

## **IT'S COMPLICATED: AGE, GENDER, AND LIFETIME DISCRIMINATION AGAINST WORKING WOMEN—THE UNITED STATES AND THE U.K. AS EXAMPLES**

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*This Article considers the effect on women of a lifetime of discrimination using material from both the U.S. and the U.K. Government reports in both countries make clear that women workers suffer from multiple disadvantages during their working lives, which result in significantly poorer outcomes in old age when compared to men. Indeed, the numbers are stark. In the United States, for example, the poverty rate of women 65 years old and up is nearly double that of their male counterparts. Older women of color are especially disadvantaged. The situation in the United Kingdom is comparable. To capture the phenomenon, the Article develops a model of Lifetime Disadvantage, which considers the major factors that on average produce unequal outcomes for working women at the end of their careers. One set of factors falls under the heading "Gender-based factors." This category concerns phenomena directly connected to social or psychological aspects of gender, such as gender stereotyping and women's traditionally greater roles in family caring activities. A second set of factors is titled "Incremental disadvantage factors." While these factors are connected to gender, that connection is less overt, and the disadvantage they produce increases incrementally over time. The role of law and policy, in ameliorating or exacerbating women's disadvantages, is considered in conjunction with each factor, revealing considerable incoherence and regulatory gaps. Notably, the United Kingdom's more protective legal stance toward women in comparison with the United States fails to change outcomes appreciably for women in that country. An effective, comprehensive*

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*regulatory framework could help compensate for these disadvantages, which accumulate over a lifetime. Using the examples of the United States and the United Kingdom, however, the Article demonstrates that regulatory schemes created by “disjointed incrementalism”—in other words, policies that tinker along the margins without considering women’s full life course—are unlikely to vanquish systemic inequality on the scale of gender-based lifetime discrimination.*

Throughout their life cycles, women accumulate disadvantages that pile up at older ages. Double or triple discrimination is often amplified as women age. Women are especially vulnerable owing to their high numbers in unpaid, low-paid, part-time, frequently interrupted, or informal economy work. As a result they are less often entitled to any contributory pension benefits in their own right. Even if they are, their pensions are often significantly lower than those of men due to lower earnings and shorter contribution periods.

-International Labour Organization<sup>1</sup>

## I. Introduction

Maria Shriver, the former First Lady of California, notably dubbed the United States a “woman’s nation” when the percentage of women in the country’s labor force approached the 50 percent mark.<sup>2</sup> In a recent report, the Ms. Foundation for Women borrowed the term, noting that a majority of the U.S. population is female, and that in the older cohorts, women outnumber men by significant numbers.<sup>3</sup> Similar statistics are present in the United Kingdom (U.K.). Women make up close to half of the

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1. *Rights, Jobs and Social Security: New Visions for Older Women and Men*, INT’L LABOUR ORG. (Sept. 30, 2008), [http://www.ilo.org/gender/Events/Campaign2008-2009/WCMS\\_098840/lang-en/index.htm](http://www.ilo.org/gender/Events/Campaign2008-2009/WCMS_098840/lang-en/index.htm).

2. MARIA SHRIVER, THE SHRIVER REPORT: A WOMAN’S NATION CHANGES EVERYTHING, CTR. FOR AM. PROGRESS 6 (2009), available at [http://www.americanprogress.org/wp-content/uploads/issues/2009/10/pdf/awn/a\\_womans\\_nation.pdf](http://www.americanprogress.org/wp-content/uploads/issues/2009/10/pdf/awn/a_womans_nation.pdf) (stating that in 2010, women made up 47% of the U.S. labor force). U.S. DEP’T OF LABOR WOMEN’S BUREAU, *Women in the Labor Force in 2010* (2010), <http://www.dol.gov/wb/factsheets/Qf-laborforce-10.htm> (last visited Apr. 29, 2014).

3. MORE TO DO: THE ROAD TO EQUALITY FOR WOMEN IN THE UNITED STATES, MS. FOUND. FOR WOMEN 8 (Jan. 16, 2013) available at <http://forwomen.org/content/143/en/publications-and-resources> [hereinafter MORE TO DO]. The report notes that 50.7 percent of the U.S. population is female.

U.K. labor force.<sup>4</sup> Women and girls comprise a little more than half of the U.K. population, and in the older reaches of the population, women make up an even greater percentage.<sup>5</sup>

Despite these numbers, government reports in both countries make clear that women workers suffer from multiple disadvantages during their working lives, which result in significantly poorer outcomes in old age when compared to men.<sup>6</sup> Indeed, the numbers are stark. In the United States, for example, the poverty rate of women 65 years old and up is nearly double that of their male counterparts.<sup>7</sup> Older women of color are especially disadvantaged.

For elder women overall, the poverty rate is 11.5 percent. Older women of color are the poorest in retirement: of women over age 65, in 2010, 20.5 percent of black women, 20.9 percent of Latinas, and 15.3 percent of Native Americans lived in poverty.<sup>8</sup>

The situation in the United Kingdom is comparable. One study, analyzing gender and age group, found that women in the United Kingdom were at a greater risk of poverty throughout their

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4. See *Women in the Labour Force in the U.K.*, CATALYST (Mar. 26, 2012), available at [http://www.catalyst.org/knowledge/women-labour-force-uk#footnote1\\_69lj59o](http://www.catalyst.org/knowledge/women-labour-force-uk#footnote1_69lj59o). In 2011, the U.K. labor force was 46.4 percent female. *Id.*

5. OFFICE OF NAT'L STATISTICS, *2011 Census: Usual Resident Population by Five-Year Age Group and Sex, United Kingdom and Constituent Countries*, tbl.1 (Dec. 17, 2012), available at <http://www.ons.gov.uk/ons/publications/re-reference-tables.html?edition=tcm%3A77-270247>. In 2010, the population in the U.K. was 50.8 percent female. *Id.*

6. See, e.g. U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-12-699, RETIREMENT SECURITY: WOMEN STILL FACE CHALLENGES 1 (July 2012), available at <http://www.gao.gov/assets/600/592726.pdf> [hereinafter RETIREMENT SECURITY] (discussing factors that in comparison to men expose women to greater risk of poverty in old age including lower earnings, more frequent withdrawal from the labor force to provide care to children and/or elderly relatives; greater average lifespans; and a greater chance of living alone); SELECT COMMITTEE ON PUBLIC SERVICE & DEMOGRAPHIC CHANGE, *READY FOR AGEING?*, 2012-13, H.L. 140, at 46 (U.K.) [hereinafter *READY FOR AGEING?*] ("The higher proportion of women whose continuity of work and rate of pay have suffered due to caregiving for children and older people, leading to inequalities in pensions and income [in comparison to men].").

7. ELLEN O'BRIEN, KE BIN WU & DAVID BAER, AARP PUBLIC POL'Y INST., *OLDER AMERICANS IN POVERTY: A SNAPSHOT 12* (Apr. 2010) ("In 2008, about 12% of women age sixty-five and above lived in poverty, compared to about 7% of men."); SUDIPTO BANERJEE, *Time Trends in Poverty for Older Americans between 2001-2009*, EMP. BENEFITS RESEARCH INST. 13 (Apr. 2012) ("In 2009, the poverty rates [for men and women 65 and up] were 7 percent and 13 percent, respectively.").

8. MORE TO DO, *supra* note 3, at 13.

working lives.<sup>9</sup> That study revealed a significant statistical difference in poverty risk between men and women under the age of 50, which decreased for the 50–64 age group, and then increased dramatically for those aged 65 and over, resulting in a poverty gap that was more than twice the average for the whole population in the United Kingdom.<sup>10</sup>

More recent data strikes the same themes. In 2010, the male/female poverty gap for the United Kingdom overall was 1.4 percent, with over 16 percent of men and almost 18 percent of women being at risk of poverty.<sup>11</sup> For the 65 and over population, the male/female poverty gap was almost 7 percent, with over 17 percent of older men and 24.5 percent of older women being at risk of poverty.<sup>12</sup> Thus, the male/female poverty gap for older people in the United Kingdom is almost five times the average of the whole U.K. population. This gap has a monetary dimension. A study by Prudential found that in the United Kingdom in 2013, women's average annual retirement income was expected "to be more than a third (36 percent) lower than men's."<sup>13</sup>

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9. Ageing and Employment: Identification of Good Practice to Increase Job Opportunities and Maintain Older Workers in Employment, Warwick Inst. for Emp't Research 51 (2006), available at [www.ec.europa.eu/social/BlobServlet?docId=214&langId=en](http://www.ec.europa.eu/social/BlobServlet?docId=214&langId=en) (citing Ian Dennis & Anne-Catherine Guio, *Poverty and Social Exclusion in the EU*, Statistics in Focus, No. 16, Eurostat (2004)). Dennis and Guio's dataset is from 2001 and thus their conclusions should be viewed as historical rather than perfectly reflective of the present time.

10. See *id.* at 51 tbl.4.8. More specifically, at the time of the study, the male/female poverty gap for the entire U.K. population was 4 percent. The male/female poverty gap for those 65 and up was 9 percent. Thus, 19 percent of men 65 and over and 28 percent of women of that age group were at risk of poverty. See *id.*

11. OFFICE FOR NAT'L STATISTICS, *Comparison of UK and EU At-Risk-of-Poverty Rates 2005-2010* 10 (June 7, 2012), available at [http://www.ons.gov.uk/ons/dcp/171776\\_266844.pdf](http://www.ons.gov.uk/ons/dcp/171776_266844.pdf). The at-risk-of-poverty rate is "[t]he share of people with an equivalised disposable income . . . below the at-risk-of-poverty threshold . . . set at 60 percent of the national median equivalised disposable income after social transfers." *Id.* at 15.

12. See *Pension Adequacy in the European Union 2010–2050*, EUROPEAN COMM'N 386 (May 2012), available at <http://bookshop.europa.eu/en/pension-adequacy-in-the-european-union-2010-2050-pbKE3012757/>.

13. See PRUDENTIAL, *Mind the Growing Gender Gap—Women Expect to Retire on £6,500 Less than Men* (Mar. 27, 2013), available at [http://www.pru.co.uk/pdf/presscentre/mind\\_the\\_growing\\_gender\\_gap.pdf](http://www.pru.co.uk/pdf/presscentre/mind_the_growing_gender_gap.pdf).

TABLE 1: UK POPULATION AT RISK OF POVERTY BY GENDER AND  
OLDER AGE – 2010 STATISTICS

	Percentage of Population at Risk of Poverty		
	Men %	Women %	Difference %
Population Overall	16.4	17.8	1.4
Age 65 and over	17.6	24.5	6.9

Statistics from U.K. Office of National Statistics and European Commission

An effective, comprehensive regulatory framework could help compensate for these disadvantages, which, as the excerpt at the start of this article indicates, accumulate over a lifetime. Using the examples of the United Kingdom and the United States, however, we demonstrate that regulatory schemes created by “disjointed incrementalism” are unlikely to vanquish systemic inequality on the scale of gender-based lifetime discrimination.<sup>14</sup> Disjointed incrementalism is policy-making characterized by:

- considering just “a few somewhat familiar policy alternatives”;<sup>15</sup>
- commingling policy goals and other values with empirical analysis;<sup>16</sup>
- emphasizing the “ills to be remedied [rather] than [the] positive goals to be sought”;<sup>17</sup>
- using the concept of trial by error and readjustment;<sup>18</sup>
- exploring “only some, not all, of the . . . possible consequences of [an] . . . alternative”; and
- apportioning the “analytical [policymaking] work to many (partisan) participants” in a fragmented fashion.<sup>19</sup>

In short, policymaking that fails to articulate a singular, overarching goal, which takes small rather than grand steps, produces decisions without coordination, and that is preoccupied with existing

14. See e.g. Sol Encel, *Looking Forward to Working Longer in Australia*, AGING LABOUR FORCES: PROMISES AND PROSPECTS 22, 37 (Philip Taylor ed., 2008) (arguing that as the labor force ages, governments will need “to take more concerted action” to “retain and retrain older workers . . . rather than the ‘disjointed incrementalism’” that generally characterizes policymaking in the area).

