

Shared parental leave and the sexual family: the importance of encouraging men to care

Gemma Mitchell

School of Law, University of East Anglia, Norwich, United Kingdom.¹

Abstract

This paper considers how shared parental leave could achieve its aim of encouraging fathers to provide care. I will argue that achieving this ambition is dependent upon the legislation continuing to be available only to those performing a parenting role, when two parents are providing childcare. Despite the problems with the two parent family model, it should be retained temporarily because it has unique potential to encourage men to care, as highlighted by Swedish legislation. This is the most effective way to challenge gender inequality. Shared parental leave should only be made available to a wider category of carers after men have been given a realistic chance to care. Widening access earlier risks reinforcing women's association with caring work.

Keywords: fathers; caring; paid work; reconciliation legislation; sexual family.

Introduction

The Coalition Government (2010-15) introduced shared parental leave to encourage men to provide childcare and challenge women's continued association with it (Department for Business, Innovation and Skills, 2011, 14-15). This important ambition has not been achieved as few men have used the entitlement (My Family Care, 2016, 2). Drawing on

¹ G.Mitchell@uea.ac.uk

a comparison with Swedish legislation, this paper will show that if modified, shared parental leave could increase men's caring role. I will argue that the success of such modifications would be dependent upon the legislation continuing to reflect the "sexual family" when two parents are providing care.

Fineman, "the preeminent feminist family theorist of our time" (Polikoff, 2000, 167), uses the term "sexual family" to describe the sexually intimate couple which conceptions of family are based around (1995). Fineman highlights how problematic this is, focusing particularly on marriage in the United States of America (1995, 150. See further Herring, 2013, 187-189, where a similar observation is made from a UK perspective). This paper will make an important contribution by applying Fineman's work to shared parental leave. I will argue that despite its problems, the sexual family provides a basis for encouraging men to care because the two people identified in the legislation are the only ones who could take the leave to provide care. As the legislation affects the beginning of a caring relationship, it provides a unique opportunity to encourage both parents to use their entitlement, increasing men's usage of leave to provide care. This will challenge women's association with caring work.

Yet limiting leave only to those caring within the sexual family problematically excludes others providing childcare. In this regard, Fineman's proposed replacement of the sexual family, the "caretaker-dependent unit" will be examined. Applying this to shared parental leave would mean that the legislative gaze would turn onto a broader range of carers. I argue that if shared parental leave recognised caring relationships outside of the sexual family, this would provide vital support to the caring relationships occurring in practice. Yet expanding eligibility for the entirety of shared parental leave

would be misjudged because it is very unlikely to encourage men to take leave and therefore, I will argue that such an extension risks reinforcing gendered stereotypes and rules. This paper will conclude by considering how shared parental leave could best balance these two competing aims.

The sexual family

Fineman develops the concept of the sexual family to describe 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” (1995, 150). Therefore, the family ideal is based around a horizontal, sexual connection. Fineman notes that “each individual family is ideally responsible for its own members’ dependency” (1995, 37). The sexual family must accommodate intergenerational relationships only temporarily, such as young children or elderly parents (1995, 145). Once caring needs have been met, the sexual family should revert to its natural state; the dyadic, intimate couple.

Traditionally the married heterosexual family was prioritised as the purest form of the sexual family (Fineman, 1995, 150). Efforts to expand legal protection to other sexually affiliated couples means that the sexual family now includes unmarried and same-sex relationships (Fineman, 1995, 2).ⁱ Despite the positive recognition of these families being worthy of protection, the sexual family unit has been widely criticised by feminist scholars for two main reasons. Firstly, the sexual family does not reflect peoples’ lived realities. There are 2.8 million lone parent families in the UK (Office for National Statistics, 2017, 5). Therefore, it cannot “be presumed that children will be raised by a couple” (McCandless and Sheldon, 2010, 187). Indeed, the sexual family has arguably

never been reflective of families because it reflects a white, middle class ideology, which has not accounted for dominant practices of childcare across different ethnic and social backgrounds (Hill Collins, 1994, 45). Furthermore, the sexual family overlooks the universal nature of dependency; people are dependent every day, not just in the obvious times of childhood, old age, illness and disability (Herring, 2013, 2). All these every day caring relationships are as important as sexual relationships; they can all provide life's meaning and purpose (see Bowden, 1997; Noddings, 2002).

The second main criticism is that the sexual family reinforces the gendered roles and expectations of men and women. Women continue to be associated with caring labour; they perform more childcare than men do, with three-quarters of mothers reporting that they have primary responsibility for their children (Eillison, Barker and Kulasuriya, 2009, 34). This is despite the current expectation that they will also participate in paid work (Morris and O'Donnell, 1999, 2). This is because "caring has become tied up in society's expectations around womanhood" (Herring, 2013, 36). In contrast, the importance of "employment in displaying socially appropriate masculinity is unquestioned" (Dermott, 2008, 41). Accordingly the workplace has been structured around a worker whose focus was paid work, with limited caring responsibilities; the fully committed worker model. The expectation of women in particular balancing care and paid work means that this model has been somewhat tempered by a growing emphasis upon workplace flexibility.

