantive body of legislation has developed within the EU which impacts upon those balancing paid work and caring responsibilities. This includes the Recast Directive,<sup>39</sup> Pregnant Workers Directive,<sup>40</sup> Parental Leave Directive,<sup>41</sup> Part-Time Workers Directive,<sup>42</sup> and Fixed-Term Work Directive.<sup>43</sup> Most of these changes have developed in a reactive fashion, "often as a means of responding to external factors, and, thus, [the EU law affecting carers] lacks the cohesion that might have resulted from a more comprehensive overarching strategy."<sup>44</sup> A right to care would unite these and highlight how they interact to affect the achievement of capabilities, including both paid work and caring relationships.

If capabilities were being undermined, the evaluative space created by a right to care would enable the EU to determine why and make corresponding amendments to the law to promote each person's right to care. The capabilities approach would be particularly useful in this context because it "enables full consideration to be given to the effects of gender as well as to other factors such as class, race, and disability either at their intersections or as self-standing aspects of an individual's identity."<sup>45</sup> Therefore, a right to care underpinned by the capabilities approach would necessitate that any law would challenge gender inequality and account for the intersectionality of carers' disadvantage, as considered in chapter two.<sup>46</sup> The capabilities approach would also highlight how social institutions which might "present

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<sup>39</sup> 2009/38/C

<sup>40</sup> 92/85/EEC

<sup>41</sup> 2010/18/EC

<sup>42</sup> 97/81/EC

<sup>43</sup> 1999/70/EC

<sup>44</sup> N. Busby *A Right to Care?* (n 10) 94

<sup>45</sup> N. Busby *A Right to Care?* (n 10) 38

<sup>46</sup> See chapters two page 27 and chapter three pages 81-91

barriers to the achievement of an individual's potential," including the workplace, should be modified to enable each person to reconcile paid work and caring relationships.<sup>47</sup> The overarching strategy would therefore highlight that carers need ongoing support in the workplace, not just periods of leave. Accordingly, Busby correctly notes that the capabilities approach may be even more beneficial as an evaluative tool than as a way to implement a right to care.<sup>48</sup>

Substantive progress has already been made by the CJEU in reconciling the disparate parts of EU law.<sup>49</sup> In *Roca Alvarez v Sesa Start Espana ETT SA*, which I analysed in chapter six, the CJEU recognised that the achievement of gender equality was dependent upon both parents being able to reconcile their paid work and caring relationships.<sup>50</sup> The CJEU acknowledged that the division of care within the private sphere perpetuates gender inequality in the workplace, aligning the two distinct areas to achieve fairness for parents. Although this is only relevant to parents, this could be an example of the proactive interpretation Busby identifies as necessary to give "effect to a specific right to care in European employment law."<sup>51</sup>

a) What would a right to care look like?

Busby argues that a right to care should firstly "be observant of, but not reliant on pre-existing anti-sex discrimination legislation."<sup>52</sup> This requires that the status of carer is recognised as a protected characteristic in the anti-discrimination laws.<sup>53</sup> Other commentators have also noted how anti-discrimination law could protect carers at a national level. For

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<sup>47</sup> N. Busby *A Right to Care?* (n 10) 38

<sup>48</sup> N. Busby *A Right to Care?* (n 10) 37

<sup>49</sup> N. Busby *A Right to Care?* (n 10) 130

<sup>50</sup> Case C-104/09 [2010] ECR I-08661. See chapter six page 207

<sup>51</sup> N. Busby *A Right to Care?* (n 10) 177

<sup>52</sup> N. Busby *A Right to Care?* (n 10) 182

<sup>53</sup> N. Busby *A Right to Care?* (n 10) 182

example, Horton argues that this would benefit carers by recognising caring relationships as an “essential feature...of what it is to be human,” as important as being able to “live according to their sexual orientation, or their religion.”<sup>54</sup> Yet protection from direct discrimination is individualised; as the law is only used to remedy limited instances of discrimination rather than challenge the workplace model which perpetuates this, Smith notes that it valorises the fully committed worker model.<sup>55</sup> In contrast, indirect discrimination “would demand some alteration of work practices or a better accommodation between so-called standard labour market practice and workers’ care-giving roles.”<sup>56</sup> Protection against discrimination, particularly indirect discrimination, could therefore challenge the idealised norm of a worker without caring responsibilities. This would be an important step towards achieving fairness for carers.

To complement the recognition of carers as a protected characteristic, Busby suggests that a right to care requires “regulatory intervention which seek[s] to accommodate a wide range of diverse needs through the prism of a reflexive right.”<sup>57</sup> Reflexive law:

identifies and emphasizes the need for legal intervention ‘to underpin and encourage autonomous processes of adjustment, in particularly by supporting mechanisms of group representation and participation’.<sup>58</sup>

Therefore, Busby considers that the right should guide self-regulation. This would encourage group representation and participation, so would be bolstered by the support of bodies such as trade unions. These could encourage more generous applications of a right to care which are

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<sup>54</sup> R. Horton ‘Care-Giving and Reasonable Adjustment in the UK’ in N. Busby and G. James *Families, Care-Giving and Paid Work: Challenging Labour Law in the 21<sup>st</sup> Century* (Edward Elgar, 2011) 146

<sup>55</sup> O. Smith ‘Reconciling Care-Giving and Work in Ireland: The Contribution of Protection Against Family Status Discrimination’ in N. Busby and G. James *Families, Care-Giving and Paid Work: Challenging Labour Law in the 21<sup>st</sup> Century* (Edward Elgar, 2011) 162

<sup>56</sup> O. Smith ‘Reconciling Care-giving and Work in Ireland’ (n 55) 163

<sup>57</sup> N. Busby *A Right to Care?* (n 10) 182

<sup>58</sup> N. Busby *A Right to Care?* (n 10) 88. Quoting C. Barnard, S. Deakin, ‘ “Negative” and “Positive” Harmonisation of Labour Law in the European Union’ (2002) 8 *Columbia Journal of European Law* 389, 389

specifically tailored to each workplace. Therefore, a right to care would also challenge the persistent restricting of trade union powers which I described in chapter three.<sup>59</sup>

b) Duty of reasonable adjustment

Busby considers two examples of a reflexive right which could provide substantive protection for carers. One is the UK duty of reasonable adjustment contained in the Equality Act 2010,<sup>60</sup> and the second is a similar duty of accommodation in the amended Anti-Discrimination Act 1977 of New South Wales, Australia.<sup>61</sup> The UK legislation will be considered first. This imposes a duty on employers to make a reasonable adjustment in three circumstances; the first two are where either a “physical feature” or a “provision, criterion or practice of [the employers] puts a disabled person at a substantial disadvantage...in comparison with persons who are not disabled.”<sup>62</sup> The third is that an employer must take reasonable steps to provide an auxiliary aid to a disabled employee if not providing one would put them “at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled.”<sup>63</sup> A similar provision has also been codified in EU law (renamed as reasonable accommodation), which is required “to enable a person with a disability to have access to, participate in, or advance in employment, or to undergo training, unless such measures would impose a disproportionate burden on the employer.”<sup>64</sup>

In *Archibald v Fife Council*, the House of Lords stated that the UK duty might require adjustments such as “adapting the premises, reallocating duties, altering the house, modifying

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<sup>59</sup> See chapter three page 100

<sup>60</sup> s. 20

<sup>61</sup> s. 49T(1)(b)

<sup>62</sup> Equality Act 2010, s. 20(3)-(4)

<sup>63</sup> Equality Act 2010, s. 20(5)

<sup>64</sup> The Employment Equality Directive 2000/78/EC, art. 5

equipment or providing training, interpretation or supervision.”<sup>65</sup> Therefore, the duty is extensive; the onus is on the employer to consider innovative and wide ranging solutions.<sup>66</sup> Accordingly, Busby argues that the duty “offers the type of conceptual flexibility necessary to encompass the wide range of care arrangements and working practices that are relevant to the unpaid care/paid work conflict.”<sup>67</sup> This is because a similar duty to accommodate carers in the workplace would require employers to consider “whether and how the nature of the role can be changed (without diminishing its status).”<sup>68</sup> This could introduce wide ranging adaptations, such as adjusting expectations or sickness policies to reflect the fact that many carers suffer with ill-health.<sup>69</sup> Horton further argues that introducing a duty of reasonable adjustment for carers would require employers to be mindful of the negative impact of working part-time and to take steps to minimise this.<sup>70</sup> As women perform the majority of part-time work, this would help to challenge gender inequality by decreasing the gender pay gap. Such transformative changes verify Busby’s argument that the duty of reasonable adjustment could promote the changes carers actually require in the workplace. Indeed, Smith notes the cumulative effect of such changes would be to challenge “an unthinking conformity to existing norms and structures.”<sup>71</sup> It may also lead to autonomous adjustments being made, such as in the London Borough of Merton, where the flexible working legislation led to a transformed workplace for all employees, as discussed in chapter three.<sup>72</sup> Therefore, the law would have a reflexive effect in line with Busby’s argument, which could promote fairness in this context.<sup>73</sup>

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<sup>65</sup> [2004] S.C (H.L) 32, [57]

<sup>66</sup> N. Busby *A Right to Care?* (n 10) 185

<sup>67</sup> N. Busby *A Right to Care?* (n 10) 184

<sup>68</sup> R. Horton ‘Care-Giving and Reasonable Adjustment in the UK’ (n 54) 150

<sup>69</sup> See chapter two page 21

<sup>70</sup> R. Horton ‘Care-Giving and Reasonable Adjustment in the UK’ (n 54) 149

<sup>71</sup> O. Smith ‘Reconciling Care-giving and Work in Ireland’ (n 55) 159

<sup>72</sup> See chapter three page 102

<sup>73</sup> N. Busby *A Right to Care?* (n 10) 88. Quoting C. Barnard, S. Deakin, ‘ “Negative” and “Positive” Harmonisation of Labour Law in the European Union’ (2002) 8 *Columbia Journal of European Law* 389, 389

c) Extending the duty of reasonable adjustment

Extending the duty of reasonable adjustment has been considered problematic. In *Coleman v. Attridge Law and Steve Law*, the European Court of Human Rights (ECtHR) stated that the UK legislation “would be rendered meaningless or could prove to be disproportionate if...not limited to disabled persons only.”<sup>74</sup> This is because the duty aimed “specifically to facilitate and promote the integration of disabled people into the working environment and, for that reason, can only relate to disabled people.”<sup>75</sup> Yet the ECtHR has extended the duty of reasonable adjustment to include grounds of religion and belief. In *Eweida and others v UK*, the ECtHR declared that:

where an individual complains of a restriction on freedom of religion in the workplace, rather than holding that the possibility of changing job would negate any interference with the right, the better approach would be to weigh that possibility in the overall balance when considering whether or not the restriction was proportionate.<sup>76</sup>