15. Charles E. Lindblom, *Still Muddling, Not Yet Through*, 39 PUB. ADMIN. REV. 517 (1979).

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

resources<sup>20</sup> will lack the remedial breadth and depth necessary to produce fair outcomes for working women in retirement. Indeed, recognizing the limitations of statutory and policy tinkering can be an important step to developing a whole life approach to women workers that will bring greater equality in old age.<sup>21</sup>

The first step, however, is to frame this social ill—lifetime discrimination—in a way that recognizes its systemic, cumulative, and sweeping nature. To that end, this Article lays out a model of Lifetime Disadvantage, which considers the major factors that on average produce unequal outcomes for working women at the end of their careers. One set of factors falls under the heading “Gender-based factors.” This category concerns phenomena directly connected to social or psychological aspects of gender, such as gender stereotyping and women’s traditionally greater roles in family caring activities. A second set of factors are titled “Incremental disadvantage factors.” While these factors are connected to gender, that connection is less overt, and the disadvantage they produce increases incrementally over time. Factors in this second category include non-standard working (part-time work, temporary work, etc.) and career interruptions. Figure 1 illustrates the model:

FIGURE 1: MODEL OF LIFETIME DISADVANTAGE

<b>Gender-based factors</b>	<b>Incremental disadvantage factors</b>
Education and training	Pay inequality
Stereotyping	Occupational segregation
Multiple discrimination	Non-Standard working
Caregiving roles	Career breaks
Career outcomes	Retirement and pensions

Arguing for equal opportunity is necessary but not sufficient to tackle the lifetime disadvantages suffered by women compared to men. The solution inevitably requires considering coordinated policies that result in equality of outcomes. Thus, for example, it is

20. See generally R.K. SAPRU, PUBLIC POLICY: ART AND CRAFT OF POLICY ANALYSIS 64 (Asoke K. Ghosh ed., PHI Learning Private Limited 2d ed. 2011) (describing various aspects of disjointed incrementalism).

21. See generally Martha Albertson Fineman, “Elderly” as Vulnerable: Rethinking the Nature of Individual and Societal Responsibility, 20 ELDER L.J. 72 (2012) (arguing that a just and responsive state is one that addresses human vulnerability across the life-course of its inhabitants).

not enough to create equal educational opportunity in science, technology, engineering, and math (STEM) subjects in order to increase the number of female engineers who will thrive in their careers.<sup>22</sup> Nor will it do to guarantee equal opportunity at work more generally in order to increase the proportion of women directors on corporate boards.<sup>23</sup> Achieving equality in outcomes requires a more interventionist and less incremental, piecemeal approach to reform.

Our discussion proceeds as follows. Part II will review the gender-based factors that on average produce lifetime disadvantage for women. Part III discusses the incremental disadvantage factors, their cumulative nature, and their relationship to women's working lives. The role of law and policy, in ameliorating or exacerbating women's disadvantages, is considered in conjunction with each factor described in Parts II and III, revealing considerable incoherence and regulatory gaps. Notably, the United Kingdom's more protective stance toward women in comparison to that of the United States fails to change outcomes appreciably for women in that country. The Article concludes with Part IV, which argues that attempts in our respective countries to address the problem of lifetime discrimination must be comprehensive and coordinated. If one hopes to produce more equal outcomes for working women in old age, it is necessary to take the long view rather than to rely on policy and law-making by disjointed incrementalism.

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22. Indeed, there are a number of factors that are thought to account for women educated in STEM fields opting out of their chosen professions including "lock step career progression," which conflicts with many women's childbearing years, difficulty with hiring and promotion, unyielding and demanding hours, and frustration with their STEM careers. Catherine Mavriplis, et al., *Mind the Gap: Women in STEM Career Breaks*, 5 J. TECH. MGMT. & INNOVATION 140, 140-43 (2010). Increasing the numbers of women who are educated in STEM fields falls short of what is necessary to address the factors that keep many women from thriving in STEM careers. See also Eileen Pollack, *Can You Spot the Real Outlier?*, N.Y. TIMES MAGAZINE, Oct. 6, 2013, at 31, 38 (discussing a hiring study that found gender bias in the attitudes of university faculty members in the fields of physics, chemistry, and biology at six research universities in the United States).

23. See *infra* notes 405-408 and 422-426 and accompanying text (detailing the dismally low representation of women on corporate boards in the United States and the United Kingdom despite decades-old legal guarantees of equal employment opportunity based on sex).

## II. Gender-based Factors

### A. Education

A society that aims to equalize economic outcomes for men and women during and after the end of their working lives must begin by providing equal access to education. Also relevant to evaluating that society are the levels of educational attainment for men and women and educational performance differentials—for example in reading and math proficiency. Indeed, the World Economic Forum’s annual assessment on national progress toward eliminating gender disparities deems “educational attainment” one of four pillars essential to measuring gender equality.<sup>24</sup> Within that category, *The Global Gender Gap Report 2012* presents a number of statistics for each of the 135 countries, including the ratio of female literacy over male literacy, and female enrollment in primary, secondary, and tertiary education over male enrollment.<sup>25</sup> The 2012 report ranked the United States as first in educational equality, a spot it has held since 2008.<sup>26</sup> At number 27, the United Kingdom slipped from its previous shared rank of number one,<sup>27</sup> but it is widely considered to have achieved gender parity for years.<sup>28</sup> While access, at least on the surface, appears a problem that has been solved in our countries, education remains an area where girls and women have made significant progress yet challenges remain.

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24. See RICARDO HAUSMANN, LAURA D. TYSON, & SAADIA ZAHIDID, WORLD ECON. FORUM, *THE GLOBAL GENDER GAP REPORT 4* (2012), available at <http://reports.weforum.org/global-gender-gap-report-2012/>. The other three fundamental categories are economic participation and opportunity, health and survival, and political empowerment. *Id.*

25. *Id.* at 5.

26. *Id.* at 351. The United States is one of nine countries that have eliminated the gender gap in education. See *id.* at 17. Overall, the United States is ranked 22 for gender equality, a disappointing showing, and a drop from its 2011 rank of 17. *Id.* at 351.

27. *Id.* at 349. The overall rank for the United Kingdom was 18, a decline from its 2011 rank of 16. *Id.*

28. MADELEINE ARNOT & ALISON PHIPPS, UNESCO, *GENDER AND EDUCATION IN THE UNITED KINGDOM 1* (2004), available at <http://unesdoc.unesco.org/images/0014/001467/146735e.pdf>.

## 1. GENDER-RELATED TRENDS IN EDUCATION

The Organisation for Economic Cooperation and Development (OECD) in a 2012 report offers a nuanced view of gender-related trends in education, trends that are evident in the United States and the United Kingdom. Interestingly, in most OECD countries the career expectations of 15-year-old girls exceed those of their male counterparts.<sup>29</sup> Girls in OECD countries on average “are 11 percentage points more likely than boys to expect to work in high-status careers such as legislators, senior officials, managers, and professionals.”<sup>30</sup> In the United Kingdom, 15-year-old girls are 10.4 percent more likely than boys to have high status career ambitions, while the percentage differential in the United States is even greater: 14.2 percent.<sup>31</sup> Thus, gender disparities in ambition are apparent, and they favor girls.

Yet girls and boys in OECD countries anticipate forging careers in very different fields.<sup>32</sup> For example, close to four times as many male as female 15-year-olds foresee a career in engineering or computing.<sup>33</sup> Across OECD countries, 18 percent of boys aspire to be engineers or work in computing while less than 5 percent of girls express those career preferences.<sup>34</sup> In the United Kingdom, 12.6 percent of boys but only 2.1 percent of girls express interest in pursuing engineering or computing as a field.<sup>35</sup> Boys in the United Kingdom are therefore six times more likely to anticipate a career in engineering or computing. In the United States, the odds are the same: boys are six times more likely than girls to see themselves in engineering or computing careers. While 16.4 percent of American boys envision a career in engineering or computers, only 2.7 percent of girls express such interest.<sup>36</sup>

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29. ORG. FOR ECON. COOPERATION & DEV., EDUCATION AT A GLANCE: HIGHLIGHTS 86 (2012) available at <http://www.oecd.org/edu/highlights.pdf> (“In almost all countries, girls have more ambitious professional aspirations than boys.”).

30. *Id.*

31. *Id.* at 87 fig.5.15.

32. *Id.* at 86.

33. *Id.* at 87. Those statistics include the field of architecture. *Id.* at 86–87 fig.5.15.

34. *Id.* at 86.

35. *Id.* at 87.

36. *Id.*

In contrast, girls see themselves employed in health services much more frequently than boys, even when nursing and midwifery, traditional female occupations, are excluded.<sup>37</sup> Thus, in OECD countries, almost 16 percent of girls and only 7 percent of boys anticipate a career in health services, a field that combines science “with a caring component.”<sup>38</sup> In the United Kingdom, almost 13 percent of girls and only about 8 percent of boys desire a career in health services.<sup>39</sup> The gender differential is also significant in the United States: almost 28 percent of girls and only 12.3 percent of boys expect a career in health services, a difference of 15.6 percent.<sup>40</sup>

TABLE 2: PERCENTAGE OF 15-YEAR OLD BOYS AND GIRLS WHO PLAN A CAREER IN ENGINEERING AND COMPUTING OR HEALTH SERVICES<sup>41</sup>

	Engineering and Computing			Health Services		
	Boys %	Girls %	Difference %	Boys %	Girls %	Difference %
OECD Average	18.2	4.6	13.6	7.1	15.7	8.6
United Kingdom	12.6	2.1	10.5	7.8	12.9	5.1
United States	16.4	2.7	13.7	12.3	27.9	15.6

In terms of educational proficiency, girls in the United States are more likely than boys to be proficient in reading, but girls are still a little less likely than boys to be proficient in math.<sup>42</sup> Gender differences are also evident in educational attainment, and it is here that in the United States, women’s advances over the last four decades have been far more significant than those of men.<sup>43</sup> Women in the United States earn approximately “57 percent of all college degrees” and comprise “57 percent of . . . undergraduate enrollment.”<sup>44</sup> Moreover, women’s enrollment advantage at the undergraduate level

37. *Id.* at 86.

38. *Id.* at 87 fig.5.16.

39. *Id.*

40. *Id.*

41. *Id.* at 82–83 tbls.A4.2 & A4.3.

42. U.S. DEPT. OF COMMERCE ECON. & STATISTIC & EXEC. OFFICE OF THE PRESIDENT OFFICE OF MGMT & BUDGET, WOMEN IN AMERICA: INDICATORS OF SOCIAL AND ECONOMIC WELL-BEING 20 (2011), available at [http://www.whitehouse.gov/sites/default/files/rss\\_viewer/Women\\_in\\_America.pdf](http://www.whitehouse.gov/sites/default/files/rss_viewer/Women_in_America.pdf) [hereinafter WOMEN IN AMERICA].

43. *Id.* at 19.

44. *Id.* at 21.

is evident across all racial and ethnic groups.<sup>45</sup> More women than men also enroll in graduate school programs, and this too holds true regarding all race and ethnic groups.<sup>46</sup>

Notwithstanding these undeniable gains, U.S. women receive far fewer degrees in science and technology than their male counterparts; in computer science and engineering, for example, women earn less than 20 percent of college degrees, and women's share in those fields declined a bit between 1998 and 2008.<sup>47</sup> U.S. women do earn 41 percent of the Ph.Ds in Science, Technology, Engineering, and Math (STEM) fields.<sup>48</sup> But their representation on tenure track university faculty in STEM fields is 28 percent.<sup>49</sup> Additionally, less than 25 percent of STEM jobs overall are held by women.<sup>50</sup> The underrepresentation of women in these fields is of concern since "women with STEM jobs earn . . . 33 percent more than comparable women in non-STEM jobs . . . [and] the gender wage gap is smaller in STEM jobs than" in other fields.<sup>51</sup> The causes of women's underrepresentation in STEM degree programs and jobs are not well understood. One report opines that:

. . . STEM career paths may be less accommodating to people cycling in and out of the workforce to raise a family—or it may be because there are relatively few female STEM role models. Perhaps strong gender stereotypes discourage women from pursuing STEM education and STEM jobs.<sup>52</sup>

Gender-based differentials in STEM education and jobs also appear in the United Kingdom, though there has been progress in girls' enrollment and performance in STEM subjects in secondary education. In 2012, almost equal percentages of girls and boys sat for

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45. *Id.*

46. *Id.* at 22.

47. *Id.* at 23.

48. EXEC. OFFICE OF THE PRESIDENT, WOMEN AND GIRLS IN SCIENCE, TECHNOLOGY, ENGINEERING, AND MATH (Nov. 30, 2011), available at <http://www.whitehouse.gov/sites/default/files/microsites/ostp/ostp-women-girls-stem-november2011.pdf> [hereinafter WOMEN AND GIRLS].

49. *Id.*

50. DAVID BEEDE ET AL., U.S. DEP'T OF COMMERCE, WOMEN IN STEM: A GENDER GAP TO INNOVATION (2011), available at <http://www.esa.doc.gov/sites/default/files/reports/documents/womeninstemagaptoinnovation8311.pdf>.

