

OCCUPATIONAL INEQUALITY†

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For economists in the 1970s, *Leviticus 27:3* was a familiar text. Its teaching, as reported in innumerable scholarly and popular articles, was that women of working age in Biblical times were valued at thirty silver shekels and men at fifty. After 2000 years, that ratio had not fundamentally changed. The difference, however, was that for the first time, many societies were actively attempting to do something about it. By the end of the 1980s, progress was apparent.

That progress has reflected an interplay of cultural and legal forces. Over the last quarter century, changes in social, economic, political, and demographic patterns have all contributed to major transformations in gender roles. Law has both reflected and reinforced these changes. Since the early 1960s, American decisionmakers have announced a broad array of legislative, administrative, and judicial mandates against sex-based discrimination. The result has been a large measure of equality in formal treatment of the sexes, but a continued disparity in their actual status. Law has played a critical role in breaking barriers to entry for those seeking non-traditional employment, but most occupations have remained highly gender-segregated or gender-stratified. While legal mandates have entitled men and women to equal pay for the same work, relatively few males and females have in fact performed the same work. If paid labor and unpaid domestic labor are combined, the average woman works longer hours and receives substantially less income than the average man. Although women have entered elite professions in substantial numbers, they have tended to cluster at the lowest levels. Most female employees, and a disproportionate number of minority female workers, have remained in relatively low-status, low-paying, female-dominated vocations.

Explanations for the lack of progress have varied, but close analysis reveals fundamental limitations in conventional legal responses. The following discussion explores those limitations in cultural context. It begins

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with a brief overview of occupational inequality and the most commonly accepted strategy for coping with it, a requirement of equal opportunities and equal treatment. Although that strategy has been highly important in raising the costs and consciousness of sex-based discrimination, too little attention has focused on its underlying foundations.

In part, the difficulty stems from the law's traditional focus on gender differences rather than gender disadvantage. Its primary objective has been to secure similar treatment for those similarly situated; less effort has centered on remedying the structural factors that contribute to women's dissimilar and disadvantaged status. A related difficulty involves the individualist premises that have restricted legal policies. All too often, a focus on maximizing individual choices has deflected attention from the social forces and workplace values that constrain such choices. Enforcement of equal opportunity, pay equity, and affirmative action mandates has been hampered by a preoccupation with individual victims and villains, a demand for evidence of intentional discrimination, and a reluctance to penalize innocent third parties. Too much concern has focused on the conscious motivations of decisionmakers and too little on the cumulative disadvantages that their actions impose.

Significant progress toward social justice will require alternative frameworks. Our objectives must include not only access to, but alteration of existing employment and compensation structures. Equal opportunity is inadequate as a means and as an end; we need fundamental changes in workplace premisses, priorities, and practices.

I. PATTERNS OF INEQUALITY

A. *Statistical Background.*

Over the last quarter century, women's employment opportunities have increased substantially. Women now constitute forty-five percent of the labor force.¹ Progress has been accelerated by the enactment of the Equal Pay Act of 1963, which prohibits sex-based discrimination in wages; title VII of the 1964 Civil Rights Act, which prohibits sex-based discrimination in hiring, advancement, termination, training, and related terms of employment; and Executive Order 11,375, which requires federal contractors to establish affirmative action programs for women.²

Despite such enactments and the broader cultural transformation they reflect, wide disparities in the sexes' vocational status have persisted.

1. V. FUCHS, *WOMEN'S QUEST FOR ECONOMIC EQUALITY* 12 (1988).

2. Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (codified as amended at 29 U.S.C. § 206(d) (1982)); Civil Rights Act of 1964, tit. VII, 42 U.S.C. §§ 2000e to 2000e-17 (1982); Exec. Order No. 11,375, 3 C.F.R. 684 (1966-1970).

In 1955, the annual wages of full-time women workers were approximately sixty-four percent of the annual wages of males.³ Over the next several decades, that percentage declined, dipping to fifty-eight percent in 1968, and then climbed back to current levels of sixty-four percent (seventy percent, if expressed in terms of weekly wages).⁴ However, those ratios understate overall gender disparities in earnings, since less than half of all employed women work full-time for the full year, and disproportionate numbers lack employment-related benefits such as health and pension coverage.⁵ Even among full-time workers, the average female college graduate still earns less than the average white male with a high-school degree.⁶ The average black female college graduate in a full-time position receives ninety-six percent of the average white female college graduate's salary, a figure roughly equivalent to the pay of a white male high-school dropout.⁷ Women also experience disproportionate levels of involuntary part-time work and unemployment, with levels particularly high among minorities.⁸

These salary and employment disparities reflect broader patterns of occupational segregation and stratification. Most women employees are crowded into a small number of existing job categories, and about three-fifths are in occupations that are at least seventy-five percent female.⁹ Even in gender-integrated occupations, men and women generally hold different positions and receive different pay and promotion opportunities.¹⁰ Most jobs still tend to be stratified by race and ethnicity as well as

3. NATIONAL COMM'N ON PAY EQUITY, BRIEFING PAPER ON THE WAGE GAP 2 (1987).

4. *Id.*

5. S. KAMERMAN & A. KAHN, *THE RESPONSIVE WORKPLACE: EMPLOYERS AND A CHANGING LABOR FORCE 60-62* (1987); Pearce, *On the Edge: Marginal Women Workers and Employment Policy*, in *INGREDIENTS FOR WOMEN'S EMPLOYMENT POLICY* 197, 200 (C. Bose & G. Spitze eds. 1987) [hereinafter *EMPLOYMENT POLICY*]; see Christopherson, *Labor Flexibility: Implications for Women Workers*, in *WOMEN AT WORK* 3, 10 (R. Schwartz ed. 1988) (two-thirds of all temporary workers are women); *THE AMERICAN WOMAN 1987-88*, at 27 (S. Rix ed. 1987).

6. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, *CURRENT POPULATION REPORTS, SERIES P-23, No. 146, WOMEN IN THE AMERICAN ECONOMY 31* (1986); J. Malveaux, *No Images* (1988) (unpublished manuscript; copy on file in offices of *Duke Law Journal*).

7. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, *supra* note 6, at 31.

8. See Malveaux, *An Economic Perspective on Difference and Commonality Among Women*, in *THEORETICAL PERSPECTIVES ON SEXUAL DIFFERENCE* (D. Rhode ed., forthcoming, 1990) [hereinafter *THEORETICAL PERSPECTIVES*]; Pearce, *On the Edge: Marginal Women Workers and Employment Policy*, in *EMPLOYMENT POLICY, supra* note 5, at 198-200.

9. See Hartmann, Roos & Trieman, *An Agenda for Basic Research on Comparable Worth*, in *COMPARABLE WORTH: NEW DIRECTIONS FOR RESEARCH* 3, 3-4 (H. Hartmann ed. 1985) [hereinafter *NEW DIRECTIONS*] (discussing job segregation by sex and gap in pay between men and women).

10. See S. BIANCHI & D. SPAIN, *AMERICAN WOMEN IN TRANSITION 180-88* (1986); Bielby & Baron, *A Woman's Place Is With Other Women: Sex Segregation Within Organizations*, in *SEX SEGREGATION IN THE WORKPLACE: TRENDS, EXPLANATIONS, REMEDIES* 27, 43-46 (B. Reskin ed. 1984) [hereinafter *SEX SEGREGATION*].

by sex, and women of color remain at the bottom of the occupational hierarchy.¹¹

Despite significant trends toward greater gender-integration, projections suggest that at current rates of change, it could take between seventy-five and one hundred years to achieve a sexually balanced workplace.¹² The most dramatic progress to date has been in formerly male-dominated professions such as law, medicine, and management: women's representation, which ranged between three to seven percent in the early 1960s, increased to levels of thirty or forty percent by the late 1980s.¹³ However, at the highest levels of professional status and financial achievement, significant disparities have remained. For example, in the late 1980s, females were still only half as likely as males to be partners in law firms, held only eight percent of state and federal judgeships, and occupied only two percent of corporate executive positions in Fortune 500 companies.¹⁴ Underrepresentation of women of color was significantly greater at all professional levels.¹⁵

Gains in blue-collar employment have been even less pronounced. Although the absolute number of women in such occupations has increased significantly since the 1970s, their proportionate representation

11. See NATIONAL COMM. ON PAY EQUITY, *PAY EQUITY: AN ISSUE OF RACE, ETHNICITY and Sex* 14, 20-37, 62 (1987); Malveaux, *Comparable Worth and Its Impact on Black Women*, in *SLIPPING THROUGH THE CRACKS: THE STATUS OF BLACK WOMEN* 51, 53-54 (M. Simms & J. Malveaux eds. 1986) [hereinafter *SLIPPING THROUGH THE CRACKS*]; Malveaux, *An Economic Perspective on Difference and Commonality Among Women*, in *THEORETICAL PERSPECTIVES*, *supra* note 8.

12. 2 UNITED STATES COMM'N ON CIVIL RIGHTS, *COMPARABLE WORTH: ISSUE FOR THE 80'S* 109 (1984) [hereinafter *COMPARABLE WORTH*] (statement of Joy Ann Grune).

13. UNITED STATES DEP'T OF LABOR, *LABOR STATISTICS, EARNINGS AND WAGES* 179 (1987); see also Menkel-Meadoe, *Feminization of the Legal Profession: The Comparative Sociology of Women Lawyers*, in *LAWYERS IN SOCIETY: COMPARATIVE THEORIES* (R. Abel & R. Lewis eds., forthcoming, 1989) (chronicling women's increasing representation in the legal profession).

14. A. MORRISON, R. WHITE & E. VAN VELSOR, *BREAKING THE GLASS CEILING* 5-6 (1987); Schafran, *Women in the Courts Today: How Much Has Changed*, 6 *LAW & INEQUALITY* 27, 29 (1988); Winter, *Survey: Women Lawyers Work Harder, Are Paid Less, but They're Happy*, 69 *A.B.A. J.* 1384, 1385 (1983); see Fossum, *A Reflection on Portia*, 69 *A.B.A. J.* 1389, 1391-93 (1983); Slater & Glazer, *Prescriptions for Professional Survival*, *DAEDELUS*, Fall 1987, at 119, 132; J. Malveaux, *supra* note 6; see also Berg, *The Big Eight: Still a Male Bastion*, *N.Y. Times*, July 12, 1988, at D1, col. 3 (only 6.5% of partners at largest law and consulting firms are women); Loden, *A Machismo That Drives Women Out*, *N.Y. Times*, Feb. 9, 1986, § F, at 2, col. 3; McCarthy, *Women's Salaries Reflect Disparities in Executive Suites*, *Wall St. J.*, Dec. 1, 1986, at 37, col. 1; *Women Lawyers Get Less Pay, Respect, Survey Says*, *Wall St. J.*, Feb. 12, 1988, at 18, col. 2 (women in law are lower-paid, less satisfied with jobs); sources cited *infra* note 65 (collegial bias in professional and business contexts).

