

# When the personal becomes political: Rethinking legal fatherhood

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*Inspired by my personal experience as a working mother during the pandemic, this contribution reflects on the urgent need, and possible ways, to rethink legal fatherhood. If the aim is to make fathers (more) active carers, making family-leave policies more assertive in encouraging fathers' uptake is certainly an important first step towards bringing men into the care frame. Yet, to counter the multiple negative effects of the pandemic on women, legal fatherhood must undergo a structural rethinking, which extends to legal regulation more broadly. A legal venue where this rethinking is long overdue is filiation law, whose rules function as channels through which notions and arrangements of (child)care are created and can, therefore, also be recreated. Driven by the desire to promote a substantive vision of equality, this article argues for a relational rethinking of legal fatherhood, which is mindful of the interconnectedness between the lives of women, men, and children, and places care at its core.*

## 1. Introduction

As a scholar working on issues surrounding gender and family law, and mother of two (soon three) young children, the impact of the pandemic and, in particular, of the kindergarten closure in spring 2020 felt like a “*dejà-lu*.” The myth of autonomy,<sup>1</sup> the privatization of care,<sup>2</sup> the double shift,<sup>3</sup> the motherhood (and, more generally, parenthood) penalty<sup>4</sup>—which I had extensively read about—all became a reality. Like most working parents, my partner and I found ourselves in the difficult position of

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<sup>1</sup> MARTHA A. FINEMAN, *THE AUTONOMY MYTH: A THEORY OF DEPENDENCY* (2004).

<sup>2</sup> See, e.g., Martha A. Fineman, *Contract and Care*, 76 CHL.-KENT L. REV. 1403 (2001).

<sup>3</sup> ARLIE R. HOCHSCHILD (with ANNE MACHUNG), *THE SECOND SHIFT: WORKING PARENTS AND THE REVOLUTION AT HOME* (2003).

<sup>4</sup> See, e.g., Joan C. Williams & Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated Against on the Job*, 26 HARV. WOMEN'S L.J. 77 (2003).

taking care of our children on a full-time basis while continuing to perform full-time academic work: in a nutshell, working from and at home 24/7. The already-thin barrier separating the public and the private spheres of our lives collapsed once and for all, and the precarious balance between professional and caregiving responsibilities turned into a state of rather constant imbalance. At the same time, the outbreak of the pandemic also meant taking a break from a hectic routine involving significant commuting, being able to live our emotional bonds more deeply and to cultivate them, and to enjoy more family time all together.

My experience of being a working mother during a pandemic is no less ambivalent. If, on the one hand, the impact of (unpaid) care work on (paid) employment has become far more tangible, on the other hand, I also experienced the difference which “active fatherhood”<sup>5</sup> makes in a mother’s life more intensely. In this sense, therefore, the pandemic marks a special moment for me, as it created the opportunity for a particularly close encounter between my scholarly work on legal fatherhood and my personal experience as a working mother. From sharing common interests, these two dimensions of my life engaged in dynamic—albeit at times, also frustrating—conversations, whose main points are addressed in the following sections.

## 2. Stories of childcare during spring 2020

In most heterosexual, bi-parental families, the outbreak of the pandemic exacerbated the gender care gap: the burden of additional childcare has indeed disproportionately fallen on those who used to be the primary caregivers before the crisis, namely on mothers. Plenty of data, gathered especially during the first wave of lockdowns, confirms this trend across the globe. To illustrate, in the United Kingdom, mothers performed childcare approximately 10 hours per week more than fathers according to data collected between May 5 and 11, 2020.<sup>6</sup> In Italy, 61% of working mothers—as opposed to 51% of working fathers—reported to undertake more childcare responsibilities in spring 2020 than before.<sup>7</sup> In Australia, mothers decreased their involvement in paid employment more significantly than fathers, and spent 5.13 hours a day on active childcare compared with 3.64 hours a day for fathers in May 2020.<sup>8</sup>

Our story is different. It is a story of equal sharing. Converging personal attitudes and individual circumstances—for example, same profession and similar working conditions, same career stage, the age of our children, and our organization of childcare work prior to the pandemic—made it “automatic” for my partner and I to

<sup>5</sup> “Active fatherhood” is herein understood as referring to involved fatherhood and shared responsibilities for care. See Nicole Busby & Michelle Weldon-Johns, *Fathers as Carers in UK Law and Policy: Dominant Ideologies and Lived Experience*, 41 J. SOC. WELFARE & FAMILY L. 280 (2019).