The ECtHR thus found that individual as well as group disadvantages caused by employment practices or conditions which restrict employees’ freedom of religion require justification. This suggests that employers have a duty to accommodate individuals’ religious beliefs reasonably within the workplace. Indeed, in interpreting this decision, the Equality and Human Rights Commission (EHRC) issued guidance for UK employers which encourages them “to take as their starting-point consideration as to how to accommodate the request

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<sup>74</sup> C-303/06 [2008] ECR I-5603, [42]

<sup>75</sup> *Coleman v. Attridge Law and Steve Law* Case C-303/06 [2008] ECR I-5603, [42]

<sup>76</sup> [2013] IRLR 231, [83]

unless there are cogent or compelling reasons not to do so.”<sup>77</sup> This is clearly a step towards a duty of reasonable adjustment, which demonstrates that it can be further extended.<sup>78</sup>

This extension to grounds of religion or belief has been regarded as problematic. This is partly because “many religions have teachings that are extremely offensive to some groups.”<sup>79</sup> This was demonstrated in *Eweida*, as two of the four applications considered were from employees who wanted to deny equal treatment to same-sex couples.<sup>80</sup> Accommodating such views would undermine justice.<sup>81</sup> Others have stressed that the differences between disability and religion make the extension of the duty of reasonable adjustment inappropriate. “The rationale for the duty is that the disability actually impairs the individual’s ability to work,” which Pitt suggests is different to religion.<sup>82</sup> Again, this was demonstrated in the facts of *Eweida*. Ms Eweida claimed that the UK law had failed to protect her right to manifest her religion because she was unable to work with a Christian cross necklace visible. This claim was upheld despite the fact that she did work for a period with her necklace concealed.<sup>83</sup> She was clearly able to work without the employer’s accommodation, which may be different if the employee was disabled. A final difference between religion and disability is that “disabilities vary enormously in kind and degree.”<sup>84</sup> Pitt argues that a reflexive provision is needed in disability laws to effectively deal with this, unlike the manifestation of people’s

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<sup>77</sup> Equality and Human Rights Commission *Religion or Belief in the Workplace: A Guide for Employers Following Recent European Court of Human Rights Judgments* (Equality and Human Rights Commission, 2014) 5

<sup>78</sup> G. Pitt ‘Taking Religion Seriously’ (2013) 42 *Industrial Law Journal* 398, 404

<sup>79</sup> R. McCrea ‘Religion in the Workplace: *Eweida and Others v United Kingdom*’ (2014) 77 *Modern Law Review* 277, 281

<sup>80</sup> [2013] IRLR 231, [23] and [31]

<sup>81</sup> R. McCrea ‘Religion in the Workplace’ (n 79) 291

<sup>82</sup> G. Pitt ‘Taking Religion Seriously’ (n 78) 405

<sup>83</sup> [2013] IRLR 231, [12]

<sup>84</sup> G. Pitt ‘Taking Religion Seriously’ (n 78) 405

religion or belief.<sup>85</sup> Therefore, it is arguable that the accommodation of religion involves different concerns so the same treatment is not required.<sup>86</sup>

Yet it should be acknowledged that these concerns are not relevant to extending the duty of reasonable adjustment to carers. Caring practices are unlikely to be considered offensive as all people require them at some point. One notable exception is breastfeeding, which research suggests that many people perceive as “largely negative, sexual, something that animals do, and worthy of disgust.”<sup>87</sup> However, this should never restrict reasonable adjustment to accommodate breastfeeding. This is partly because such arguments ignore the very fact that all people require feeding as a baby to survive. Also, breastfeeding is the primary biological function of female breasts and it “is acknowledged to be the optimal way both of feeding and caring for young infants.”<sup>88</sup> Therefore, those who consider breastfeeding to be offensive are wrong. Accepting this argument would cause grave injustices to women and children and thus should not be considered relevant to extending the duty of reasonable adjustment to carers.

Extending the duty of reasonable adjustment to carers would be further justified because the problems carers and disabled people face have certain similarities. It is widely acknowledged that caring responsibilities impair people’s ability to work.<sup>89</sup> Also, caring relationships vary so much that they cannot be fitted into a standard model. Therefore, “disability and care are on a continuum of shared experience,” so extending the duty of reasonable adjustment to

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<sup>85</sup> G. Pitt ‘Taking Religion Seriously’ (n 78) 405

<sup>86</sup> G. Pitt ‘Taking Religion Seriously’ (n 78) 405

<sup>87</sup> M. Acker ‘Breast is Best...But Not Everywhere: Ambivalent Sexism and Attitudes Towards Private and Public Breastfeeding’ (2009) 61 *Sex Roles* 476, 479

<sup>88</sup> M. Latham ‘Breastfeeding – A Human Rights Issue?’ (1997) 5 *The International Journal of Children’s Rights* 397, 397

<sup>89</sup> See chapter one page 2



carers would be justified.<sup>90</sup> To effectively promote and reflect the wide variety of caring practices already occurring, a flexible and responsive entitlement such as the duty of reasonable adjustment is needed. This would promote fairness for carers by ensuring that the workplace responded to the changing caring needs and relationships, as there is no restriction on the number or nature of the adjustments.<sup>91</sup>

A duty of reasonable adjustment has been extended to carers in New South Wales, Australia, the second example Busby considers as a model for a right to care. Employers have discriminated against a carer if they require them:

to comply with a requirement or condition with which a substantially higher proportion of persons who do not have such responsibilities comply or are able to comply, being a requirement that is not reasonable having regard to the circumstances of the case and with which the aggrieved person does not or is not able to comply.<sup>92</sup>

This provision is applicable to a wide range of carers, including those providing childcare and immediate family members caring for adults, including legal and de facto spouses or former spouses.<sup>93</sup> The other potential carers identified for adult dependents reflect a transformative vision of familial obligations; siblings, grandparents, parents and grandchildren of the dependent are identified as carers, including those who have these relationships via marriage or even a previous marriage, again including de facto marriages.<sup>94</sup>

Busby notes that this is transformative in a number of ways. Firstly, it “explicitly protects employees with caring responsibilities...and is primarily targeted at reforming working time

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<sup>90</sup> C. O’Brien ‘Confronting the Care Penalty: The Case for Extending Reasonable Adjustment Rights Along the Disability/Care Continuum’ (2012) 34 *Journal of Social Welfare and Family Law* 5, 23

<sup>91</sup> R. Horton ‘Care-Giving and Reasonable Adjustment in the UK’ (n 54) 147

<sup>92</sup> Anti-Discrimination Act 1977 (NSW), s. 49T(1)(b)

<sup>93</sup> Anti-Discrimination Act 1977 (NSW), s. 49S(1)(a), (b) and (c)(i)

<sup>94</sup> Anti-Discrimination Act 1977 (NSW), s. 49S(1)(c)(ii)-(v) and s. 49S(3)(b)

arrangements and working conditions through flexible work practices.”<sup>95</sup> Also, the burden of proof is on the employers “to justify their refusal to make such adjustments which potentially cover all aspects of work organization including home-based work, relocation, notice periods and overtime requirements.”<sup>96</sup> Busby further recognises that the legislation does not focus upon the nature of the relationship.<sup>97</sup> Instead, the extensive list of carers acknowledges more of the caring relationships which are occurring “as a matter of social fact.”<sup>98</sup> However, it is still focused upon relationships within the sexual family, excluding other personal relationships which could provide care such as friends.<sup>99</sup> Nonetheless, such legislation could achieve real change and shows how a duty of reasonable adjustment could protect all carers.

d) The limitations of a duty of reasonable adjustment

Busby recognises that neither the UK duty of reasonable adjustment nor the Australian provision would fully achieve a right to care. Each falls “somewhat short of the provision of self-standing rights which recognize the social value and related contributions of the individuals they are intended to protect.”<sup>100</sup> This is partly because the duty of reasonable adjustment is reliant upon comparison against the fully committed worker, so carers are still identified as different.<sup>101</sup> Reliance upon the identification of difference means that a duty of reasonable adjustment would not go to the heart of a system that privileges workers without caring responsibilities.

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<sup>95</sup> J. Bourke ‘Using the Law to Support Work/Life Issues: The Australian Experience’ (2004) 12 *Journal of Gender, Social Policy and the Law* 19, 21

<sup>96</sup> N. Busby *A Right to Care?* (n 10) 187

<sup>97</sup> J. Bourke ‘Using the Law to Support Work/Life Issues’ (n 95) 21

<sup>98</sup> J. McCandless, S. Sheldon ‘The Human Fertilisation and Embryology Act (2008) and the Tenacity of the Sexual Family Form’ (2010) 73 *Modern Law Review* 175, 198

<sup>99</sup> See chapter four page 112

<sup>100</sup> N. Busby *A Right to Care?* (n 10) 188

<sup>101</sup> N. Busby *A Right to Care?* (n 10) 188

This is further reinforced by the individualistic nature of each provision. The duty of reasonable adjustment only bites when the employer knows of the individual's caring responsibilities.<sup>102</sup> Employers also only have to respond to the situation and request of each employee. The adjustments may be incomplete, so they only reduce disadvantage rather than eliminate it.<sup>103</sup> Therefore, it does not require the "broader structural changes within the workplace [which are] needed to make them fully inclusive," although as reflexive right, it may encourage such change in some workplaces.<sup>104</sup> However, protection from indirect discrimination may require such transformative changes to the workplaces, which would benefit all carers. Although this protection requires an individual to bring a claim, which may limit the protection afforded by indirect discrimination in practice, one claim would implement "general anticipatory duties to dismantle obstacles of perception and to change workplace norms."<sup>105</sup> Therefore, O'Brien argues that reasonable adjustment "establishes duties less comprehensive than an indirect discrimination prohibition."<sup>106</sup> Accordingly, she suggests that the duty of reasonable adjustment was applied in the UK as a compromise, to avoid the excessive requirements of indirect discrimination provisions.<sup>107</sup>

Nonetheless, as the duty of reasonable adjustment is only applicable to disabled people in the UK, it has been regarded as extra protection; something additional and better than the anti-discrimination laws. This in turn has resulted in law-makers not fully embracing the indirect anti-discrimination legislation.<sup>108</sup> The duty of reasonable adjustment has been "treated as a

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<sup>102</sup> R. Horton 'Care-Giving and Reasonable Adjustment in the UK' (n 54) 148

<sup>103</sup> C. O'Brien 'Confronting the Care Penalty' (n 90) 19

<sup>104</sup> R. Horton 'Care-Giving and Reasonable Adjustment in the UK' (n 54) 148

<sup>105</sup> C. O'Brien 'Confronting the Care Penalty' (n 90) 20

<sup>106</sup> C. O'Brien 'Confronting the Care Penalty' (n 90) 9

<sup>107</sup> C. O'Brien 'Confronting the Care Penalty' (n 90) 16

<sup>108</sup> Equality Act 2010, s. 19(3). Disabled people in the UK are also protected from direct discrimination (Equality Act 2010, s. 6 and 13(1)) as well as protection from discrimination arising from disability. This means that an employee cannot be treated "unfavourably because of something arising in consequence of B's [their] disability." (Equality Act 2010, s. 15(1)(a)). As this is not reliant upon adverse impact from group disadvantage, employees are enabled to challenge discriminatory decisions without a hypothetical comparator, such as "a

substitute for an indirect disability discrimination prohibition.”<sup>109</sup> This undermines the protection afforded to disabled people; it has limited both hearings and findings on indirect discrimination which could have challenged the workplace model to better accommodate all disabled people. Indeed, O’Brien argues that extending the duty of reasonable adjustment to carers would benefit disabled people by challenging the idea that adjustment is a special form of protection.<sup>110</sup> Therefore, although a duty of reasonable adjustment is important, it cannot be prioritised over all other forms of protection. Appropriate cases should still be tried as indirect discrimination.