15. See B. VETTER & E. BABCO, *PROFESSIONAL WOMEN AND MINORITIES* 90-93 tbl. 4-7 (7th ed. 1987) (reporting 1986 annual average numbers of employed persons by detailed occupation, sex, race, and Hispanic origin); see also A. SIMEONE, *ACADEMIC WOMEN* 29-31 (1987) (discussing minority women within faculty ranks). See generally J. FERNANDEZ, *RACISM AND SEXISM IN CORPORATE LIFE* (1981).

has not substantially changed.¹⁶ Female employees have an increasingly visible presence in some blue-collar jobs, such as bus driver (forty-nine percent) and bartender (forty-eight percent), but reports in the 1980s numbered their share of skilled trade positions at only about twenty percent.¹⁷ So, too, women's increasing interest in "men's work" has not been matched by a comparable increase in men's enthusiasm for "women's work." Within the most heavily female-dominated job sectors, such as clerical work, male representation has not significantly changed.¹⁸

Defenders of the conventional equal opportunity approach to employment discrimination typically dismiss these asymmetries as artifacts of cultural lag or employee choice, and, in either case, as matters beyond the scope of legitimate legal concern. From this perspective, much of the existing gender gap is a transitory phenomenon, the result of conduct no longer permitted under contemporary antidiscrimination doctrine. Formal prohibitions on gender bias in educational and employment practices will, in time, prove sufficient to guarantee equal opportunity. Given the available remedies for discriminatory treatment, any remaining disparity in occupational status allegedly can be attributed to individual choice, capabilities, and commitment; it is not a ground for further legal intervention.¹⁹

Yet the vast majority of research suggests that the obstacles confronting women workers are considerably more intractable than the equal opportunity approach acknowledges. In identifying these obstacles, we should note at the outset certain complexities in the concept of occupational equality. It is not self-evident that proportional representation in all employment sectors is the ultimate ideal. To assume that, under conditions of full equality, women will make precisely the same occupational choices as men is to accept an assimilationist perspective that many feminists renounce. But as long as there remains a strong negative correlation between the concentration of women in a given occupation and its relative earnings and status, the persistence of gender segregation is a major concern. We can leave questions about the precise

16. Deaux, *Blue-Collar Barriers*, 27 AM. BEHAV. SCIENTIST 287, 288 (1984).

17. *The Job Market Opens up for the 68-Cent Woman*, N.Y. Times, Mar. 27, 1987, at 6, col. 4; see *Women in the Work Force; Supreme Court Issues: Hearing Before the Subcomm. on Employment Opportunities of the House Comm. on Education and Labor*, 99th Cong., 2d Sess. 44 (1986) [hereinafter *1986 House Hearings*] (statement of Cynthia Marano, Executive Director, Wider Opportunities for Women).

18. See Bielby & Baron, *Undoing Discrimination: Job Integration and Comparable Worth*, in EMPLOYMENT POLICY, *supra* note 5, at 228 (male preferences have not changed).

19. See sources cited *infra* notes 20-21.

degree of sex-role differentiation in the ideal society open without losing sight of the disadvantages confronting women in this one.

Analysis of those disadvantages should distinguish problems along two dimensions. Workforce inequalities reflect the relatively low status and pay in female-dominated occupations, as well as the factors discouraging women's entry and advancement in alternative employment contexts. These phenomena in turn depend on complex interrelationships among individual choices, social norms, discriminatory practices, and institutional structures.

B. *Individual Choice and Socialization Patterns.*

1. *Human Capital Approaches.* Although individual choice plays an important role in virtually all theories of occupational inequality, the nature of that role is the subject of considerable dispute. According to human capital models of labor force participation, gender differences in earnings and occupational status are largely attributable to differences in career investments.²⁰ In essence, these models assume that women seek to balance work and family commitments by selecting female-dominated occupations that tend not to require extended training, long hours, inflexible schedules, or skills that deteriorate with absence.²¹ Under these theories, the solution to women's workplace inequality lies with women themselves. In their crudest form, human capital approaches lead to a kind of Marie Antoinette response to occupational stratification: if women want positions with greater pay, prestige, and power, they should make different career investments; if female nurses want pay scales equivalent to male hotel clerks', let them become hotel clerks.²²

Human capital approaches are problematic on several levels. Estimates vary widely concerning the percentage of the wage gap that is attributable to human capital factors such as education, experience, hours worked, and so forth. However, most studies have concluded that these characteristics cannot account for more than half of current gender dis-

20. G. BECKER, HUMAN CAPITAL 178-80 (2d ed. 1975); see Blau & Jusenius, *Economists' Approaches to Sex Segregation in the Labor Market: An Appraisal*, in WOMEN AND THE WORKPLACE: THE IMPLICATIONS OF OCCUPATIONAL SEGREGATION 181, 185-88 (M. Blaxall & B. Reagan eds. 1976).

21. See Hartmann, Roos & Trieman, *An Agenda for Basic Research on Comparable Worth*, in NEW DIRECTIONS, *supra* note 9, at 22. See generally G. DUNCAN, YEARS OF POVERTY, YEARS OF PLENTY 168 (1984).

22. See *Manufacturers Group Hits Comparable Worth in Pay*, L.A. Times, Nov. 24, 1984, § 1, at 24, cols. 1-2 (quoting Alexander B. Trowbridge, President, National Association of Manufacturers).

parities.²³ On the whole, women who make comparable investments in time, training, and experience still advance less far and less quickly than men.²⁴

Even in their most sophisticated forms, human capital approaches leave a vast range of questions unanswered. What accounts for cross-cultural variations and historical changes in occupational segregation? Why do females choose to be nurses rather than hotel clerks, or, for that matter, truck drivers, whose job skills are even less likely to deteriorate with absence? Why do unskilled hotel clerks earn more than highly educated nurses? Why don't male employees with family responsibilities disproportionately choose jobs requiring shorter hours? Answers to these questions require a more complex account of cultural norms and institutional constraints.

2. *Cultural Expectations.* At the turn of the century, Charlotte Perkins Gilman warned against making any assumptions about what kinds of work men and women would freely choose until generation after generation could grow up under equal conditions.²⁵ American society remains a considerable distance from that ideal, and occupational choices have been colored by cultural expectations. At very early ages, children begin absorbing cues about appropriate sex-role traits and occupations, and only recently has that socialization process prompted serious concern. For example, not until the 1970s did public attention focus on stereotypes in children's books. What then became apparent was the crudest form of gender generalization. In the world traditionally presented to preschoolers, homemaking was women's sole occupation; in one representative survey, fairies and water maidens were the only apparent alternatives.²⁶ Most fictional stories centered on males. Female characters appeared mainly in supporting roles; boys had adventures, while girls went shopping or lost bunnies that boys found.²⁷

Despite substantial progress over the last decade, the legacy of such gender stereotypes persists. Most research indicates that by early adoles-

23. See, e.g., H. AARON & C. LOUGY, *THE COMPARABLE WORTH CONTROVERSY* 12-13 (1986); Hartmann, Roos & Trieman, *An Agenda for Basic Research on Comparable Worth*, in *NEW DIRECTIONS*, *supra* note 9, at 13-43.

24. For a critical review of human capital theories and their inability to account for various wage and occupational patterns, see Blau, *Occupational Segregation and Labor Market Discrimination*, in *SEX SEGREGATION*, *supra* note 10, at 117-27; Corcoran & Duncan, *Work History, Labor Force Attachment, and Earnings Differences Between the Races and Sexes*, 14 *J. HUM. RESOURCES* 3 (1979); England, *The Failure of Human Capital Theory to Explain Occupational Sex Segregation*, 17 *J. HUM. RESOURCES* 358 (1982).

25. See C. GILMAN, *WOMEN AND ECONOMICS* 8, 146-68 (3d ed. 1900).

26. See A. OAKLEY, *WOMAN'S WORK: THE HOUSEWIFE, PAST AND PRESENT* 190 (1974).

27. J. HOLE & E. LEVINE, *REBIRTH OF FEMINISM* 333-35 (1971).

cence, males and females have acquired different career expectations. In general, women continue to express lower expectations for occupational success than men and attach higher priorities to relational aspects of employment (such as opportunities to help others) than to opportunities for formal recognition (in terms of money, status, or power).²⁸

For many individuals, career decisions have been less the product of fully informed and independent preferences than the result of preconceptions about "women's work," which are shaped by cultural stereotypes, family and peer pressure, and the absence of alternative role models.²⁹ Many families have discouraged career choices that would conflict with domestic duties, require geographic mobility, or entail greater prestige or income for wives than for husbands. Such patterns can be especially pronounced among some minority groups, where males' education may carry greater priority than females'.³⁰ Women who have deviated from traditional norms in job selection have generally received less social approval than those who have not. Job training, counseling, and recruitment networks have also channeled women toward conventional occupations, and socioeconomic barriers have limited employment aspirations. Although increasing numbers of women are expressing the same vocational preferences as men, a majority still choose traditional, female-dominated occupations.³¹ Having made such choices, many women have found it too costly—financially, psychologically, or logistically—to shift careers in response to more complete information about other options. Family obligations, seniority structures, and financial constraints have converged to entrench the effects of sex-role socialization.³²

28. Research on women's differential expectations of success is summarized in D. KAUFMAN & B. RICHARDSON, *ACHIEVEMENT AND WOMEN: CHALLENGING THE ASSUMPTIONS* 49-50, 96 (1982); Mednick, *Women and the Psychology of Achievement: Implications for Personal and Social Change*, in *WOMEN IN THE WORK FORCE* 48 (H.J. Bernardin ed. 1972). For general accounts of sex-role socialization processes, see E. MACCOBY & C. JACKLIN, *THE PSYCHOLOGY OF SEX DIFFERENCES* 275-374 (1974); Bem & Bem, *Homogenizing the American Woman: The Power of an Unconscious Ideology*, in *FEMINIST FRAMEWORKS* 6 (P. Struhl & A. Jaggar eds. 1978); Bernard, *Sex Differences: An Overview*, in *BEYOND SEX-ROLE STEREOTYPES* 14-15 (1976).

29. For a summary of research on explanations for continued sex segregation in the workplace, see COMMITTEE ON WOMEN'S EMPLOYMENT & RELATED SOCIAL ISSUES, *WOMEN'S WORK, MEN'S WORK: SEX SEGREGATION ON THE JOB* 63-68 (B. Reskin & H. Hartmann eds. 1986) [hereinafter *WOMEN'S WORK, MEN'S WORK*]. For an overview of institutional mechanisms underlying job training, assignments, mobility, and retention—all of which serve to limit women's opportunities—see Roos & Reskin, *Institutional Factors Contributing to Sex Segregation in the Workplace*, in *SEX SEGREGATION*, *supra* note 10, at 235-56.

30. See A. MIRANDE & E. ENRIQUEZ, *LA CHICANA: THE MEXICAN-AMERICAN WOMAN* 133-35 (1979).

31. See Cain, *Prospects for Pay Equity in a Changing Economy*, in *NEW DIRECTIONS*, *supra* note 9, at 137, 155.

32. See Rosen, *Career Progress of Women: Getting In and Staying In*, in *WOMEN IN THE WORK FORCE*, *supra* note 28, at 70, 73.

These socialization processes are reinforced by the mismatch between characteristics associated with femininity and characteristics associated with vocational achievement.³³ The aggressiveness, competitiveness, dedication, and emotional detachment thought necessary for advancement in the most prestigious and well-paid occupations are incompatible with traits commonly viewed as attractive in women: cooperativeness, deference, sensitivity, and self-sacrifice. Similar discontinuities have been apparent in blue-collar contexts requiring physical strength, "toughness," or other seemingly in masculine attributes. Despite substantial progress toward gender equality over the last several decades, these sexual stereotypes have been remarkably resilient. Women remain subject to the familiar double bind: they are criticized for being too feminine or not feminine enough. Those who conform to accepted stereotypes appear to lack the initiative necessary for occupational success, while those who are more assertive are judged arrogant, aggressive, or abrasive.³⁴ A "third sex" in vocational contexts has yet to emerge.³⁵

Different socialization patterns have also led women to structure their priorities in ways that mesh poorly with occupational dynamics. Although cultural commitments to equal opportunity in vocational spheres have steadily increased, they have not translated into equal obligations in domestic spheres. Most contemporary studies have indicated that women still perform about seventy percent of the family tasks in an average household.³⁶ Employed wives spend about twice as much time on homemaking tasks as employed husbands.³⁷ Women also head ninety

33. See L. LARWOOD & M. WOOD, *WOMEN IN MANAGEMENT* 29-40 (1977) (discussing gender-based stereotypes and barriers to women in management).

