

The Paradox of Parental Leave

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Deborah A. Widiss, *The Hidden Gender of Gender-Neutral Paid Parental Leave: Examining Recently-Enacted Laws in the United States and Australia*, __ **Comp. Lab. L. & Pol'y J.** __ (forthcoming, 2020), available at [SSRN](#).

In the mid-1980s, Professor [Wendy Williams](#) posed “[equality's riddle](#)”: does pregnancy result in women being unequal, thus needing special workplace protections, or should pregnancy be treated the “same” as other workplace conditions? The essence of the riddle concerns the best way to promote sex equality, more specifically whether pregnancy requires accommodation or whether it can be handled in the same manner as other physical conditions.

In her article, *The Hidden Gender of Gender-Neutral Paid Parental Leave: Examining Recently-Enacted Laws in the United States and Australia*, Professor [Deborah Widiss](#) updates the dilemma Williams posed by examining the impact on sex equality of the differing approaches of paid parental, bonding leave laws in the United States and Australia. Spoiler alert: the article compellingly shows that the riddle has not yet been solved. While the U.S. approach may foster formal equality, the Australian approach may result in more overall time spent in caretaking.

The U.S. has chosen the same-treatment approach. Anti-discrimination law mandates that pregnant workers be treated the “same” as other employees, while the [Family and Medical Leave Act](#) provides equal amounts of unpaid leave to parents, regardless of gender. Although the U.S. has no paid federal parental leave, Widiss focuses on state paid-leave laws (more than one-quarter of the population lives in one of those states), which offer each parent the same, non-transferable benefits. Each parent is thus eligible for bonding leave, depending on the state, of between four to twelve weeks of paid leave.

By contrast, Australia initially chose the special-treatment approach, providing new mothers one year of unpaid maternity leave and structuring its sex discrimination law to permit this differential treatment. Subsequently, Australia revised its national paid parental leave program in 2011, and it provides unequal, although seemingly gender-neutral benefits: the “primary carer” is given eighteen weeks of coverage, while a “[Dad and Partner Pay](#)” (DAPP) program provides two weeks of benefits to a secondary caregiver. While both programs are available to either parent, the birth mother is the default recipient of the primary carer leave.

Internationally, most countries have distinct paid leave policies for mother or fathers, so Australia’s is somewhat in line with those policies because it offers differing levels of leave based on parental role. Typically, mothers receive more of that leave; indeed, in six countries, including [Canada](#), [Switzerland](#), and [New Zealand](#), maternity leave is the only type of paid leave that is available for the birth or care of a child. In other countries, including Sweden, some portion of paid parental leave is reserved exclusively for fathers. In the U.S., however, the rights are independent for each parent.

Some of the difference in approach among countries may, Widiss suggests, be due to background laws concerning gender equity. The U.S. promotes formal equality and gender neutrality in its sex discrimination laws, while Australian law includes special accommodations for women “premised on a substantive conception of equality that suggests that differential treatment may be essential to equalize

opportunity.” (P. 3.) Indeed, the [Australia Sex Discrimination Act](#) explicitly permits “special” accommodations for women relating to pregnancy or childbirth. (P. 15.) Moreover, U.S. law may be friendlier than Australian law to claims of discrimination based on parental caregiving responsibilities (P. 21), although, as [David Fontana](#) and [Naomi Schoenbaum](#) point out, laws surrounding pregnancy itself [remain “sexed.”](#)

Going beyond the jurisprudential aspects of these laws, Widiss focuses on who actually takes the leave. In the states that have implemented paid leave, she points to early evidence showing that fathers are increasingly likely to take advantage of the opportunity. For example, [in 2004 in California](#), when paid leave first became available, men took 15% of all bonding leave, while by 2018, they took 38%. (P. 19.) That large percentage (note that, even in California, women still take 62% of the leaves) is not replicated in all states, and Widiss suggests that future research should analyze whether fathers’ leavetaking is correlated with the level of benefits and time available.

In Australia, the statistical picture is different. Virtually all of the “primary carer” leave is claimed by the birth mother, while virtually all of the DAPP leave is claimed by the father. (P. 19.) Accordingly, Widiss observes that U.S. policies have been more successful than Australian in encouraging men to claim parental leave benefits for infant caregiving. On the other hand, Australian policies are more likely to provide new mothers “a reasonably ample period of time away from work.” (P. 24.)

Widiss places these outcomes in the context of the countries’ norms around caregiving and the U.S. minimal approach to a social safety net for working parents. In the U.S., more than 40% of mothers with a one-year-old child work full time, compared with only 14% of similarly-situated Australian mothers. (P. 24.) In addition to the lack of paid federal leave, the U.S. does not provide paid time off for caring for sick family members, workplace flexibility, or limits on mandatory overtime. And Widiss notes that the U.S. system disadvantages single-parent families—the subject of her related article, [Equalizing Parental Leave](#), 105 Minn. L. Rev. ___ (forthcoming, 2021). On the other hand, Australia seeks to “normalize men’s use of leave” and protect against family responsibilities discrimination; it already provides various protections for caretaking at work. (Pp. 24-25.)

The article provides a rich description of different approaches to “equality’s riddle.” Although Widiss does not endorse one over the other, she concludes by noting the ongoing challenge to ensuring social and legal support, so that parents can manage their lives as workers and caregivers. Her article shows the importance of carefully considering the goals of any approach to parental leave—and that there is no easy answer on how to respond to contemporary work-family challenges while ensuring gender equality.

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