A final problem with each of the duty of adjustment provisions analysed is that they are unlikely to challenge gender inequality. Although Weldon-Johns argues that to encourage men to take on more caring roles, legislation should focus upon “facilitating care while remaining in employment,”<sup>111</sup> the New South Wales provision, which does exactly this, is predominantly used by women.<sup>112</sup> This further substantiates my argument that “an equal opportunity to engage in nurturing and caretaking,” will not lead to gender equality.<sup>113</sup>

Accordingly, a duty of reasonable adjustment alone will not achieve fairness for carers. Even if indirect discrimination cases are not overlooked, the identification of difference will leave gender inequality and the fully committed worker model unchallenged. However, these both could be dismantled by supplementary laws, which encourage more people, namely men, to care. As I argued in chapter three, this is needed to challenge gender inequality, as well as

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decision to discipline or dismiss an employee due to disability-related absences.” (M. Bell ‘Mental Health at Work and the Duty to Make Reasonable Adjustments’ (2015) 44 *Industrial Law Journal* 194, 218)

<sup>109</sup> C. O’Brien ‘Confronting the Care Penalty’ (n 90) 18

<sup>110</sup> C. O’Brien ‘Confronting the Care Penalty’ (n 90) 18

<sup>111</sup> M. Weldon-Johns ‘The Additional Paternity Leave Regulations 2010: A New Dawn or More ‘Sound-bite’ Legislation?’ (2010) 33 *Journal of Social Welfare and Family Law* 25, 29

<sup>112</sup> J. Bourke ‘Using the Law to Support Work/Life Issues’ (n 95) 64

<sup>113</sup> M. Fineman *The Autonomy Myth* (n 5) 201

realise the dually responsible worker model.<sup>114</sup> However, the EU's restricted competence has resulted in a "reluctance to progress measures perceived as overly prescriptive in relation to...the division of labour within families."<sup>115</sup> Yet such legislation could be enacted within the UK. Therefore, I will now consider how a right to care might be applied in the UK.

### **A right to care in the UK**

The flexibility and adaptability of a right to provide care alongside paid employment means that this transformative idea could help achieve fairness for carers in the UK by recognising all caring relationships as basic capabilities.<sup>116</sup> Implementing a right to care concurs with my argument that the state should act in the interests of all members of society to change the workplace and better value carers and their vital labour. This would achieve Fineman's ideal of "making nurturing and caretaking a central responsibility of the nonfamily arenas of life."<sup>117</sup>

The overarching nature of a right to care would be particularly useful. The UK body of law which affects carers has evolved in response to external factors, just like EU law.<sup>118</sup> This is particularly true of the UK reconciliation legislation. Despite the more limited competence of the EU, it has encouraged many of the progressive changes to this body of law. For example, the Pregnant Workers Directive was the impetus for the removal of restrictions on the original entitlement to maternity leave and pay.<sup>119</sup> Also, parental leave was introduced because of the first Parental Leave Directive,<sup>120</sup> and subsequently extended as a result of the

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<sup>114</sup> See chapter three page 76

<sup>115</sup> N. Busby *A Right to Care?* (n 10) 106

<sup>116</sup> See chapter two page 57

<sup>117</sup> M. Fineman *The Autonomy Myth* (n 5) 201

<sup>118</sup> N. Busby *A Right to Care?* (n 10) 94

<sup>119</sup> Directive 92/85/EC

<sup>120</sup> Directive 96/34

updated directive.<sup>121</sup> This has resulted in UK law, like EU law, lacking “the cohesion that might have resulted from a more comprehensive overarching strategy.”<sup>122</sup> Indeed, the gaps within the UK body of reconciliation legislation have been highlighted throughout this thesis. The overarching nature of a right to care would mean that such gaps would be more readily identified and would justify the introduction of legislation to reduce or remove them. Therefore, such a change would promote people’s flourishing by giving them a genuine chance to combine their caring relationships with their paid workforce commitments.

Implementing a right to care is achievable within the UK. The legislator can promote transformative social changes, such as challenging the gendered division of labour within families by encouraging men to care, which the EU cannot because of its founding objectives as an economic entity. Yet, this potential is unlikely to be effectively utilised. The reconciliation legislation which aims to promote fathers’ caring roles has demonstrated how successive UK governments have failed to give men any genuine chance to provide childcare.<sup>123</sup> In contrast, the EU has utilised its more limited competence. Therefore, in many ways, it has been more progressive than the UK in regards to the reconciliation of paid work and caring responsibilities. This is evidenced by the changes it has led at UK level. Also, carer’s leave, which has been proposed under the Carers (Leave Entitlement) Bill 2015-16, was proposed at EU level two years earlier.<sup>124</sup> The European Parliament voted in favour of “a period of absence from a place of employment to take care of dependent family members who are ill, disabled or impaired,”<sup>125</sup> in 2013, and called upon the Commission to propose a

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<sup>121</sup> Parental Leave Directive 2010/18/EU

<sup>122</sup> N. Busby *A Right to Care?* (n 10) 94

<sup>123</sup> See chapters six and seven

<sup>124</sup> (HL Bill 42)

<sup>125</sup> European Commission *Public Consultation on Possible EU Measures in the Area of Carers’ Leave (Leave to Care for Dependent Relatives)* (European Commission, 2011) 2

Directive on carers' leave.<sup>126</sup> Although there has been no response to the EU Consultation to date, the fact that carers' leave was proposed before the UK considered it, and it is unlikely to be implemented in the UK as a Private Member's Bill, demonstrates that the EU is more forward thinking in regards to the reconciliation of paid work and caring responsibilities. Indeed, even when EU proposals have not been accepted, they are often more progressive than UK led legislation. For example, in one document, the EU suggested making twenty weeks of paid maternity leave available at 100% of mothers' wages and proposed introducing two weeks of mandatory paternity leave, as considered in chapters five and six respectively.<sup>127</sup> At the same time the then New Labour Government (1997-2010) implemented additional paternity leave in the UK.<sup>128</sup> Both of the EU proposals would have been transformative. Although the increase in pay would have problematically reinforced gendered expectations, I recognised in chapter five that increasing the level of payment would acknowledge the value of caring and promote parents' capabilities.<sup>129</sup> Mandatory paternity leave may have actually changed the workplace by clearly demonstrating that men can care. Therefore, the proposals are arguably more transformative than the sound-bite Additional Paternity Leave Regulations 2010, which failed to understand the problems both men and women faced in balancing paid work and caring relationships.

Accordingly, there is a tension here. The UK is most able to fully realise a right to care, but radical change is more likely to be implemented by the EU. The EU is taking steps towards this, as shown by article 33(2) of the Charter of Fundamental Rights. As this article and progressive CJEU judgements such as *Roca Alvarez* are binding upon the UK, it is possible

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<sup>126</sup> Impact of the Crisis on Access to Care for Vulnerable Groups 2013/2044(INI) – 04/07/2013 Text Adopted by Parliament, Single Reading. Summary Content

<sup>127</sup> See chapter five page 168 and chapter six page 195

<sup>128</sup> See chapter six page 198

<sup>129</sup> See chapter five page 168

that such a reflexive and transformative right will have to be implemented in the future.<sup>130</sup> However, the limited competence of the EU will mean that such a right will not be implemented in the most transformative way it could be in the UK. To fully realise this, the UK legislator would have to build upon such a right to achieve fairness as defined in chapter two.<sup>131</sup> Such change is not only dependent upon the EU, and the CJEU in particular transforming article 33(2), but also upon the UK's continued EU membership. This is in question as the European Referendum Bill 2015-16, which will enable a referendum upon EU membership to be held, is progressing through Parliament at the time of writing.

Although a radical application of a right to care is unlikely in the UK, as it could achieve fairness for carers, it remains worthy of analysis. However, this does necessitate that I defend this chapter against criticisms of it being utopian. I will do so after considering how a right to care could be implemented in the UK.

a) General right to care

Firstly, a general right to provide care alongside paid employment should be incorporated in the UK.<sup>132</sup> This could be similar to article 33(2) of the Charter of Fundamental Rights of the EU. Like the EU right, it would have to be supplemented by other legislative changes to be realised in practice and achieve fairness for carers, namely reconciliation legislation in the modified forms I have suggested in chapters five, six and seven. As Busby notes, it would also have to be observant of anti-discrimination law; any employer who did not accommodate people's right to care would have discriminated against them. This would recognise the importance of caring relationships as a basic capability, which could not be affected by "the

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<sup>130</sup> Case C-104/09 [2010] ECR I-08661

<sup>131</sup> See chapter two page 48

<sup>132</sup> N. Busby *A Right to Care?* (n 10) 11



vagaries of the economy.’<sup>133</sup> The state’s universal membership would be harnessed to ensure that each person achieves this.