34. See also Prather, *Why Can't Women Be More Like Men: A Summary of the Sociopsychological Factors Hindering Women's Advancement in the Professions*, in *WOMEN IN THE PROFESSIONS: WHAT'S ALL THE FUSS ABOUT?* 14, 14-15, 22-23 (1971) (women competing for powerful and responsible positions caught in "double bind" of being either too aggressive or too feminine). See A. THEODORE, *THE CAMPUS TROUBLEMAKERS: ACADEMIC WOMEN IN PROTEST* 51, 77 (1986); See also sources cited *infra* note 55.

35. See generally P. MCBROOM, *THE THIRD SEX: THE NEW PROFESSIONAL WOMAN* (1986) (studying women in financial careers to explore concepts of the professional woman, combining feminine identity and professional behavior).

36. Hartmann, *The Family as the Locus of Gender, Class, and Political Struggle: The Example of Housework*, 6 *SIGNS* 366, 385 (1981) (research indicates that married women do 70% of housework, regardless of their employment status); see *Status Report: Who Does the Work*, *MS. MAG.*, Feb. 1988, at 19; see also G. STAINES & J. PLECK, *THE IMPACT OF WORK SCHEDULES ON THE FAMILY* 63 (1983) (working women generally spend more time with children and on housework than do working men); Burros, *Women: Out of the House But Not Out of the Kitchen*, *N.Y. Times*, Feb. 24, 1988, at A1, col. 1 (citing poll showing working, married women still perform a majority of household tasks).

37. O'Neill, *Role Differentiation and the Gender Gap in Wage Rates*, in 1 *WOMEN AND WORK: AN ANNUAL REVIEW* 50, 56-60 (L. Larwood, A. Stromberg & B. Gutek eds. 1985) (citing statistic for amount of time spent by married men and women on household tasks); see also H. BOHEN & A.

percent of the nation's single-parent households, which impose special burdens.³⁸ The problems are particularly acute for women of color, who are most likely to have such responsibilities and least able to afford help in meeting them.³⁹

As subsequent discussion suggests, individual choices have also been constrained by unconscious discrimination and workplace structures.⁴⁰ The result is a convergence of self-perpetuating social signals that reinforce occupational inequalities. Males' and females' different career investments have been heavily dependent on their perceptions of different opportunities. Women have long faced relatively low wages in traditional vocations and substantial barriers to advancement in non-traditional pursuits. Under such circumstances, it has been economically rational for working couples to give priority to the husband's career, to relocate in accordance with his job prospects, and to assign wives a disproportionate share of family obligations. The gender division of labor in the home and workplace have been mutually reinforcing patterns. Subordinate occupational status has encouraged women to make lower career investments and to assume greater domestic responsibilities, both of which help to perpetuate that subordination. Breaking this cycle will require treating individual choices not as fixed and independent phenomena, but as responses to cultural forces that are open to redirection.

C. *Discriminatory Practices and Occupational Dynamics.*

Attempts to move beyond individual-choice-based models of occupational inequality have proceeded on several levels. One approach has focused on occupational segregation. Some commentators, drawing on dual-labor-market theories, have stressed men's concentration in the primary sector of the workforce and women's concentration in the secondary sector. The primary sector, generally characterized by high capital investment, advanced technology, unionization, opportunities for promotion, and low employee turnover, also has relatively high wages and ben-

VIVEROS-LONG, *BALANCING JOBS AND FAMILY LIFE* 81 (1981) ("Employed women everywhere spend an average of three to five hours a day on home chores; employed men, on the other hand, spend an average of one-half to one-and-one-half hours per day on such chores."); L. GENEVIE & E. MARGOLIES, *THE MOTHERHOOD REPORT* 381-93 (1987) (discussing conflicts between home and job that working mothers experience); sources cited *supra* note 36.

38. See Peterson, *The Feminization of Poverty*, 21 J. ECON. ISSUES 329, 331 (1987) (discussing poverty level of families headed by women).

39. See *THE AMERICAN WOMAN* 1987-88, *supra* note 5, at 28 (noting high rate of pregnancy for unmarried black teenagers and large number of black female heads of households living in poverty). See generally R. SIDEL, *WOMEN AND CHILDREN LAST: THE PLIGHT OF POOR WOMEN IN AFFLUENT AMERICA* (1986) (description of lives of women and children living at or near the edge of poverty).

40. See *infra* notes 41-70 and accompanying text.

efits. The secondary sector, with the converse structural characteristics, tends to have lower pay scales and benefits, which in turn encourage higher turnover and provide fewer incentives for advancement.⁴¹ Other commentators have stressed more general effects of occupational crowding. Since women have remained clustered in a relatively small number of female-dominated occupations, the resulting oversupply of labor in those fields has depressed wage rates and has increased unemployment.⁴²

Such approaches, although useful to a point, have proved too reductive or restrictive to provide a full account of occupational inequality. In part, these approaches' limitations reflect the level of analysis on which they proceed; their focus on surface explanations of gender disparities tends to leave fundamental causal questions unaddressed. Why, for example, have women remained crowded in certain sectors of the labor market, and why have those sectors commanded relatively low status and prestige? Why do females in predominately male occupations have lower pay scales and fewer promotion opportunities despite comparable qualifications?⁴³

In seeking answers to such questions, commentators have accumulated increasing evidence concerning various forms of discrimination: deliberate, statistical, and unconscious. On the most overt level, as economists such as Gary Becker have argued, market forces do not necessarily discourage deliberate bias against women or minorities when employers have developed a "taste for discrimination."⁴⁴ Such tastes, founded on personal prejudice, customer or co-worker preference, or favoritism toward male "breadwinners," have been identified in a wide range of contexts.⁴⁵ Before passage of antidiscrimination legislation in the early 1960s, many employers were surprisingly public about their private biases. During the nineteenth century, intermingling between male and female workers was often viewed as "actively operative for evil."⁴⁶ Although twentieth-century employers have appeared less concerned

41. See, e.g., THE ECONOMICS OF WOMEN AND WORK 20-22 (A. Amsden ed. 1980) (discussing segmentation of labor market into primary and secondary markets).

42. See Blau, *Occupational Segregation and Labor Market Discrimination*, in SEX SEGREGATION, *supra* note 10, at 117, 126; WOMEN'S WORK, MEN'S WORK, *supra* note 29, at 10-13.

43. See generally Hartmann, *Internal Labor Markets and Gender: A Case Study of Promotion*, in GENDER IN THE WORKPLACE 59 (C. Brown & J. Pleckman eds. 1987) (reviewing theories of gender differentiation in labor markets and showing, by case study, that sex-role and racial stereotyping contribute to unequal promotions and earnings).

44. G. BECKER, THE ECONOMICS OF DISCRIMINATION 14-17 (2d ed. 1971).

45. See *id.* at 9-12; sources cited *infra* notes 46-48.

46. For nineteenth-century views, see A. AMES, SEX IN INDUSTRY 30-31 (1875), *quoted in* R. SMUTS, WOMEN AND WORK IN AMERICA 118 (1959). See generally Goldin, *The Earnings Gap in Historical Perspective*, in 1 COMPARABLE WORTH, *supra* note 12, at 3, 3-19 (explaining changes between 1890 and 1980 in ratios of male to female earnings).

about the moral dimensions of occupational integration, many have viewed it as economically inefficient or culturally inappropriate.⁴⁷ As late as 1970, some job advertisements openly specified "males preferred,"⁴⁸ and many workplaces had separate job titles, pay scales, and promotion channels for males and females performing substantially the same work.

Although changing attitudes and statutory mandates have made overt discrimination increasingly rare, some of its legacy remains. Continuing assumptions have been that male workers will resist female colleagues or supervisory personnel, that male consumers of certain services or products will not relate well to female employees, and that women lack the capacity or commitment for positions calling for physical strength, extended training, or managerial skills.⁴⁹ Litigation in the late 1980s still revealed claims such as those advanced by owners of tuna fishing boats that excluded women. According to these owners, the presence of female employees would "destroy morale and distract the crew"; their boats would "catch fewer fish if a woman is on board."⁵⁰ Similar biases have left women of color doubly disadvantaged.⁵¹

In theory, a well-functioning free market should serve to erode such discriminatory patterns, since employers who do not indulge arbitrary prejudices should have a competitive advantage. In practice, however, occupational segregation and differential reward structures, once estab-

47. See V. OPPENHEIMER, *THE FEMALE LABOR FORCE IN THE UNITED STATES* 107-09 (1970) (discussing employers' strong preference for men in supervisory positions if work groups are gender-integrated). See generally J. MATTHAEI, *AN ECONOMIC HISTORY OF WOMEN IN AMERICA* 187-232 (1982) (tracing development of sex-typed jobs in consumer services, the professions, blue-collar work, and office work).

48. Sandler, *Patterns of Discrimination in Higher Education in New York*, in *NEW YORK CITY COMM'N ON HUMAN RIGHTS, WOMEN'S ROLE IN CONTEMPORARY SOCIETY* 567, 575 (1972) (1970 advertisement for assistant professor).

49. See J. LYLE & J. ROSS, *WOMEN IN INDUSTRY* 9-10 (1973); *WOMEN, WORK, AND WAGES: EQUAL PAY FOR JOBS OF EQUAL VALUE* 61-62 (D. Trieman & H. Hartmann eds. 1981) [hereinafter *WOMEN, WORK, AND WAGES*] (questioning perceived biases of male employees and customers as basis for discrimination against female employees); Bielby & Baron, *Undoing Discrimination: Job Integration and Comparable Worth*, in *EMPLOYMENT POLICY*, *supra* note 5, at 215 (jobs requiring physical strength seen as inappropriate for women).

50. *Caribbean Marine Serv. Co. v. Baldrige*, 844 F.2d 668, 671, 675 (9th Cir. 1988).

51. See S. EDSON, *PUSHING THE LIMITS: THE FEMALE ADMINISTRATIVE ASPIRANT* 171-93 (1988) (noting special demands on black females seeking positions as high-school administrators); J. FERNANDEZ, *supra* note 15, at 73 (double stigmatization of black women may account for their criticism of female managers); Simpson, *The Daughters of Charlotte Ray: The Career Development Process During the Exploratory and Establishment Stages of Black Women Attorneys*, 11 *SEX ROLES* 113 (1984) (survey of black female attorneys on factors enabling them to overcome double obstacles of race and sex). See generally Bielby, *Modern Prejudice and Institutional Barriers to Equal Employment Opportunity for Minorities*, 43 *J. SOC. ISSUES* 79 (1987) (commenting on proposals for reducing race bias in the workplace); Lawrence, *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*, 39 *STAN. L. REV.* 317 (1987) (discussing unconscious racism).

lished, can be highly resistant to change. The more insulated the labor market from competitive forces, the more resilient these biases may prove.

Even reasonably competitive markets will permit what economists label "statistical discrimination," that is, discrimination premised on generalizations that are inaccurate in a large percentage of cases, but are cheaper to indulge than to ignore.⁵² For example, if an employer believes that female workers have a higher turnover rate than males, and that it is expensive or difficult to screen for job commitment in advance, then it makes sense to channel women toward relatively low-status, low-paid positions where they are easily replaced. Although recent data suggest that men and women with comparable qualifications and holding comparable jobs do not in fact have different turnover rates, the residual effects of statistical discrimination often linger.⁵³ Once jobs become "typed" as male or female, socialization processes tend to perpetuate those labels.