51. *Id.*

52. *Id.* at 8. See also Ellen Ullman, *How to be a 'Woman Programmer,'* N.Y. TIMES, May 19, 2013 at SR5 (providing an anecdotal account describing gender bias in the technology field written by a former software engineer).

the General Certificate of Secondary Education (GCSE) exams<sup>53</sup> in Science, Math, Biology, Statistics, Physics, and Chemistry.<sup>54</sup> Moreover, girls scored equal or higher combined grades than boys in all GCSE STEM subjects except Mathematics,<sup>55</sup> where boys combined scores exceeded those of girls by 1 percent.<sup>56</sup> However, a gender-stratified picture appears at A Levels,<sup>57</sup> subjects taken at sixth form colleges, which are the equivalent of the American junior and senior year of high school.<sup>57</sup> For example, in 2012, only 21 percent of students enrolled in A Level Physics were female: girls made up only 8 percent of the students enrolled in A Level Computing, comprised only 40 percent of students enrolled in A Level Mathematics, and only 30 percent of students in Further Mathematics.<sup>58</sup>

As in the United States, women in the United Kingdom receive far fewer undergraduate degrees in many STEM subjects. Women earn a mere 15 percent of undergraduate degrees in Engineering and Technology, 18 percent of undergraduate degrees in Computer Science, and 28 percent of the degrees in Architecture, Building, and Planning.<sup>59</sup> At the post-graduate level, what in the United States is called graduate study, there is a decrease in gender segregation in some STEM fields yet male and female dominated areas remain. For example, in 2011, women earned 20 percent of post-graduate degrees in Engineering and Technology, 20 percent of post-graduate degrees in Computer Science, and 35 percent of post-graduate degrees in Mathematical Sciences.<sup>60</sup> In contrast, women heavily dominated the post-graduate degrees earned in subjects allied to Medicine,

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53. See generally FULBRIGHT COMM'N, *U.K. School System*, <http://www.fulbright.org.uk/study-in-the-uk/k-12-study/uk-school-system> (last visited Apr. 30, 2014). General Certificate of Secondary Education exams are national standards examinations administered at the end of year 11, the equivalent of tenth grade in the United States. Students choose from almost 50 exams, and university-bound students will typically sit for at least 5 such exams. *Id.*

54. Sue Botcherby & Lisa Buckner, WISE, *Women in Science, Technology, Engineering and Mathematics: from Classroom to Boardroom—UK Statistics 2012 3* (2012), available at [http://www.wisecampaign.org.uk/files/useruploads/files/wise\\_stats\\_document\\_final.pdf](http://www.wisecampaign.org.uk/files/useruploads/files/wise_stats_document_final.pdf).

55. *Id.* at 8.

56. *Id.* at 9.

57. See FULBRIGHT COMM'N, *supra* note 53.

58. BOTCHERBY & BUCKNER, *supra* note 54, at 9.

59. *Id.* at 13.

60. *Id.* at 14.

Veterinary Science, Biological Sciences, and Dentistry.<sup>61</sup> This segregation translates into a diminished opportunity for gender integration of STEM jobs. Only 13 percent of those working in STEM occupations are female, including health occupations.<sup>62</sup>

## 2. EFFORTS IN EDUCATION LAW AND POLICY

Both U.K. and U.S. law and policy seek to promote educational equality. Legal regulation in the area is long-standing, but the process by which young people make life choices is complex. The decisions of girls and young women regarding education and career are influenced by “cultural messages, peer and parental pressures, people they meet from the world of work and their individual self-determination.”<sup>63</sup> Thus, we may see what look like robust legal protections on the books and yet find differences in the way male and female students understand their career options.

In the United States, Title IX of the Educational Amendments of 1972 (Title IX) provides that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any educational program or activity receiving Federal financial assistance.”<sup>64</sup> The Office of Civil Rights (OCR) is the federal agency responsible for enforcing Title IX. OCR, under the Obama administration, has issued policy guidance documents on gender-based “bullying, sexual harassment, sexual violence, and equity in athletics programs.”<sup>65</sup> Part of OCR’s enforcement efforts includes ensuring equal access to educational opportunities. In this area, OCR has focused attention on the underrepresentation of girls in rigorous math and science courses, and the underrepresentation of women among those earning “bachelor’s degrees in computer and information sciences.”<sup>66</sup> Yet gender-based discrimination in education can be subtle and difficult

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61. *Id.*

62. *Id.* at 16.

63. WOMEN’S BUS. COUNCIL, MAXIMISING WOMEN’S CONTRIBUTION TO FUTURE ECONOMIC GROWTH 11 (2013), available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/204751/DCMS\\_WBC\\_Full\\_Report\\_v1.0.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/204751/DCMS_WBC_Full_Report_v1.0.pdf).

64. 20 U.S.C. § 1681 (2012).

65. U.S. DEP’T OF EDUC., OFFICE OF CIVIL RIGHTS, TITLE IX: ENFORCEMENT HIGHLIGHTS 2 (June 2012), available at <http://www2.ed.gov/documents/press-releases/title-ix-enforcement.pdf>.

66. *Id.* at 4.

to root out, and many teachers do not realize that their actions—for example, in dividing children in the primary grades “by gender for all kinds of strange purposes, including eating lunch”—violate Title IX and send the message that gender is relevant in educational endeavors.<sup>67</sup>

As a policy matter, President Obama has made encouraging girls to study STEM subjects a priority. States are encouraged to broaden girls’ participation by receiving competitive preference for federal education funds if they embrace efforts to identify and remove barriers discouraging girls from pursuing STEM careers.<sup>68</sup> The President also launched a campaign, Educate to Innovate, which, *inter alia*, promotes STEM education for underrepresented students, including girls.<sup>69</sup> And agencies across the federal government have programs aimed at increasing the number of girls and women in STEM education and careers.<sup>70</sup>

In the United Kingdom, as recently as 1980, less than two-fifths of university degrees were awarded to women.<sup>71</sup> This trend has now been reversed partly as a result of U.K. government efforts to increase participation and widen access to formal education and training among young people.<sup>72</sup> Girls now outperform boys at GCSE, A levels and degree standards, yet there are still, as noted above, significant gender differences in the choice of subjects studied at university and the choice of subsequent career.<sup>73</sup>

Part 6 of the Equality Act 2010 includes provisions related to the field of education.<sup>74</sup> Chapter 1 of this Part concerns schools and

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67. See DAVID SADKER, MYRA SADKER, & KAREN R. ZITTELMAN, *STILL FAILING AT FAIRNESS: HOW GENDER BIAS CHEATS GIRLS AND BOYS IN SCHOOL AND WHAT WE CAN DO ABOUT IT* 312 (2009).

68. *WOMEN AND GIRLS*, *supra* note 48, at 1.

69. *Id.*

70. *Id.* at 2.

71. JOE HICKS & GRAHAME ALLEN, *A CENTURY OF CHANGE: TRENDS IN UK STATISTICS SINCE 1900*, Library Research Paper, 1999, H.C. 99/111, at 11 (U.K.), available at <http://www.parliament.uk/briefing-papers/RP99-111>.

72. EQUALITY & HUMAN RIGHTS COMM’N, *HOW FAIR IS BRITAIN? EQUALITY, HUMAN RIGHTS AND GOOD RELATIONS IN 2010* 301 (2011), available at [http://www.equalityhumanrights.com/uploaded\\_files/triennial\\_review/how\\_fair\\_is\\_britain\\_-\\_complete\\_report.pdf](http://www.equalityhumanrights.com/uploaded_files/triennial_review/how_fair_is_britain_-_complete_report.pdf) [hereinafter *HOW FAIR IS BRITAIN?*].

73. *Id.* at 339–40.

74. Equality Act, 2010, part 6, c. 1–2, available at <http://www.legislation.gov.uk/ukpga/2010/15/part/6>.

chapter 2 with further and higher education.<sup>75</sup> Schools must not, in relation to pupils, directly or indirectly discriminate against pupils in their admissions processes, in the way they provide education, or in the way they afford access to an education benefit, facility or service.<sup>76</sup> Yet these provisions have not eradicated gender stratification in subject or career choice. The government sees providing independent and impartial career advice as integral to the solution.<sup>77</sup> In its periodic report to the United Nations as a signatory to the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW), the U.K. government showed that it recognized the problem and was pursuing solutions:

The UK government supports schools and other partners to tackle gender stereotyping and segregation in education and training through guidance in relation to subject choices and careers. This has included statutory guidance for schools on delivering impartial careers education and lesson plans for teachers on equal opportunities and stereotyping.

The United Kingdom has also, in order to encourage girls to study STEM subjects, created a STEM Ambassadors Programme, which partners with scientists and engineers who visit classrooms and encourage enthusiasm for STEM subjects.<sup>79</sup> Of the STEM ambassador corps, 41 percent are female.

Whether and to what extent these new U.K. and U.S. policy efforts will bear fruit is an open question. This is especially so since so much more than benignly promoting STEM education is necessary. For example, at a recent gathering at Yale University of over 80 students interested in science and gender, students conveyed stories that make clear that gender bias is alive and well in science classes and beyond. As reported in the New York Times:

One young woman had been disconcerted to find herself one of only three girls in her AP physics course in high school, and even more so when the other two dropped out. Another student was the only girl in her AP physics class from the start. Her

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75. *Id.*

76. *Id.* at §§ 85(1) & 85(2).

77. Education Act, 2011, part 4, C. 21 §§ 28–29, available at <http://www.legislation.gov.uk/ukpga/2011/21/contents>.

78. U.K., UNITED KINGDOM'S SEVENTH PERIODIC REPORT, CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN (CEDAW) 14, ¶ 42 (2011), available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/85456/7th-cedaw-report.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/85456/7th-cedaw-report.pdf).

79. *Id.* at ¶¶ 46 & 47.

classmates teased her mercilessly: “You’re a girl. Girls can’t do physics.” She expected the teacher to put an end to the teasing but he didn’t. In one physics class, [reported another student,] the teacher announced that the boys would be graded on the “boy curve,” while the one girl would be graded on the “girl curve”; when asked why, the teacher explained that he couldn’t reasonably expect a girl to compete in physics on equal terms with boys. [As for their experiences at university,] “The boys in my group don’t take anything I say seriously,” one astrophysics major complained. Another said that she disliked when she and her sister went out to a club and her sister introduced her as an astrophysics major [because men she meets] . . . turn away. Yet another [said that] . . . even at Yale the men didn’t want to date a physics major.

Moreover, one must note that the policy efforts detailed above essentially accept the status quo: male-dominated occupations are more handsomely compensated than those attracting women. As societies, we do not attempt to increase the compensation of female dominated fields; instead, the Obama administration and the U.K. government direct their efforts into luring women into the STEM fields.

## B. Stereotyping

The second of the gender-based factors in our model of lifetime disadvantage is stereotyping. People understand the world through a process of categorization.<sup>81</sup> Cognitive psychologists note that we naturally classify things to simplify the diverse data we take in.<sup>82</sup> For example, upon encountering a stranger, we cognitively place the stranger in a category, which aims to help us predict how the unknown individual might act.<sup>83</sup> Certain characteristics, in particular sex, race, and age, are salient or highly noticeable; we categorize people on those bases automatically.<sup>84</sup> Stereotypes are beliefs about

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80. Pollack, *supra* note 22, at 33.

81. See generally Linda Hamilton Krieger, *The Content of Our Categories: A Cognitive Bias Approach to Discrimination and Equal Employment Opportunity*, 47 STAN. L. REV. 1161 (1995).

82. See Marcia L. McCormick, *Decoupling Employment*, 16 LEWIS & CLARK L. REV. 499, 514 (2012).

83. See *id.*

84. BRUCE E. BLAINE, UNDERSTANDING THE PSYCHOLOGY OF DIVERSITY 23–24 (2007).

the individuals we place in categories.<sup>85</sup> These beliefs are often, though not always, negative and overgeneralized.<sup>86</sup>

**1. GENDER STEREOTYPES AFFECTING GIRLS AND WOMEN, AND AGEIST STEREOTYPES AFFECTING OLDER PERSONS**

Human beings are immersed in environments often rife with gender stereotypes, including the classroom<sup>87</sup> and the workplace.<sup>88</sup> In the classroom, for example, stereotyped beliefs about the differing characteristics of girls and boys lead to differential treatment of the members of those groups.<sup>89</sup> Research in many countries reveals the same patterns: boys are the recipients of much more teacher-student interaction; boys receive teacher praise more frequently than girls; teachers pose more questions to boys than girls; when boys offer a classroom contribution,<sup>90</sup> it is more frequently accepted than the contributions of girls. Gender socialization about appropriate behavioral norms is communicated by teachers through this “hidden curriculum,” a curriculum that rewards girls for quiet, compliant behavior<sup>91</sup> but that ultimately may undermine their confidence, “particularly in areas [such as science and math] traditionally considered to be a male domain.”<sup>92</sup>

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85. *See id.* at 30.

86. *See id.* at 33.