The expansion of legal protection to those in same-sex relationships may help to challenge both these problems, firstly, by recognising different family forms.ⁱⁱ However, the reforms merely reproduce the sexual family, "affirm[ing] the centrality of sexuality

to the fundamental ordering of society and the nature of intimacy” (Fineman, 2013, 45). Secondly, same-sex relationships may challenge gendered roles by “degendering parenting, reconceptualising family, and reworking masculine [and feminine] gender roles” (Schacher, Auerbach and Bordeaux Silverstein, 2005, 31). It is unlikely that this will lead to substantive changes in the near future however, as same-sex couples head less than 1% of UK families with dependent children (Office for National Statistics, 2017, 5).

Gendered expectations mean that men and women’s workplace participation remains different, as evidenced by the gender pay gap. Nationwide it is currently the lowest on record between full-time employees, at 8.6%, but between all employees it is 17.9% (Office for National Statistics, 2018a, 2-3). Women’s continued association with unpaid caring labour is widely acknowledged as a key reason the gender pay gap has stubbornly remained (Fredman, 2014, 442). It is linked particularly with parenthood; “the [pay] gap opens up gradually after the first child arrives and continues to widen for many years after that point” (Costa Dias, Elming and Joyce, 2016, 12). Many women feel the negative impact of childcare instantly, as 54,000 pregnant women a year are dismissed, made redundant, or “treated so poorly they felt they had to leave their job” (Department for Business, Innovation and Skills and the Equality and Human Rights Commission, 2016, 6). Even women without children are subjected to discrimination, because they are viewed as potential carers. This makes some employers “wary of hiring women,” fearing they will become less committed to the workplace and prioritise caring relationships in the future (Williams, 2000, 70).

The expectation of balancing care and paid work also affects the type of work women perform; “the employment rate for women with dependent children [is] 73.7%

with 51.8% of the jobs being part-time whilst the employment rate for men with dependent children is 92.4% with 90.1% of these jobs being full-time” (Office for National Statistics, 2018b, 10). Furthermore, the growing emphasis upon workplace flexibility, which initially seems beneficial for women balancing paid work and care, pushes women disproportionately into precarious work (Rittich, 2006, 49). This work is associated with “low wages, few benefits, the absence of collective representation, and little job security” (Rittich, 2006, 12). Precarious workers are excluded from employment law protections, including shared parental leave. There has been growing awareness of the vulnerability of precarious workers, culminating in the Government asking the Taylor review to examine the idea of good work (Taylor, Marsh, Nicol and Broadbent, 2017). However, this is unlikely to improve precarious workers’ situations. The review failed to make any revolutionary suggestions as it was “blunted by a high degree of satisfaction with the workings of the current labour market” (Bales, Bogg and Novitz, 2018, 49).

Accordingly, the sexual family ideal is problematic because it excludes those who provide care in different family forms and reinforces gendered expectations. This is a key reason women and men’s participation in the workplace remains different, reinforcing gender inequality. The next section introduces shared parental leave, which aimed to challenge some of these problems, particularly gendered expectations within the workplace and family.

Shared parental leave

Since New Labour formed government in 1997, a substantive body of legislation has developed aiming to help employees balance their childcare and paid work commitments. This was initially termed family-friendly legislation but has since been renamed work-

life balance policies (Macpherson, 2011, 24). I will refer to this body of law as reconciliation legislation. This definition was adopted by Busby and James to avoid focusing entirely upon childcare and to cover the wide variety of policies that deal with the perceived conflict between paid work and care (Busby and James, 2011). UK reconciliation legislation initially aimed to remove obstacles to paid work and stop mothers relying on welfare (Lewis, 2009, 71). Accordingly, maternity leave is the most developed and generous reconciliation entitlement; twelve months is available to all employees as a day one right, nine of which are paid (Work and Families Act 2006, s 1(1)).ⁱⁱⁱ Eligible mothers are entitled to 90% of their wages for the first six weeks and for the remaining 33 weeks, they are entitled to the low flat rate of statutory maternity pay, which is currently £145.18 a week, or if it is less, 90% of their earnings (Social Security Contributions and Benefits Act 1992, s 164(2)(a)). However, with all reconciliation entitlements, individual employers can choose to pay more than the statutory minimum.

Shared parental leave had a different aim; challenging the assumption that mothers should be primary caregivers and creating a society where work and family complement one another (Department for Business, Innovation and Skills, 2011, 14-15). This was 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” (Department for Business, Innovation and Skills, 2011, 3). Accordingly, 50 of the 52 weeks of maternity leave are now transferable to eligible fathers (The Shared Parental Leave Regulations 2014, reg 6(1)). 38 weeks of shared parental pay is available paid at the same rate as statutory maternity pay (£145.18); the final twelve weeks are unpaid (The Statutory Shared Parental Pay Regulations 2014, reg 40(1)). This built on previous legislative efforts to encourage fathers’ caring roles, replacing the less generous

additional paternity leave (The Maternity and Adoption Leave (Curtailed of Statutory Rights of Leave) Regulations 2014, regs 6(2)(a) and 10(2)(b)). Eligible fathers are also entitled two weeks of ordinary paternity leave, paid at £145.18 a week (Employment Act 2002, s 1).^{iv}

Fathers' eligibility for shared parental leave is dependent on them being employed by their respective employer for twenty-six weeks by the fifteenth week before the expected week of childbirth (The Shared Parental Leave Regulations 2014, regs 5(2)(a), 35(1) and (3)(a)). To transfer maternity leave, the mother must also 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" (The Shared Parental Leave Regulations 2014, regs 5(2)(a), 5(3)(a) and 36(1)(a)).