<sup>6</sup> Almudena Sevilla & Sarah Smith, *Baby Steps: The Gender Division of Childcare during the Covid-19 Pandemic*, 36 OXFORD REV. ECON. POL’Y S169, S179 (2020).

<sup>7</sup> Daniela Del Boca, Noemi Oggero, Paola Profeta, Maria Cristina Rossi, & Paola Villosio, *Prima, durante e dopo Covid-19: Disuguaglianza in famiglia*, LAVOCE.INFO (May 12, 2020), [www.carloalberto.org/wp-content/uploads/2020/05/Prima-durante-e-dopo-Covid-19.pdf](http://www.carloalberto.org/wp-content/uploads/2020/05/Prima-durante-e-dopo-Covid-19.pdf).

<sup>8</sup> Lyn Craig & Brendan Churchill, *Dual-Earner Parent Couples’ Work and Care during COVID-19*, 28 GENDER, WORK & ORG. 66, 72 (2021).

rethink our daily schedule along an equal distribution of care and academic work. To cope with kindergarten closures, we divided the day into two-hour slots and alternated care and academic work shifts. I would take care of the children for two hours, while my partner would do academic work, and then vice versa, from around 9 a.m. to 6 p.m. It was a state of continuous juggling, especially during the childcare shift. The parent in charge of the children was also responsible for housework (i.e. cooking meals, tidying up, cleaning, laundry, etc.). Even if shared childcare has always been at the core of our relationship and family arrangements, the absence and impossibility of external support made the benefits of “active fatherhood” all of a sudden more visible and concrete.

Inspired by my personal experience, this article sheds light on (legal) fatherhood as a distinctive—and largely neglected—angle and aspect of conversations around the gendered effects of Covid-19. The extent of the pandemic’s negative consequences on the situation of women has prompted a debate on the urgent need to adopt a gender-sensitive approach when shaping policy and legal responses to the Covid-19 crisis.<sup>9</sup> Feminists have advocated for recovery and resilience plans, including, for instance, greater investment in the care infrastructure in the light of its employment-generating potential for women.<sup>10</sup> Making (child)care a public responsibility undoubtedly constitutes a crucial step toward reducing the burden on (private) families, mostly to the advantage of mothers as primary caretakers. Yet, part of the problem of, and thereby part of the solution to, unequal sharing of childcare responsibilities (and its aggravated manifestations during the pandemic) is also to be found in the private sphere of parenting and, more specifically, fatherhood. One truth which my story sheds light on is the difference that a more or less active co-parent can make, especially in the life of a mother and throughout a crisis. Written in the wake of my personal experience, the following sections set out the argument that the pandemic can act as a springboard for rethinking legal fatherhood. Apart from counteracting COVID-19’s gendered impact on women, this process is essential to advance a substantive vision of gender equality more broadly.

### 3. Fathers and extra chances

The most “immediate” reason for devoting attention to fatherhood in the midst of the Covid-19 pandemic is empirical. In spite of the increased gender care gap, the outbreak of the pandemic also set in motion welcome patterns. Following the rapid and unprecedented shift towards teleworking in March 2020, some fathers took up greater

<sup>9</sup> Magdalena Sapala, *Gender Equality in the Recovery and Resilience Facility*, EUR. PARL. RES. SERVICE (Apr. 2022), [www.europarl.europa.eu/RegData/etudes/BRIE/2021/698757/EPRS\\_BRI\(2021\)698757\\_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2021/698757/EPRS_BRI(2021)698757_EN.pdf).