This right to care should be made available to all carers to recognise the importance of all relationships, unlike the EU right. Indeed, I suggest that the right does not need to be limited to the carers Busby identifies: parents; relatives or partners of the disabled or terminally ill; or those providing elderly care.<sup>134</sup> Achieving fairness for carers is dependent upon the right being applicable to all carers, including those in non-familial relationships caring for children or the disabled or terminally ill.<sup>135</sup> After all, it is at least foreseeable that someone who is not a partner or relative of the disabled or terminally ill could provide care and I have referred to the vital care provided by kinship carers throughout this thesis. To reflect the equal importance of all caring relationships, any UK right to care should be underpinned by the caretaker-dependent unit, as discussed in chapter four.<sup>136</sup>

To further promote fairness in this context, this right should be available not just to employees, but all those working under a personal work contract.<sup>137</sup> This would make the eligibility requirements and tests for employee status unjustifiable in the reconciliation legislation which would substantiate the right to care. Instead, potential employers would have to accommodate all workers’ use of the considerable number of legislative entitlements. This would herald a substantial change. Those working under a personal work contract are currently only entitled to maternity allowance. To avoid employers having to financially support all these precarious workers, the eligibility requirements could remain, but they would be relevant only to determine whether the employer or state would financially support

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<sup>133</sup> S. Fredman *Women and the Law* (n 14) 410

<sup>134</sup> N. Busby *A Right to Care?* (n 10) 11

<sup>135</sup> Public Service and Demographic Change *Ready for Ageing* (HL 2012 – 13, 140) 7

<sup>136</sup> See chapter four page 111

<sup>137</sup> See chapter four page 147

these workers; those without the requisite workplace commitment would be paid by the state. The state would also support those in precarious work that have no identifiable employee.<sup>138</sup> Therefore, this would be a vital step in promoting all people's basic capabilities, especially socio-economically disadvantaged carers who often face more severe challenges in balancing their paid work and caring responsibilities.<sup>139</sup>

However, in this current political climate such a right is not likely to be implemented. The Conservative Government (2015-present) has pledged to remove the Human Rights Act 1998.<sup>140</sup> As this proposal originated to deny certain people basic rights, the Government is unlikely to add to the rights protected in the UK. The pledge also reflects wider concerns about the influence of European law on the UK, as demonstrated by the European Union Referendum Bill 2015-16. Accordingly, it is suggested that the current Government is even less likely to voluntarily implement a right originating from the EU. Also, even if the EU does transform the right already enshrined in the Charter of Fundamental Rights, the UK would not have to implement it if it ceases its membership. Nonetheless, such a right would create important changes in the UK so considering how the right would need to be supplemented by other legislative changes remains relevant.

b) Non-discrimination legislation

To bolster this right, carers should be protected by UK anti-discrimination law. Caring status is not a protected characteristic under the Equality Act 2010, although this was debated during the drafting process. The then New Labour Government did not enact this for two reasons; firstly, they reasoned that the existing entitlements already available to carers provided the necessary protection, particularly focusing upon the right to request flexible

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<sup>138</sup> See chapter five page 162

<sup>139</sup> See chapter three page 39

<sup>140</sup> The Conservative Party *The Conservative Party Manifesto 2015* (The Conservative Party, 2015) 60

working and the other heads of anti-discrimination law.<sup>141</sup> The second was that “the role of carer applies more to what a person does, than to what a person is (their innate or chosen characteristics).”<sup>142</sup> Therefore, they reasoned that being a carer is not part of “an individual’s status or identity.”<sup>143</sup> I will argue that neither of these reasons justifies the exclusion of carers as a protected characteristic. Firstly, I will examine the existing protection to show how they do not promote fairness for carers. Then I will concur with Horton that the second reason given by the New Labour Government is “neither obviously right nor obviously relevant.”<sup>144</sup>

Carers may be protected against discrimination on the grounds of sex or disability. Firstly:

because of the persistent relationship between gender and care, the prohibition of indirect sex discrimination has resulted in findings that workplace policies and practices which disadvantage those who have a care-giving role are indirectly discriminatory on grounds of sex.<sup>145</sup>

O’Brien notes that for a claim to be successful, it must impact upon women more than men, “so it requires adopting and evidencing a traditional model of female care roles.”<sup>146</sup> She notes that reliance upon the ground of sex discrimination therefore problematically reinforces gendered expectations, rather than challenge them. Male carers may have been discriminated against if they are treated less well than a female carer, but Horton further notes “that this will be of no benefit in an environment where all carers are treated with an equal lack of concern.”<sup>147</sup> Therefore, this protected characteristic does not promote fairness for carers as it reinforces gender inequality and fails to recognise the value of caring labour.

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<sup>141</sup> Government Equalities Office *The Equality Bill – Government Response to the Consultation* (The Stationary Office, 2008) 179

<sup>142</sup> Government Equalities Office *The Equality Bill* (n 141) 179

<sup>143</sup> N. Busby ‘Carers and the Equality Act 2010 : Protected Characteristics and Identity’ (2011) 11 *Contemporary Issues in Law* 71, 71

<sup>144</sup> R. Horton ‘Care-Giving and Reasonable Adjustment in the UK’ (n 54) 145

<sup>145</sup> R. Horton ‘Care-Giving and Reasonable Adjustment in the UK’ (n 54) 141

<sup>146</sup> C. O’Brien ‘Confronting the Care Penalty’ (n 90) 13

<sup>147</sup> R. Horton ‘Care-Giving and Reasonable Adjustment in the UK’ (n 54) 141

Carers may also be protected through associative disability discrimination. In *Coleman v. Attridge Law and Steve Law*, the ECtHR did recognise that discrimination on the ground of disability does prohibit less favourable treatment “by reason of the disability of his child for whom he is the primary provider of the care required by virtue of the child’s condition.”<sup>148</sup> The Equality Act 2010 applied this judgment to protect carers from direct discrimination,<sup>149</sup> and harassment,<sup>150</sup> on the grounds of their association with a disabled person. This is problematic for a number of reasons; only carers of those who fall within the definition of disability are protected, which excludes those who are unwell or incapacitated.<sup>151</sup> Also, these carers are not protected against indirect discrimination, which O’Brien notes is the “most common, and so most widely disempowering, type of discriminatory disadvantage encountered by carers.”<sup>152</sup> This may also undermine the protection given to disabled people, as the disadvantages that carers face in the workplace will inevitably affect the person they care for.<sup>153</sup> Accordingly, carers are not sufficiently protected by the current anti-discrimination laws. Provision of caring labour “is an independent vector of disadvantage.”<sup>154</sup>

Finally, the New Labour Government reasoned that the right to request flexible working was the better way to protect carers, because carers’ responsibilities may change.<sup>155</sup> This argument is problematic for two reasons. Firstly, it suggests that the other protected characteristics are static, but Busby notes that these can vary too.<sup>156</sup> This is evidently true for

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<sup>148</sup> C-303/06 [2008] ECR I-5603, [33]

<sup>149</sup> s. 13, explained in Explanatory Notes s. 59

<sup>150</sup> s. 26

<sup>151</sup> R. Horton ‘Care-Giving and Reasonable Adjustment in the UK’ (n 54) 143

<sup>152</sup> C. O’Brien ‘Confronting the Care Penalty’ (n 90) 13

<sup>153</sup> R. Horton ‘Care-Giving and Reasonable Adjustment in the UK’ (n 54) 143

<sup>154</sup> C. O’Brien ‘Confronting the Care Penalty’ (n 90) 15

<sup>155</sup> Government Equalities Office *The Equality Bill* (n 141) 180

<sup>156</sup> N. Busby ‘Carers and the Equality Act 2010’ (n 143) 88

pregnancy, but she notes that religion and disability can also change over time.<sup>157</sup> Therefore, Busby argues that “it is the status of the individual at the time that the protection is sought that is relevant in assessing the occurrence and extent of the less favourable treatment,” rather than the changing nature of their need for support.<sup>158</sup> Thus, fluctuating care needs do not justify the exclusion of carers from the protected characteristics identified in the Equality Act 2010. Secondly, one of the problems I noted with the right to request flexible working in chapter three is that it leads to a permanent change in the contract.<sup>159</sup> Therefore, by definition it does not accommodate changing caring needs, undermining the New Labour Government’s reasoning. Indeed, I noted in chapter three that the right to request flexible working fails to promote fairness for carers in a number of ways.<sup>160</sup> It is a weak right which does not entitle carers to work flexibly as requests can easily be rejected. Also, it does not challenge the negative consequences of part-time work, so is likely to reinforce class inequality. Therefore, the right to request flexible working and the existing anti-discrimination legislation fails to protect carers.

The second reason the New Labour Government did not include carers as a protected characteristic is arguably even more problematic. Stating that “the role of carer applies more to what a person does, than to what a person is,” fundamentally misunderstands caring relationships.<sup>161</sup> As noted in chapter two, caring relationships very much affect who a person is because people define themselves partly through their relationships; they are relational.<sup>162</sup> Busby notes that caring is “something you do *and* something you are.”<sup>163</sup> Accordingly, the

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<sup>157</sup> N. Busby ‘Carers and the Equality Act 2010’ (n 143) 88

<sup>158</sup> N. Busby ‘Carers and the Equality Act 2010’ (n 143) 88

<sup>159</sup> See chapter three pages 94

<sup>160</sup> See chapter three pages 91-95

<sup>161</sup> Government Equalities Office *The Equality Bill* (n 141) 179

<sup>162</sup> C. Gilligan *In a Different Voice: Psychological Theory and Women’s Development* (Harvard University Press, 1982) 156

<sup>163</sup> N. Busby ‘Carers and the Equality Act 2010’ (n 143) 86

then Government's reasoning is flawed. Their reliance upon the idea that caring is something you do led Busby to rightly conclude that carers were not protected because caring is seen as a choice.<sup>164</sup> This is problematic for two reasons; firstly, some of the other protected characteristics could be characterised as a choice. Fredman highlights pregnancy and religion, but notes that these are now accepted as protected characteristics.<sup>165</sup> Therefore, she notes that "the fact that some aspects of our identity are indeed a matter of personal choice, or can in principle be changed or suppressed, should not be a reason for denying such characteristics the protection of discrimination law."<sup>166</sup> The second problem with the Government's reasoning that caring relationships should not be a protected characteristic because providing care is a choice, is that it overlooks the fact that the provision of care can never be considered a personal preference, as argued in chapter two.<sup>167</sup> People's relational sense of self, the expectation of care being provided within the private home and the feelings of guilt of those who cannot provide this care, means that this is better identified as a moral imperative. Accordingly, the Government should have recognised that caring relationships are "a fundamental part of what it is to be human," just like the other protected characteristics.<sup>168</sup>

In addition, carers should be a protected characteristic because there is no "clear conceptual basis for excluding caring from the reach of discrimination law."<sup>169</sup> The justification for anti-discrimination legislation has been debated, but it is widely recognised that such legislation promotes equality.<sup>170</sup> Fredman identifies that one factor that has been used to determine if a group should be protected by anti-discrimination legislation is whether the group has "been

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<sup>164</sup> N. Busby 'Carers and the Equality Act 2010' (n 143) 86

<sup>165</sup> S. Fredman *Discrimination Law* (2<sup>nd</sup> ed, Oxford University Press, 2011) 131

<sup>166</sup> S. Fredman *Discrimination Law* (n 165) 131

<sup>167</sup> See chapter two pages 28-33

<sup>168</sup> R. Horton 'Care-Giving and Reasonable Adjustment in the UK' (n 54) 146

<sup>169</sup> R. Horton 'Care-Giving and Reasonable Adjustment in the UK' (n 54) 146

<sup>170</sup> See S. Fredman *Discrimination Law* (n 165) 130-139. N. Busby *A Right to Care?* (n 10) 108, M. Fineman 'Beyond Identities: The Limits of an Antidiscrimination Approach to Equality' (2012) 92 *Boston University Law Review* 1713, 1725. H. Collins 'Discrimination, Equality and Social Inclusion' (2003) 66 *The Modern Law Review* 16, 16.

subject to a history of disadvantage or prejudice.”<sup>171</sup> Collins argues that the similar basis of tackling social exclusion provides the best basis for protection from discrimination.<sup>172</sup>

O’Brien further notes that the original aim of EU anti-discrimination laws was to promote economic security by ensuring everyone could partake in the workplace.<sup>173</sup> Both of these grounds would justify recognising care as a protected characteristic within anti-discrimination laws. Carers face considerable disadvantages which affect their wellbeing, including physical and mental ill health, as well as poverty.<sup>174</sup> Also, I have noted throughout that many carers and parents have to reduce their paid working hours to provide care, sometimes having to leave the workplace altogether. Therefore, any Government would be fully justified in recognising carers as a protected characteristic.