The Coalition Government also linked encouraging men's caring role to women maintaining a strong attachment to the workplace and therefore reducing "the 'gender penalty' that women suffer from taking time out of the workplace with their children" (Department for Business, Innovation and Skills, 2011, 7). Accordingly, shared parental leave aimed to dismantle the gendered expectations of the sexual family ideal. It does partially achieve this, as it recognises that either parent is capable of caring. Nonetheless, shared parental leave does also reinforce the sexual family ideal and undermine some of the symbolic progress, as considered in the next section.

How shared parental leave reinforces the sexual family

The first way in which shared parental leave reinforces the sexual family is that only two people can access leave; the mother or adopter, and their partner or the biological father.

Therefore, eligibility is dependent upon conformance to the sexual family ideal. Those providing childcare outside this family form are excluded, notably single parents. This is particularly problematic because single parents are likely to be overwhelmed by their dual commitments.

Furthermore, although shared parental leave is available to mothers' partners, the preceding policy documents focus upon encouraging fathers' childcare role. The Coalition Government argued that fathers' involvement in the earlier stages of childcare improved children's welfare, including improving "children's educational and emotional development in later life" (Department for Business, Innovation and Skills, 2011, 7). Linking only fathers to children's welfare is problematic. Although "there is evidence that strong paternal involvement is beneficial to children," this does not warrant a focus upon fathers to the exclusion of other parents (Caracciolo di Torella, 2015, 336). Raising children with men is not linked to improved child welfare; "studies find far more similarities than differences among children with lesbian and heterosexual parents, and the rare differences mainly favo[u]r the former" (Biblarz and Stacey, 2010, 13). Accordingly, the focus upon fathers, to the exclusion of other parents, is unjustified. This reflects outdated notions that heterosexual families are best suited to raising children.

Shared parental leave also reinforces the sexual family ideal by prioritising mothers' caring role. Firstly, the minimum service requirements mean that mothers are the only parents eligible for leave as a day one employment right. Secondly, entitlement to shared parental leave is mediated through the mother, rather than a standalone right. Fathers are only able to access shared parental leave if the mother meets the eligibility requirements and consents to transfer her leave (The Shared Parental Leave Regulations

2014, reg 8(3)(b)(iii)). This suggests that the mother's caring role is the most important; anyone else has merely a secondary role. Such mediated entitlements were criticised by the Court of Justice of the European Union (CJEU), which 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.”

(*Roca Alvarez v Sesa Start Espana ETT SA* Case C-104/09 [2010] ECR I-08661, [36]).

It is problematic that the UK introduced legislation which contravenes this progressive judgement and failed to challenge gendered roles.

The only standalone entitlement that fathers have is two weeks of ordinary paternity leave. As James notes, this “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” (2003). This is in vast contrast to the 52 weeks of leave available to mothers, who are clearly expected to provide the majority of childcare, with the father performing a merely supportive role.

Finally, the initial six week period of maternity pay is the only income related pay available to parents on leave. When maternity leave is transferred as shared parental leave, it is paid at the very low rate of £145.18 a week, or if it is less, 90% of their earnings. The Employment Appeals Tribunal has confirmed that companies who pay higher rates of maternity pay do not have to make such rates available as shared parental pay (*Capita Customer Management Limited v Mr M Ali, Working Families (Intervenor)* [2018] I.R.L.R. 586). This prioritises mothers' caring roles, by “accord[ing] a lower value to

paternal care and suggesting that it is a secondary or supplementary right” (Weldon-Johns, 2011, 28).

The prioritisation of the sexual family, especially the treatment of fathers’ caring role as secondary, is one of the reasons that there has been a low uptake of shared parental leave; less than 1% of men have taken any (My Family Care 2016, 2). Another key reason for this is that leave is merely made available to both parents. This may be enough to encourage parents in more egalitarian families to share leave, such as same-sex parents (See Sullivan, 1996). However, this is unlikely to lead to men raising children in a heterosexual relationship using the entitlement; gendered expectations, workplace discrimination and the gender pay gap mean that for most families, the mother will take the leave. Furthermore, as men are not associated with caring labour and therefore are not expected to take leave, Fredman suggests “fathers are subject to as much or more pressure to forego any rights to leave which are offered to them” (2014, 451). The gendered expectations inherent in the sexual family reinforce these issues. If more men are to take leave to provide childcare, legislation must do more than just make leave available; men must be actively encouraged to take leave.

Encouraging men to care: non-transferable leave

Encouraging men to take leave requires it is paid at a relatively high rate. Low levels of payment not only undervalues caring labour, but also discourages men in particular from taking leave. This is because the costs of raising a child are considerable, making the larger income indispensable. It remains likely that the man in a heterosexual couple will be earning this larger wage. For the same reason, flexibility is vital; this enables men to find the best balance between providing care and maintaining their income. Yet, more is

needed to encourage men to use shared parental leave. Barlow and Duncan found that parents do not determine childcare responsibilities as rational economic actors; instead their choices are influenced and often restricted by their moral and socially negotiated views (2000, 35). Men may be unwilling to take leave even when practicable, because they feel an expectation to prioritise work. Some fear that contravening these gendered expectations may negatively impact their career. This demonstrates the power of gendered ideologies and shows that encouraging men to care requires more than just making leave available.