<sup>10</sup> See, e.g., Elisabeth Klatzer & Azzurra Rinaldi, “#nextGenerationEU” *Gender Impact Assessment of the European Commission Proposals for the EU Recovery Plan*, THE GREENS/EFA GROUP IN EUR. PARL. (June 2020), [https://alexandrageese.eu/wp-content/uploads/2020/07/Gender-Impact-Assessment-NextGenerationEU\\_Klatzer\\_Rinaldi\\_2020.pdf](https://alexandrageese.eu/wp-content/uploads/2020/07/Gender-Impact-Assessment-NextGenerationEU_Klatzer_Rinaldi_2020.pdf).

childcare responsibilities than before the pandemic.<sup>11</sup> In Germany, for instance, fathers reported spending 5.3 hours a day on childcare in spring 2020, compared to 2.8 hours a day in 2019.<sup>12</sup> A comparative survey involving parents in Italy, the United Kingdom, and the United States in the period of April 11–19, 2020 registered an increase in the number of couples who shared childcare activities equally: 17% more in Italy; 8% more in the United Kingdom; 11% more in the United States.<sup>13</sup> In Italy, the time spent on childcare by fathers of children between three and five years of age increased from three hours a day (prior to the lockdown in spring 2020) to 5.5 hours a day during the first lockdown.<sup>14</sup>

Unpacking this data gives law- and policymakers some real food for thought. The above patterns seem to suggest that being forced, or strongly encouraged, to work from home helped fathers to spend more time taking care of their children by eliminating, or at least relaxing, structural tensions between “breadwinning” and “caregiving.” From a matter to be negotiated on the part of the employee, and therefore a concession to be granted on the part of the employer, working from home became a general obligation, at least for employees doing office work or similar activities that could be carried out from home. Lockdowns therefore reduced the risk of working from home being misunderstood as prioritizing family over work, and, arguably, made it easier for some working fathers to benefit from remote or otherwise flexible work arrangements.

Fathers seem to need an extra chance, some external pressure, and particularly “compelling” reasons for doing (more) childcare work, as compared to mothers. Turning our attention to the legal regulation of fatherhood is of utmost importance, as the law can be a source of these chances, pressures, and reasons. The law may thus serve as a springboard for making “active fatherhood” a more widespread and long(er)-term social reality.

#### 4. Family leave as the entry point

One of the first areas of law which comes to mind in relation to fathers and childcare is that of work–life balance. Unsurprisingly, therefore, this very area has been the focus of the few forward-looking reflections on legal fatherhood in the era of Covid-19.<sup>15</sup> Fatherhood being strongly tied to employment,<sup>16</sup> family-leave policies could play an

<sup>11</sup> According to a recently published study carried out in the Netherlands, however, the percentage of fathers who had taken up greater childcare responsibilities following the pandemic already started decreasing in November 2020. See Mara Yerkes et al., *COVID Gender (In)equality Survey Netherlands—Eighteen Months of COVID: The Impact of the Pandemic on Inequality between Men and Women in Work, Care and Wellbeing*, COGIS-NL (2022), [www.uu.nl/sites/default/files/Yerkes%20Policybrief%2018%20months%20of%20covid.pdf](http://www.uu.nl/sites/default/files/Yerkes%20Policybrief%2018%20months%20of%20covid.pdf).

<sup>12</sup> Michaela Kreyenfeld & Sabine Zinn, *Coronavirus and Care: How the Coronavirus Crisis Affected Fathers' Involvement in Germany*, 44 *DEMOGRAPHIC RES.* 99 (2021).

<sup>13</sup> Pietro Biroli et al., *Family Life in Lockdown* (Inst. for the Study of Labor (IZA) Discussion Paper No. 13398, June 2020), [www.iza.org/publications/dp/13398/family-life-in-lockdown](http://www.iza.org/publications/dp/13398/family-life-in-lockdown).

<sup>14</sup> Marina Zannella, Erica Aloè, Marcella Corsi, & Alessandra De Rose, *Un'occasione per i padri*, *INGENERE* (July 17, 2020), [www.ingenere.it/articoli/occasione-per-padri](http://www.ingenere.it/articoli/occasione-per-padri).

<sup>15</sup> See, e.g., Alice Margaria, *Fathers, Childcare and Covid-19*, 29 *FEMINIST LEGAL STUD.* 133 (2021).

<sup>16</sup> NICHOLAS W. TOWNSEND, *THE PACKAGE DEAL: MARRIAGE, WORK AND FATHERHOOD IN MEN'S LIVES* (2004).

essential role in bringing men into the (care) frame and reimagining “the father” as an active and equal caregiver.