Accordingly, carers should have been recognised as a protected characteristic in the Equality Act 2010. I have already noted how this could promote the importance of caring labour and lead to “significant and far-reaching alterations,” in the workplace.<sup>175</sup> However, just enacting such legislation will not necessarily achieve these transformative changes. This is because discrimination can only be challenged if employees enforce their claims. This requires “certain preconditions: awareness of rights; knowledge of how to enforce them; capacity to claim and willingness to do so.”<sup>176</sup> These preconditions are often lacking in those workers who need protection the most, including those in precarious work.<sup>177</sup> The issues in bringing a claim have been exacerbated by the Coalition Government’s introduction of a fee, as

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<sup>171</sup> S. Fredman *Discrimination Law* (n 165) 138-9

<sup>172</sup> H. Collins ‘Discrimination, Equality and Social Inclusion’ (2003) 66 *The Modern Law Review* 16, 21

<sup>173</sup> C. O’Brien ‘Confronting the Care Penalty’ (n 90) 10

<sup>174</sup> See chapter two page 21

<sup>175</sup> C. O’Brien ‘Confronting the Care Penalty’ (n 90) 16. See the discussion in this chapter page 260

<sup>176</sup> L. Dickens ‘The Coalition Government’s Reforms to Employment Tribunals and Statutory Employment Rights – Echoes of the Past’ (2014) 45 *Industrial Relations Journal* 234, 238

<sup>177</sup> L. Dickens ‘The Coalition Government’s Reforms to Employment Tribunals and Statutory Employment Rights’ (n 176) 238

discussed in chapter three.<sup>178</sup> Despite this being criticised for undermining “workers’ rights and fair treatment,”<sup>179</sup> the current Conservative Government is unlikely to implement change as it deems these tribunal reforms a “success.”<sup>180</sup>

Therefore, reliance upon anti-discrimination laws alone will not achieve fairness for carers. Many would remain unable to access this protection in practice, so carers would still be denied the chance to meaningfully participate in the paid workforce. Achieving fairness in this context would be reliant upon additional legislative support which effects practical change. This would necessitate a positive duty being placed upon employers, requiring proactive efforts to accommodate carers within the workplace.<sup>181</sup>

c) Duty of reasonable adjustment for carers

Extending the duty of reasonable adjustment to carers would enforce such a positive duty, as Busby suggested at EU level. It is expansive enough to cover all caretaker-dependent relationships and could achieve transformative change. This is partly because employers would have to justify their reasons for refusing requests, which could include modifying working times and even requiring employers to be mindful of the effects of part-time work.<sup>182</sup> O’Brien highlights that this would create more containable rights than discrimination law, which she argues could be advantageous because it may lead to requests actually being enforced.<sup>183</sup> Tribunals may be more reluctant to enforce widespread changes under indirect anti-discrimination legislation. The enforcement of some requests may then encourage self-directed change across the workplace. Although O’Brien raises concerns about how

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<sup>178</sup> See chapter three page 98

<sup>179</sup> L. Dickens ‘The Coalition Government’s Reforms to Employment Tribunals and Statutory Employment Rights’ (n 176) 238

<sup>180</sup> The Conservative Party *The Conservative Party Manifesto 2015* (n 140) 19

<sup>181</sup> O. Smith ‘Reconciling Care-giving and Work in Ireland’ (n 55) 167

<sup>182</sup> N. Busby *A Right to Care?* (n 10) 187

<sup>183</sup> C. O’Brien ‘Confronting the Care Penalty’ (n 90) 25



employers could be established, this could be overcome through the carer's passport scheme and reliance upon proof of parental responsibility, as I suggested in chapter four.<sup>184</sup>

Yet, despite the problematic acceptance of employers' duty of reasonable adjustment for religion and belief outlined above, the UK courts have refused to recognise such a duty for carers.<sup>185</sup> In *Hainsworth v Ministry of Defence v Equality and Human Rights Commission*, a mother argued that a move to the UK to educate her disabled child would have amounted to reasonable accommodation under article 5 of the Employment Equality Directive.<sup>186</sup> She could not rely on the Equality Act 2010 because she was not an employee. The EHRC, intervening as a third party, argued that employers should make adjustments to support employees caring for a disabled person as far as is reasonable. They advocated a purposive interpretation of the law, which recognises that a failure to accommodate carers will detrimentally affect both the carer's work and the dependent person.<sup>187</sup> Therefore, the EHRC highlighted the relational nature of care.<sup>188</sup> However, the Court of Appeal rejected this argument and followed a strict interpretation of the law, limiting protection to the disabled person.<sup>189</sup> In disregarding the EHRC's insight, the court problematically ignored the practical realities of caring labour and denied disabled people protection in practice.

Extending the duty of reasonable adjustment to carers would not only have enabled Ms Hainsworth and her child to flourish, it also would have effectively replaced the problematic right to request flexible working, as analysed in chapter three.<sup>190</sup> Just like the right to request flexible working, the duty of reasonable adjustment would enable carers to adjust their

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<sup>184</sup> C. O'Brien 'Confronting the Care Penalty' (n 90) 18. See chapter four page 114

<sup>185</sup> See chapter eight page 264

<sup>186</sup> 2000/78/EC

<sup>187</sup> [2014] EWCA Civ 763, [3]

<sup>188</sup> J. Herring *Caring and the Law* (Hart, 2013) 2. See chapter two page 31

<sup>189</sup> [2014] EWCA Civ 763, [25]

<sup>190</sup> See chapter three page 91

working hours or work at home, but the entitlement would be much stronger. Employers would be unable to refuse a reasonable request. The wide array of business grounds on which an employer can refuse a flexible working request would be irrelevant.<sup>191</sup> Also, if employers fail to comply with a reasonable request, then they will have discriminated against the disabled person.<sup>192</sup> Therefore, employers would be held to a much higher standard under a duty of reasonable adjustment, which would benefit all carers.

Carers would further benefit from the flexibility provided by the duty of reasonable adjustment, which would not mandate permanent change. This would provide carers with the necessary flexibility to accommodate the fluctuating needs within a caring relationship. Also, requests would not be limited to changing working hours; criteria which put carers at a substantial disadvantage could also be challenged.<sup>193</sup> This would produce more transformative results as employers would have to be conscious about the effects of caring, such as how it impacts their physical and mental health, as noted in chapter two.<sup>194</sup> Therefore, Horton argues that reasonable adjustment might require working policies, such as sickness leave, to be changed to ensure that carers are not penalised.<sup>195</sup> Finally, the duty of reasonable adjustment may serve to challenge the negative consequences of part-time work, which often includes an immediate and significant reduction in wages.<sup>196</sup> As noted in chapter three, the right to request flexible working has been criticised for its inability to do this.<sup>197</sup> Therefore, the duty of adjustment would improve drastically upon the existing entitlement, negating the need for the right to request flexible working.

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<sup>191</sup> See chapter three page 93

<sup>192</sup> Equality Act 2010, s. 21(2)

<sup>193</sup> Equality Act 2010, s. 20(3)

<sup>194</sup> See chapter two page 21

<sup>195</sup> R. Horton 'Care-Giving and Reasonable Adjustment in the UK' (n 54) 149

<sup>196</sup> C. Lyonette, B. Baldauf, H. Behle *Quality Part-time Work: A Review of the Evidence* (Government Equalities Office, 2010) 8-9

<sup>197</sup> See chapter three page 95

Working class carers balancing paid work and caring responsibilities, especially precarious workers, would have particularly benefitted if the duty of reasonable adjustment was applied to those working under a personal work contract. For example, it would have mandated change for individual carers to the policy in *O'Kelly v Trusthouse Forte plc* whereby workers were punished by suspension or removed from the “regular casual” list if they refused work, as analysed in chapter three.<sup>198</sup> This is because their lesser ability to commit to working at very short notice would have to be accommodated.

Accordingly, extending the duty of reasonable adjustment to protect carers would be an important step towards achieving fairness in this context. However, this is dependent upon the duty being supplemented by a substantive body of reconciliation legislation which is consolidated by the right to care.

d) Using the overarching right to care to eradicate legislative gaps

Another key aspect of a right to care is that it would consolidate existing laws affecting carers and provide the evaluative space to determine how to promote carers’ flourishing. In this section, I will use the evaluative space to consider how the proposed duty of reasonable adjustment and anti-discrimination law should be supplemented to achieve fairness for carers. Two clear gaps are initially apparent; gender inequality and the fully committed worker paradigm would remain unchallenged. I argued in chapter four that these sources of unfairness could be challenged by care centric reconciliation legislation which actively encourages all people to take leave, especially men. In chapters five, six and seven, I demonstrated how the substantive body of UK reconciliation legislation should be modified

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<sup>198</sup> [1983] I.C.R. 728. See chapter three page 83

to become care centric. These changes remain of vital importance to supplement a right to care and achieve fairness in this context. Therefore, in this section, I will review and consolidate the changes I have advocated throughout this thesis.

Gender equality could be challenged through the leave available to parents, as I argued in chapter four.<sup>199</sup> The year long period of leave after childbirth or adoption should remain as this period is particularly labour intensive, but the legislation would require modifications to become more care centric and supplement a right to care. Firstly, both parents providing childcare within the sexual family should be entitled to at least six weeks of income-related leave at childbirth or adoption, as default. Two weeks of these should be mandatory to encourage change within the workplace and challenge discrimination against women. To reduce the costs and ensure that this expenditure benefits those most in need, the level of income-related leave should be reduced to 80% and the level of pay should be capped.

To challenge gender inequality further, the remaining forty-six weeks of maternity and adoption leave should be available to both parents as a gender neutral entitlement. To encourage men to access any of this leave, a period should be reserved for each parent on a non-transferable basis. At first, four weeks of leave could be reserved for each parent, as was proposed in the shared parental leave consultation, but this should be increased.<sup>200</sup>

Ultimately, sixteen weeks of leave should be reserved for each parent and the remaining fourteen weeks should be available to either parent on a gender neutral basis. The success of such a scheme would be dependent upon the level of payment being increased; a longer period should be income-related and none should be unpaid. Also, to increase flexibility the entitlement should be available on a part-time basis. These changes may result in more men

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<sup>199</sup> See chapter four page 123

<sup>200</sup> See chapter seven page 238

developing a caring orientation, which could result in them taking more leave and providing care in other relationships.<sup>201</sup> Once men are participating more widely within caring relationships, the duty of reasonable adjustment would support them as carers.

A gap in the legislation would remain as those raising children outside the sexual family would be excluded. To promote their flourishing, such legislative changes would need to be supplemented by a wider definition of parenting, which would underpin entitlements for those raising children outside the sexual family. This would expressly recognise the vitally important work kinship carers provide and promote their flourishing by entitling them to the same entitlements as adopters. Also, lone parents in the UK would be better protected by the legislation, as they could transfer the leave reserved for the recognised co-parent to another carer who would provide this care in reality. If the lone parent is providing childcare without such support, they would be entitled to this whole period of leave. As argued in chapter six, such a change could easily be implemented, as it would mirror parents' entitlement, just excluding the requirement that the person taking the leave was the father or parent's spouse, partner or civil partner. In addition, the mandatory two weeks' leave could be removed, as it is not needed to promote gender equality.