The consultation on shared parental leave did make a proposal which would have encouraged men to take leave to care; a four week period of non-transferable leave (Department for Business, Innovation and Skills, 2011, 22). This proposal partially reflects more generous Swedish legislation, where non-transferable leave entitlements are available on a “use it or lose it” basis (Gornick and Meyers, 2008, 331). 90 days of leave are allocated to each parent raising children within a couple (Duvander and Haas, 2018, 402). If it is not taken, the leave is lost as no one else can access it. There is an exception for parents with sole custody, who can access the whole period of parental leave (Duvander and Haas, 2018, 404). Eligible parents are paid at a high rate of 77.6 per cent of earnings, up to an earnings ceiling of SEK 455,004 (approximately £ 40,057.87) per year (Duvander and Haas, 2018, 403).

A non-transferable period of leave, paid at an affordable rate, has many potential benefits, particularly for heterosexual couples. It would challenge gendered expectations by recognising that men can care and resisting the prioritisation of mothers’ caring role. Secondly, research suggests that “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” (Barclay, 2011, 170). This reflects the argument that challenging women’s association with care would remove employers’ reasons to discriminate against them and change the workplace. Thirdly, fathers would be provided with a “realistic opportunity and encouragement...to become involved in a very practical and more holistic way in care-giving” (James, 2009, 276). Men’s take-up of the non-transferable leave is considered “a core responsibility of being a parent,” in Sweden, due to extensive advertising campaigns (Harris-Short, 2011, 360). The number of parents sharing leave equally is increasing and by 2016, fathers took 27% of all parental leave days (Duvander and Haas, 2018, 407). This indicates that fathers’ parenting role can be encouraged through government planning.

Therefore, the Coalition Government proposal, could have actually encouraged men to take leave to provide care, albeit less successfully than the more generous Swedish legislation. This proposal was rejected because having numerous different types of leave would increase confusion and costs (Department for Business, Innovation and Skills, 2011, 20). This reasoning problematically prioritised employers’ interests over caring relationships. The Children and Families Act 2014 instead includes the power to extend paid paternity leave (s 123(3)(a)).^v This would make a longer length of paternity leave available at the low flat rate of statutory paternity pay; £145.18 a week, or if it is less, 90% of their earnings. This would increase men’s standalone entitlement, but even if implemented, the low level of pay means that this is unlikely to challenge the gendered division of care. The Swedish example shows that a non-transferable, income related period of leave, in addition to paternity leave, is more likely to have encouraged men to provide care. This is reflected in further recommendations made to the Government. Most

recently, twelve weeks of paternal leave, the first four weeks paid at 90% of income, was recommended to replace shared parental leave (House of Commons Women and Equalities Committee, 2018, 26).

However, not all feminists would support legislative changes to encourage men's caring role. Fineman argues that encouraging men to care is a "dead end" (2004, 171). This is perhaps reflected in the continued gender pay gap in Sweden, which although smaller than the UK's, remains at 13.3% (Eurostat). This is despite Sweden's cultural and social framework supporting the notion that the upbringing of children is "a shared responsibility between parents, employers, and society in general" (Harris-Short, 2011, 360). As childcare is not conceived in the same way in the UK, similar legislation would be unlikely to have the same impact. Instead, Fineman argues that the best way to challenge gender inequality is to make "nurturing and caretaking a central responsibility of the nonfamily arenas of life" (2004, 201). Other feminists agree that recognising care as a public concern would better achieve gender equality (Sevenhuijsen, 2003, 182). This necessitates the restructuring of societal institutions to support caring work. This would include modifying the workplace so that each person has "an equal opportunity to engage in nurturing and caretaking" (Fineman, 2004, 201). Fineman argues that achieving this requires the sexual family ideal is dismantled and replaced with the caretaker-dependent unit.

The caretaker-dependent unit

The caretaker-dependent unit is a new conception of family. It includes a wide variety of caring relationships, recognising that each are equally important. Dependents could be children, the elderly, or others in need of care and anyone could provide their care

(Fineman, 2004, 68). Therefore, the caretaker-dependent unit recognises more fluid, dynamic and interactive personal caring relationships as important. As childcare would no longer be considered parents' job alone, this would accommodate the caring relationships which take place in practice. In addition, as the caretaker-dependent unit is gender neutral, anyone would be able to participate in caring relationships. By recognising men's equal caring capabilities, the caretaker-dependent unit would symbolically contest women's association with caring labour and therefore challenge gendered expectations.

To achieve this, Fineman advocates abolishing the legal protections given to marriage. Instead, she argues that "if people want their relationships to have consequences, they should bargain for them" (2004, 134). People in relationships "would be regulated by the terms of their individualized agreements, with no special rules governing fairness and no unique review or monitoring of the negotiation process" (2004, 134).

This lack of concern for fairness is problematic for several reasons. Informal and consensual processes, including such a contract negotiation, can "magnify power imbalances and open the door to coercion and manipulation by the stronger party" (Genn, 2010, 90). Accordingly, informal agreements between partners have been widely criticised for failing to protect women (Genn, 2010, 91). Secondly, in negotiating such a contract, parties would not be dealing at arm's length with each other. This means that the parties may not "zealously guard their own interests, out of concern for the other person or because of a mistaken (but extremely prevalent) belief that their own relationship will last for life" (Eichner, 2010, 102). This is perhaps more likely in women

because they have a more relational sense of self, in that they define themselves partly through their relationships (Gilligan, 1982, 156). A third problem is the practical impossibility of creating a contract to cover the wide variety of things that could happen over someone's life course.