87. *See* MAUREEN BOHAN, STEERING COMM. FOR EQUAL. BETWEEN WOMEN & MEN, COUNCIL OF EUR., STUDY ON “COMBATING GENDER STEREOTYPES IN EDUCATION” 12 (Dec. 2, 2011), *available at* [http://www.coe.int/t/dghl/standard\\_setting/equality/03themes/gender-mainstreaming/CDEG\\_2011\\_16\\_GS\\_education\\_en.pdf](http://www.coe.int/t/dghl/standard_setting/equality/03themes/gender-mainstreaming/CDEG_2011_16_GS_education_en.pdf) (“The values, practices, structures, organisation, and teaching in many schools throughout Europe operate according to traditional stereotyped beliefs. In studies where principals/head teachers and class teachers were interviewed, many held stereotyped beliefs about the abilities and future roles of boys and girls [and] men and women.”); *see also* SADKER ET AL., *supra* note 67, at 3 (noting with regard to U.S. classrooms “[w]ithout training, we have a new generation of teachers and students who are repeating many of the gender stereotyped lessons of those who preceded them.”).

88. *See, e.g.*, Katherine T. Bartlett, *Making Good on Good Intentions: The Critical Role of Motivation in Reducing Implicit Workplace Discrimination*, 95 VA. L. REV. 1893, 1895–1904 (2009).

89. *See* BOHAN, *supra* note 87.

90. *Id.* at 13.

91. *See* Nancy Chi Cantalupo, *Comparing Single-Sex and Reformed Coeducation: A Constitutional Analysis*, 49 SAN DIEGO L. REV. 725, 753 (2012).

92. BOHAN, *supra* note 87, at 13.

Stereotyping is also pervasive in the workplace, and can result in discriminatory conduct.<sup>93</sup> Gender stereotypes, which are “agreed-upon ways of thinking about men and women,”<sup>94</sup> connect characteristics or traits to the categories of male and female.<sup>95</sup> These stereotypes may be descriptive or prescriptive.<sup>96</sup> Descriptive stereotypes contain expectations about group member traits, are shared broadly throughout society, and are acquired when we are young. They often act as lenses through which individual performance is evaluated, and are “nonconscious and automatic.”<sup>97</sup> Masculine traits include those that are “agentic,” such as “competence, ambition, leadership abilities, independence”<sup>98</sup> as well as traits viewed more negatively like arrogance, egotism, and greed.<sup>99</sup> Traits associated with femininity include those that are “communal,” and include “warmth, nurturance, kindness, [and] empathy,”<sup>100</sup> and, less flatteringly, gullibility, spinelessness, and servility.<sup>101</sup> Problematically, the traits associated with men are more highly valued than those corresponding to women.<sup>102</sup>

Prescriptive gender stereotypes embody beliefs about what category members “ought to or should be like,” and include subtypes of women, generally corresponding to those who comply or fail to comply with gender prescriptions.<sup>103</sup> As two prominent social psychologists note:

[P]opularly perceived subtypes of women include clusters who are loyal, dependable helpmates (housewives, secretaries) versus those who fail to conform to traditional roles (feminists, lesbians, female professionals).<sup>104</sup>

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93. Bartlett, *supra* note 88, at 1895-96.

94. BLAINE, *supra* note 84, at 102.

95. PETER GLICK & SUSAN T. FISKE, SEX DISCRIMINATION: THE PSYCHOLOGICAL APPROACH, *in* SEX DISCRIMINATION IN THE WORKPLACE 155, 159 (Faye J. Crosby, et al. eds., 2007).

96. *Id.*

97. *Id.* at 159-60.

98. *Id.* at 161.

99. See BLAINE, *supra* note 84, at 103.

100. GLICK & FISKE, *supra* note 95, at 162.

101. See BLAINE, *supra* note 84, at 103.

102. *Id.*

103. GLICK & FISKE, *supra* note 95, at 160.

104. *Id.*

In contrast with descriptive stereotypes, prescriptive stereotypes often give rise to discrimination that is overt, intentional, and hostile, and is triggered by non-conformity to traditional subtypes.<sup>105</sup>

Jobs themselves are connected to gender-typed images; these images specify whether the job requires agentic (masculine) or communal (feminine) traits, and whether men or women typically hold the job.<sup>106</sup> These images influence the perceived “fit” between job or promotion candidates and the position in question.<sup>107</sup>

Additionally, both male and female decision-makers may shift the criteria they feel is necessary for a job or promotion when confronted with male and female candidates depending on whether the job is gender-typed as male- or female dominated.<sup>108</sup> If the job is typed male, they will stress the need for the attributes of male applicants. For example, in one experiment, participants were presented with two candidates—a well-educated woman and a street-wise man—for the position of police chief, a stereotypical male job.<sup>109</sup> In evaluating the candidates, the participants stressed the need for the chief to be street-wise rather than highly educated and chose the man. When the situation was reversed, and study participants were presented with a street-wise woman and a well-educated man for the same job, the criteria shifted. The participants found the need for education as a more important attribute of a police chief.<sup>110</sup>

Older age is also associated with negative stereotyping, although much less research has been done on age discrimination compared with race and sex discrimination.<sup>111</sup> Age-based constructs often operate unconsciously and are triggered automatically;<sup>112</sup> in other words, they operate like other forms of implicit bias and may affect conscious conduct, feelings, and thought.<sup>113</sup> Schmidt and

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105. *Id.* at 160–61.

106. *Id.* at 166–67.

107. *Id.*

108. *Id.* at 168–69.

109. *Id.*

110. *Id.*

111. See Susan Bisom-Rapp & Malcolm Sargeant, *Diverging Doctrine, Converging Outcomes: Evaluating Age Discrimination Law in the United Kingdom and the United States*, 44 LOY. U. CHI. L.J. 717, 727 (2013).

112. See Todd D. Nelson, *Ageism: The Strange Case of Prejudice Against the Older You*, in *DISABILITY AND AGING DISCRIMINATION: PERSPECTIVES IN LAW AND PSYCHOLOGY* 37, 42 (Richard L. Wiener & Steven L. Willborn eds., 2011).

113. *Id.* at 42–43.

Boland's seminal study of media depictions of older people identified multiple levels of stereotyping: general characteristics; positive and negative subgroups; and subgroup individual characteristics.<sup>114</sup> Most of the general traits were physical, such as gray hair, baldness, deafness, and bad eyesight.<sup>115</sup> The study also found 12 older people subgroups—eight positive and four negative.<sup>116</sup> A later replication of the study was performed, and combined with Schmidt and Boland's classic study, seven subgroups of older people emerge. Those subgroups and the individual traits connected to them are: (1) despondent (people who are sad and lonely); (2) severely impaired (those who are senile and feeble); (3) shrew or curmudgeon (people who are stubborn, nosy, complaining); (4) recluse (those who are timid, quiet, set in their ways); (5) John Wayne conservative (people who are patriotic, rich, religious, conservative); (6) perfect grandparent (those who are kind, family-oriented, wise); and (7) golden ager (persons who are independent, healthy, productive).<sup>117</sup>

One meta-analysis of older worker stereotypes discerned three main themes that may operate to the detriment of older people.<sup>118</sup> Older workers are seen as less competent and motivated, difficult to train, and more expensive due to high salaries and high medical benefit costs.<sup>119</sup> Other studies echo these findings. Managers in one study, for example, were found less willing to provide training to older workers, and less likely to promote them to jobs viewed as requiring creativity and innovation.<sup>120</sup> In terms of the impact of implicit bias, studies by industrial psychologists and gerontologists reveal that when rating job applicants both managers and coworkers rely on negative age-based stereotypes.<sup>121</sup> Whether biased ratings

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114. Daniel F. Schmidt & Susan Boland, *Structure of Perceptions of Older Adults: Evidence for Multiple Stereotypes*, 1 PSYCH. & AGEING 255–60 (1986), cited in BLAINE, *supra* note 84, at 176. See also Malcolm Sargeant, *Age Stereotypes and the Media*, 13 (4) COMM. L. 119 (2008).

115. See BLAINE, *supra* note 84, at 176.

116. *Id.*

117. *Id.*

118. *Id.* at 177 (citing Richard Posthuma & Paul Campion, *Age Stereotypes in the Workplace: Common Stereotypes, Moderators, and Future Research Directions*, 35 J. MGMT. 158–188 (2009)).

119. *Id.* at 177–78.

120. See Scott J. Adams & David Neumark, *Age Discrimination in U.S. Labor Markets: A Review of the Evidence*, in HANDBOOK ON THE ECONOMICS OF DISCRIMINATION 187, 189–90 (William M. Rodgers III ed., 2006).

121. *Id.* at 189.

affect hiring is less clear since study results are mixed; some studies find no age effects and other studies find bias in favor of younger workers.<sup>122</sup> There is some indication that jobs are perceived as either a good or poor fit for older workers depending on job content.<sup>123</sup> What is certain is that age bias is more difficult to flush out than race or sex discrimination; nonetheless, experts confirm that bias against older workers exists.<sup>124</sup>

Clearly women may suffer from gender stereotypes when they engage in gender non-conforming behavior or occupy gender incongruent roles.<sup>125</sup> Older women, however, suffer from the disadvantage of the combination of stereotyping based on age and gender, both of which can negatively affect them in the workplace. Below we explore the concept of “multiple discrimination,” which is a very difficult phenomenon to tackle through legal prohibition. Before that we briefly describe the problems with using employment discrimination law to address stereotyping on a single matrix.

## 2. ADDRESSING STEREOTYPING THROUGH LAW AND POLICY

As Professor Kim Yuracko notes, U.S. Supreme Court jurisprudence<sup>126</sup> prohibits both descriptive and prescriptive gender stereotyping.<sup>127</sup> In key language from *Price Waterhouse v. Hopkins*,<sup>127</sup> the Court noted:

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122. *Id.*

123. *Id.* at 190; see also *Age Discrimination in the 21st Century- Barriers to the Improvement of Older Workers Before Equal Emp’y Opportunity Comm’n 1* (July 15, 2009) (statement of Michael Campion, Professor of Mgmt., Purdue Univ.) (“[T]here are perceptions that certain jobs should be held by workers of certain ages, and that age stereotypes are more influential when this perception does not match the candidate’s (or incumbent’s) age.”). See, e.g., Norman S. Matloff, *The Adverse Impact of Work Visa Programs on Older U.S. Engineers and Programmers*, CAL. LAB. & EMP. L. REV. 5, 6 (2006) (“The fabled ‘youth culture’ in the tech industry has an obvious major effect on older workers.”).

124. See Michael Winerip, *Three Men, Three Ages. Who Do You Like?*, N.Y. TIMES, Jul. 23, 2013, available at [http://www.nytimes.com/2013/07/23/booming/three-men-three-ages-who-do-you-like.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2013/07/23/booming/three-men-three-ages-who-do-you-like.html?pagewanted=all&_r=0) (“Age discrimination in the workplace has always been harder to identify and quantify than race and sex discrimination . . . There is little doubt that such discrimination exists.”).

125. Alice H. Eagly & Anne M. Koenig, *Gender Prejudice: On the Risks of Occupying Incongruent Roles*, in BEYOND COMMON SENSE: PSYCHOLOGICAL SCIENCE IN THE COURTROOM 63, 70–73 (Eugene Borgida & Susan T. Fiske eds., 2008).

126. Kimberly A. Yuracko, *Soul of a Woman: The Sex Stereotyping Prohibition at Work*, 161 U. PA. L. REV. 757, 763–64 (2013).

127. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (plurality opinion).

[W]e are beyond the day when an employer could evaluate employees by *assuming* or *insisting* that they matched the stereotype associated with their group, for “[in] forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.<sup>128</sup>

Additionally, the Equal Employment Opportunity Commission (EEOC), the federal agency responsible for enforcing federal anti-discrimination law, has construed the sex stereotyping prohibition as a ban on stereotyping about the caregiving responsibilities of men and women,<sup>129</sup> as well as a ban on gender non-conformity discrimination, which has led the agency to extend protection to transgendered people,<sup>130</sup> and lesbian, gay, and bisexual individuals.<sup>131</sup> Courts, however, have not always followed the EEOC’s lead.<sup>132</sup>

Moreover, legal commentators have argued that American employment discrimination law, with its requirement that plaintiffs prove intent in disparate treatment cases,<sup>133</sup> is especially ill-suited to flushing out implicit bias.<sup>134</sup> The ubiquity of this social psychological

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128. *Id.* at 251 (citations omitted) (emphasis added by the author).

129. See EQUAL EMP’T OPPORTUNITY COMM’N, No. 915.002 ENFORCEMENT GUIDANCE: UNLAWFUL DISPARATE TREATMENT OF WORKERS WITH CAREGIVING RESPONSIBILITIES (2007), available at [http://www.eeoc.gov/policy/docs/care\\_giving.html](http://www.eeoc.gov/policy/docs/care_giving.html); see generally Stephanie Bornstein, *The Law of Gender Stereotyping and the Work-Family Conflicts of Men*, 63 HASTINGS L.J. 1297 (2012).

130. See *Macy v. Dep’t of Justice*, EEOC Appeal No. 0120120821 (Apr. 20, 2012).

131. See *Varetto v. U.S. Postal Service*, EEOC Appeal No. 0120110873 (July 1, 2011); *Castello v. U.S. Postal Service*, EEOC Request No. 0520110649 (Dec. 20, 2011).