A final, and in contemporary society perhaps the most intransigent, form of discrimination operates at unconscious levels. Employer decisionmaking has reflected the same gender biases and stereotypes that have constrained employees' vocational choices. Psychological research suggests that most decisionmakers rate more positively those who conform to stereotypical notions of masculine and feminine behavior than those who do not. Individuals are also more likely to recall evidence that supports rather than challenges such stereotypes.⁵⁴ Given the discontinuities between traits associated with femininity and those associated with vocational achievement, female performance is often undervalued.⁵⁵ Since research involving racial bias reveals similar patterns, women of color face special obstacles.⁵⁶

More specific clinical and longitudinal research makes the point directly. For example, surveys of a wide variety of decisionmakers have revealed that identical resumes are rated significantly lower if an appli-

52. Phelps, *The Statistical Theory of Racism and Sexism*, 62 AM. ECON. REV. 659, 659 (1972).

53. See L. WAITE & S. BERRYMAN, *WOMEN IN NONTRADITIONAL OCCUPATIONS* 75-76 (1985).

54. K. DEAUX, *THE BEHAVIOR OF WOMEN AND MEN* 24-34 (1976) (reviewing effects of sex stereotypes on performance evaluations); Hagen & Kahn, *Discrimination Against Competent Women*, 5 J. APPLIED SOC. PSYCHOLOGY 362, 371-74 (1975) (reviewing empirical data on bias against women in leadership roles); Hamilton, *Some Thoughts on the Cognitive Approach*, in *COGNITIVE PROCESSES IN STEREOTYPING AND INTERGROUP BEHAVIOR* 333, 340 (D. Hamilton ed. 1981) (stereotypical expectations influence evaluation of data).

55. C. EPSTEIN, *DECEPTIVE DISTINCTIONS: SEX, GENDER, AND THE SOCIAL ORDER* 87-92 (1988); A. MORRISON, R. WHITE & E. VAN VELSOR, *BREAKING THE GLASS CEILING* 61-63 (1987); see *supra* notes 33-35 and accompanying text.

56. Unconscious racism is considered in Symposium, *Black Employment Opportunities: Macro and Micro Perspectives*, 43 J. SOC. ISSUES, No. 1, at 1 (1987). See also sources cited *supra* note 51.

cant is a woman rather than a man.⁵⁷ In analogous studies, both male and female subjects have often given lower ratings to the same art or scholarly works when the artist or author is thought to be a woman.⁵⁸ Men's success is more likely to be attributed to ability and females' to luck, a pattern that has obvious implications for employment decisionmaking.⁵⁹

Such unconscious bias affects not only opportunities for individual workers, but also reward structures for women as a group. This point was well illustrated by a survey of the federal government's *Dictionary of Occupational Titles*, which rates the complexity of tasks in some 30,000 jobs and has influenced many public and private employers' compensation schemes. Among the occupations rating lowest in the 1975 *Dictionary* edition were foster mother, nursery-school teacher, and practical nurse—all of which were thought equally or less demanding than parking lot attendant and "offal man," whose respective responsibilities were to park cars and to "shovel[] ice into [a] chicken offal container." Although repeated critiques prompted substantial progress in a later *Dictionary* edition, the legacy of earlier biases remains pervasive in many employment settings.⁶⁰

Anthropological studies suggest similar evidence of gender bias. Although cultures vary considerably in the tasks they allocate to each sex, their valuation patterns have been consistent. As Margaret Mead once noted, there have been villages in which men fish and women weave and villages in which women fish and men weave, but in either type of village the work done by men is more valued than the work done by women.⁶¹

57. Lott, *The Devaluation of Women's Competence*, 41 J. SOC. ISSUES 43, 50 (1985); see Rosen & Jerdee, *Effects of Applicant's Sex and Difficulty of Job on Evaluations of Candidates for Managerial Positions*, 59 J. APPLIED PSYCHOLOGY 511 (1974) (male applicants for managerial positions were accepted more frequently and evaluated more favorably than equally qualified female applicants).

58. Goldberg, *Are Women Prejudiced Against Women?*, TRANS-ACTION, Apr. 1968, at 28; Lott, *supra* note 57, at 48. *But cf.* Ferber & Huber, *Sex of Student and Instructor: A Study of Student Bias*, 80 AM. J. SOC. 949 (1975) (student evaluations of former college teachers failed to support Goldberg's conclusion that women are prejudiced against women).

59. Lott, *supra* note 57, at 51; Shepela & Viviano, *Some Psychological Factors Affecting Job Segregation and Wages*, in COMPARABLE WORTH AND WAGE DISCRIMINATION: TECHNICAL POSSIBILITIES AND POLITICAL REALITIES 47, 51-52 (H. Remick ed. 1984) [hereinafter COMPARABLE WORTH AND WAGE DISCRIMINATION].

60. See L. HOWE, PINK COLLAR WORKERS: INSIDE THE WORLD OF WOMEN'S WORK 236-40 (1977); Steinberg & Haignere, *Equitable Compensation: Methodological Criteria for Comparable Worth*, in EMPLOYMENT POLICY, *supra* note 5, at 157, 165.

61. For Margaret Mead's findings, see M. MEAD, MALE AND FEMALE: A STUDY OF THE SEXES IN A CHANGING WORLD 159-60 (1st ed. 1949); CENTER FOR PHILOSOPHY & PUB. POLICY, PAYING WOMEN WHAT THEY'RE WORTH 1 (1983).

Unconscious gender prejudices not only affect evaluation of female performance, but also affect performance itself. Low expectations of achievement frequently become self-fulfilling prophecies. Those who expect inadequate performance tend to signal their assumptions in subtle ways, and this negative feedback leads to anxiety, mistakes, and diminished aspirations. Such consequences then reinforce the initial adverse expectations, and a self-perpetuating cycle continues.⁶²

Preconceptions about women's lower career commitment create analogous patterns. A common assumption is that many women will "stop being productive when [they] become reproductive."⁶³ Decisionmakers who expect higher turnover among female employees will often structure women's jobs to minimize the costs of replacement. In effect, that means minimizing challenge, training, and responsibility, which in turn encourages boredom, frustration, and high turnover.⁶⁴

More overt, although often unintentional, forms of collegial bias have comparable consequences. Women in a wide range of employment settings remain outside the informal networks of support, guidance, and information exchange that are critical to advancement.⁶⁵ Such problems often begin in educational or job training programs and increase in workplace environments.⁶⁶ Related problems involve sexual harassment, which not only impairs performance and restricts advancement, but also discourages women from entering male-dominated environments.⁶⁷ All of these problems are especially acute for women of color, who face unconscious discrimination on two fronts, and whose small numbers make mentoring and role modeling especially difficult.

62. A. THEODORE, *supra* note 34, at 6-9, 237-40. For discussion of "feedback discrimination," in which employers, by denying women training and reinforcing "feminine behavior," ensure that women will exhibit the characteristics that employers attribute to them, see Blau, *Occupational Segregation and Labor Market Discrimination*, in *SEX SEGREGATION*, *supra* note 10, at 123.

63. A. THEODORE, *supra* note 34, at 6.

64. *Id.*; Blau, *Occupational Segregation and Labor Market Discrimination*, in *SEX SEGREGATION*, *supra* note 10, at 123.

65. Collegial bias in professional and business contexts is considered in COMMISSION ON WOMEN IN THE PROFESSIONS, AM. BAR ASS'N, REPORT TO THE HOUSE OF DELEGATES 7-12 (1988); C. EPSTEIN, WOMAN'S PLACE: OPTIONS AND LIMITS IN PROFESSIONAL CAREERS 172-75 (1970); C. EPSTEIN, WOMEN IN LAW 265-302 (1981); R. KANTER, MEN AND WOMEN OF THE CORPORATION 18-25 (1977); Prather, *supra* note 34, at 23. See also Rhode, *supra* note †.

For discussions of bias in the blue-collar context, see S. MARTIN, BREAKING AND ENTERING: POLICEWOMEN ON PATROL 109-57 (1980); L. ZIMMER, WOMEN GUARDING MEN 52-77 (1986).

66. See, e.g., M. WALSHOK, BLUE-COLLAR WOMEN: PIONEERS ON THE MALE FRONTIER 158, 168-70, 186, 204 (1981) (women excluded from normal channels of recruitment and on-the-job training); Deaux, *supra* note 16, at 294 (blue-collar women receive less training and information than male co-workers).

67. See B. GUTER, SEX AND THE WORKPLACE 42-60 (1985); C. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION (1979).

As long as women constitute small minorities in non-traditional employment contexts, these problems are likely to remain serious. The presence of a few token females may do little to alter underlying stereotypes, and the pressures placed on such individuals make successful performance less likely. Members of underrepresented groups perform under a special spotlight; their performance is heavily scrutinized and often assessed under particularly rigorous standards.⁶⁸ Moreover, individuals who seek to fit in by changing the culture rather than themselves face additional problems. The woman who "make[s] too much of the 'woman issue' " is subject to significant risk.⁶⁹

Given these barriers and biases, women must work harder to succeed, and when they do, they must deal with the envy and anxiety that success arouses.⁷⁰ Those who do not advance under such circumstances, or who become frustrated and opt for different employment, confirm the adverse stereotypes that had worked against their advancement in the first instance. The perception remains that women "can't make it" by conventional standards, or are less committed to doing so. In either case, they do not seem to warrant the same investment in training, assistance, and promotion opportunities as their male counterparts. Again, the result is a subtle but self-perpetuating cycle in which individual choices are constrained by discriminatory practices.

Taken as a whole, this body of research leaves no doubt about the lingering effects of gender bias. Whatever weight is assigned to particular factors—dual markets, occupational crowding, or deliberate, statistical, or unconscious discrimination—it is clear that societal prejudice has played a substantial role. Not only has gender bias shaped employment opportunities and salary patterns, it has also affected the way workplace structures have adapted to women's participation.

D. *Institutional Constraints.*

Just after the turn of the century, in *Muller v. Oregon*, the Supreme Court acknowledged the "obvious" respects in which performance of wo-

68. For discussion of the pressures on "token" women, see R. KANTER, *supra* note 65, at 207; Kanter, *Some Effects of Proportions on Group Life: Skewed Sex Ratios and Responses to Token Women*, 82 AM. J. SOC. 965, 971-72 (1977); Fuehrer & Schilling, *The Values of Academe: Sexism as a Natural Consequence*, 41 J. SOC. ISSUES 29, 37, 39-40 (1985).

69. A. MORRISON, R. WHITE & E. VAN VELSOR, *supra* note 55, at 38; see also G. LANOUE & B. LEE, *ACADEMICS IN COURT* 55-58 (1987) (female faculty member denied promotion for "aggressive" behavior and for advocating equal athletic facilities for women). See generally A. THEODORE, *supra* note 34.

70. For research reflecting adverse reactions to successful women, see J. FERNANDEZ, *supra* note 51, at 79-85; I. FRIEZE, J. PARSONS, P. JOHNSON, D. RUBLE & G. ZELLMAN, *WOMEN AND SEX ROLES* 252-53 (1978); Hagen & Kahn, *supra* note 54, at 371-74.

man's "maternal functions place[d] her at a disadvantage in the struggle for subsistence."⁷¹ Three-quarters of a century later, the most fundamental of those disadvantages remain. The majority of women work in occupational environments designed by and for men. The way in which the workplace has been structured, advancement criteria defined, and domestic responsibilities allocated have all tended to perpetuate gender inequalities.

In contemporary American society, any individual who seeks to balance significant work and family commitments confronts substantial obstacles. Since, as noted earlier, women continue to assume an unequal share of homemaking obligations, they also experience an unequal share of workplace difficulties.⁷² The most obvious problems involve the length and rigidity of most work schedules, the absence of adequate parental leave provisions, and inadequacies in child care services.

By the early 1980s, eighty percent of non-farm employees were holding full-time jobs, and about eighty-five percent of those jobs required a fixed forty-hours-plus workweek.⁷³ The small number of positions that have permitted flexible hours or compressed schedules have generally done so within narrow bounds.⁷⁴ Opportunities for permanent part-time work have been constrained in a different sense. The demand for such jobs has greatly exceeded their availability, despite the relatively low pay and benefits that most part-time positions command.⁷⁵ Although public support for reduced hours, job sharing, and home work sites has been steadily increasing, most of the options available have been in low-level, female-dominated areas lacking benefits and opportunities for advancement.⁷⁶

Resistance to more flexible structures has come from a variety of sources. Despite empirical findings to the contrary, many employers have overestimated the difficulties and underestimated the benefits of

71. *Muller v. Oregon*, 208 U.S. 412, 421 (1908).