A final issue, which Fineman recognises, is that some people would not enter a contract to define their caretaker-dependent unit. Fineman suggests that the existing rules would protect these parties (2004, 134). Despite some progress in protecting those living outside formalised relationships in England and Wales, this protection remains weaker than for married partners. For example, *Stack v Dowden* ([2007] UKHL 17) and the common intention constructive trust is considered to have given unmarried women the protection they require (see Auchmuty, 2012, 85). Yet, the common intention constructive trust only creates property rights over the family home, unlike the much wider powers of distribution in divorce cases (Matrimonial Causes Act 1973). Furthermore, it provides no protection to those who have not had express discussions about ownership or made direct financial contributions to the house (see *Lloyds Bank Plc v Rossett* [1991] 1 AC 107, 133). Therefore, even this progressive judgement undermines Fineman's assertion that the existing rules would adequately protect caretaker-units who did not enter contractual agreements. These problems show that entering contracts to support caretaking relationships will not solve the problems caused by the prioritisation of the sexual family; women would continue to be disadvantaged.

Eichner, although in favour of supporting all caring relationships, recognises other disadvantages to grouping all caring relationships into one single legal status, like the caretaker-dependent unit. She argues that this would stop the state "from tailoring the

particular obligations and benefits assigned to that status to the type of caretaking relationship at issue” (2010, 111). In particular, she argues that it makes sense for the conjugal partner to be presumed to act as the parent when a child is born. This is because as a default, this is what most people would want. Removing the ability to enforce this presumption would be disadvantageous to the majority of families.

Secondly, Eichner suggests that the state should do more than just support all existing children in their caretaking relationships; it should “promote those family forms that better foster children’s welfare so that future children are born into sounder circumstances” (2010, 100). The state should seek to encourage and stabilise any groupings that have two or more adults because “all other things being equal, close, stable, family relationships are better for children than more distant or unstable relationships” (Eichner, 2010, 112). The resources of two people to provide care is also better than just one. This highlights another important ambition linked with supporting caring relationships; promoting the best outcomes for dependents.

Therefore, implementing the caretaker-dependent would not be without problems. The concerns about reliance on contracts are not relevant to reconciliation legislation. However, Eichner’s two criticisms are. When a child is born, most people would want the two people in the position of parents to act as such. This might be a reason to support shared parental leave retaining the sexual family underpinning. However, this is not a convincing argument because acting as parents would not necessarily mean that they would want to provide all the care or that they should. Furthermore, it is clear that, all things being equal, having two or more people provide care in a stable environment will promote dependents’ needs.

The next section will demonstrate how some UK reconciliation legislation, focused on a wider range of dependents than just children, does already uphold the caretaker-dependent unit. I will then consider how eligibility for shared parental leave could be extended to a wider variety of carers. This will highlight how shared parental leave could also encourage and stabilise groupings of two or more adults, responding to Eichner's criticism.

UK reconciliation legislation and the protection of other caring relationships

Some UK reconciliation legislation does already reflect the caretaker-dependent unit to support existing caring relationships. The right to request flexible working was originally only available to parents (Employment Act 2002 s 67), but has since been extended to carers and then finally to all employees with twenty-six weeks of continuous employment (Children and Families Act 2014, s 131). All employees can request a change to “the hours he is required to work...the times when he is required to work [and] where...he is required to work” (Employment Rights Act 1996 s 80F(1)(a)). The second extension of the right to request flexible working reflects the caretaker-dependent unit by supporting carers to remain in the paid workplace. However, extending eligibility to all employees undermines the recognition of carers, problematically reinforcing the invisibility of caregiving (Masselot, 2015, 63). It also suggests that caregiving is comparable to hobbies and other past-times, which misrepresents the life-sustaining and everyday nature of care work.

The right to request flexible working has also been criticised for failing to support carers in practice. It is a “weak” right because it does not entitle employees to work

flexibly (James, 2006, 277). Employers can easily reject requests on business grounds identified within the legislation, including the burden of additional costs and detrimental impact on quality or performance (Employment Rights Act 1996 s 80G(1)(b)). Another issue is that the process leads to a permanent change to the contract so does not accommodate “fluctuating demands for care or the need for short-term intensive periods of caring or unpredictable time away from the workplace” (Horton, 2011, 140). Thirdly, the negative consequences of part-time work, including often immediate and significant reduction in wages, remain unchallenged (Lyonette, Baldauf and Behle, 2010, 8-9). Accordingly, the legislation does mark an improvement, but “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” (Horton, 2011, 140-1).

Emergency leave is also available to a wide range of potential carers, including the spouse, civil partner, child, parent or anyone who “reasonably relies on the employee” when they are ill, injured or assaulted (Employment Rights Act 1996, s 57A (3)-(4)). However, this leave is available for a very limited period and therefore does not provide ongoing support to carers (*Qua v John Ford Morrison Solicitors* [2003] I.C.R. 482 [21]).

These two entitlements, although problematic, do challenge the sexual family ideal. This is necessary to support the caring relationships occurring in practice. A legislative change to shared parental leave has also been proposed which, if enacted, would represent a step towards challenging the sexual family underpinning. David Cameron’s Conservative Government (2015-16) proposed entitling one eligible grandparent to access shared parental leave, in addition to the father (Her Majesty’s Treasury and The Rt Hon George Osborne, 2015). The challenges posed by Brexit and

the change of Conservative Government means that this is unlikely to be implemented soon. Furthermore, as a period of uncertainty for the UK economy is expected, it is likely that reconciliation legislation will be “shelved or diluted” as priorities shift towards protecting businesses (Her Majesty’s Treasury, 2016, 1; James, 2016, 479). Nonetheless, examining this proposal remains pertinent, as it is an indicator of how shared parental leave might be amended in the future.