The abovementioned data on childcare patterns during spring 2020 provides two points of departure for reconsidering family-leave policies. The first has to do with the importance of approaching work–life balance as a fathers’ issue as well.<sup>17</sup> Reconciling family and professional responsibilities has unfolded as a women’s struggle following the economic transition from the male-breadwinner model to relying on women’s participation in paid employment. Accordingly, much of the legislative and policy efforts in this field have understandably and crucially sought to improve the working conditions of women, enabling them, among others, to engage in biological and social reproduction by accommodating career breaks for pregnancy, childbirth, breastfeeding, and care of newborns. Yet, recent research reveals that men experience work–life conflict as well, sometimes even to a similar degree as women.<sup>18</sup> In the context of the pandemic, the experience of fathers during spring 2020 can also be viewed through that lens. Covid-19, and the related lockdowns in particular, freed (some) working fathers from the difficult position of having to choose between work and family responsibilities, where these are perceived to interfere with one another.

The second point of departure has to do with the ambivalent nature of work–life balance. Although it is an issue that transcends gender, work–life balance comes with its own gendered specificities. Hence, in order to bring fathers into the (care) frame, laws and policies have to be formulated in ways that take into account the specific concerns and challenges which working fathers are likely to experience. Albeit closely connected, these concerns and challenges are distinct from those faced by mothers, and become particularly visible in, for example, parental leave-taking patterns. In Organisation for Economic Co-operation and Development (OECD) countries, fathers are less likely to make use of the same gender-neutral entitlement to parental leave than mothers.<sup>19</sup> This has been attributed to a variety of factors, which go well beyond childcare decisions taken by the family as a whole. Prevailing social norms and attitudes, which see childcare as the mother’s responsibility, retain a strong influence over the organization of leave-taking. Employers’ attitudes, and workplace culture more generally, also matter.<sup>20</sup> Taking parental leave may be perceived as a lack of commitment to the job, possibly making fathers unwilling to make use of their parental leave for fear of potential repercussions on their career. Additionally, financial considerations have a significant bearing on leave-taking patterns.<sup>21</sup> Fathers tend to

<sup>17</sup> See, e.g., ISABELLA CRESPI & ELISABETTA RUPINI, *BALANCING WORK AND FAMILY IN A CHANGING SOCIETY: THE FATHERS’ PERSPECTIVE* (2016); Sandra Fredman, *Reversing Roles: Bringing Men into the Frame*, 10 INT’L J. L. IN CONTEXT 442 (2014).

<sup>18</sup> Kristen M. Shockley et al., *Disentangling the Relationship between Gender and Work–Family Conflict: An Integration of Theoretical Perspectives Using Meta-analytic Methods*, 102 J. APPLIED PSYCH. 1601 (2017).

<sup>19</sup> Policy Brief, *Parental Leave: Where Are the Fathers?*, ORG. ECON. CO-OPERATION & DEV. (Mar. 2016), [www.oecd.org/policy-briefs/parental-leave-where-are-the-fathers.pdf](http://www.oecd.org/policy-briefs/parental-leave-where-are-the-fathers.pdf).

<sup>20</sup> See, e.g., Linda Haas & C. Philip Hwang, *Workplace Support and European Fathers’ Use of State Policies Promoting Shared Childcare*, 22 CMTY. WORK & FAM. 1 (2019).

<sup>21</sup> See, e.g., Gayle Kaufman, *Barriers to Equality: Why British Fathers Do Not Use Parental Leave*, 21 CMTY. WORK & FAM. 310 (2018).

earn more than their partners. Accordingly, renouncing the main source of income, be it in full or in part, for a certain period of time, may be unattractive or unaffordable to many fathers and families.<sup>22</sup>

Although none of the ideas presented above are necessarily new, the pandemic has finally created a momentum for acting on this knowledge. By exacerbating certain *facts* that relate to gender and childcare—i.e. the gender care gap, but also fathers' increased involvement as care-givers in spring 2020—Covid-19 has increased the responsibility of law- and policymakers to take a range of well-documented truths about fathers and family-leave policies more seriously.<sup>23</sup> The existence of a legal right to take time off from work to look after one's child is by far insufficient to bring men into the care frame: making men more “active” fathers is (also) a question of assertively encouraging them and, to some extent, even requiring them to make use of existing family-leave policies.<sup>24</sup> More specifically, research strongly suggests that parental leave needs to be an individual entitlement and to include a father-specific, non-transferrable allocation (so-called “daddy quotas”).<sup>25</sup> In addition, leave needs to be well-paid. Leave arrangements need to have some flexibility: flexible or part-time leave arrangements offer a good compromise for parents who are not willing, or unable, to take a full-time break from work. Such flexible arrangements can also reduce the financial impact of leave-taking, and facilitate “shift-sharing” part-time leave and work responsibilities between partners.<sup>26</sup> Finally, policies need to envisage some mandatory paternity leave around the time of birth.<sup>27</sup> A combination of these conditions is a likely way to reorient family-leave policies firmly towards “active fatherhood.”<sup>28</sup>