132. See, e.g., Bornstein, *Work-Family Conflicts of Men*, *supra* note 129, at 1337–42 (describing caregiving cases where men were unsuccessful in court). Professor Melissa Hart has written about the U.S. Supreme Court’s lack of deference to the EEOC. She surmises that members of the Court doubt the “EEOC [h]as...valuable expert knowledge, and...are suspicious of the agency’s agenda.” Melissa Hart, *Skepticism and Expertise: The Supreme Court and the EEOC*, 74 FORDHAM L. REV. 1937, 1937 (2006) (noting that “the EEOC receives remarkably little respect from the [Supreme] Court.”).

133. In the United States, disparate treatment is a legal theory encompassing acts of intentional discrimination. See *Texas Dep’t of Cmty. Affairs v. Burdine*, 450 U.S. 248, 253 (1981). Yet many cases have recognized that a showing of “conscious intent” is not necessary to one’s claim. Bartlett, *supra* note 88, at 1924. See, e.g., *Price Waterhouse v. Hopkins*, 490 U.S. 228, 235–36 (1989).

134. Bartlett, *supra* note 88, at 1893; Martha Chamallas, *Deepening the Legal Understanding of Bias: On Devaluation and Biased Prototypes*, 74 S. CAL. L. REV. 747, 752 (2001); Tristin K. Green, *A Structural Approach as Antidiscrimination Mandate: Locating the Employer Wrong*, 60 VAND. L. REV. 849, 895–900 (2007); Krieger, *supra*

phenomenon not only makes discrimination hard to prove,<sup>135</sup> it may even bias claim evaluations by “those who interpret and enforce the law.”<sup>136</sup> Indeed, employment discrimination claims are notoriously unsuccessful. One recent study, for example, reviewed employment discrimination claims filed between 1979 and 2006 and found at the district court level a plaintiff win rate of only 15 percent compared with a plaintiff win rate for other civil cases of 51 percent.<sup>137</sup> Yet another recent study, which reviewed federal employment discrimination cases filed between 1987 and 2003, found that over 40 percent of plaintiffs lost at summary judgment or had their complaint dismissed, while half agreed to early settlements.<sup>138</sup> Only 6 percent of the employment discrimination cases went to trial, and the chance of prevailing was only one in three.<sup>139</sup>

The experience is similar in the United Kingdom, where equal pay legislation was first adopted in 1970 and was followed in 1975 by sex discrimination legislation.<sup>140</sup> Over 25 years later, there were still some 10,800 sex discrimination claims, and some 28,800 equal pay claims made it to employment tribunals.<sup>141</sup> Only 290 sex discrimination cases were won at a tribunal hearing representing 2 percent of those claims.<sup>142</sup> Only 32 equal pay cases were won—a shockingly small number of the total equal pay claims.<sup>143</sup> Age discrimination in

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note 81, at 1168–73; McCormick, *supra* note 82, at 513–14; Ann C. McGinley, *Viva La Evolucion!: Recognizing Unconscious Motive in Title VII*, 9 CORNELL J.L. & PUB. POL’Y 414, 417–18 (2000).

135. See Bartlett, *supra* note 88, at 1893.

136. McCormick, *supra* note 82, at 517.

137. See Kevin M. Clermont & Stewart J. Schwab, *Employment Discrimination Plaintiffs in Federal Court: From Bad to Worse?*, 3 HARV. L. & POL’Y REV. 104, 127 (2009).

138. Laura Beth Nielsen et al., *Individual Justice or Collective Legal Mobilization? Employment Discrimination Litigation in the Post-Civil Rights United States*, 7 J. EMPIRICAL LEGAL STUD. 175, 188 (2010).

139. *Id.*

140. Both the Equal Pay Act 1970, which came into effect in 1975, and the Sex Discrimination Act 1975, have now been incorporated into the Equality Act 2010.

141. MINISTRY OF JUSTICE, *Employment Tribunals and EAT Statistics 2011–12* 8 tbl.1 (2012), [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/218497/employment-trib-stats-april-march-2011-12.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/218497/employment-trib-stats-april-march-2011-12.pdf).

These filings, however, do represent a decline from the previous two years.

142. *Id.* at 9 tbl.2.

143. *Id.*

employment legislation was first adopted in 2006,<sup>144</sup> and in the year 2011–2012, there were some 3,700 age discrimination complaints to an employment tribunal.<sup>145</sup> Astonishingly, in the same year, only some 48 age cases were won at an employment tribunal hearing.<sup>146</sup> A hefty 43 percent of age cases were withdrawn and 14 percent were struck out without a hearing; a further 31 percent resulted in conciliated settlements.<sup>147</sup>

Despite laws on the books, it is widely recognized that stereotyping persists within European countries. In 2012, the European Parliament's Gender and Equality Committee adopted a report on eliminating gender stereotypes.<sup>148</sup> The report identified four factors that contribute to the intractability of stereotyping as a social phenomenon. First, stereotypes are conveyed to young children both consciously and unconsciously by teachers, and they influence boys and girls on how men and women should behave and the careers they should choose.<sup>149</sup> Second, the media facilitates the production and reproduction of gender stereotypes by portraying sexualized images of girls and women and women in domestic roles such as cleaning house or caring for children.<sup>150</sup> Third, stereotyping that permeates education and training follows women into the labor market, where they confront horizontal and vertical occupational segregation, barriers to certain traditionally male sectors, pay gaps, and difficulty reconciling work and family life, with responsibility for the latter falling stereotypically and traditionally on them.<sup>151</sup> Finally, the report found a link between stereotyping and the under-representation of women in public life.<sup>152</sup>

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144. Employment Equality (Age) Regulations (2006) are now incorporated into the Equality Act (2010).

145. *Employment Tribunals*, *supra* note 141, at 8 tbl.1.

146. *Id.* at 9 tbl.2.

147. *Id.*

148. See generally KARTIKA TAMARA LIOTARD, EUR. PARLIAMENT, REPORT OF THE COMMITTEE ON WOMEN'S RIGHTS AND GENDER EQUALITY: ON ELIMINATING GENDER STEREOTYPES IN THE EU (2012), available at <http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//NONSGML+REPORT+A7-2012-0401+0+DOC+PDF+V0//EN>.

149. *Id.* at 6.

150. *Id.* at 5–6.

151. *Id.* at 6–7.

152. *Id.* at 7–8.

European Union member states, including the United Kingdom, are encouraged to “take decisive policy action to fight gender stereotypes.”<sup>153</sup> And there is evidence that in the United Kingdom attitudes to male/female stereotypical roles may have changed over years. For example, in nine major surveys between 1984 and 2008 people were asked how much they agreed or disagreed with the statement: “A man’s job is to earn money; a woman’s job is to look after the home and family.”<sup>154</sup> In 1984, 43 percent of respondents agreed with the statement while by 2008 agreement was expressed by only 16 percent.<sup>155</sup> Overt expressions of support for gender equality, however, do not necessarily translate into equal outcomes for many in the United Kingdom, a fact the government does appreciate.<sup>156</sup> Crafting effective policies to vanquish stereotyping is a complex undertaking, and one that we argue, has not been effectively addressed by either the United Kingdom or the United States.

### C. Multiple Discrimination

As noted above, older women workers may suffer from stereotypes at the confluence of the two statuses they occupy—that of being female and middle or older-aged.<sup>157</sup> In fact, older women workers may occupy other statuses that further complicate the way in which they are viewed. For example, those of minority races or ethnicity, the disabled, those practicing particular religions, and LGBT community members, may experience “disadvantage and exclusion [related to] . . . the multiple dimensions of their identity.”<sup>158</sup> Of course, every person can likewise reference “a range of protected characteristics,” making this complex phenomenon one that potentially affects us all.<sup>159</sup> Relevant to our model of lifetime

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153. *Id.* at 14.

154. HOW FAIR IS BRITAIN?, *supra* note 72, at 29.

155. *Id.*

156. *Id.* at 13.

157. *See supra* page 121; *see also infra* notes 167–175 and accompanying text.

158. Colleen Sheppard, *Multiple Discrimination in the World of Work* 1 (Int’l Labour Org., Working Paper No. 66, 2011); *see also* INT’L LABOUR OFFICE, ABC OF WOMEN WORKERS’ RIGHTS & GENDER EQUALITY 146 (2d ed. 2007) (“Older women workers are vulnerable to double or even multiple discrimination on grounds of sex, age and other forms of discrimination such as race/ethnicity.”).

159. TAMARA LEWIS, CENT. LONDON LAW CENTRE, MULTIPLE DISCRIMINATION: A GUIDE TO LAW AND EVIDENCE, 4 (2010).

disadvantage, however, is that the phenomenon affects girls and women throughout their lifetimes, although in different ways over time.

The terminology for this problem is varied and can be inconsistent. In academic circles, U.S. Professor Kimberlé Crenshaw's work on what she called "intersectionality," which she developed and applied to African American women, is credited with opening a dialogue about the shortcomings of analyzing discrimination along a single matrix.<sup>160</sup> North Americans tend to use the terminology coined by Crenshaw—intersectionality—to describe the phenomenon, while international documents use "multiple discrimination" as an umbrella term referring to several kinds of complex discrimination.<sup>161</sup> In 2002, Timo Makkonen, a Finnish scholar, produced a comprehensive paper covering the development of the terminology.<sup>162</sup>

#### 1. RELEVANT TERMINOLOGY

Our model uses the typology that has developed in the United Kingdom, since there has been significant effort there to define "multiple discrimination." More specifically, this phenomenon is seen as manifesting itself in three distinct ways. As described by Dr. Maria Hudson, who relies on the Central London Law Centre's Guide to Multiple Discrimination, multiple discrimination can take any of three forms:

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160. See Kimberlé Crenshaw, *Demarginalizing the Intersection between Race and Sex: A Black Feminist Critique of Anti-Discrimination Doctrine, Feminist Theory and Anti-Racist Politics*, U. CHI. LEGAL F. 139 (1989); see also EUR. COMM'N, TACKLING MULTIPLE DISCRIMINATION: PRACTICES, POLICIES AND LAWS 15 (2007) [hereinafter TACKLING MULTIPLE DISCRIMINATION] (noting Crenshaw's seminal work on the subject in the late 1980s). Other scholars credited with early work in this area—in particular by developing a critique of feminist theory as insufficiently attentive to the plight of women of color—are bell hooks, Angela Harris, and Elizabeth Spelman. See Lynn Roseberry, *Multiple Discrimination*, in AGE DISCRIMINATION AND DIVERSITY: MULTIPLE DISCRIMINATION FROM AN AGE PERSPECTIVE 16, 19–21 (Malcolm Sargeant ed., 2011) (citing and discussing the work of hooks, Harris, and Spelman); see also Bell Hooks, *AIN'T I A WOMAN* (1981); Angela Harris, *Race and Essentialism in Feminist Theory*, 42 STAN. L. REV. 581 (1990); ELIZABETH SPELMAN, *ESSENTIAL WOMAN: PROBLEMS OF EXCLUSION IN FEMINIST THOUGHT* (1988).

161. Sheppard, *supra* note 158, at 4.

162. See TIMO MAKKONEN, INST. FOR HUMAN RIGHTS, ABO AKADEMI UNIV., *MULTIPLE, COMPOUND AND INTERSECTIONAL DISCRIMINATION: BRINGING THE EXPERIENCES OF THE MOST MARGINALIZED TO THE FORE* (2002).

Ordinary multiple discrimination—[involving a victim with different characteristics, [but where discrimination against that victim occurs on only a single basis on] different occasions;

Additive multiple discrimination—[involving a victim with different characteristics, [but where discrimination against that victim occurs separately on each basis on the] same occasion;

Intersectional multiple discrimination—[involving a victim with different characteristics [but where discrimination against that victim occurs<sup>163</sup> because the characteristics are viewed] in combination.

To illustrate *ordinary multiple discrimination*, imagine Emily, a 60-year-old woman, is rejected in her bid for promotion in favor of a 30-year-old woman because her supervisor prefers someone younger. Sometime later, Emily attempts to transfer to a different department and is refused because all the members of the department she wishes to transfer to are men.<sup>164</sup> Discrimination based on age occurred on one occasion and discrimination based on sex on the other.

Regarding *additive multiple discrimination*, imagine Emily was denied promotion because her supervisor prefers young male employees. Hence, the supervisor rejects all women of any age interested in the promotion, and all the older employees (men and women) desirous of advancement. The supervisor instead selects a 30-year-old man for promotion rather than 60-year-old Emily.<sup>165</sup> Discrimination based on sex and age arguably occurred separately albeit on the same occasion.

Finally, with respect to *intersectional multiple discrimination*, imagine that Emily is not promoted because she is an older woman. Her supervisor is happy to consider younger men and women, as well as older men for advancement. The supervisor simply harbors negative stereotyped views of older women.<sup>166</sup> In this instance, the combination of Emily's age and sex led to discrimination.