I have also noted throughout this thesis that childcare is not only important in the first year of a child's life. Yet the current body of legislation has a "myopic focus" on a child's first year and fails to acknowledge the long term commitment that childcare entails.<sup>202</sup> The duty of reasonable adjustment would provide some support in this regard, especially as the adjustments do not have to lead to permanent change. Nonetheless, there may be times when workers can anticipate that they are going to need to take leave, such as after an operation or

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<sup>201</sup> N. Noddings *Starting at Home: Caring and Social Policy* (Cambridge University Press, 2002) 28

<sup>202</sup> S. Fredman *Women and the Law* (n 14) 196

in school holidays. Parental leave as analysed in chapter five would fill this gap if it was paid and available more flexibly.

Those caring for dependent adults may also require access to leave in labour intensive periods, such as after a planned operation. Therefore, a gap would remain that should be filled by an entitlement for all carers to a reasonable period of leave, which has been proposed in the Carers (Leave Entitlement) Bill [HL] 2015-16. Such an entitlement should be introduced and to ensure that it supports each caring relationship, this should be underpinned by the caretaker-dependent unit, available to those with a carer's passport, and should mirror the parental leave entitlement.<sup>203</sup>

Parental leave and carers' leave would remain supplemented by emergency leave. I noted in chapter three that this vitally enables care to be provided at essential times. The only legislative modification needed would be to enable the carer to actually provide the care, rather than just arrange for someone else to.

Therefore, using a right to care to consolidate the existing legislation would promote fairness for carers; it would show how each caring relationship is equally important, challenge gender inequality and promote the flourishing of those in precarious work, thus challenging class inequality. A right to care would mean that the UK legislation would reflect the dually responsible worker model and achieve Fineman's ideal of "making nurturing and caretaking a central responsibility of the nonfamily arenas of life."<sup>204</sup>

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<sup>203</sup> See chapter four page 114

<sup>204</sup> M. Fineman *The Autonomy Myth* (n 5) 201

## Defending the thesis against criticisms of utopianism

I have noted throughout that such transformative changes are unlikely to be implemented in the UK. Therefore, my thesis is open to criticism because it is utopian. I have not accepted that “living beyond the present is delusional...or claims there is no alternative.”<sup>205</sup> Instead, I have imagined a better world where carers no longer bear the costs of caring needs alone, but are supported by both employers and the state to realise the basic capabilities of participating in paid work and caring relationships.

Despite the improbable implementation, I argue that such utopian work is important for a number of reasons. Firstly, the need for utopian thinking demonstrates “a desire to bring about change of a quite fundamental sort.”<sup>206</sup> Therefore, my work demonstrates how profoundly the UK needs to change if carers are to be adequately protected. This is particularly important because in the UK, the number of older people is increasing in “an unprecedented manner...[which is] likely to mean an increase in demand for unpaid care.”<sup>207</sup> Unless changes are made to support these carers, the House of Lords Select Committee warns that “this great boon could turn into a series of miserable crises.”<sup>208</sup> To avoid this, urgent and radical action is needed to support carers, rather than incremental legislative change.<sup>209</sup> Therefore, utopian work is needed to fundamentally challenge labour law’s current focus; only a transformative change will recognise the great progress and opportunity that the ageing population represents.

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<sup>205</sup> R. Levitas ‘Looking for the Blue: The Necessity of Utopia’ (2007) 12 *Journal of Political Ideologies* 289, 294

<sup>206</sup> P. Young ‘Importance of Utopias in Criminological Thinking’ (1992) 32 *British Journal of Criminology* 423, 427

<sup>207</sup> L. Pickard ‘A Growing Care Gap? The Supply of Unpaid Care for Older People By Their Adult Children in England 2032’ (2015) 35 *Ageing and Society* 97, 97-98

<sup>208</sup> Public Service and Demographic Change *Ready for Ageing* (n 135) 7

<sup>209</sup> Public Service and Demographic Change *Ready for Ageing* (n 135) 7

Secondly, utopian thinking provides an opportunity to critique the existing structure and analyse how it could be improved. As Harding notes, “looking to utopia offers a window into alternative ways of being and different approaches to the place of law.”<sup>210</sup> Accordingly, utopian thinking has enabled me to critique the current treatment of carers and consider how they could be better accommodated in the workplace to achieve fairness in this context.

Finally, despite the aspirational nature of the thesis, it could still achieve change. It has been noted that utopian thoughts are primarily important “as a way of thinking...to set things in motion.”<sup>211</sup> There is reason for optimism that some of these changes are already happening in the UK. The major UK political parties which reject right wing political ideals all advocated some form of change to the current body of reconciliation legislation in their 2015 election manifestos, excluding Plaid Cymru. The most popular change was improving fathers’ access to leave, which was advocated by the Liberal Democrats, the Labour Party and the Scottish National Party, although the latter gave no substantive detail about how this would be achieved.<sup>212</sup> The Liberal Democrats suggested improving shared parental leave, by making one month available on a “use it or lose it” basis,<sup>213</sup> and tripling paternity leave to six weeks.<sup>214</sup> They also suggested shared parental leave and paternity leave should be made day one entitlements.<sup>215</sup> Labour focused upon improving the standalone entitlement to paternity leave by doubling it in length to four weeks and the rate of payment to £260 a week.<sup>216</sup> They also pledged to make unpaid parental leave transferable to grandparents.<sup>217</sup> In addition, both

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<sup>210</sup> R. Harding ‘Imagining a Different World’ (n 13) 458

<sup>211</sup> P. Young ‘Importance of Utopias in Criminological Thinking’ (n 206) 428

<sup>212</sup> The Scottish National Party *Stronger for Scotland: The Scottish National Party Manifesto 2015* (The Scottish National Party, 2015) 10

<sup>213</sup> Liberal Democrat *Liberal Democrat Manifesto 2015: Stronger Economy. Fairer Society. Opportunity for Everyone.* (Liberal Democrat, 2015) 41

<sup>214</sup> Liberal Democrats *Six Weeks Paternity Leave for Fathers* <[http://www.libdems.org.uk/six\\_weeks\\_paternity\\_leave\\_for\\_fathers](http://www.libdems.org.uk/six_weeks_paternity_leave_for_fathers)> accessed 20.04.15

<sup>215</sup> Liberal Democrat *Liberal Democrat Manifesto 2015* (n 213) 47

<sup>216</sup> The Labour Party *The Labour Party Manifesto 2015* (The Labour Party, 2015) 45

<sup>217</sup> Labour *A Better Future for Women* (Labour, 2015) 11



the Liberal Democrats and the Green Party advocated paid carers' leave; the Greens suggested five to ten days a year,<sup>218</sup> whereas the Liberal Democrats were more modest, proposing five.<sup>219</sup>

Therefore, change to the existing body of reconciliation legislation is likely in the future, albeit not under the Conservative Government. The enactment of any of these proposals would represent further progress and would be a step towards achieving fairness for carers. Yet, all of these proposals represent more incremental change and thus will not fundamentally change the nature of the workplace to accommodate carers. This suggests that “political parties accept the desirability of parental leave policies but are not yet moved to viable solutions.”<sup>220</sup> Therefore, utopian work such as this thesis could set further change in motion by turning this widespread acceptance into more transformative future proposals, which would better promote fairness for carers.

## **Conclusion**

In this chapter, I have analysed Busby's proposal for a right to care in the EU. This focuses upon promoting fundamental change, rather than more incremental legislative modifications. This will elevate the status of carers and caring labour, making important steps towards recognising it as a basic capability. The capabilities approach underpinning means that such a right would also create an evaluative space in which all the relevant entitlements which affect carers could be considered together. Their relative successes and weaknesses would be assessed and any gaps which need to be filled would be clearly highlighted. By

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<sup>218</sup> The Green Party of England and Wales *For the Common Good: General Election Manifesto 2015* (The Green Party of England and Wales, 2015) 26

<sup>219</sup> Liberal Democrat *Liberal Democrat Manifesto 2015* (n 213) 77

<sup>220</sup> M. Baird, M. O'Brien 'Dynamics of Parental Leave in Anglophone Countries: The Paradox of State Expansion in Liberal Welfare Regimes' (2015) 18 *Community, Work & Family* 198, 212

requiring proactive steps to be taken to accommodate carers and fill these gaps, genuine workplace change would be promoted.

Therefore, I applied this innovative idea to the UK legislation. Although such a transformative change is currently unlikely to be implemented in the UK, I suggested that the legislator could fully achieve a right to care and thus promote fairness as defined in chapter two.<sup>221</sup> This would firstly require a standalone right to care, underpinned by the caretaker-dependent unit, being implemented. To ensure that vulnerable precarious workers were protected, this would also have to reflect Freedland and Kountouris' personal work contract.

The right to care would need to be supplemented by further changes, but these would be viewed as an overall body of entitlement, consolidated by the right and underpinned by the capabilities approach. Such changes would include caring status being added as a protected characteristic in the non-discrimination legislation.<sup>222</sup> Protection from discrimination would also be available under the duty of reasonable adjustment. This would need to be supplemented by the substantive body of reconciliation legislation, modified in accordance with the suggestions I made in chapters five, six and seven. The capabilities approach would also provide a method of monitoring the effectiveness of such changes, so that the law would continue to develop in a way which promoted all people's flourishing.

Although this chapter has been somewhat aspirational, I have noted that this sort of work is important. Indeed, it is only with these radical changes that the UK legislation will achieve fairness for carers.