Such family-leave policy designs have the potential of fostering a substantive vision of equality in many ways. First, they tend to increase fathers' take-up rates by giving fathers a realistic chance to make use of leave. Second, by giving rise to longer leave periods for fathers and to larger numbers of “fathers on leave alone,” such

<sup>22</sup> *Parental Leave: Where Are the Fathers?*, *supra* note 19.

<sup>23</sup> In addition to the sources previously cited, see also Marre Karu & Diane-Gabrielle Tremblay, *Fathers on Parental Leave: An Analysis of Rights and Take-up in 29 Countries*, 21 *CMTY. WORK & FAM.* 344 (2018); Alison Koslowski & Margaret O'Brien, *Fathers and Family Leave Policies: What Public Policy Can Do to Support Families*, in *ENGAGED FATHERHOOD FOR MEN, FAMILIES AND GENDER EQUALITY 141* (Marc Grau Grau, Mireia Las Heras Maestro, & Hannah Riley Bowles eds., 2022); *ORG. ECON. CO-OPERATION & DEV., BACKGROUND BRIEF ON FATHERS' LEAVE AND ITS USE* (March 2016), [www.oecd.org/els/family/Backgrounder-fathers-use-of-leave.pdf](http://www.oecd.org/els/family/Backgrounder-fathers-use-of-leave.pdf).

<sup>24</sup> Gemma Mitchell, *Shared Parental Leave and the Sexual Family: The Importance of Encouraging Men to Care*, 41 *J. SOC. WELFARE & FAM. L.* 406 (2019); Margaria, *supra* note 15.

<sup>25</sup> On the effects of “daddy months,” see Esther Geisler & Michaela R. Kreyenfeld, *How Policy Matters: Germany's Parental Leave Benefit Reform and Fathers' Behaviour 1999–2009* (Max-Planck-Inst. for Demographic Res. Working Paper No. 21, July 2012), [www.demogr.mpg.de/papers/working/wp-2012-021.pdf](http://www.demogr.mpg.de/papers/working/wp-2012-021.pdf); John Ekberg, Rickard Eriksson, & Guido Friebel, *Parental Leave—A Policy Evaluation of the Swedish “Daddy-Month” Reform* (Inst. for the Study of Labor (IZA) Discussion Paper No. 1617, May 2005), <https://ftp.iza.org/dp1617.pdf>.

<sup>26</sup> *ORG. ECON. CO-OPERATION & DEV.*, *supra* note 23.

<sup>27</sup> This is the case in, for example, Portugal. See Rita B. Correia, Karin Wall, & Mafalda Leitão, *Portugal*, in *INTERNATIONAL REVIEW OF LEAVE POLICIES AND RESEARCH 2021* at 473 (Alison Koslowski, Sonja Blum, Ivana Dobrotić, Gayle Kaufman, & Peter Moss eds., 2021), [www.leavenetwork.org/annual-review-reports/review-2021/](http://www.leavenetwork.org/annual-review-reports/review-2021/).

<sup>28</sup> Karu & Tremblay, *supra* note 23.

policies—presumably—increase fathers’ experience as primary caregivers and the share of childcare work which they actually perform, to the benefit of their partners.<sup>29</sup> Third, at a more conceptual level, policies which assertively encourage fathers’ involvement convey the important message that childcare is the equal responsibility of mothers and fathers. In so doing, they contribute to reshaping the image of the (working) father and inspire a broader rethinking of legal fatherhood away from a traditional gender division of labor.

## 5. Towards a structural rethinking of legal fatherhood

Because they are designed for workers who also have childcare responsibilities, family leave policies perhaps represent the most evident legal venue where the pandemic’s potential to trigger a redefinition of fatherhood can be realized. Yet, legal regulation helps create, crystallize, channel, as well as potentially reshape images of “the father,” well beyond the area of work–life balance. More or less explicit ideas about the “proper” organization of labor within families and the father’s role in the life of children tend to underlie the formulation and the application of the law, even when the subject of regulation is not immediately connected to childcare.