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163. MARIA HUDSON, ACAS, THE EXPERIENCE OF DISCRIMINATION ON MULTIPLE GROUNDS 3 (2012); see also Sarah Hannett, *Equality at the Intersections: The Legislative and Judicial Failure to Tackle Multiple Discrimination*, 23 OXFORD J. LEGAL STUD. 65, 65 (2003); MALCOLM SARGEANT, DISCRIMINATION AND THE LAW 9–11 (2013) [hereinafter DISCRIMINATION AND THE LAW].

164. LEWIS, *supra* note 159, at 8 (reworking the ordinary multiple discrimination hypothetical).

165. *Id.*

166. *Id.*

## 2. HOW AGE AFFECTS WOMEN

Discussions of how aging affects women typically reference the problem of appearance. In societies that prize female youth and beauty, signs of aging in women lead to their devaluation and what has been termed “gendered ageism.”<sup>167</sup> Hence, wrinkled skin and gray hair are generally considered unattractive for women but attributes that make men appear more distinguished.<sup>168</sup> This is especially so in some occupations such as television news anchoring.<sup>169</sup> Yet, this phenomenon also affects women outside of the appearance-oriented news and entertainment industry.<sup>170</sup>

Research reveals three predominant ways that women are stereotyped as they age. First, women are seen as aging sooner than men. More specifically, women are viewed as having reached old age from the ages of 55–59 in comparison to men, who are viewed as having entered old age from the ages of 60–64.<sup>171</sup> Older women’s appearance is also viewed more harshly than the appearance of older men.<sup>172</sup> Labeling women as “over the hill” and “old bags” is symptomatic of the negative, appearance-based judgments of gendered ageism.<sup>173</sup> Second, compared to older men, aging women are seen “as less competent, intelligent, and wise.”<sup>174</sup> Finally, older

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167. See Sian Moore, ‘No matter what I did I would still end up in the same position’: Age as a Factor Defining Older Women’s Experience of Labour Market Participation, 23 WORK, EMP. & SOC’Y 655, 662 (2009) [hereinafter ‘No matter what I did’].

168. See Nicole Buonocore Porter, *Sex Plus Age Discrimination: Protecting Older Women Workers*, 81 DENV. U. L. REV. 79, 94 (2003).

169. DISCRIMINATION AND THE LAW, *supra* 163, at 9 (referencing discrimination against older women T.V. presenters at the BBC); Porter, *supra* 168, at 94–95 (discussing discrimination against older, women news anchorwomen in the U.S.); CHRISTINE CRAFT, TOO OLD, TOO UGLY, AND NOT DEFERENTIAL TO MEN: AN ANCHORWOMAN’S COURAGEOUS BATTLE AGAINST SEX DISCRIMINATION (1991); see also Deborah L. Rhode, *The Injustice of Appearance*, 61 STAN. L. REV. 1033, 1065 (2009) (discussing the infamous case of news anchor Christine Craft, whose discrimination suit was rejected).

170. Porter, *supra* note 168, at 95–96.

171. See Silvia Sara Canetto, *Older Adult Women: Issues, Resources, and Challenges*, in HANDBOOK OF PSYCHOLOGY OF WOMEN AND GENDER 183, 184 (Rhoda K. Unger ed., 2001).

172. *Id.*

173. See Toni C. Antonucci, Rosemary Blieszner, & Florence Denmark, *Psychological Perspectives on Older Women*, in HANDBOOK OF DIVERSITY IN FEMINIST PSYCHOLOGY, 233, 235 (Hope Landrine & Nancy Felipe Russo eds., 2010).

174. Canetto, *supra* note 171, at 184.

women are viewed as more nurturing, sensitive, and warmer than older men, a reference to grandmotherly characteristics.<sup>175</sup>

Aging not only affects the responses of others to older women, it has been found to impact women psychologically and more profoundly than men. As Dr. Diane Grant notes:

Gender inequalities are compounded over time and internalised by women; as women grow older, the 'social pathology' of ageing affects women more than men, in terms of how they age and the perception that looking older may have on their opportunities. Women appear as more vulnerable to such pressures than men. Indeed, internalisation of previous discriminatory experiences is made complex by the realisation that in today's society an older woman [sic] no longer conforms to the modern standards of youth and beauty.<sup>176</sup>

One study found explicit actions taken by unemployed study participants, who anticipated they might face age-related, appearance-based discrimination in job interviews. While "both men and women . . . considered altering their physical appearance for job interviews, this occurred far more frequently for women."<sup>177</sup> Indeed, research indicates that age discrimination affects women "at younger ages than men largely as a result of bodily appearances."<sup>178</sup> In other words, discriminatory actions are triggered by appearance sooner for women than for men.

There is not much empirical work on older women subject to discrimination on additional bases such as race and class. Researcher Sian Moore, however, conducted a study consisting of 33 interviews with women older than 50 in London, Coventry, and Oxford, United Kingdom.<sup>179</sup> Her study also involved a survey of a large organization,

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175. *Id.*

176. Diane Grant, *Older Women, Work and the Impact of Discrimination*, in *AGE DISCRIMINATION AND DIVERSITY: MULTIPLE DISCRIMINATION FROM AN AGE PERSPECTIVE* 41, 48 (Malcolm Sargeant ed., 2011). *But see* Clary Krekula, *The Intersection of Age and Gender: Reworking Gender Theory and Social Gerontology*, 55 *CURRENT SOC.* 155, 166–67 (2007) (arguing that an "intertwined" approach to age and gender can enrich the understanding of older women's feelings about their bodies beyond "the simple addition of miseries").

177. Julie Ann McMullin & Ellie D. Berger, *Gendered Ageism/Age(ed) Sexism: The Case of Unemployed Older Workers*, in *AGE MATTERS: REALIGNING FEMINIST THINKING* 201, 217 (Toni M. Calasanti & Kathleen F. Slevin eds., 2006).

178. *Id.* at 219.

179. Sian Moore, *Age As a Factor Defining Older Women's Experience of Labour Market Participation in the UK*, 36 *INDUS. L.J.* 383 (2007) [hereinafter *Age As a Factor*].

which yielded about 850 responses.<sup>180</sup> The organization had “relatively high levels of older female workers although black and ethnic minority staff were slightly under-represented.”<sup>181</sup>

The interviewees described age as a barrier in looking for work, whether they were presently employed or not.<sup>182</sup> Interestingly, however, Moore found that among the female interviewees, age discrimination “was bound up with gender, race and class discrimination.”<sup>183</sup> The women had trouble identifying specific age effects, some were confused about what kind of discrimination they had faced (race, sex, or age), confessing that they were not sure what the perpetrator was thinking.<sup>184</sup>

Moore hypothesizes that occupational and industry segregation—“women worked alongside other women (often of the same race) and thus could not compare themselves to men or other races”—made it difficult for them to conceptualize the way complex discrimination played out.<sup>185</sup> The survey results also indicated that perceptions of bias “are influenced by the composition of the workgroup and by occupational segregation.”<sup>186</sup>

Although not explicitly exploring the effects of age, the “genderace study,” an empirical examination in six E.U. countries of the way in which gender and race or ethnicity together “influence the perception and use of antidiscrimination laws,”<sup>187</sup> similarly concluded that discrimination victims rarely perceive multiple discrimination “unless prompted by an interviewer.”<sup>188</sup> Interviewees had trouble giving voice to the experience of discrimination, especially where

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180. *Id.*

181. *Id.*

182. *Id.*

183. *Id.* at 384.

184. *Id.*

185. *Id.* at 385.

186. *Id.*

187. ISABELLE CARLES ET AL., GENDERACE: THE USE OF RACE ANTIDISCRIMINATION LAWS—GENDER AND CITIZENSHIP IN A MULTICULTURAL CONTEXT 7 (Isabelle Carles & Olga Jubany-Baucells eds., 2010) [hereinafter GENDERACE].

188. Eleonore Kofman et al., *The Impact of Gender and Racialized Identities on the Experience of Discrimination*, in GENDERACE: FINAL REPORT, *supra* note 187, at 118, 122. Nonetheless, the U.K. study team did find younger girls mentioning age discrimination as an issue and three of the older interviewees—ages 60, 59, and 57—reported experiencing age and gender discrimination. *Id.* at 134.

multiple discrimination was at issue.<sup>189</sup> Such results hint at the problem that will be discussed below: the difficulty of using employment discrimination law to address multiple discrimination.

### 3. THE DIFFICULTY OF USING LAW TO ADDRESS MULTIPLE DISCRIMINATION

As noted above, one obstacle to deploying law as a tool for redressing multiple discrimination is the difficulty victims themselves have in recognizing it.<sup>190</sup> Two additional hurdles are discussed in this subsection: doctrinal and evidentiary barriers; and judicial skepticism. In both the United States and the United Kingdom, legal doctrine is in general not hospitable to claims of intersectional discrimination, creating evidentiary barriers to plaintiffs' suits. Moreover, in the United States, the lack of success of multiple discrimination claims overall may indicate that judges are more likely to interpret the evidence in such suits in the employer's favor.<sup>191</sup>

Although American academics are credited with producing seminal writings on complex discrimination,<sup>192</sup> U.S. courts have not, in general, developed a uniform approach to multiple discrimination, especially claims of intersectional discrimination.<sup>193</sup> Indeed, the case law is decidedly mixed, with, for example, some courts embracing the notion of intersectional discrimination when the plaintiff alleges she is the victim of combined sex and race discrimination<sup>194</sup> and others

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189. *Id.* at 145.

190. *See supra* notes 183–89 and accompanying text.

191. Rachel Kahn Best et al., *Multiple Disadvantages: An Empirical Test of Intersectionality Theory in EEO Litigation*, 45 *LAW & SOC'Y REV.* 991, 1018 (2011) (empirical study finding “some support for the ideas that intersectional claims are held back by a combination of doctrinal barriers and judicial interpretations”); *see also* Minna J. Kotkin, *Diversity and Discrimination: A Look at Complex Bias*, 50 *WM. & MARY L. REV.* 1439, 1442 (2009) (relating the criticism voiced by one district court judge of plaintiffs' lawyers in a multiple discrimination case as “throwing spaghetti at the wall to see what sticks”).

192. *See supra* note 160 and accompanying text.

193. *See* TACKLING MULTIPLE DISCRIMINATION, *supra* note 160, at 26 (“Case law from the [U.S.] court system seems to reflect that no overall intersectional approach has been developed.”); Best et al., *supra* note 191, at 996–97 (noting that courts have “varying responses to intersectional claims”).

194. *See, e.g.*, *B.K.B v. Maui Police Dept.*, 276 F.3d 1091, 1101 (9th Cir. 2002) (citing Kimberlé Crenshaw's work on intersectionality with approval and noting that “a confluence of race and sex-based harassment is . . . possible”); *Lam v. Univ. of Haw.*, 40 F.3d 1551, 1562 (9th Cir. 1994) (citing intersectionality theory with approval and noting that Asian women are subject to discrete stereotypes not

refusing to do so and requiring a plaintiff to proceed separately on the sex and race discrimination claims.<sup>195</sup>

The latter approach often makes the evidentiary burden insurmountable, as demonstrated in *DeGraffenreid v. General Motors*,<sup>196</sup> where a claim of intersectional discrimination brought by African American women failed not only because the court refused to consider black women a protected subgroup but also because disaggregation of the sex and race claims barred the plaintiffs from using statistical evidence that might have established their case. More specifically, General Motors had hired white women, precluding a finding of sex discrimination, and the company had also hired African American men, negating the plaintiffs' race discrimination claims.<sup>197</sup> In short, when courts require claim disaggregation—when they implicitly assume that the multiple discrimination experienced was either ordinary multiple discrimination or additive multiple discrimination—statistics or other evidence related to the victims' subgroup, for example African American women, which might otherwise enable them to plead their case successfully, will be deemed “legally irrelevant.”<sup>198</sup>

Intersectional discrimination claims brought by older women present similar problems. Ten years ago, Professor Nicole Porter

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shared by Asian men or white women); *Jeffries v. Harris Cnty. Cmty. Ass'n*, 615 F.2d 1025, 1032–33 (5th Cir. 1980) (acknowledging that discrimination against African American women may be operative even where there is no discrimination against white women and African American men); *Westmoreland v. Prince George's Cnty Md.*, 876 F. Supp. 594, 604 (D. Md. 2012) (concluding “intersectional claims based on sex and race are generally cognizable”). Interestingly, the EEOC agrees. In fact, the EEOC's Compliance Manual contains a section on intersectionality, which notes that discrimination can occur “because of the intersection of two or more protected bases (e.g. race and sex).” EQUAL EMP'T OPPORTUNITY COMM'N, No. 915003, COMPLIANCE MANUAL: RACE AND COLOR DISCRIMINATION, §15-IV, C, “INTERSECTIONAL DISCRIMINATION” (2006), available at <http://www.eeoc.gov/policy/docs/race-color.html>. As noted above, however, scant deference is paid to the EEOC by the U.S. Supreme Court. See *supra* note 132 (describing the work of Professor Melissa Hart). When the nation's highest Court affords an agency so little respect, it is no surprise that lower court judges feel free to disregard EEOC interpretations with which they disagree.