72. See *supra* notes 36-37 and accompanying text.

73. OFFICE OF INFORMATION, U.S. DEP'T OF LABOR, *TEN MILLION AMERICANS WORK FLEXIBLE SCHEDULES, TWO MILLION WORK FULL-TIME IN THREE TO FOUR AND A HALF DAYS* (1981).

74. See T. GREIS, *THE DECLINE OF ANNUAL HOURS WORKED IN THE UNITED STATES SINCE 1947*, at 216-17 (1984) (surveying perceived problems with compressed workweeks); A. HARRIMAN, *THE WORK/LEISURE TRADE OFF: REDUCED WORK TIME FOR MANAGERS AND PROFESSIONALS* 159, 161-63 (1982) (noting limited availability of modified workweeks).

75. See A. COHEN & H. GORDON, *ALTERNATIVE WORK SCHEDULES* 85 (1978); Holden & Hansen, *Part-Time Work, Full-Time Work, and Occupational Segregation*, in *GENDER IN THE WORKPLACE* 217, 218-22 (G. Brown & J. Pleckman eds. 1987) (discussing relative concentrations of women in full-time and part-time employment); see also *supra* note 5.

76. S. RONER, *ALTERNATIVE WORK SCHEDULES* 8 (1984); Holden & Hansen, *supra* note 75, at 234.

such innovations. Decisionmakers have feared resentment among workers with more demanding schedules, and have often magnified the coordination problems caused by absent employees.⁷⁷ Many employers and clients have been put off by the unavailability and seeming lack of commitment of part-time workers, and those attitudes have affected assignment and promotion decisions. For example, studies in upper-level business and professional contexts have revealed widespread disparagement of anything less than full-time work.⁷⁸ In non-professional job sectors, union leaders have been similarly unenthusiastic about the loss of full-time positions.⁷⁹

Related problems involve the inadequacy of parental leave policies and child care programs. Data from the late 1980s indicate that about three-fifths of female workers are not entitled to wage replacement, and over one-third cannot count on returning to their same positions after a normal period of maternity leave. America remains alone among Western industrialized nations in its failure to guarantee such benefits.⁸⁰ Women who do not come back "faster than a speeding bullet" after childbirth have faced substantial risks. Even fewer employees are entitled to temporary leaves for parenting or care of disabled relatives.⁸¹ A still more chronic problem involves the inadequacies of child care programs. Although by the late 1980s over fifty percent of mothers with young children were in the workforce, less than one percent of private employers were providing any child care assistance.⁸² Public support has

77. A. COHEN & H. GORDON, *supra* note 75, at 75; see Rhode, *supra* note †, at 1185-86 (resistance faced by women attorneys juggling career and family).

78. For barriers to part-time work in the legal profession, see Projeet, *Law Firms and Lawyers with Children: An Empirical Analysis of Family/Work Conflict*, 34 STAN. L. REV. 1263, 1297 (1982); Rhode, *supra* note †, at 1185-86; Brill, *Labor Pains*, Am. Law., Jan./Feb. 1986, at 1, col. 1, 13, cols. 2-4; Sylvester, *How Firms Cope with Motherhood*, Nat'l L.J., Nov. 7, 1983, at 1, col. 4, 28, col. 1; Kingson, *Women in the Law Say Path Is Limited by "Mommy Track"*, N.Y. Times, Aug. 8, 1988, at 1, col. 5.

79. WORK IN AM. INST., NEW WORK SCHEDULES FOR A CHANGING SOCIETY 124-28 (1981) (discussing reluctance of labor unions to lobby for new work schedules out of fear of disrupting overtime provisions); Christopherson, *supra* note 5, at 10-13.

80. See CONGRESSIONAL CAUCUS ON WOMEN'S ISSUES, FACT SHEET ON PARENTAL LEAVE LEGISLATION (1985); S. KAMERMAN & A. KAHN, *supra* note 5, at 54-57. See generally A. RADIGAN, CONCEPT AND COMPROMISE (1988) (surveying data on paid maternity leave and tracing history of proposed legislation).

81. See sources cited *supra* note 78; R. SPALTER-ROTH & H. HARTMANN, UNNECESSARY LOSSES: COSTS TO AMERICANS OF THE LACK OF FAMILY AND MEDICAL LEAVE 2 (1988) (report for Institute for Women's Policy Research); Taub, *From Parental Leaves to Nurturing Leaves*, 13 N.Y.U. REV. L. & SOC. CHANGE 381, 384 (1984-1985).

82. 1986 House Hearings, *supra* note 17, at 5, 7 (statement of Jill Houghton Emery, Acting Director, Women's Bureau, Department of Labor).

been similarly lacking.⁸³

For women, the inadequacy of flexible scheduling options, temporary leave provisions, and child care services carry significant occupational consequences. Short-term losses result when female employees find it necessary to forgo promotional and training opportunities, or to leave a particular job, together with its seniority and benefit provisions. Long-term costs result from women's discontinuous work history, which makes advancement within high-paying job sectors more difficult. For most women, the choice is to curtail either employment or family commitments, and whichever option they elect, the result is to perpetuate a decisionmaking structure insulated from their concerns. Those who advance to the positions with greatest power over policies governing parental leaves, working schedules, child care, and related issues are those least likely to have experienced significant work-family conflicts.⁸⁴ To promote equality between the sexes and to improve the quality of life for both of them will require fundamental changes in employment policies.

II. THE LEGAL RESPONSE

As in other contexts, the law's primary approach to these occupational issues has been to focus on gender differences rather than gender disadvantages. It has sought to prevent those with comparable abilities from experiencing different treatment because of sex. Under the equal protection guarantee of the fourteenth amendment, courts have prohibited various forms of intentional discrimination.⁸⁵ Under title VII of the Civil Rights Act, courts have barred both intentionally discriminatory actions and certain facially neutral conduct that has a disproportionate adverse impact on women and is not justified by business necessity.⁸⁶ Various legislative and administrative regulations have also required gov-

83. See R. SIDEL, *supra* note 39, at 118-28 (tracing history of government-sponsored child care programs). See generally *Hearings on Childcare Before the U.S. Commission on Education and Labor, U.S. House of Representatives*, 100th Cong., 2d Sess. — (held Apr. 21, 1988; hearing print forthcoming) (testimony of Heidi Hartmann); BUREAU OF THE CENSUS, U.S. DEPT OF COMMERCE, *CURRENT POPULATION REPORTS: WHO'S MINDING THE KIDS?* (1987) (documenting mothers' reliance on their own resources for child care).

84. See generally sources cited *supra* notes 14, 65.

85. See, e.g., *Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977).

86. See *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977) (height and weight requirements that disproportionately exclude women from jobs not related to such requirements violate Civil Rights Act); see also *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) (title VII "proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation"). See generally Bartholet, *Application of Title VII to Jobs in High Places*, 95 HARV. L. REV. 947, 947-49 (1982) (reviewing title VII doctrine).

ernment contractors to implement affirmative action programs.⁸⁷ Taken together, these strategies have played a critical role in expanding women's employment opportunities. This approach has not, however, adequately confronted the deeper institutional and ideological forces that perpetuate gender disadvantage.

Part of the problem stems from the law's focus on individual intent and its unwillingness to challenge conduct that does not seem specifically designed to discriminate against women.⁸⁸ Given the unconscious level at which much gender bias operates, as well as the costs, both financial and psychological, of initiating legal action, such a framework has limited value.⁸⁹ A related problem involves the inadequacy of governmental and private-sector support for policies mandating flexible scheduling, temporary leaves, child care assistance, and strong forms of affirmative action.⁹⁰

In effect, traditional approaches have centered on equalizing women's opportunities within conventional workplace structures. The task remaining is to challenge the structures themselves, and their underlying priorities and premises. This, in turn, will require a broad range of initiatives, including a redirection of the law's focus on individual intent, an expanded understanding and implementation of affirmative action policies, and a restructuring of workplace institutions to allow better accommodation of family commitments. Since I have discussed these initiatives at greater length elsewhere, my intent here is to center attention on a final and equally crucial set of strategies, those concerning pay equity.⁹¹

A. *Pay Equity.*

By the close of the 1970s, as the limitations of conventional antidiscrimination approaches became increasingly apparent, women's rights organizations sought new strategies to secure greater pay equity between the sexes. A primary objective was to obtain comparable pay for jobs of comparable worth.

87. See, e.g., Revised Order No. 4, Affirmative Action Programs, 41 C.F.R. § 60-2 (1988) (covering non-construction contractors).

88. See Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049, 1103 (1978); Sullivan, *Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 HARV. L. REV. 78, 80 (1986).

89. See Lawrence, *supra* note 71, at 328-44; Rhode, *supra* note †, at 1187-93.

90. See sources cited *supra* notes 81-83; sources cited *infra* note 91.

91. See D. RHODE, *supra* note †; Rhode, *Definitions of Difference*, in THEORETICAL PERSPECTIVES, *supra* note 8; Rhode, *supra* note †, at 1193-95, 1196-202, 1205-07.

1. *The Evolution of Comparable Worth.* As a conceptual framework, comparable worth has historical analogues in medieval notions of a "just price," and in the early twentieth-century theories of the British Fabian Sidney Webb.⁹² As a practical strategy, the concept emerged in this country during World War II. Although the federal government had made earlier, intermittent efforts to reduce sex-based wage discrimination in the civil service, it was not until the national mobilization of the 1940s that prominent officials first identified such discrimination as a serious problem. To the War Labor Board, some legal intervention seemed necessary to preserve the morale not only of female workers, but also of their male counterparts at home and on the front, who worried that feminization of the workforce would undermine existing wage structures.⁹³ Accordingly, the Board decreed that there should be "no discrimination between employees whose production [was] substantially the same on comparable jobs."⁹⁴ But Board enforcement efforts proved woefully inadequate to secure equal pay even for identical jobs, and standards governing comparability never developed.⁹⁵

In any event, Board directives lost force once the war was over. Subsequent congressional proposals that would have prohibited "paying female employees at a lower rate than males for work of comparable quality or quantity" failed to come to a vote.⁹⁶ Although similar language reappeared in the initial drafts of the Equal Pay Act during the early 1960s, this language met with a similar fate.⁹⁷ Neither sponsors nor their critics were prepared for the specter of federal intruders "trooping around all over the country . . . harassing business with their various interpretations of the term 'comparable.'" ⁹⁸

Two decades later, that caricature no longer appeared so disquieting, particularly if the alternative was reliance solely on market forces to determine wage hierarchies. Many manifestations of the invisible hand

92. Goldin, *The Earnings Gap in Historical Perspective*, in 1 COMPARABLE WORTH, *supra* note 12, at 4-5; Kessler-Harris, *The Just Price, the Free Market, and the Value of Women*, 14 FEMINIST STUD. 235, 239-45 (1988).

93. 2 P. FONER, *WOMEN AND THE AMERICAN LABOR MOVEMENT: FROM WORLD WAR I TO THE PRESENT* 355 (1980) (discussing arguments presented to War Labor Board).

94. Tobias & Anderson, *What Really Happened to Rosie the Riveter? Demobilization and the Female Labor Force, 1944-47*, in *WOMEN'S AMERICA* 367-68 (L. Kerber & J. Mathews eds. 1982) (quoting UAW memorandum that quotes Board decision).

95. 2 P. FONER, *supra* note 93, at 355-57.

96. *E.g.*, S. 882, 88th Cong., 1st Sess., *introduced*, 109 CONG. REC. 2770 (1963).

97. *See* 109 CONG. REC. 2780 (1963) (remarks of Sen. Case regarding change in language from "comparable" to "equal"); *see also id.* at 2714 (similar remarks by Rep. Dwyer).