Such legislation would be a (small) step towards adopting the caretaker-dependent unit. The reality that more than two people can and often do provide childcare would be recognised. Indeed, if implemented, this would be the first UK reconciliation legislation to recognise that non-parents can play a substantive role in providing childcare, alongside parents.^{vi} Expanding access to shared parental leave would undoubtedly help the 2 million grandparents the Government at the time predicted “have given up work, reduced their hours or have taken time off work to help families who cannot afford childcare costs” (Her Majesty’s Treasury and The Rt Hon George Osborne, 2015). The UK’s 2 million single parents raising children would particularly benefit; someone else could provide support during the child’s labour intensive first year. This also reflects Eichner’s ambition of supporting family forms with more than two people, to encourage stability and security in a child’s life.

However, extending shared parental leave to grandparents alone would fail to recognise the many different people providing childcare. Theoretically, anyone could be eligible for shared parental leave. This would be justified because there is no reason why grandparent care should be prioritised over other caring relationships. Other people would be equally well placed to take the leave to provide the care, including siblings, friends

amongst many others. This would help parents unable to rely on grandparent care, for example, because of geographical distance. Although the proposal was not revolutionary, if implemented, this could have been a small step towards recognising the importance of non-parents' childcare roles.

Any widening of eligibility for shared parental leave would have disadvantages. Fineman notes that replacing the sexual family is unlikely to affect gendered roles or result in men providing more care (2004, 179). This is because it is gender neutral; such legislation is criticised for perpetuating gendered stereotypes and reinforcing gender inequality (McKinnon, 1983, 638). Merely enabling men and women equal access to legislative entitlements will not lead to equal uptake because people's actions will remain restricted by moral and socially negotiated views (Barlow and Duncan, 2000, 35). Workplace structures reinforce these views, further inhibiting both men and women from acting outside gendered expectations.

Extending eligibility for shared parental leave to grandparents would therefore result mainly in grandmothers taking leave. This is because grandmothers are more likely to be practised and confident in providing care, having provided most of the care for their own children. This will also make them more likely to prioritise childcare (Noddings, 2002, 4). Furthermore, "support for a traditional division of labour is much more pronounced among older people" (Park, Bryson, Clery, Curtice and Phillips, 2013, 122). Therefore, grandmothers are likely to want (and feel expected) to take the leave to provide childcare. Furthermore, the pay gap widens considerably after people turn 40 and is at its widest when people are in their 50s; women working full-time in their 50s earn 17.5% less than men do (Department for Culture, Media & Sport, 2014, 9). This means that for

most heterosexual grandparents, it will be easier for grandmothers to sacrifice their wages. Therefore, for most families, enacting the previous Government's proposals would have created grandmothers' leave.

These same issues may result in fathers being bypassed in favour of another female carer. As noted, shared parental leave has not been widely used by men because of societal expectations and reliance upon their generally larger wages. Therefore, given the choice, many mothers may consider it more appropriate to transfer their maternity leave to another woman, rather than the father. Indeed, there would be limited incentive for men to take any leave. Women sharing childcare between themselves would entirely undermine the aim of shared parental leave, likely decreasing the number of men providing childcare. It would also reinforce women's association with care work.

Therefore, although extending shared parental leave to all carers would positively support the caring relationships already occurring, it may reinforce women's caring role. Fineman does not consider encouraging men to care important (2004, 171). However, I will contest Fineman's approach and argue leaving women to care will not challenge gender inequality in practice.

The tricky issue of challenging gender inequality

Fineman and others have increasingly argued that gender equality should be achieved not by encouraging men to care, but by rewarding those providing childcare. This would recognise care as a public concern, through state recognition of care's value (Sevenhuijsen, 2003, 182). Mothers would be the main recipients of this support, as they continue to provide most of the childcare. They might benefit from improved maternity

leave, support when they are unable to participate in paid work and compensation for the disadvantages associated with their caring role. Men who choose not to care would then be held accountable in terms of child custody or subsidies for care work (Fineman, 2004, 202).

I agree that care should be recognised as an issue of public concern. However, focusing upon care work alone is unjustified, partly because it would increase reliance upon the state. It is unlikely that the state would reward caring labour with enough value to demonstrate its importance or overcome the associated disadvantages (Bowden, 1997, 5-6). This is because the everyday nature of caring labour and the public/private divide makes it invisible. This is reflected in the minimal amount available as shared parental pay, which is less than minimum wage. As caring labour will never be rewarded enough to overcome the associated disadvantages, gender inequality will not be overcome by the recognition of mothers alone.

Furthermore, fathers will never be punished for prioritising paid work. In England and Wales, parent and child contact is determined on the basis of the child's welfare (Children Act 1989, s 1(1)). There is a presumption of parental involvement (Children Act 1989, s 1(2A)). In *Re W (Children)*, it was confirmed that "it is almost always in the interests of a child whose parents are separated that he or she should have contact with the parent with whom the child is not living" ([2012] EWCA civ 999, [37] Macfarlane LJ, quoting Wall J in *Re P (Contact: Supervision)* [1996] 2 FLR 314, 328). It is unlikely and undesirable that decisions about children's relationships with their parents would be decided on any basis other than the child's welfare (Eekelaar, 2002, 426).