195. *DeGraffenreid v. Gen. Motors Assembly Div.*, 413 F. Supp. 142, 143 (E.D. Mo. 1976) *aff'd in part, rev'd in part*, 558 F.2d 480 (8th Cir. 1977).

196. *Id.*

197. See Best et al., *supra* note 191, at 996.

198. *Id.*

discussed with great hope *Arnett v. Aspin*,<sup>199</sup> one of the first such claims.<sup>200</sup> In *Arnett*, the 49-year-old plaintiff, on two separate occasions, applied for a transfer to the position of equal employment specialist.<sup>201</sup> On the first occasion, the position was given to a woman under 30 years of age.<sup>202</sup> The open second position was given to a 29-year-old woman.<sup>203</sup> The defendant admitted that every woman placed into the position of equal employment specialist was under 40 and every man ever given the position was over 40.<sup>204</sup>

Arnett sued under the Age Discrimination in Employment Act of 1967 (ADEA), which prohibits discrimination against those 40 years of age and over,<sup>205</sup> and Title VII of the Civil Rights Act of 1964 (Title VII), which prohibits sex discrimination.<sup>206</sup> She advanced a traditional age discrimination claim. Her sex discrimination claim, however, was stated as a claim for “Sex Plus Age Discrimination.”<sup>207</sup> The defendant moved for summary judgment on the second count claiming that Title VII does not encompass such claims.<sup>208</sup> Relying on a line of cases that created the so-called sex-plus theory, the court found that Title VII provides protection to “a subclass of women based on either (1) an immutable characteristic or (2) the exercise of a fundamental right.”<sup>209</sup> Since age is an immutable characteristic, held the court, Arnett’s “Sex Plus Age” claim could proceed.<sup>210</sup>

Porter notes that in so ruling, the court “closed a loophole that allowed employers to discriminate against some women as long as they did not discriminate against all women.”<sup>211</sup> This was especially important, she said, in the case of older women who are a subgroup

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199. *Arnett v. Aspin*, 846 F. Supp. 1234 (E.D. Pa. 1994).

200. See Porter, *supra* note 168, at 87. See generally Sabina F. Crocette, *Considering Hybrid Sex and Age Discrimination Claims by Women: Examining Approaches to Pleading and Analysis*, 28 GOLDEN GATE U. L. REV. 115, 115 (1998) (discussing the dearth of cases brought by older women that are analyzed by courts as intersectional claims).

201. *Arnett*, 846 F. Supp. at 1236.

202. *Id.*

203. *Id.*

204. *Id.*

205. 29 U.S.C. §§ 621–78 (2012).

206. 42 U.S.C. §2000e et seq. (2012).

207. *Arnett*, 846 F. Supp. at 1237.

208. *Id.*

209. Porter, *supra* note 168, at 88.

210. *Arnett*, 846 F. Supp. at 1241.

211. Porter, *supra* note 168, at 88.

“discriminated against differently than older men and younger women . . . much . . . as black women are treated differently than black men and white women.”<sup>212</sup>

Some older women, however, have fared less well before courts than the plaintiff in *Arnett*. For example, in *Thompson v. Mississippi State Personnel Board*,<sup>213</sup> the plaintiff, a 59-year-old woman, brought disparate impact claims<sup>214</sup> under Title VII and the ADEA, arguing that the State’s educational requirements for a supervisory position fell more harshly on women 40-years old and over than on similarly situated older men.<sup>215</sup> To prove her claim, she proffered statistics comparing the impact of the requirement on older women versus older men.<sup>216</sup> Rejecting the statistics as lacking in probity,<sup>217</sup> the court noted that neither statute protected a subset of older women.

Courts in several unreported decisions have likewise concluded that older women are not a protected subgroup.<sup>218</sup> And in

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212. *Id.* at 90; see also Joanne Song, *Falling Between the Cracks: Discrimination Laws and Older Women* (2012), available at <http://paa2013.princeton.edu/papers/130235>.

213. See generally *Thompson v. Miss. State Pers. Bd.*, 674 F. Supp. 198 (N.D. Miss. 1987).

214. The ADEA allows for recovery under disparate impact theory when a neutral employment policy or practice falls more harshly on older workers. See *Smith v. City of Jackson*, 544 U.S. 228, 232 (2005). Title VII allows for recovery under disparate impact theory when a neutral employment policy or practice falls more harshly on the plaintiff’s group, in terms of race, color, national origin, religion, or sex. See Civil Rights Act of 1991, Pub. L. No. 102-166, sec. 105(a), § 703(c)(1)(A)(i), 105 Stat. 1071, 1074 (codified as amended at 42 U.S.C. § 2000e-2(k)(1)(A)(I) (2006)); *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 987 (1988); *Albamarle Paper Co. v. Moody*, 422 U.S. 405, 421 (1975); *Griggs v. Duke Power Co.*, 401 U.S. 424, 431–32 (1971).

215. *Thompson*, 846 F. Supp. at 204–05.

216. *Id.*

217. *Id.* at 203–04.

218. See, e.g., *Murdock v. Goodrich*, 1992 WL 393158, at \*3 (Ohio Ct. App., Dec. 30, 1992) (“[O]lder females are not a separate protected class under state or federal law. Rather, they are part of two distinct protected classes which must be kept analytically separate in reviewing evidence of discrimination.”); *Cartee v. Wilbur Smith Assoc., Inc.*, 2010 WL 1052082, at \*4 (D.S.C.) (“[T]he court finds that it lacks the authority to recognize an age plus [sex] claim under the ADEA . . . .”); *Sherman v. American Cyanamid Co.*, 1999 U.S. App. LEXIS 21086, at \*2 (“[P]laintiff . . . ask[s] us to recognize a new cause of action for sex plus age discrimination, or discrimination against ‘older women.’ We decline the invitation to decide the issue . . . .”); *Reap v. Continental Casualty Co.*, 2002 WL 1498679, at \*n.15 (distinguishing *Arnett* because it involved a Title VII claim and concluding that a “sex-plus-age” discrimination claim is not available under the ADEA).

one confused decision, which was reported, the court expressed doubt that the age-plus-sex theory is available under the ADEA.<sup>219</sup> That said, embracing the age-plus-sex theory might not solve the problem older women face in litigation. Plaintiffs bringing multiple discrimination claims—in any of the three forms described above<sup>220</sup>—are often much less successful than those who bring discrimination claims on a single basis.

There is only one comprehensive empirical study of the litigation success rate of those who bring multiple discrimination claims.<sup>221</sup> Published in 2011, that study examined a representative sample of equal employment opportunity law decisions issued by U.S. federal courts between 1965 and 1999.<sup>222</sup> The authors were interested in two types of intersectionality: (1) demographic intersectionality, defined as a plaintiff, who may or may not bring an intersectional claim, but who him- or herself has “overlapping demographic characteristics produc[ing] disadvantages that are more than the sum of their parts;”<sup>223</sup> and (2) claim intersectionality, defined as involving a plaintiff who “allege[s] discrimination on the basis of intersecting ascriptive characteristics (e.g., race and sex).”<sup>224</sup> Claim intersectionality, as described in the study, encompasses any suit where discrimination is alleged on more than one protected basis whether or not the court will allow a combined claim of “intersectional multiple discrimination,” as this article previously defined that term.<sup>225</sup>

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219. See *Smith v. Bd. of Cnty. Comm’rs of Johnson Cnty.*, 96 F. Supp. 1177, 1187 (D. Kan. 2000) (“No district court has explicitly adopted an age-plus-gender theory of liability under the ADEA . . . . Even if such a claim is cognizable under the ADEA, plaintiff has failed to present evidence sufficient for a reasonable jury to find in her favor.”).

220. Previously, this article categorized multiple discrimination as occurring in three forms: (1) ordinary multiple discrimination; (2) additive multiple discrimination; and (3) intersectional multiple discrimination. See *supra* notes 163–66 and accompanying text.

221. Best et al., *supra* note 191, at 1017.

222. *Id.*

223. *Id.* at 994.

224. *Id.* at 991.

225. See *id.* at 1002 (“We distinguish intersectional claims from cases where plaintiffs allege only one basis of discrimination and also from cases where plaintiffs allege multiple nonintersectional bases of discrimination (that is, more than one basis of discrimination of which only one or none are ascriptive characteristics.) For instance, a case with allegations of race and sex discrimination is coded as intersectional, while a case with allegations of race discrimination and retaliation is not.”)

While the study's findings on the lack of success associated with demographic intersectionality and claim intersectionality are intuitive, the magnitude is startling. As the authors note:

[W]e find that both intersectional demographic characteristics and legal claims are associated with dramatically reduced odds of plaintiff victory. Strikingly, plaintiffs who make intersectional claims are only half as likely to win their cases as plaintiffs who allege a single basis of discrimination. Our results suggest that antidiscrimination lawsuits provide the least protection for those who already suffer multiple social disadvantages, thus limiting the capacity of civil rights law to produce social change.<sup>226</sup>

The study found overall that "all else equal . . . plaintiffs alleging only one basis of discrimination will win their cases 28 percent of the time, whereas plaintiffs bringing otherwise identical cases that allege intersectional bases of discrimination will win only 13 percent of the time."<sup>227</sup>

No comparable study is available in the United Kingdom, but the legal doctrine is just as unfavorable. There is no provision in U.K. law to handle multiple discrimination cases except as separate claims under each ground of discrimination. Nonetheless, courts have on occasion recognized the existence of ordinary multiple and additive multiple discrimination. In *Ministry of Defence v. DeBique*,<sup>228</sup> for example, a female British soldier from St. Vincent and the Grenadines, who was also a single parent, successfully sued for indirect discrimination<sup>229</sup> on the separate grounds of gender and race. She argued that the Ministry of Defence applied two intertwined provisions to her that created a detrimental impact. First, she challenged the requirement that she be available for deployment 24 hours a day, seven days a week (24/7).<sup>230</sup> Next, she challenged the application of U.K. immigration rules, which prevented her from having a family member reside with her in the Service Families Accommodation barracks; had she been permitted to do so, her childcare needs would have been met, allowing her to be available for deployment 24/7.<sup>231</sup>

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226. *Id.* at 991–92.

227. *Id.* at 1009.

228. *Id.*

229. *Ministry of Defence v. DeBique*, [2009] UKEAT 0048\_09\_1210, (U.K.) [2010] IRLR 471, available at [http://www.bailii.org/uk/cases/UKEAT/2009/0048\\_09\\_1210.html](http://www.bailii.org/uk/cases/UKEAT/2009/0048_09_1210.html).

230. *Id.* at ¶ 53, 55.

231. *Id.*

The court's statements about complex discrimination are sophisticated. Analyzing the case, the court noted:

In general, the nature of discrimination is such that it cannot always be sensibly compartmentalized into discrete categories. Whilst some complainants will raise issues relating to only one or other of the prohibited grounds, attempts to view others as raising only one form of discrimination for consideration will result in an inadequate understanding and assessment of the complainant's true disadvantage. Discrimination is often a multi-faceted experience.<sup>232</sup>

The soldier suffered discrimination on two grounds—sex and national origin—due to two provisions that were interrelated. Female soldiers were at a particular disadvantage from the 24/7 rule since they were more likely than their male counterparts to be single parents who had difficulty arranging for childcare.<sup>233</sup> The Vincentian claimant, moreover, as a foreign national, was at a “double disadvantage” due to the immigration rule that prohibited her from bringing a family member into the barracks for childcare purposes.<sup>234</sup> This latter circumstance constituted a disadvantage compared to those soldiers who were of British national origin because foreign nationals had no access to their extended family to help with child care.<sup>235</sup> Although the claimant in the *DeBique* case was not an older woman, the court's opinion highlights how gender can interact with other grounds of discrimination to produce complex discrimination.

The United Kingdom's legal framework can analytically accommodate ordinary multiple discrimination, and, as evidenced by *DeBique*, additive multiple discrimination as well.<sup>236</sup> There is concern, however, that the legal framework is ill-suited to addressing

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232. *Id.* at ¶ 53.

233. *Id.* at ¶ 165.

234. *Id.* at ¶ 167.