A good example of this can be found in filiation law and the rationales underlying the determination of legal parenthood. In western jurisdictions, the attribution of legal motherhood and legal fatherhood has been grounded in historically sensitive and meaningful presumptions: *mater semper certa est*, whereby the person who gives birth is automatically registered as the child’s mother; *pater est, quem nuptiae demonstrant*, according to which the child’s legal father is the husband of the child’s mother. Even though societies have considerably changed, and we live in times of unprecedented family diversity, these rules continue to apply and to define what makes a legal mother and father.

Consider, for instance, the case of Freddy McConnell, a trans man who gave birth to his children and was registered as “mother” on their birth certificates contrary to his will. This is an evident manifestation of the still-decisive weight attached to the biological process of pregnancy and childbirth when determining legal motherhood.<sup>30</sup> By leaving the tenacious hold of the rule *mater semper certa est* uncontested, cases like that of McConnell reinforce the idea that the person who is ready and able to become responsible for the care of a newborn child is who we call a “mother” and, by virtue of dualistic beliefs about the sexes, that what makes someone a legal father is (indirect) economic provision, rather than (direct) provision of care. Conceptions of legal fatherhood are also at stake in the

<sup>29</sup> See, generally, COMPARATIVE PERSPECTIVES ON WORK-LIFE BALANCE AND GENDER EQUALITY: FATHERS ON LEAVE ALONE (Margaret O’Brien & Karin Wall eds., 2017).

<sup>30</sup> Re TT and YY [2019] EWHC 2384, [279], *aff’d by* R (McConnell and YY) v. Registrar General [2020] EWCA Civ 559. On November 9, 2020, the UK Supreme Court refused McConnell’s application for permission to appeal because it did “not raise an arguable point of law.” *Permission to Appeal Decisions*, Sup. Ct. (Nov. 16, 2020), [www.supremecourt.uk/news/permission-to-appeal-from-the-uk-supreme-court-nov-2020.html](http://www.supremecourt.uk/news/permission-to-appeal-from-the-uk-supreme-court-nov-2020.html).

regulation of post-separation/divorce child arrangements. Here, aspirational views of fathering have often resulted in elevating the genetic link to the defining element of fatherhood, almost justifying a presumption of contact with the non-resident father, regardless of his involvement in the child's life.<sup>31</sup> Filiation law and contact law therefore represent some of the legal sites where legal fatherhood has been often constructed as detached from caring roles, and where it can be fruitfully reoriented towards "active fatherhood."

Rethinking legal fatherhood has become more than a theoretical possibility. Through its multiple gendered dimensions, the pandemic has created the (unfortunate) practical conditions for embarking on a *structural* redefinition of legal fatherhood that aims to challenge the foundations upon which the law has based and built the role of fathers, and of men in society more generally. Newly emerging data shows that, since the outbreak of the pandemic, all types of violence against women and girls have intensified, and domestic violence in particular.<sup>32</sup> Moreover, women have suffered the greatest job and income losses, with their overall weakened position in paid employment likely to persist in the near future.<sup>33</sup> The additional childcare responsibilities women have undertaken in response to the pandemic are indeed expected to have long-term negative repercussions by, among others, hindering work and career progression for working mothers.<sup>34</sup> Insofar as they have introduced anything useful at all, these worrying trends contribute to foregrounding the central role of men as carers by creating equality or sustaining inequality and, more specifically, indicating fatherhood as a critical terrain in which to discuss legal concepts of, and avenues toward, gender equality.

If the ultimate aim is substantive gender equality and more equal societies overall, legal fatherhood is to be redefined (i) relationally and (ii) around care. In redefining the legal positions of fathers, law- and policymakers should be mindful of the repercussions of the regulation of legal fatherhood on other parties involved, especially mothers and children. This approach rests on the very idea of gender as being relational: "gender is a process, rather than a thing."<sup>35</sup> Fatherhood and motherhood (just as masculinity and femininity, male and female, men and women, etc.) are constantly and dynamically constructed in relation to one another, with the law playing a part in setting the terms of these relationships. This interdependence holds some opportunities, but also some risks. In the context of post-separation/divorce arrangements, for instance, a pressing

<sup>31</sup> Julie Wallbank, (*En*)*Gendering the Fusion of Rights and Responsibilities in the Law of Contact*, in RIGHTS, GENDER AND FAMILY LAW 93 (Julie Wallbank, Shazia Choudhry, & Jonathan Herring eds., 2010).