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<sup>221</sup> See chapter two page 48

<sup>222</sup> Equality Act 2010, s. 4

## Chapter Nine

# CONCLUSION: VALUING CARING RELATIONSHIPS WITHIN THE WORKPLACE

### Introduction

This thesis has aimed to consider how carers could be more fairly treated in the UK and the law's role in facilitating this. In chapter three, I concluded that carers' disadvantages would be best challenged by using the law to shape the workplace to better accommodate carers. Fineman argues optimistically that introducing reconciliation legislation would help carers within the workplace "by making nurturing and caretaking a central responsibility of the nonfamily arenas of life."<sup>1</sup> However, as she is writing in the United States, which is so ungenerous to carers that it is the only developed country in the world not to provide any paid leave after childbirth, she did not focus on reconciliation legislation.<sup>2</sup> Therefore, I took up Fineman's challenge: I aimed to examine how the substantive body of UK reconciliation legislation has promoted caring relationships and thus changed the workplace. In particular, I wanted to consider if the legislation promoted fairness for carers in accordance with the vision I outlined in chapter two, and what more could be done.<sup>3</sup>

In chapter three, I noted that the UK reconciliation legislation has been widely criticised within the substantive body of academic writing.<sup>4</sup> This is mainly because the legislation has failed to promote fundamental change. Nonetheless, I argued that reconciliation legislation has a vital role to play in promoting fairness for carers because it recognises the intersection between paid work and caring labour. Achieving this potential is dependent upon the

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<sup>1</sup> M. Fineman *The Autonomy Myth: A Theory of Dependency* (The New Press, 2004) 201

<sup>2</sup> P. Moss *11<sup>th</sup> International Review of Leave Policies and Related Research 2015* (International Network on Leave Policies and Research, 2015) 11

<sup>3</sup> See chapter two page 48

<sup>4</sup> See chapter three page 80

legislation becoming more care centric: focused upon carers' rights to work, rather than workers' rights to care.<sup>5</sup> To understand how this could be achieved, I have built upon Busby's work to combine the bodies of literature on care and reconciliation legislation.<sup>6</sup> In chapter two, I focused upon caring relationships, which formed the basis of my understanding of what care centric reconciliation legislation should do. Firstly, it should recognise the importance of all caring relationships, without focusing upon the status of the person providing care or the person they are caring for. Care centric legislation should also acknowledge that each of these caring relationships is equally as important as paid work and employers' needs. Finally, such legislation should reflect a thorough and accurate understanding of caring relationships. Of particular importance in this context, it should reflect their ongoing nature, rather than just allow caring labour to be momentarily prioritised.

Examination of the care literature also provided an insight as to why women continue to be primary care givers, namely restrictive workplaces and gendered stereotypes. I argued that these should be challenged to promote gender equality, relying upon the generally recognised principles of justice: people are of equal worth; the promotion of wellbeing is important; and resources should be fairly distributed. Indeed, my argument that carers should be better accommodated within the workplace has been underpinned by these generally recognised tenets of justice and Rawl's concept of justice as fairness.<sup>7</sup> Therefore, I demonstrated in chapter two that the principles of justice and care are not necessarily in tension in this context.

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<sup>5</sup> N. Busby *A Right to Care? Unpaid Care Work in European Employment Law* (Oxford University Press, 2011) 50

<sup>6</sup> N. Busby *A Right to Care?* (n 5) 41

<sup>7</sup> See chapter two page 48

Grounding my argument in justice also led me to consider the capabilities approach. In chapter two, I built upon Robeyns' work and argued that caring relationships are so important and fundamental to what it is to be human, that they should be recognised as a basic capability in the UK.<sup>8</sup> In addition, I argued that decent paid work is vital to people's flourishing and should also be deemed a basic capability in chapter three.<sup>9</sup> Therefore, if the state fails to promote each person's participation in both paid work and caring relationships, it is perpetuating manifest injustice.<sup>10</sup>

### **Care centric reconciliation legislation**

In chapter four, I identified how reconciliation legislation could become care centric, again building upon Busby's work.<sup>11</sup> Firstly, I examined the sexual family ideal. Despite the substantive body of literature on reconciliation legislation, little attention has been paid to the underpinning of it, which excludes so many of the caring relationships occurring in practice in the UK. Evans and Pupo note that the legislation only supports partnered parents, but there have been limited attempts to consider how the caring practices outside this family form can be promoted.<sup>12</sup> In this regard, I considered Fineman's caretaker-dependent unit as a potential basis for the body of reconciliation legislation. Such an underpinning would encourage vital change by promoting all caring relationships. Familial relationships would not be unduly prioritised and instead, more fluid, dynamic and interactive personal caring relationships would be recognised. Carer's passports, provided through the National Health Service (NHS), could be used to identify carers alongside proof of parental responsibility to make this practically viable for UK employers. Therefore, the prioritisation of the sexual family could

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<sup>8</sup> I. Robeyns 'Sen's Capability Approach and Gender Inequality: Selecting Relevant Capabilities' (2003) 9 *Feminist Economics* 61, 80. See chapter two page 57

<sup>9</sup> See chapter three page 75

<sup>10</sup> See chapter two page 54-60

<sup>11</sup> N. Busby *A Right to Care?* (n 5) 50

<sup>12</sup> P. Evans, N. Pupo 'Parental Leave: Assessing Women's Interests' (1993) 6 *Canadian Journal of Women and the Law* 402, 407

be challenged. However, as carer's passports are still a relatively new idea which are only just beginning to be implemented by various NHS Trusts, this would benefit from further research to examine how this would work in practice.

Initially, I reasoned that the caretaker-dependent unit should underpin all the reconciliation legislation. This would promote each caring relationship and challenge the prioritisation of parenting. However, having considered the reasons why women continue to provide care in chapter two, it became clear that this would not challenge gender inequality.<sup>13</sup> Gendered expectations would likely result in women continuing to use the entitlements.<sup>14</sup> This would further undermine their equal position in the workplace and reinforce gender discrimination. Therefore, introducing legislation premised on the caretaker-dependent unit alone will not achieve fairness for carers. Instead, challenging gender inequality is reliant upon steps being taken to actively encourage men to provide care.

Achieving this is dependent upon the sexual family model being retained in some of the reconciliation legislation. As the majority of children in the UK are raised by heterosexual couples, this provides a unique opportunity for legislators to actively encourage men to provide care in their fathering role.<sup>15</sup> I noted three ways this could be achieved: mandatory leave, making leave available as default and finally as a non-transferable entitlement. Each of these entitlements would promote men's caring role and thus challenge employers' discrimination against women in the workplace. People would therefore be less constrained by gendered stereotypes, so could turn their capabilities into functions.<sup>16</sup> Therefore, enabling only two parents to access leave in the short-term, would encourage men to care, promoting

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<sup>13</sup> See chapter two page 26-43

<sup>14</sup> See chapter four page 116

<sup>15</sup> See chapter four page 117

<sup>16</sup> On flourishing, see chapter two page 55

fairness for carers by challenging gender inequality. This would be appropriate until such a time when gendered expectations cease to limit people's achievement of the basic capabilities. Such entitlements would also be available to parents raising children in a same-sex relationship. Indeed, I have noted throughout this thesis that use of leave by same-sex parents could play an important role in challenging gendered expectations.<sup>17</sup>

If reconciliation legislation focused solely upon the sexual family, some caring units would still be excluded: those raising children outside the sexual family. Achieving fairness for these carers is dependent upon the legislation accounting for their different circumstances to promote their wellbeing. Again, this has not been examined in the existing body of literature. Therefore, I firstly considered how reconciliation legislation could protect single parents.<sup>18</sup> I argued that their flourishing could be promoted by allowing them to nominate someone else to take the other parents' entitlements. Albeit some changes to the sexual family entitlement would be required, including removing the mandatory period of leave. This would promote the children's and each carer's wellbeing by recognising the relationships which are already occurring in the UK and better enabling single parents to return to the workplace. However, if there was no one to whom the entitlements could be transferred, then the lone parent should simply be able to access the whole period of leave.

I also considered how the growing number of kinship carers could be better protected within the reconciliation legislation.<sup>19</sup> To ensure that each of them can flourish, I argued that the adoption entitlements should be made relevant to them. After all, they will experience many of the same issues, so it is only fair that they receive the same support. This would promote

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<sup>17</sup> See chapter four page 134

<sup>18</sup> See chapter four page 135-140

<sup>19</sup> See chapter four page 140-141

their vital caring labour and help them to avoid poverty by maintaining a workforce connection.

A final way I argued reconciliation legislation could achieve fairness for all carers was by challenging the classed dimension of care. Reconciliation legislation has been criticised for prioritising middle class parents and excluding poorer carers.<sup>20</sup> Although this has been considered in the body of relevant literature, notably by Crompton and Williams, few scholars have considered practical ways in which working class people could be supported in balancing their paid work and caring responsibilities.<sup>21</sup> Therefore, I considered how the legislation should better support precarious workers who are likely to comprise some of the working poor. They are excluded from the support they require, making them some of the most vulnerable workers in the UK. To equalise access to the reconciliation legislation and enable them to flourish, I applied Freedland and Kountouris' personal work contract.<sup>22</sup> Applying this transformative concept would recognise the valuable contributions of caring labour and enable more people to access the entitlements needed to reconcile their paid work and caring commitments. This is because different types of work, not just paid work performed by an employee, would be acknowledged and accounted for in determining eligibility. Therefore, everyone who needed to access reconciliation entitlements would be enabled to. This would require the state to financially support workers who have no identifiable employer or who do not meet the current eligibility requirements. This is because the state is the only body which can support all carers, as I have noted throughout this thesis.

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<sup>20</sup> L. Williams 'Poor Women's Work Experiences: Gaps in the 'Work/Family Discussion' in J. Conaghan, K. Rittich *Labour Law, Work and Family* (Oxford University Press, 2005) 198

<sup>21</sup> R. Crompton *Employment and the Family: The Reconfiguration of Work and Family Life in Contemporary Societies* (Cambridge University Press, 2006) and J. Williams *Reshaping the Work-Family Debate: Why Men and Class Matter* (Harvard University Press, 2010)

<sup>22</sup> M. Freedland, N. Kountouris *The Legal Construction of Personal Work Relations* (Oxford University Press, 2011)



Chapters five, six and seven demonstrated how even the entitlements available to parents in the UK, which is the “exemplar of the caretaker-dependent relationship,” are not care centric.<sup>23</sup> Caring labour is poorly remunerated and paid work is consistently prioritised over caring relationships. Many of the entitlements are practically inaccessible, especially those which aim to promote fathers’ caring role. Also, employees are given more support than other workers. Indeed, the only entitlement available to non-employees is maternity allowance. As men are denied a genuine opportunity to participate in caring relationships and only women’s caring labour as a mother is considered important enough to be supported when not combined with employment, albeit exceptionally minimally, the legislation reinforces gender inequality.

The support for non-parents is even weaker. Only emergency leave and the right to request flexible working are currently available to all carers in contrast to the extensive entitlements which have been introduced for parents. The proposed carers’ leave, although unlikely to be implemented, could be an important step towards balancing out this unfair treatment by providing support to the 6.5 million people caring for an elderly, disabled or otherwise dependent person in the UK.<sup>24</sup> Kinship carers may also benefit from such an entitlement, as they are currently only able to access unpaid parental leave. However, for carers’ leave to really achieve change, the entitlement should be care centric. Bearing in mind the preceding legislation, this is unlikely. It is expected that even if carers’ leave is introduced, the pay will be limited and the leave will be available inflexibly, similarly to the existing entitlements. Therefore, in all likelihood, carers would not be provided with a genuine opportunity to use this leave. Accordingly, all carers in the UK, including parents, are likely to continue to be disadvantaged.