The only realistic way to tackle gender inequality under Fineman's gender neutral model would be for women to become more like men by focusing primarily upon paid work. Yet this also is problematic. There is a limit to how far women can become fully committed workers because of their reproductive functions (Esping-Anderson, 2002, 95). Children are "a social necessity" and many men and women still desire to have them (Esping-Anderson, 2002, 95; Fredman, 1997, 179). 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 legally proscribed, pregnancy-related discrimination remains widespread, as previously noted (Department for Business, Innovation and Skills and the Equality and Human Rights Commission, 2016, 6). Encouraging women to become more like men will not alleviate this discrimination. Many pregnant women, or those who have recently given birth, simply cannot act like men; "most women contend with several minor to moderate discomforts for weeks [after childbirth]...and some face serious problems, such as depression, that may limit daily activities for months" (McGovern, Dowd, Gjerdingen, Gross, Kenney, Ukestad, McCaffrey and Lundberg, 2006. 160). Furthermore, as caring relationships are needed to "lead successful and fulfilling lives," many mothers will prioritise them (Busby, 2011, 46). Encouraging women to behave like men is therefore, for many, impossible and undesirable. The fact that so many women are unable to meet this standard will only exacerbate pregnancy discrimination by emphasising their different reproductive roles.

Men would continue to be perceived as more reliable and dependable employees. Without incentives to accommodate carers, workplace change would be dependent upon highly prescriptive legislation. Such legislation is unlikely to be implemented by any UK

government as labour law is now “a key instrument of economic policy,” focusing upon reducing employers’ costs (Conaghan, 1999, 27).

A second obstacle to achieving gender equality by encouraging women to prioritise paid work is that it discounts the fact that dependency needs must be met. People “can only exist as individuals through and via caring relationships” (Sevenhuijsen, 2003, 182). It is therefore impossible for all people to satisfy the fully committed worker model, unless care work is outsourced to professional, paid carers. Although low cost, accessible and quality childcare is linked to higher levels of women’s employment, this cannot be relied upon alone (Fredman, 1997, 209). This is because it would unduly prioritise paid caring relationships to the exclusion of those between family and friends. Solely relying upon paid care would also reinforce gender and class inequality. Working class women generally perform paid care work; it is often undervalued and poorly paid in the UK, providing limited chances for promotion and job progression (Fredman, 1997, 216). As Macklin notes, “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” (1994, 34).

Therefore, it is impossible and undesirable for all people to only prioritise paid work. Without prescriptive legislation or care work being better valued, women will continue to be disadvantaged by their association with care. As neither of these are likely to happen, gender inequality would remain unchallenged in practice under Fineman’s model.

For women to participate equally in paid work men must provide care. This would challenge women's longstanding association with it. Consequently, employers would have no reason to discriminate against women, as men would be considered equally likely to provide care. This would incentivise employers to modify workplaces to better accommodate carers. This would mean that women would no longer be forced into lower paid jobs. Furthermore, men providing caring labour would highlight how gendered expectations are socially constructed. After all, it is not that men cannot care, merely that they are treated differently when they do. This would be one-step towards liberating women from childcare "so that they can achieve economic and political autonomy in the 'public' sphere" (Lister, 1994).

Encouraging men to care would also enable them to enjoy more of the extensive social benefits of caring. As Herring notes, "caring relationships are a source of meaning and value to life; a source of joy" (2013, 11). Furthermore, fathers' involvement can benefit children, although as noted earlier, this does not warrant excluding others. Therefore, as well as being necessary economically, men providing care has individual and social benefits. It also encourages long-term change, as men raised in families with a more egalitarian division of childcare and household labour are "more likely to be 'involved' fathers themselves" (Hattery, 2001, 28). Accordingly, once men start providing care, gender inequality and stereotypes will be persistently and increasingly challenged.

Although recognising a wider category of carers would provide much needed support, it would fail to challenge gender inequality. Instead, the best way to challenge gender inequality in practice is to encourage men to care. Whilst shared parental leave has not

achieved this, the Swedish experience shows that this is indeed possible. In the next section, I will argue that such success is dependent upon the legislation being available exclusively to parents when they are raising children in a couple.

Encouraging men to care using the sexual family

Leave entitlements underpinned by the sexual family would mean that care could only be provided by one of two identifiable people. Within heterosexual family units, this is the mother and father. Due to these gendered titles, each parent can be identified within the reconciliation legislation and encouraged to use their entitlement. This provides legislators a unique opportunity to actively promote men's caring work and gender equality by challenging the restrictive gendered expectations. This is because childbirth marks the start of new caring relationships. It is outside legislators remit to force changes upon existing caring relationships (unless they are problematic). This may be traumatic to those providing and receiving care. Furthermore, it is more challenging to change existing patterns of behaviour, as these are ingrained into people's lives and form part of their identity (in a different context, see Kelly and Barker, 2016, 112). However, as childbirth marks the beginning of new caring relationships, it is an appropriate and unique opportunity to influence childcare responsibilities before patterns are established.

In addition to being necessary to the success of non-transferable leave, the sexual family basis would also enable the introduction of other types of leave to increase men's uptake. Fredman advocates a period of mandatory leave for both parents (2014, 451). This would equalise entitlement with mothers, who have two weeks of compulsory maternity leave, but Fredman also argues that it could "achieve the kind of cultural change which has remained elusive so far" (2014, 451). However, introducing mandatory leave

in the UK would be practically impossible. Shared parental leave was explicit in that it aimed to promote more choices for working parents (Department for Business, Innovation and Skills, 2012, 3). Forcing parents to take leave infringes too much on personal autonomy.