98. 108 CONG. REC. 14,768 (1962) (remarks of Rep. Landrum on amendment to Equal Pay Act of 1962); *see* 1963 U.S. CODE CONG. & ADMIN. NEWS 690-92; Note, *Equal Pay, Comparable Work, and Job Evaluation*, 90 YALE L.J. 657, 665-66 (1981).

appeared visibly gender-biased. Feminists cited hosts of examples not readily squared with merit principles: schoolteachers who earned less than liquor store clerks, nurses who earned less than tree trimmers or sign painters, and librarians who earned less than crossing guards or water meter readers.⁹⁹ Given the vast body of research pointing to undervaluation of women's work, particularly work done by women of color, market forces appeared to be unreliable guardians of equitable compensation structures.¹⁰⁰

2. *Job Evaluation Strategies: Relative Worth and Intrinsic Worth.*

The most frequently proposed alternatives to market forces rely on formal systems of job evaluation for establishing salaries.¹⁰¹ Such approaches have become increasingly prevalent since World War II; an estimated two-thirds of employees are currently subject to some formal evaluation system.¹⁰² Methodologies vary, as does decisionmaking authority. Participants in the evaluation process may include outside consultants and worker representatives, as well as management.¹⁰³ Although the technical aspects of job evaluation require more extended analysis than is possible here, it is useful to distinguish the two basic frameworks that are often lumped together under the generic label of comparable worth.

The most common job evaluation system involves a "policy-capturing" approach.¹⁰⁴ This system focuses on the *relative worth* of particular positions under existing wage scales, either the employer's own rates or those of similarly situated employers. Through this approach, decisionmakers identify factors relevant to compensation and score jobs in terms of those factors, such as skill, responsibility, and working conditions.¹⁰⁵ Then, statistical regression techniques are used to assess the rel-

99. D. KIRP, M. YUDOF & M. FRANKS, GENDER JUSTICE 168 (1986); see Savage, *San Jose's Equal Pay Plan Survives*, L.A. Times, Sept. 12, 1983, § 1, at 3, col. 5.

100. See Malveaux, *An Economic Perspective on Difference and Commonality Among Women*, in THEORETICAL PERSPECTIVES, *supra* note 8; NATIONAL COMM'N ON PAY EQUITY, *supra* note 3; see also *supra* note 61 and accompanying text.

101. Schwab, *Using Job Evaluations to Obtain Pay Equity*, in 1 COMPARABLE WORTH, *supra* note 12, at 83, 85. See generally WOMEN, WORK AND WAGES, *supra* note 49, at 71-90 (discussing conventional and statistical job evaluation approaches).

102. Steinberg, *Identifying Wage Discrimination and Implementing Pay Equity Adjustments*, in 1 COMPARABLE WORTH, *supra* note 12, at 99, 101.

103. See Schwab, *Job Evaluation Research and Research Needs*, in NEW DIRECTIONS, *supra* note 9, at 37, 45-46.

104. Clauss, *Comparable Worth—The Theory, Its Legal Foundation, and the Feasibility of Implementation*, 20 U. MICH. J.L. REF. 7, 52 (1986).

105. For example, whatever importance an employer determines to give mathematical skills, such skills should carry the same weight in female- as well as male-dominated jobs. For further elaboration, see *id.* at 41-54.

ative importance of such factors in predicting current wages and to establish a weight for each factor.¹⁰⁶ Each job receives a rating based on its weighted characteristics. This rating can serve as the basis for adjusting pay scales or for setting salaries for new jobs, although decisionmakers may make further modifications in response to market forces.

To pay equity advocates, such a policy-capturing approach is primarily useful for identifying racial or gender biases in an employer's own evaluation system. For example, statistical analysis can indicate the importance an employer attaches to particular factors in male-dominated or gender-integrated jobs and determine whether the same factors command the same financial reward in female-dominated positions. When used in this fashion, such an approach often reveals underpayment of "women's work" in terms of the employer's own criteria for compensation.¹⁰⁷

From a pay equity perspective, the strengths of this system are also the source of its limitation. By relying on the employer's own standards to establish relative value, a policy-capturing technique avoids more subjective and divisive issues about the intrinsic value of particular jobs. Such a framework takes no position on what weight specific employment characteristics *should* assume. It only demands that employers consistently apply their own weighting systems across job categories, regardless of the gender, race, and ethnicity of employees and the pay at which they are willing to work. Although this approach is consistent with antidiscrimination principles reflected in existing legislation, including title VII, it does not accomplish one central objective of pay equity advocates—to challenge societal devaluations of women's work. Since a policy-capturing system uses existing wage rates to assess the relative importance of job characteristics, it will reflect gender and racial biases that have traditionally affected those rates.

A more fundamental challenge to current norms is possible with techniques that focus on *intrinsic worth*. Under such an approach, decisionmakers generally define a priori the set of factors *and* the factor weights that should serve as the basis for salary differentials. Typically, this system will rank job characteristics such as skill, effort, responsibility, and working conditions, and then assign points to particular jobs based on their weighted characteristics. Compensation levels can then be adjusted to ensure parity between jobs with similar ratings. By valuing job characteristics without explicit reference to employers' existing sala-

106. *Id.* at 52.

107. See NATIONAL COMM'N ON PAY EQUITY, *supra* note 3, at 86-104 (detailing undervaluation of disproportionately black, Hispanic, and female job titles in New York state government employment); WOMEN, WORK, AND WAGES, *supra* note 49, at 71-78; Clauss, *supra* note 104, at 52-54.

ries or market rates, such techniques often expose underpayment of predominantly female occupations. Although employers can further adjust their compensation structures to reflect external pay rates as well as internal rankings, an a priori system has the advantage of making such adjustments visible.¹⁰⁸

To varying degrees, relative and intrinsic worth approaches can challenge current wage structures. By the mid-1980s, one or both frameworks were influential in shaping comparable worth litigation, legislative lobbying, and collective bargaining strategies.¹⁰⁹

B. *Critics of Comparable Worth.*

From critics' perspectives, comparable worth presents a range of problems. The central difficulty is how to define "worth."¹¹⁰ Few salaries are based solely on objective factors, such as the skill, responsibility, and working conditions a job entails; the most cursory comparison of income levels for cabinet officials and fashion models makes this point directly. Any evaluation system involves subjective judgments, and such judgments are especially prevalent in a priori intrinsic worth approaches. Gender biases can enter at any number of points: in the choice and weighting of factors to be compensated, in the application of these factors to a given job, and in the selection of standards for determining exemptions.¹¹¹ How much significance should be attached to particular skills or working conditions, and how skills should be defined, are often open to dispute. Given the inherent subjectivity of job assessment techniques, it is scarcely surprising that different evaluators and evaluation systems have attached different values to identical positions.¹¹²

This subjectivity can lead to the kind of bias apparent in a salary reevaluation study for New York state employees. That study concluded

108. See generally Remick, *Major Issues in A Priori Application*, in *COMPARABLE WORTH AND WAGE DISCRIMINATION*, *supra* note 59, at 99-117.

109. For an overview of state law and legislation, see Cook, *Developments in Selected States*, in *COMPARABLE WORTH AND WAGE DISCRIMINATION*, *supra* note 59, at 267-83; Dean, Roberts & Boone, *Comparable Worth Under Various Federal and State Laws*, in *COMPARABLE WORTH AND WAGE DISCRIMINATION*, *supra* note 59, at 238-66; Weiler, *The Wages of Sex: The Uses and Limits of Comparable Worth*, 99 HARV. L. REV. 1728, 1754-56, 1797-801 (1986); Note, *The Future of Comparable Worth: Looking in New Directions*, 37 SYRACUSE L. REV. 1189, 1207-18 (1987).

110. See Schwab, *Job Evaluation and Pay Setting: Concepts and Practices*, in *COMPARABLE WORTH: ISSUES AND ALTERNATIVES* 49, 59, 69 (E. Livernash ed. 1980) [hereinafter *ISSUES AND ALTERNATIVES*] (noting lack of definition of worth, substantial subjective judgment involved in implementing job evaluations, and need for further research on sex-role stereotyping).

111. See *id.* at 59; *infra* notes 112-13.

112. See generally Beatty & Beatty, *Some Problems With Contemporary Job Evaluation Systems*, in *COMPARABLE WORTH AND WAGE DISCRIMINATION*, *supra* note 59, at 59-78; Killingsworth, *The Economics of Comparable Worth: Analytical, Empirical, and Policy Questions*, in *NEW DIRECTIONS*, *supra* note 9, at 6, 86-115.

that acquired (and hence compensable) abilities were necessary for zoo keepers in charge of baby animals, but that only innate (and hence non-compensable) abilities were necessary for day care attendants responsible for human infants.¹¹³

A related criticism of both intrinsic worth and relative worth approaches concerns issues of supply and demand. To take one of economists' favorite illustrations, the fact that water is cheaper than diamonds has more to do with the abundance of water than with its "worth," in the way that pay equity advocates generally use the term. An evaluation system that considers only job content might, for example, dictate paying similar salaries to professors of male-dominated disciplines such as law, and more gender-integrated disciplines such as English, even if legal academics were in shorter supply and could command much higher wages for alternative uses of their skills. Such evaluative approaches might make it difficult for any particular employer to attract and retain workers in areas of tight labor supply, and might distort signals to potential employees about labor needs.¹¹⁴

The experience of one General Electric plant in the mid-1980s illustrates critics' concerns. That plant reportedly had 3000 women on a waiting list for openings as assemblers of radio components, a female-dominated occupation. No such labor supply was available for certain male-dominated packaging positions, which had comparable rankings in terms of job characteristics. Since GE paid the female assemblers less than the male packagers, but eight times more than workers who performed the same assembling functions in Japan, the potential competitive consequences of revaluing women's jobs were significant. Lowering or freezing male packagers' wages could cause labor shortages, increased turnover, and worker resentment. Increasing female assemblers' wages could necessitate higher prices, which might eventually result in lower sales, production, and employment.¹¹⁵

If, under the threat of legal liability or other government mandates, domestic employers had to make comparable wage adjustments, the resulting price escalations would contribute to inflation and, in some sectors, could diminish American industry's ability to compete with

113. See Lauter, *How to Factor the Value of Workers' Skills*, Nat'l L.J., Jan. 2, 1984, at 24, col. 1.

114. See Levin, *Comparable Worth: The Feminist Road to Socialism*, COMMENTARY, Sept. 1984, at 13, 16-18; see also *Christensen v. Iowa*, 563 F.2d 353, 356-357 (8th Cir. 1977) (citing supply and demand concerns as one reason not to require that employers equally reward jobs that command similar skills but different market prices); M. GOLD, A DIALOGUE ON COMPARABLE WORTH 75-77 (1983) (discussing *Christensen*).

115. M. GOLD, *supra* note 114, at 55-64.

producers from abroad.¹¹⁶ Alternatively, if employers responded to the higher costs of female employees by substituting foreign workers or less labor-intensive processes, the result would be increased domestic unemployment.¹¹⁷ The greater the government's involvement in the wage-setting process, the greater critics' concerns about overtures to a centrally planned economy.¹¹⁸

Critics have also questioned whether these costs would be offset by gains in social justice. One concern is that higher wages might simply encourage women to stay in traditional, female-dominated jobs, and thus reinforce the problems of occupational crowding and stereotyping that underlie current sex-based disparities.¹¹⁹ Moreover, according to some commentators, comparable worth as a distributive principle would often prove regressive. The primary beneficiaries would be middle-class white women, and the primary losers would be lower-class minority men. A familiar claim has been that the "maintenance man will be paid less so the librarian can be paid more."¹²⁰

Both the magnitude and distribution of such adverse consequences are open to question, however. Estimates of the aggregate price of comparable worth have ranged between 2 and 150 billion dollars, and projections of efficiency and GNP losses reflect similar variations.¹²¹ On the whole, available research suggests that critics have often overestimated the costs and underestimated the potential benefits of pay equity.¹²² Ob-

116. See generally sources cited *supra* note 114, *infra* note 117.

117. See Fischel & Lazear, *Comparable Worth and Discrimination in Labor Markets*, 53 U. CHI. L. REV. 891, 907 (1986) (discussing unemployment as a possible consequence of wage adjustments); cf. *American Nurses' Ass'n v. Illinois*, 783 F.2d 716, 720 (7th Cir. 1986) (discussing inefficiencies associated with comparable worth). But see Becker, *Barriers Facing Women in the Wage-Labor Market and the Need for Additional Remedies: A Reply to Fischel and Lazear*, 53 U. CHI. L. REV. 934, 947 (1986) (suggesting that movement of males into higher-paying women's jobs would create new employment opportunities for women in male jobs).