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<sup>23</sup> M. Fineman *The Autonomy Myth* (n 1) 304

<sup>24</sup> Carers UK *Facts About Carers* (Carers UK, 2014) 1. On carers’ leave not being implemented see chapter one page 6

In chapter eight, I considered a more transformative way to ensure that carers are treated fairly in the UK; a right to care. Busby developed this in the EU context, focusing less upon incremental legislative change and instead promoting a wide ranging and overarching solution which would promote care centric legislation.<sup>25</sup> This would require proactive steps to be taken to accommodate carers, so would be capable of achieving the drastic workplace change which is necessary. Therefore, I applied this idea to the UK and noted how it would elevate the status of carers and their vital labour by recognising caring relationships as a basic capability. A right to care would also require that caring status was added as a protected characteristic in the Equality Act 2010.<sup>26</sup> It would further justify other wide ranging changes, including the proposals I made throughout chapters five, six and seven to improve the entitlements available to parents. Indeed, promoting fairness for carers would be dependent upon the right being supplemented by a substantive body of reconciliation legislation. This would include the introduction of a duty of reasonable adjustment, which would abolish the weak right to request flexible working. The right to care would overarch and consolidate this substantive body of legislation, promoting its care centric application.

### **The need for wider societal change**

Despite the transformative potential of a right to care, Busby recognises that this “is merely an important initial step in a much longer process aimed at solving the current conflict between unpaid care and paid work.”<sup>27</sup> Labour law changes alone, no matter how innovative, will not elevate caring labour enough to achieve fairness for carers. A wider societal change is needed; the full realisation of a right to care “will depend on the satisfaction of a range of claims across the civil, economic, social, and political spectrum.”<sup>28</sup>

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<sup>25</sup> N. Busby *A Right to Care?* (n 5)

<sup>26</sup> S. 4

<sup>27</sup> N. Busby *A Right to Care?* (n 5) 188

<sup>28</sup> N. Busby *A Right to Care?* (n 5) 90

Two necessary societal changes were noted in chapter three. Firstly, those whose caring responsibilities make it impossible to maintain a paid workforce connection require adequate financial support.<sup>29</sup> Although payment may not solve all the problems carers have reported, it would hugely benefit those experiencing financial issues.<sup>30</sup> Also, to support those balancing paid work and caring labour, formalised care supported by the state should be made increasingly accessible.<sup>31</sup> Reliance upon this alone would be ineffective because it would reinforce gender stereotypes. However, some accessible formalised care is necessary to achieve fairness for carers. Indeed, without it, some people would be unable to maintain their workforce connection.

This thesis has highlighted how those in low paid, precarious work are particularly vulnerable in the workplace and face certain hardships balancing their paid work and caring responsibilities.<sup>32</sup> Achieving fairness for these workers is dependent upon them being protected by all labour law provisions, not just reconciliation legislation. This will protect them from “the most extreme forms of abusive employment arrangements,” to which they are currently vulnerable.<sup>33</sup> Implementing the personal work contract across the whole body of labour law would achieve this. However, Freedland and Kountouris note that this increased protection should be complemented by efforts to reduce the number of precarious jobs. Stability in the workplace should become a “policy compass for labour law reform.”<sup>34</sup> As “long-term stable relationships of trust and loyalty...constitute a cohesive society,” these

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<sup>29</sup> See chapter three page 70

<sup>30</sup> See chapter two page 21

<sup>31</sup> See chapter three page 70-73

<sup>32</sup> See chapter three page 74

<sup>33</sup> A. Adams, M. Freedland, J. Prassl ‘The ‘Zero-Hours Contract’: Regulating Casual Work, or Legitimizing Precarity?’ (2015) University of Oxford Legal Research Paper Series (Paper no 00/2015) 3

<sup>34</sup> M. Freedland, N. Kountouris *The Legal Construction of Personal Work Relations* (n 22) 381

relationships are more likely to foster a workplace ethos which is supportive of carers.<sup>35</sup> This would also accord with the International Labour Organisation's aims of promoting decent work for all.<sup>36</sup>

To further promote fairness for carers and challenge gender inequality, part-time work or leave from the workplace should no longer be associated with decreased earnings.<sup>37</sup> Also, the minimum wage should be increased. Of the 13 million people living in poverty in the UK, 6.7 million are in a family where someone works.<sup>38</sup> Therefore, despite workplace participation, many are denied a living wage, high enough to achieve the basic capabilities. To enable all people to flourish, this should be remedied.

Many employers are likely to be anxious about the financial impact of the promotion of carers' interests. Some of these concerns will be well-founded, notably small business owners may struggle to meet these demands. This is because corporations are vulnerable, just like workers. They are human enterprises and thus susceptible to the same weaknesses as humans: they may suffer "harm, decline, and demise."<sup>39</sup> Large businesses are more likely to be able to deal with this vulnerability and thus should be able to promote carers' rights to work.

However, small employers may require more state provided support to promote carers' rights to work. This would be similar to the extra maternity pay small employers can reclaim from the state.<sup>40</sup>

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<sup>35</sup> P. Ackers 'Reframing Employment Relations: The Case for Neo-Pluralism' (2002) 33 *Industrial Relations Journal* 1, 17

<sup>36</sup> See chapter three page 76

<sup>37</sup> See chapter three page 94

<sup>38</sup> T. MacInnes, H. Aldridge, S. Bushe, P. Kenway, A. Tinson *Monitoring Poverty and Social Exclusion 2013* (Joseph Rowntree Foundation, 2013) 26

<sup>39</sup> J. Fineman 'The Vulnerable Subject at Work: A New Perspective on the Employment At-Will Debate' (2013) 43 *Southwestern Law Review* 275, 310

<sup>40</sup> See chapter five page 156

## Future directions

Care centric reconciliation legislation could be an important step towards achieving fairness for carers in the UK. However, the road to achieving fairness within the definition adopted in chapter two is clearly a long one that can only be achieved through a thorough understanding of the practical situations in which people provide care.<sup>41</sup> Research has been conducted on how widely reconciliation legislation is used in the UK as I have noted throughout this thesis.<sup>42</sup> Yet due to the legislative focus upon the heterosexual family and middle class parents, this provides limited insight into the ways in which those caring in other circumstances reconcile their paid work and caring labour. Due to my focus upon challenging the unfair disadvantages carers' face, I am particularly interested in exploring these gaps further.

I have identified three gaps in understanding the practical use of reconciliation legislation. Firstly, I have noted throughout this thesis that same-sex parents generally have more egalitarian relationships and are therefore more likely to make use of transferable entitlements such as shared parental leave.<sup>43</sup> However, there is no information about their actual usage of such entitlements. Therefore, it would be interesting to conduct some empirical work to determine if same-sex parents actually divide their entitlement more equally. Such research would be particularly pertinent due to the recent introduction of shared parental leave.

Empirical research on single parents balancing their paid work and caring commitments would also be useful. This could engage further with the possibility of enabling single parents

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<sup>41</sup> See chapter two page 48

<sup>42</sup> Much of this has been compiled in M. O'Brien, A. Koslowski, M. Daly 'United Kingdom' in P. Moss *11<sup>th</sup> International Review of Leave Policies and Related Research 2015* (International Network on Leave Policies and Research, 2015)

<sup>43</sup> See chapter four page 134

to transfer some of their leave entitlements to another carer, as I explored in chapter four.<sup>44</sup> It would be interesting to know how beneficial this would be in practice. It would also be informative to understand if those supporting single parents feel that their ability to participate in paid work is being undermined by a lack of support for their caring role.

A final gap in the current understanding is how precarious workers reconcile their paid work and caring commitments. Their coping strategies are not reflected in the research on the uptake of leave because they are often not entitled to such support. However, as the number of zero-hours contracts increase, the reconciling of paid work and caring commitments by precarious workers is becoming an increasingly important issue.<sup>45</sup> Therefore, research should be conducted to determine how precarious workers would benefit from reconciliation legislation being made available to all those working under a personal work contract. In particular, it would be useful to find out how likely they are to make use of such entitlements. Such insight would be necessary because existing research suggests that many of those who are denied employee status are unwilling to enforce their rights for fear of reprisals.<sup>46</sup> Research into each of these three areas should be engaged with, but due to my focus upon precarious workers, this final option would be my top priority.

This would build upon empirical work already undertaken in labour law. For example, James conducted research upon pregnancy discrimination, where she relied upon tribunal cases to highlight flaws in the treatment of pregnant women's cases.<sup>47</sup> She also highlighted how pregnant women or those who have just had children are particularly unlikely to bring

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<sup>44</sup> See chapter four pages 135-140

<sup>45</sup> Office for National Statistics *Employee Contracts That Do Not Guarantee a Minimum Number of Hours: 2015 Update* (Office for National Statistics, 2015) 1

<sup>46</sup> C. Barnard 'Enforcement of Employment Rights by Migrant Workers in the UK: The Case of EU-8 Nationals' in C. Costello, M. Freedland *Migrants at Work: Immigration and Vulnerability in Labour Law* (Oxford University Press, 2014) 206

<sup>47</sup> G. James *The Legal Regulation of Pregnancy and Parenting in the Labour Market* (Routledge, 2009) 85

tribunals claims because they may prioritise “enjoying or managing the pregnancy or newborn baby,” further undermining their current protection.<sup>48</sup> Barnard has also researched how EU migrants from Czech Republic, Estonia, Hungary, Latvia, Lithuania, Poland, Slovakia and Slovenia access labour law protection in the UK.<sup>49</sup> She adopted a similar approach to James, by considering the claims brought to employment tribunals. Both recognised the limitations of relying upon tribunal findings; so many people are restricted from even bringing a claim, as discussed in chapter eight.<sup>50</sup> Accordingly, although both these pieces of research provide valuable insights, both authors recognised that this does not reflect the whole picture.

A focus upon employment tribunals is unlikely to demonstrate very much about how precarious workers reconcile their paid work and caring labour. It will not consider the situation of those who are not entitled to leave and thus cannot bring a claim. Therefore, a better understanding of the situations precarious workers face would be reflected through qualitative research. This would require identification of the main places precarious work takes place. The EHRC undertook extensive research into the meat processing industry where many migrants work and are denied employee status, which leaves them particularly vulnerable to poor treatment.<sup>51</sup> Engaging with these workers may promote a better understanding of the issues precarious workers face in meeting their caring responsibilities.

Such an understanding would highlight further ways that the law could promote fairness for carers and thus build upon this thesis. Such work should be completed because caring relationships are of central importance to all humans, as is decent paid work. This is true of

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<sup>48</sup> G. James *The Legal Regulation of Pregnancy and Parenting in the Labour Market* (n 47) 91

<sup>49</sup> C. Barnard ‘Enforcement of Employment Rights by Migrant Workers in the UK’ (n 46) 193

<sup>50</sup> See chapter eight page 281

<sup>51</sup> Equality and Human Rights Commission *Inquiry into Recruitment and Employment in the Meat and Poultry Processing Sector* (Equality and Human Rights Commission, 2010) 10

all people, including those in precarious work. Currently, these workers' basic capabilities are being undermined, which Lewis and Guillari poignantly note, "has the hallmarks of tragedy."<sup>52</sup>

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<sup>52</sup> J. Lewis, S. Guillari 'The Adult Worker Model Family, Gender Equality and Care: The Search for New Policy Principles and the Possibilities and Problems of a Capabilities Approach' (2005) 34 *Economy and Society* 76, 98



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