Instead, legislation should aim to incentivise men's uptake of leave. Gheaus and Robeyns suggest that taking leave after birth should be the default position for both parents (2011, 184). Opting out would be possible but would require active conduct. This would encourage men to care because opting out 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" (Gheaus and Robeyns, 2011, 184). Furthermore, men's usage of leave would be "understood as the option that society or the government holds to be morally or prudently most worthwhile" (Gheaus and Robeyns, 2011, 184). This period of learning childcare skills may further encourage men to use any non-transferable entitlements. Therefore, implementing default leave, in addition to a non-transferable entitlement, would lead to men taking leave. Again, achieving this would require that the sexual family basis continued to underpin the legislation. It could encourage men to care and challenge gendered expectations.

Therefore, the sexual family underpinning of shared parental leave provides legislators with a unique opportunity to challenge gender inequality. However, as noted previously, this would exclude other caring relationships from needed support. In contrast, the caretaker-dependent unit underpinning would support the caring relationships occurring but would fail to challenge gender inequality. Therefore, the two different conceptions of family would realise different legislative ambitions. Both the

ambitions of encouraging men to care and supporting caring relationships are important. Neither should be sacrificed. Accordingly, I will argue that shared parental leave should reflect both the caretaker-dependent unit and the sexual family model at different points to achieve both these aims.

Achieving both aims; supporting caring relationships and challenging gender inequality

The start of the childcare relationship in two parent families is a unique point where it is appropriate to encourage men to care to challenge gendered expectations. This could be achieved through periods of default leave available to both parents at childbirth. This means parents would take leave at the same time. A further period of non-transferable leave should be available to both parents. These leave entitlements would give men a realistic chance to care, enabling them to appreciate the benefits and maybe encouraging them to do it more. Furthermore, there could be a snowball effect, encouraging more men to take leave (Dahl, LØken and Mogstad 2014). Achieving this is dependent on the legislation reflecting the sexual family.

The non-transferable period of leave would be removed for a parent with sole custody. This would make the whole period of leave available to the parent, as in Sweden. This would be unnecessary for the default leave as this would not affect the overall number of days of leave available.

To challenge gender inequality further, the remaining period of maternity leave should be made available as a gender neutral entitlement. This would challenge the prioritisation of mothers' caring role yet would enable them to take the leave required to

recover from childbirth. However, it would not be necessary for the sexual family to underpin this period of leave. After parents have been given access to default and non-transferable entitlements, it would be appropriate for the remainder of shared parental leave to reflect the caretaker-dependent unit.

This would provide much needed support to those providing care in practice, who might benefit from the opportunity to balance this caring work with their paid work obligations. The 2.8 million lone parent families in the UK would particularly benefit, being supported to participate in both paid work and caring relationships in a meaningful way, rather than just subsisting in both (Office for National Statistics, 2017, 5). Furthermore, it would improve children's welfare as they might receive better care, through more stable relationships with more than one adult. In addition, the children's family unit would be legitimated.

Conclusion

The aim of this paper has been to consider how shared parental leave could achieve its important ambition of challenging gender inequality. Despite the feminist criticisms of the sexual family, I have argued that using this as a temporary basis of shared parental leave is justified to challenge powerful and restrictive gendered stereotypes. It provides legislators with a unique opportunity to encourage men to provide childcare, which is the only practical way to challenge gender inequality. Therefore, shared parental leave should be improved to promote men's caring role. Such improvements should include increasing the level of pay as well as making leave available more flexibly. A period of default leave and non-transferable leave for both parents raising children in a couple would further

encourage men's caring role. This should be only one part of a long-term strategy to challenge gender inequality.

However, the sexual family underpinning excludes other caring relationships. Supporting existing caring relationships is an equally important ambition. Achieving this is dependent on shared parental leave also reflecting the caretaker-dependent unit. Therefore, this should underpin the remainder of the gender neutral leave after the period of default and non-transferable leave. More research is required to examine how this could apply to reconciliation entitlements available after the child's first year.

When gender inequality is eradicated, the caretaker-dependent unit should entirely underpin shared parental leave. At this point, those raising children could make decisions about balancing their care work and paid work free from gendered expectations. Therefore, the sexual family basis would only be an expedient measure to encourage men to provide care. However, rushing towards this end goal only risks reinforcing gender inequality. It is vitally important that the ambition of encouraging men to care is not abandoned.

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ⁱ In the UK, see the Civil Partnership Act 2004, Marriage (Same Sex Couples) Act 2013, Children Act 1989, s 2.

ⁱⁱ Children Act 1989, Adoption and Children Act 2002, Civil Partnership Act 2004, Marriage (Same Sex Couples) Act 2013, Human Fertilisation and Embryology Act 2008.

ⁱⁱⁱ This is available also to adopters (Employment Act 2002) and those who have a baby through surrogacy (Children and Families Act 2014, s 122).

^{iv} This introduced s 80A Employment Rights Act 1996. The Paternity and Adoption Leave Regulations 2002 introduces the detailed provisions.

^v Introduced into Social Security Contributions and Benefits Act 1992, s 171ZE(2)(b).

^{vi} This would have been in contrast to unpaid parental leave, which is available to those with parental responsibility, so those performing the parenting role in place of the child's parents (The Maternity and Parental Leave etc. Regulations 1999, reg 14).