118. See Jacobson, *Comparable Worth: The Working Woman's Issue for the 80s*, NAT'L F., fall 1981, at 5, 5; Levin, *supra* note 114, at 18-19; Reynolds, *Comparable Worth: Bad Policy and Bad Law*, 9 HARV. J.L. & PUB. POL'Y 89, 90, 94 (1986).

119. 1 COMPARABLE WORTH, *supra* note 12, at 111 (statement of June O'Neill); Nelson, Opton & Wilson, *Wage Discrimination and the "Comparable Worth" Theory in Perspective*, 13 U. MICH. J.L. REF. 233 (1980); Ratner, *Equal Employment for Women: Summary of Themes and Issues*, in EQUAL EMPLOYMENT POLICY FOR WOMEN 419, 432-33 (R. Ratner ed. 1980).

120. Scales-Trent, *Comparable Worth: Is This a Theory for Black Workers?*, 8 WOMEN'S RTS. L. REP. 51, 56 (1984) (quoting Michael Horowitz, Counsel to Director of Office of Management and Budget); see also NATIONAL COMM'N ON PAY EQUITY, *supra* note 3, at 16-18 (discussing impact of pay equity initiatives on minority men).

121. Newman & Vonhof, "Separate but Equal"—*Job Segregation and Pay Equity in the Wake of Gunther*, 1981 U. ILL. L. REV. 269, 309; Remick & Steinberg, *Technical Possibilities and Political Realities: Concluding Remarks*, in COMPARABLE WORTH AND WAGE DISCRIMINATION, *supra* note 59, at 285, 290-93.

122. See *infra* notes 123-26 and accompanying text; see also Brown, Baumann & Melnick, *Equal Pay for Jobs of Comparable Worth: An Analysis of the Rhetoric*, 21 HARV. C.R.-C.L. L. REV. 127,

jections concerning unemployment, inflation, foreign competition, and socialism have been voiced about virtually every form of employment regulation over the last century. Such concerns were common in early debates surrounding child labor, occupational safety, minimum wage, and collective bargaining regulation.¹²³ Mucking about with the free market earlier in this century did not lead to chaos or communism then, and it is unlikely to do so now.

Criticisms of the subjectivity of comparable worth procedures tend to ignore the biases of existing wage structures. Current pay differentials reflect a legacy of discrimination that already distorts responses to labor supply and demand.¹²⁴ Subjectivity is what we now have; the fact that it is embedded in existing market dynamics does not render it morally just or economically essential. Critics' adverse projections have also incorporated assumptions about the efficiency and competitiveness of current markets, assumptions that do not hold in many public and private sectors of the economy where pay equity initiatives have centered.¹²⁵ Gradual pay scale revisions in these areas could in turn help drive up women's compensation in other contexts.

Although comprehensive long-term data are lacking, the comparable worth reforms here and abroad have not appeared to trigger the kinds of inflation, inefficiency, and unemployment that critics predict. The typical cost of these reforms has been around five to ten percent of employers' total wage rates, phased in over a number of years.¹²⁶ Recent case studies of state and local comparable worth initiatives have not found evidence of increased unemployment or reduced interest in non-traditional jobs among female workers.¹²⁷ Moreover, even if the immediate

169-70 (1986) (arguing that judicial critics of comparable worth have too readily accepted predictions of disruptive economic results); Hartmann, *Comparable Worth and Women's Economic Independence*, in EMPLOYMENT POLICY, *supra* note 5, at 253-57 (discussing economy's ability to adjust to modest cost increases that typically result from comparable worth).

123. See generally Remick & Steinberg, *Technical Possibilities and Political Realities: Concluding Remarks*, in COMPARABLE WORTH AND WAGE DISCRIMINATION, *supra* note 59, at 285, 289-93 (responding to economic criticisms of comparable worth).

124. See the discussion of sex-role socialization and discriminatory practices, *supra* text accompanying notes 25-40.

125. For example, even the most ardent critics of comparable worth, such as Richard Posner, have acknowledged that "collective bargaining, public regulation of wages and hours, and the lack of information and mobility of some workers may make the market model an inaccurate description of how relative wages are determined and how they influence the choice of jobs," particularly in the context of the state as employer. *American Nurses' Ass'n v. Illinois*, 783 F.2d 716, 720 (7th Cir. 1986).

126. Hartmann, *Comparable Worth and Women's Economic Independence*, in EMPLOYMENT POLICY, *supra* note 5, at 256.

127. See, e.g., Clauss, *supra* note 104, at 90-95 (reviewing studies); Rothchild, *Pay Equity—The Minnesota Experience*, 20 U. MICH. J.L. REF. 209, 214-15 (1986) (describing Minnesota's experience with pay equity at the state and local levels).

effect of increasing pay in some female-dominated job contexts were to reduce the number of positions available, the eventual result might be to encourage women's entrance into alternative, male-dominated occupations. That, in turn, could reduce occupational segregation and gender disparities in reward structures.¹²⁸ Any adequate analysis of comparable worth must take into account not only its short-term costs, but also its long-term benefits.

Such an analysis must also remain sensitive to the distribution of those costs and benefits. Contrary to critics' suggestions, recent evidence does not establish that comparable worth reforms have imposed disproportionate burdens on minority or blue-collar workers.¹²⁹ Women of color are overrepresented in public-sector, female-dominated occupations, where such reforms have been most pervasive.¹³⁰ Minority male workers are similarly overrepresented in female-dominated jobs that have benefited most from pay equity initiatives.¹³¹ Moreover, the same procedures that have exposed evidence of gender bias have often revealed evidence of racial bias as well, and the resulting adjustments have benefited groups that are disadvantaged on both counts.¹³² Although evidence regarding class is more mixed, some research has suggested that overcompensation is most likely with male-dominated white-collar, not blue-collar, jobs.¹³³ Whatever short-term losses some workers sustain as a result of job revaluations must also be offset by the potential long-term gains of making compensation criteria explicit and subjecting such criteria to collective bargaining and organizing strategies.

C. *Pay Equity Implementation.*

Much of the objection to pay equity could be minimized if implementation occurred gradually, with some sensitivity to the costs of pay equity and to the respective abilities of various decisionmakers. It is well within courts' capabilities and authority to enforce principles of relative worth and to hold employers accountable for salary discrimination that

128. Remick & Steinberg, *Technical Possibilities and Political Realities: Concluding Remarks*, in *COMPARABLE WORTH AND WAGE DISCRIMINATION*, *supra* note 59, at 285, 290-91; see Holzhauser, *The Economic Possibilities of Comparable Worth*, 53 U. CHI. L. REV. 919, 928 n.16 (1986).

129. See NATIONAL COMM'N ON PAY EQUITY, *supra* note 3, at 17-18, 63-64, 105-06; Clauss, *supra* note 104, at 93-95.

130. See Malveaux, *Comparable Worth and Its Impact on Black Women*, in *SLIPPING THROUGH THE CRACKS*, *supra* note 11, at 53-61; see also *COMPARABLE WORTH, PAY EQUITY, AND PUBLIC POLICY* 157-236 (R. Kelly & J. Bayes eds. 1988) (reviewing implementation of comparable worth in the public sector).

131. NATIONAL COMM'N ON PAY EQUITY, *supra* note 3, at 82, 105.

132. See *id.* at 105, 177-78; Malveaux, *Comparable Worth and Its Impact on Black Women*, in *SLIPPING THROUGH THE CRACKS*, *supra* note 11, at 56.

133. See Bartholet, *supra* note 86, at 1004-05; Clauss, *supra* note 104, at 93-94.

employers cannot justify under their own evaluative criteria. However, issues of intrinsic worth—that is, judgments about what criteria are most important and how those judgments should be made—are best addressed through political and collective bargaining processes. Such an allocation of responsibility could do much to clarify existing law.

1. *Judicial Strategies.* Part of the confusion stems from the United States Supreme Court's determination to avoid decisions on point. In the first decade and a half of pay equity litigation, the Court accepted review of only one case, *County of Washington v. Gunther*.¹³⁴ In *Gunther*, a majority of Justices carefully disclaimed any view on the "controversial concept of 'comparable worth.'" ¹³⁵ In fact, the case involved a straightforward application of relative worth principles. The plaintiffs, female jail guards, alleged that county officials had intentionally discriminated on the basis of sex by setting female guards' pay scales below those of male guards and below what county surveys indicated was appropriate. In concluding that such allegations stated a claim under title VII's antidiscrimination mandates, the majority noted that its holding would not force a court to make "its own subjective assessment of the value of the male and female guard jobs" or to quantify the impact of discrimination.¹³⁶ Rather, the plaintiffs were seeking remedies for a departure from their employer's own evaluation of relative worth.¹³⁷

In the aftermath of *Gunther*, lower-court decisionmaking has remained confusing and confused. In contexts analogous to *Gunther*, some judges have rejected relative worth claims on the dubious assumption that they would open a "Pandora's box" and potentially disrupt "the entire economic system of the United States of America."¹³⁸ Similar concerns were apparent in a celebrated federal court decision involving Washington state employees.¹³⁹ The litigation arose in the mid-1970s after the state's own survey found that women's jobs paid an average of twenty percent less than men's jobs with comparable rankings. Despite that finding, the state did not seek to reduce the disparity until six years later, after the American Federation of State, County, and Municipal Employees (AFSCME) filed a sex discrimination suit. In the federal trial

134. 452 U.S. 161 (1981).

135. *Id.* at 166.

136. *Id.* at 181.

137. *Id.* at 166.

138. *Lemons v. City of Denver*, 17 Fair Empl. Prac. Cas. (BNA) 906, 909, 907 (D. Colo. 1978); see *American Nurses' Ass'n v. Illinois*, 783 F.2d 716, 722 (7th Cir. 1986); *Christensen v. Iowa*, 563 F.2d 353, 355-56 (8th Cir. 1977).

139. *AFSCME v. Washington*, 578 F. Supp. 846 (W.D. Wash. 1983), *rev'd*, 770 F.2d 1401 (9th Cir. 1985).

judge's view, such inaction (coupled with other evidence of gender bias) constituted proof of intentional disparate treatment in violation of title VII.¹⁴⁰ The district court further concluded that the state's salary practices had a disparate impact on predominantly female job classifications, and that no business necessity could justify those practices. Accordingly, the district judge's decree ordered the state to raise female wages and provide back pay of some 838 million dollars.¹⁴¹ Since estimates of the total costs of compliance ran as high as a billion dollars, the case aroused considerable public attention.¹⁴²

Its notoriety was short-lived. In 1985, the United States Court of Appeals for the Ninth Circuit reversed the trial judge's decision.¹⁴³ Under the appellate panel's analysis in *AFSCME v. Washington*, compensation schemes based on market forces did not constitute specific employment practices for purposes of establishing disparate impact. Nor was the state's reliance on market wage rates rather than job evaluation surveys sufficient evidence of discriminatory intent.¹⁴⁴ Underlying the court's judgment were concerns both about the indeterminacy of job evaluation and the likelihood that few employers would undertake it if title VII liability could follow. Before further appeals, the parties reached a settlement under which the state allocated 480 million dollars over six years to raise salaries in female-dominated occupations.¹⁴⁵

Yet, it is possible to address the concerns of the appellate court in *AFSCME* without denying legal remedies in all comparable worth contexts. Where decisionmakers have commissioned an evaluation and accepted its results, the accuracy of survey procedures need not become an issue. If holding employers to the results of their own job reassessments discourages these initiatives, federal, state, or local governments could mandate such evaluations, either directly or as a condition of receiving government contracts or assistance. Courts also could minimize disincentives for comparable worth reviews by following precedents from other sex discrimination contexts and by considering such reviews as evidence of gender bias only for purposes of granting prospective relief, not back pay.¹⁴⁶ In addition, employers' refusal to undertake evaluation procedures could serve as a basis for liability, at least under circumstances

140. *Id.* at 867.