<sup>32</sup> *The Shadow Pandemic: Violence against Women during COVID-19*, UN WOMEN, [www.unwomen.org/en/news/in-focus/in-focus-gender-equality-in-covid-19-response/violence-against-women-during-covid-19](http://www.unwomen.org/en/news/in-focus/in-focus-gender-equality-in-covid-19-response/violence-against-women-during-covid-19) (last visited 30 July, 2022).

<sup>33</sup> Titan Alon, Matthias Doepke, Jane Olmstead-Rumsey, & Michèle Tertilt, *This Time It's Different: The Role of Women's Employment in a Pandemic Recession* (Inst. for the Study of Labor (IZA) Discussion Paper No. 13562, Aug. 2020), <https://docs.iza.org/dp13562.pdf>; INT'L LABOUR ORG., FLAGSHIP REPORT, WORLD EMPLOYMENT AND SOCIAL OUTLOOK—TRENDS 2021 (June 2, 2021), [www.ilo.org/global/research/global-reports/weso/trends2021/WCMS\\_795453/lang-en/index.htm](http://www.ilo.org/global/research/global-reports/weso/trends2021/WCMS_795453/lang-en/index.htm).

<sup>34</sup> For evidence on past financial crises, see Robert Blanton, Shannon Blanton, & Dursun Peksen, *The Gendered Consequences of Financial Crises: A Cross-National Analysis*, 15 POL. & GENDER 941 (2019).

<sup>35</sup> RAEWYN CONNELL, GENDER AND POWER: SOCIETY, THE PERSON AND SEXUAL POLITICS 140 (1987).

concern is the ongoing problem of domestic violence, whose dynamics and impact are often not understood by courts and other professionals, and/or are overlooked “in the rush to acknowledge the emotional significance of fathers to children.”<sup>36</sup> This leads to potentially unsafe decisions about child contact, which strengthen the legal positions of (genetic) fathers in the name of the child’s best interests, but damage the lives of mothers and children.

The interconnectedness of the lives of women, men, and children should therefore be a central concern in the process of rethinking legal fatherhood. This requires being aware of the ways in which legal fatherhood impacts mothers and children and, accordingly, approaching family relationships as a whole, even while challenging “the myth of family unit.”<sup>37</sup> In other words, a relational rethinking of fatherhood should address the fact that treating family members as belonging to one harmonious unit may lead to subsuming one person’s interests under those of another, ignoring unequal power relations, and overlooking conflicting interests within families. Adopting this perspective involves considering the claims of fathers, mothers, and children together and relationally, but also—critically—as distinct from one another, reflecting different experiences, and pursuing potentially clashing interests.

As a second, related step, a pandemic-inspired reshaping of legal fatherhood includes, and is centered around, care. Different paths may lead to this result, depending on the specific context. In recent disputes concerning trans fatherhood, for instance, a care-centered redefinition of legal fatherhood might consist in leveraging the specific factual circumstances of the case to foreground care as an ability of (trans) fathers and, what is more, as a sufficient basis for attributing the status of legal father. Trans fathers, such as Freddy McConnell, who demand to be designated as “fathers” on their children’s birth certificates confront filiation law with lived experiences of fatherhood that shake up conventional, binary understandings of legal fatherhood and motherhood. Freddy is a trans man who conceived through his ovaries and uterus, gestated two children, and gave birth to them.<sup>38</sup> He is therefore biologically connected to his children, but their connection is not established through sperm, and thereby is not typical of a cisgender reality. Moreover, Freddy is a single father. Accordingly, his relationship with his children is direct, rather than “mediated” by a maternal or feminine figure. By excluding the possibility of relying on conventional father–child connectors, Freddy’s story and legal claim serve an opportunity to make care a central feature of legal fatherhood on a proverbial silver plate. Courts are thus forced to consider what weight, if any, paternal care should be given when deciding about the parental status of trans fathers. And, if and when they do accept the requests of trans fathers, courts send the important message that

<sup>36</sup> Carol Smart, *Preface to FATHERS’ RIGHTS ACTIVISM AND LAW REFORM IN COMPARATIVE PERSPECTIVE* at vii, viii (Richard Collier & Sally Sheldon eds., 2006). For recent evidence, see Jenny Birchall & Shazia Choudhry, “*What About My Right Not to Be Abused?*”: *Domestic Abuse, Human Rights and the Family Courts*, WOMEN’S AID (2018), <https://1q7dqy2unor827bqjls0c4rn-wpengine.netdna-ssl.com/wp-content/uploads/2018/05/Domestic-abuse-human-rights-and-the-family-courts-report.pdf>.

<sup>37</sup> SUSAN MOLLER OKIN, *JUSTICE, GENDER AND THE FAMILY* (1989).

<sup>38</sup> To learn more about Freddy’s story, see SEAHORSE (Grain Media, 2019), <https://seahorsefilm.com/>.

men, and even more controversially trans men, are able to care, and that trans men are not “mothers” if they do (care).<sup>39</sup>

Shifting our gaze to post-separation/divorce arrangements, a care-centered regulation of fatherhood calls for, among other things, seriously taking past patterns into account and paying attention to the gendered realities of mothers’ and fathers’ lives while their relationship was intact. Although it is true that family crises may become opportunities for positive change, and judicial determinations around residence and contact may help to achieve a more equal (re)configuration of caring responsibilities between separated parents, overlooking past levels of investment in care in the name of (formal) gender equality may actually lead to profound gender injustices.

The same risk arises if such investment on the part of parents is assessed against different parameters, depending on whether they are made by mothers or fathers. “Care” and “caring” have been subject to extensive conceptual theorisation. One important distinction has been made between “care as a disposition” and “care as a practice.”<sup>40</sup> Whilst the former can be broadly understood as emotional and psychological commitment, the latter relates to the physical work of caring. Given that their economic role is so predominant, fathers are generally expected to have less concrete involvement in childcare in order to prove their parenthood and obtain related rights, than mothers. As Rosenblum phrases it, “with less efforts, men’s actions appear more socially laudable.”<sup>41</sup> When redefining legal fatherhood, this double standard must be rectified: instances of caregiving, as opposed to mere intentions of and aspirations to care, should become the basis for attributing legal rights (and responsibilities) to fathers wherever possible. Doing otherwise—i.e. according moral and legal significance to “care as a disposition”—entails the risk of disregarding the organization of care on the ground, mostly at the expense of mothers who are more likely than fathers to understand and *actually* care in its more demanding sense.<sup>42</sup> This would in turn result in “sentimentalizing,” rather than redefining, legal fatherhood. In other words, it would involve bringing men into the care frame only nominally, while leaving the traditional gender order untouched.

## 6. Conclusion

By isolating people and families, the pandemic has reminded us of the societal importance and centrality of care, even while pushing care back to the private sphere. In times of lockdowns and discontinued childcare services, the private nuclear family has come under scrutiny as the primary, and often the only, locus of childcare. This in turn has led to observing long-standing inequalities between men and women in the

<sup>39</sup> Alice Margaria, *Trans Men Giving Birth and Reflections on Fatherhood: What to Expect?* 34 INT’L J. L., POL’Y & FAM. 225, 245 (2021).

<sup>40</sup> JOAN CLAIRE TRONTO, MORAL BOUNDARIES: A POLITICAL ARGUMENT FOR AN ETHIC OF CARE 118–20 (2009).

<sup>41</sup> Darren Rosenblum, *Unsexing Mothering: Toward a New Culture of Parenting*, 35 HARV. J. L. & GENDER 57, 75 (2012).

<sup>42</sup> TRONTO, *supra* note 40, at 118; GILLIAN DOUGLAS, OBLIGATION AND COMMITMENT IN FAMILY LAW 34 (2018); Carol Smart, *The Legal and Moral Ordering of Child Custody*, 18 J. L. & SOC. 485, 489 (1991).

home, but, importantly, also acknowledging the urgent need to embark on a structural rethinking of legal fatherhood in relational terms and revolving around care. While remaining realistic and alert, we must not lose courage and keep trying to activate the “fatherhood” button, not only because the inherently interdependent nature of family life may bring benefits to women, as my personal experience has shown, but especially because not doing so can lead to the stagnation of debates around the law, gender, and parenting, mostly to the detriment of women.