141. *Id.* at 871.

142. See Weiler, *supra* note 109, at 1750 & nn.90-91.

143. *AFSCME v. Washington*, 770 F.2d 1401 (9th Cir. 1985).

144. *Id.* at 1405-06.

145. See Weiler, *supra* note 109, at 1755.

146. For sex discrimination decisions granting only prospective remedies, see *Arizona Governing Comm. v. Norris*, 463 U.S. 1073 (1983) (per curiam); *City of Los Angeles v. Manhart*, 435 U.S. 702 (1978).

suggesting a violation of relative worth principles. Where employers receive evidence indicating that the same characteristics command higher pay in predominantly male jobs than in predominantly female jobs, a refusal to take corrective measures could serve as grounds for legal intervention.

This approach would have the advantage of providing some recourse for demonstrable gender or racial bias in relative wage rates, but would not enmesh courts in disputes over intrinsic value. Such a strategy would allow employers to consider market factors in establishing job evaluation criteria, but would not allow employers to depart from those criteria simply because they could hire female or minority employees for less. To recognize market forces as a complete defense in wage discrimination cases is to perpetuate the problems antidiscrimination law was designed to address. Just as we do not tolerate such excuses in other equal pay or in title VII contexts, we should not tolerate them here.¹⁴⁷

This framework would also respond to legitimate concerns about judicial capacity and the lack of principled standards for resolving issues of intrinsic worth. If, for example, employers commission job evaluation surveys that attach high importance to skills that are disproportionately associated with male-dominated positions (for example, heavy lifting), on what grounds would courts challenge those assessments? Judges would have to adjudicate battles among experts, with very little basis on which to choose between them. Although such battles would not be unique to comparable worth litigation, the implications of staging them under judicial oversight raise significant concerns. Indeterminate standards often result in substantial uncertainties, inconsistencies, and legal costs.

Of still greater concern are the potential economic dislocations that litigation over intrinsic worth could entail. If courts were to require that evaluation systems focus only on job content, how could variations in labor supply be accommodated? As litigation in the early 1980s indicated, examples such as academics with differential pay scales present more than hypothetical problems.¹⁴⁸ Had courts in those cases required that compensation reflect only intrinsic job characteristics, with no allowance for wage differentials sensitive to market factors, universities would have faced an unhappy choice. In the likely event that budget

147. See *WOMEN, WORK, AND WAGES*, *supra* note 49, at 82-90; Claus, *supra* note 104, at 77-83.

148. See *Spaulding v. University of Wash.*, 740 F.2d 686, 706 n.11 (9th Cir. 1984); *Craig v. Minnesota State Univ. Bd.*, 731 F.2d 465, 480 (8th Cir. 1984); *Wilkins v. University of Houston*, 654 F.2d 388, 402 (5th Cir. 1981). See generally Hildebrand, *The Market System*, in *ISSUES AND ALTERNATIVES*, *supra* note 110, at 79-106 (discussing significance of external labor markets in setting salaries).

constraints would have prevented raising all salaries, administrators would have been forced to reduce compensation for faculty in male-dominated, high-paying disciplines such as law and medicine, and accept whatever loss in quality or quantity of instructors resulted. While the world might well be better off with fewer law professors, it is by no means clear that we want courts to make that determination.

2. *Political Strategies.* The above objections do not, however, apply with equal force to pay equity strategies in collective bargaining and legislative contexts. These forums have the advantage of allowing wider participation and more flexible implementation than is generally possible in litigation. Pay equity as a political issue presents opportunities not only to challenge workplace values, but also to expand the groups involved in workplace decisionmaking. As contemporary union campaigns reflect, comparable worth can also be a powerful mobilizing force among women.¹⁴⁹ One significant contributor to wage disparities between the sexes has been a lack of organization among female employees. In the mid-1980s, female workers were only half as likely as men to belong to unions, and unionized women earned, on the average, twenty percent more than non-unionized women.¹⁵⁰ Comparable disparities exist for minorities, and unions historically have paid too little attention to the interests of these groups.¹⁵¹ Pay equity presents new opportunities. By raising the expectations, self-esteem, and sense of relative deprivation among women and minorities, comparable worth initiatives can aid workplace organizing and bargaining efforts.

Pay equity might also perform similar functions in political campaigns at the national, state, and local levels. Comparable worth frameworks can challenge not only the undervaluation of women's work, but also women's underrepresentation in evaluation processes. One objective of these frameworks could be to vest greater responsibility for job reassessment in committees or task forces with broad-based worker and management representation. The more inclusive the evaluative process, the less likely that it will reflect gender, racial, and class biases.¹⁵²

149. See Drogin, *Comparable Worth at Center of Yale Strike*, L.A. Times, Nov. 18, 1984, § 1, at 5, col. 1.

150. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, EMPLOYMENT AND EARNINGS 210 (1985); see Weiler, *supra* note 109, at 1797-801.

151. See Kessler-Harris, *Where Are the Organized Women Workers?*, in A HERITAGE OF HER OWN 343-66 (N. Cott & E. Pleck eds. 1979); Weiler, *supra* note 109, at 1797-801. See generally J. KENNEALLY, *WOMEN AND AMERICAN TRADE UNIONS* (1981) (discussing barriers to organizing women).

152. See Acker, *Sex Bias in Job Evaluation: A Comparable Worth Issue*, in EMPLOYMENT POLICY, *supra* note 5, at 186-96 (discussing Oregon Comparable Worth Task Force); Bielby & Baron, *Undoing Discrimination: Job Integration and Comparable Worth*, in EMPLOYMENT POLICY, *supra*

All too often, both critics and supporters have treated comparable worth as a generic concept, without regard to variations in evaluation strategies and decisionmaking contexts. In many debates, pay equity appears as the first step on the path either to socialism or to salvation. Critics, including some prominent executive branch officials, frequently present comparable worth as ludicrous or dangerous; it becomes either the " 'looniest' idea since 'Looney Tunes,' " or a serious overture towards a centrally planned economy.¹⁵³ To proponents, it is these criticisms that border on the fanciful.

A more productive dialogue requires less loose rhetoric and more contextual analysis, sensitive to the varying implications of legal, legislative, and bargaining strategies. Enough public- and private-sector initiatives are now in place to allow more comprehensive review of different job reevaluation procedures and their effects on unemployment, inflation, turnover, occupational segregation, worker satisfaction, and income distribution. Where adverse consequences of comparable worth have emerged, we need further analysis of policies that might best cushion such effects, such as job retraining, affirmative action, and expanded unemployment compensation. Our research agenda should also explore broader questions surrounding markets, merit, and money. How much consensus is there concerning the relative importance of factors that influence compensation? How closely do public attitudes about what salaries should be correspond to what salaries actually are? What evaluation procedures are most likely to seem fair to the greatest number of constituencies?

As with affirmative action, the most substantial risks of comparable worth are not the ones that conservatives invoke. The danger is less that it will prove too radical than that it will not prove radical enough. One disquieting possibility is that some narrow vision of pay equity will prevail, and that concerns about gender will displace concerns about race, class, and ethnicity. If we rest with narrow, incremental reform strategies, the result could be a modified compensation hierarchy under which the haves still come out far ahead, but with more women among them. A related concern is that short-term political objectives could obscure broader normative issues. By cloaking job evaluation with a mantle of

note 5, at 226 (advocating worker representation in setting compensation policy); Reskin, *Bringing the Men Back in: Sex Differentiation and the Devaluation of Women's Work*, 2 GENDER & SOC'Y 58, 74-75 (1988) (discussing need for women to apply political pressure to secure pay equity).

153. Lawson, *Women in State Jobs Gain in Pay Equity*, N.Y. Times, May 20, 1985, at C12, col. 2 (quoting Civil Rights Commission Chairman Clarence Pendleton, Jr.); see also Weiler, *supra* note 109, at 1729 (quoting Ronald Reagan dismissing concept of comparable worth as a "cockamamie idea"); see Levin, *supra* note 118, at 16-19; Remick & Steinberg, *Technical Possibilities and Political Realities*, in COMPARABLE WORTH AND WAGE DISCRIMINATION, *supra* note 59, at 289-90.

"scientific" objectivity, comparable worth adjustments could insulate wage hierarchies from more searching review.

A more hopeful alternative is that pay equity initiatives will focus attention on fundamental questions not only of gender equality but of social priorities. How should we reward various occupational and worker attributes, and how much differentiation across salary levels is appropriate? Are we comfortable with a society that pays more for parking attendants than for child care attendants, whatever the male/female composition of these jobs? Exploring the dynamics of comparable worth can enrich our understanding of gender and class inequities, and of the strategies best able to reduce them. Inspired by a social vision that emphasizes collective responsibility rather than individual competition, job revaluation could become a strategy for narrowing economic inequality. From that vantage, comparable worth is indeed a radical concept, but not in the sense most critics claim. It need not invite the kind of centralized planning reflected in current state-run economies, which have scarcely dispensed with wage hierarchies or ensured gender equality. Rather, pay equity initiatives could help spark a rethinking of the scope of inequality and the ideologies that sustain it.

III. EMPLOYMENT POLICY AND STRUCTURAL CHANGE

If occupational equity is to become a serious national commitment, expressed in social policy as well as in political rhetoric, we need an array of strategies that extend beyond antidiscrimination and pay equity mandates. Women's subordinate labor force status is a function of various factors, including sex-role socialization, workplace structures, and domestic constraints. Effective policy responses will require an equally varied set of public- and private-sector initiatives, and a more systematic attempt to assess the relative success of these initiatives.

Although law has a limited influence on socialization processes, it could play a more constructive role. Government-funded education, counseling, vocational, and job training programs often affect occupational choices. Yet despite formal mandates of gender equality, such programs have often served more to perpetuate than to counteract sex-role stereotypes. Vocational education remains highly gender-segregated, as do placements under government-sponsored job-training programs.¹⁵⁴ Efforts to improve women's math and science skills and to interest men in traditional female vocations have been at best sporadic. Too few financial incentives have been available to private employers for programs that challenge occupational segregation through recruitment, training, coun-

154. See *WOMEN'S WORK, MEN'S WORK*, *supra* note 29, at 108-110.

selling, and restructured promotion ladders that bridge male- and female-dominated job sectors. All of these areas require greater governmental resources and more systematic study.¹⁵⁵

Similar observations are applicable to other workplace structures. More incentives should be available for employers to offer part-time and flexible schedules. Adequate parental leaves and child care should become social priorities. Finally, and perhaps most fundamentally, employment-related issues must be conceived as part of a broader political agenda. Men's and women's positions in the market are affected by a wide network of public policies concerning education, housing, welfare, tax structure, and social services. Too many of these policies reflect outmoded assumptions about women's secondary labor force status; too few address the structural problems that still confine many women to that status. For almost a century, some feminists have sought programs designed better to accommodate public and private life: cooperative residential housing, child care and homemaker services, and integrated urban planning sensitive to the needs of single parents and dual-career couples. Current demographic trends have invested such policies with new urgency, not only to promote gender equality in this generation, but to provide decent environments for the next.

155. *See id.* at 99-112.