235. *Id.*

236. There is an argument that the court in *DeBique* actually approved the use of an intersectional claim. Yet since the court's reasoning was sequential—first noting the way in which the 24/7 rule disadvantaged women soldiers, and then proceeding to address the discriminatory impact of the immigration rule on foreign nationals, the authors believe that the case is actually an example of additive multiple discrimination. In any case, even if *DeBique* is an example of intersectional analysis, it is a ruling of an Employment Appeals Tribunal (EAT) and, as will be described shortly, the Court of Appeal issued a precedent that would appear to prohibit such analysis by the Employment Tribunals and EATs.

intersectional multiple discrimination.<sup>237</sup> Moreover, the Court of Appeal issued a very unfavorable ruling, which is binding on the lower courts,<sup>238</sup> in *Bahl v. The Law Society*.<sup>239</sup> Dr. Bahl, a black Asian woman of British nationality, served as Vice President of the Law Society.<sup>240</sup> Dr. Bahl, who, due to her allegedly harsh treatment of her staff, was subject to a series of disciplinary actions, including formal censure and suspension, eventually resigned from her position.<sup>241</sup> She brought suit claiming that she had suffered discrimination because she was a woman and an Asian. The Court of Appeal held that each ground had to be considered separately, rather than the combination of characteristics.<sup>242</sup> In other words, the court would not permit an intersectional claim.

The U.K. Equality Act 2010 introduced for the first time the possibility of intersectional multiple discrimination claims, albeit in relation to a combination of only two protected characteristics.<sup>243</sup> The government decided, however, not to bring this measure into effect, believing it to be an unnecessary burden on business.<sup>244</sup> Hence, the United Kingdom has no formal provision allowing intersectional claims to be advanced.

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237. See Hudson, *supra* note 163, at 4 (“While the [U.K.] legal framework can engage with ORDINARY/ADDITIVE discrimination, there has been concern from a number of quarters about the lack of redress for INTERSECTIONAL multiple discrimination.”)

238. *Id.*

239. *Kamlesh Bahl v Law Soc’y*, (2004) EWCA Civ 1070 (U.K.).

240. *Id.* at ¶ 4.

241. *Id.* at ¶ 52.

242. *Id.* at ¶ 137.

243. Section 14(1) Equality Act 2010 provides, in relation to the protected characteristics of age, disability, gender reassignment, race, religion or belief, sex and sexual orientation, that: “A person (A) discriminates against another (B) if, because of a combination of two relevant protected characteristics, A treats B less favourably than A treats or would treat a person who does not share either of those characteristics.” Equality Act 2010, 2010 c.15, §14(1), (U.K.).

244. See *Equalities Red Tape Challenge and Reform of the Equality and Human Rights Commission: Outcome, Before House of Commons* (May 15, 2012) (written statement of Theresa May), available at <https://www.gov.uk/government/speeches/equalities-red-tape-challenge-and-reform-of-the-equality-and-human-rights-commission-outcome>.

#### D. Caregiving Roles

During their lifetimes, many women may find themselves acting as caregivers—roles that may produce significant economic impacts for them in retirement. Many men, of course, may assume caregiving roles as well. No doubt balancing caregiving responsibilities with paid employment can be just as daunting for men as for women.<sup>245</sup> Men in the United States, however, are less likely than women to act as caregivers,<sup>246</sup> and when men are caregivers, they on average spend less time in that role than women<sup>247</sup> and are less likely to provide primary care for a family member or friend who needs it.<sup>248</sup> American men are also less likely to reduce their paid labor or drop out of the labor force due to caregiving responsibilities than are women.<sup>249</sup> One research report notes that “the over-representation of women as carers contributes to the under-representation of women in positions of power and influence relative to men.”<sup>250</sup> To understand why outcomes for women in retirement are on average poorer for women than for men, one must consider women’s traditional caregiving role in society.

In the United Kingdom, caring is also a highly gendered activity and older women have the greatest chance of becoming a caregiver to a family member, partner, or friend who is ill, frail or disabled.<sup>251</sup> Women have a 50-50 chance of undertaking significant caretaking responsibilities at least once before age 59.<sup>252</sup> Men, on the other hand, reach this point when they are 74 years-old.<sup>253</sup> Some 58 percent of caregivers in the United Kingdom are women compared to

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245. In fact, social science studies provide compelling evidence that men are penalized at work when they engage in caregiving activities. See Bornstein, *Work-Family Conflicts of Men*, *supra* note 129, at 1334; see also Martin H. Malin, *Father's and Parental Leave Revisited*, 19 N. ILL. U. L. REV. 25, 39–40 (1998).

246. See *infra* notes 280–81 and accompanying text.

247. See *infra* notes 263, 289–90, 299, 310 and accompanying text.

248. See *infra* notes 290, 306 and accompanying text.

249. See *infra* notes 294, 651–54 and accompanying text.

250. DALIA BEN-GALIM & AMNA SILIM, INST. FOR PUB. POL’Y RESEARCH, THE SANDWICH GENERATION: OLDER WOMEN BALANCING WORK AND CARE 4 (2013), available at <http://www.ippr.org/publication/55/11168/the-sandwich-generation-older-women-balancing-work-and-care>.

251. CARERS UK, IT COULD BE YOU: A REPORT ON THE CHANCES OF BECOMING A CARER, at 1–2, (2001).

252. *Id.* at 4.

253. *Id.*

42 percent who are men.<sup>254</sup> Approximately one in four women in their 50s provide some care compared to one in five men.<sup>255</sup> As in the United States, women in the United Kingdom are more likely than men to drop out of the labor force due to caregiving responsibilities.<sup>256</sup>

Women face three main, potentially overlapping periods of caregiving: (1) when women parent their own children;<sup>257</sup> (2) when women care for elderly or sick family members, including their partners, or friends;<sup>258</sup> and (3) when women care for their grandchildren.<sup>259</sup> Although the first period will immediately impact younger women, and the second and third categories are more likely to impact middle aged or older women, there is a group, sometimes called the “sandwich generation,” which is defined as those

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254. EQUAL. & HUMAN RIGHTS COMM’N, *supra* note 72, at 560.

255. *Id.* at 564.

256. CARERS UK, FACTS ABOUT CARERS 2012, (2012).

257. Although childlessness among women has increased over time, over 80 percent of American women give birth to children. See GRETCHEN LIVINGSTON & D’VERA COHN, PEW RESEARCH CTR., CHILDLESSNESS UP AMONG ALL WOMEN; DOWN AMONG WOMEN WITH ADVANCED DEGREES 1 (2010) (noting that 18 percent of American women ages 40–44 “end[] [their] childbearing years without having borne a child.”). Some who do not bear biological children raise adoptive or step children. *Id.* at 2. Professor Rona Kaufman Kitchen calls the accumulation of workplace disadvantages suffered by women when they become mothers the “Mothering Effect,” a phenomenon that includes gender-based wage gaps, glass ceiling and maternal wall effects, hiring and promotion discrimination, and heightened risk of poverty. See Rona Kaufman Kitchen, *Eradicating the Mothering Effect: Women as Workers and Mothers, Successfully and Simultaneously*, 26 WIS. J.L. GENDER & SOC’Y 167, 171-73 (2011).

258. The majority of family caregivers in the United States are women. See JOAN C. WILLIAMS ET AL., AARP PUBLIC POL’Y INST., PROTECTING FAMILY CAREGIVERS FROM EMPLOYMENT DISCRIMINATION 2 (Aug. 2012), [http://www.aarp.org/content/dam/aarp/research/public\\_policy\\_institute/health/protecting-caregivers-employment-discrimination-fs-AARP-ppi-ltc.pdf](http://www.aarp.org/content/dam/aarp/research/public_policy_institute/health/protecting-caregivers-employment-discrimination-fs-AARP-ppi-ltc.pdf). In the United States, two-thirds of those who care for children with special needs and/or adults are female. NAT’L ALLIANCE FOR CAREGIVING & AARP, CAREGIVING IN THE U.S. 4 (2009), [http://www.caregiving.org/data/Caregiving\\_in\\_the\\_US\\_2009\\_full\\_report.pdf](http://www.caregiving.org/data/Caregiving_in_the_US_2009_full_report.pdf).

259. See generally Jessica Dixon Weaver, *Grandma in the White House: Legal Support for Intergenerational Caregiving*, 43 SETON HALL L. REV. 1 (2013) (detailing the way law and policy disadvantages grandparents—mainly grandmothers—who assume caregiving roles for their grandchildren); Gretchen Livingston & Kim Parker, *Since the Start of the Recession, More Children Raised by Grandparents*, PEW RESEARCH CTR. (Sept. 9, 2010), <http://www.pewsocialtrends.org/2010/09/09/since-the-start-of-the-great-recession-more-children-raised-by-grandparents/> (noting that 1 in 10 children in the United States resides with a grandparent).

simultaneously responsible for children and the elderly.<sup>260</sup> Definitions of caregiving may vary. In our model, we include not only care for those with special needs and medical conditions but also ongoing responsibility for minor children without special needs. We also include as part of women's caregiving responsibilities pregnancy, a physical condition that is integral to parenting for most mothers but does not have any direct impact on fathers.

#### 1. CAREGIVING DETAILED

Mothering constitutes the first major period of caregiving for many women. In the United Kingdom and the United States,<sup>261</sup> parenting roles have changed significantly over the last 50 years. While fathers now engage in much more childcare and housework than they did during the mid-twentieth century, and mothers are more likely to participate in the paid labor force, gender differences between the activities of female and male parents persist.<sup>262</sup> American mothers "spend about twice as much time with their children as fathers do."<sup>263</sup> Additionally, mothers devote eight more hours per week to housework than do fathers.<sup>264</sup> Although the gap between time in paid work for mothers and fathers has narrowed, fathers continue to spend more time in paid labor than do mothers. Among American mothers and fathers overall, including those who do not work, in 2011 fathers spent on average 37 hours per week in paid work while mothers spent only 21 hours.<sup>265</sup> Comparing only employed mothers and fathers reveals different figures. Among employed parents, in 2011, fathers worked 41 hours per week while

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260. See Kim Parker & Eileen Patten, *The Sandwich Generation: Rising Financial Burdens for Middle-Aged Americans*, PEW RESEARCH CTR. (Jan. 30, 2013), <http://www.pewsocialtrends.org/2013/01/30/the-sandwich-generation/>; Charles R. Pierret, *The 'Sandwich Generation': Women Caring for Parents and Children*, MONTHLY LAB. REV., (Sept. 2006).

261. See Kim Parker & Wendy Wang, *Modern Parenthood: Roles of Moms and Dads Converge as They Balance Work and Family*, PEW RESEARCH CTR. (Mar. 14, 2013), [http://www.pewsocialtrends.org/files/2013/03/FINAL\\_modern\\_parenthood\\_03-2013.pdf](http://www.pewsocialtrends.org/files/2013/03/FINAL_modern_parenthood_03-2013.pdf) ("The way mothers and fathers spend their time has changed dramatically in the past half century.").

262. *Id.*

263. This statistic includes both married and single mothers and fathers. *Id.* at 34.

264. *Id.* at 35.

265. *Id.* at 36.

employed mothers worked 33 hours.<sup>266</sup> In terms of part-time employment, in 2011, only 6.6 percent of employed fathers worked part-time while among employed mothers, 26.6 percent were working part-time.<sup>267</sup>

Parents' views of ideal childcare arrangements often vary from how parents meet childcare needs in reality. For example, one U.K. survey found that only one-quarter of parents think that childcare is the primary responsibility of the mother.<sup>268</sup> In practice, however, three-quarters of mothers surveyed stated that they have primary responsibility for childcare in the home.<sup>269</sup> There are also gender differences in parents' perceptions. When asked whether it is the parent who earns the most who should remain in the labor force, men were much more likely to agree (54 percent) than women (42 percent).<sup>270</sup>

Pregnancy, a common condition in the workplace, is a precursor to caregiving for the majority of mothers. In fact, in the United States, "a majority of pregnant women work in paid employment, and the vast majority of working women will become pregnant at some point."<sup>271</sup> Most American working women stay on the job into their third trimester, and many are back at work within three months of the birth.<sup>272</sup> As will be described in greater detail below, this precursor to caregiving, experienced only by women, does not necessarily but may in some cases be accompanied by physical conditions that affect an employee's ability to meet job requirements.<sup>273</sup> Even where pregnancy has no impact on job performance, bias against and resistance to pregnant women

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266. *Id.* at 37.

267. *Id.*

268. GAVIN ELLISON, ANDY BARKER, & TIA KULASURIYA, EQUAL. & HUMAN RIGHTS COMM'N, WORK AND CARE: A STUDY OF MODERN PARENTS 15, 32 (2009), available at [http://www.equalityhumanrights.com/uploaded\\_files/research/15\\_work\\_and\\_care\\_modern\\_parents\\_15\\_report.pdf](http://www.equalityhumanrights.com/uploaded_files/research/15_work_and_care_modern_parents_15_report.pdf).

269. *Id.* at 34.

270. *Id.* at 26.

271. Joanna L. Grossman, *Pregnancy, Work, and the Promise of Equal Citizenship*, 98 GEO. L.J. 567, 569 (2010).

272. *Id.* at 574.

273. See Jeannette Cox, *Pregnancy as "Disability" and the Amended Americans with Disabilities Act*, 53 B.C. L. REV. 443, 452 (2012).

continues in many American workplaces<sup>274</sup> and is especially problematic in low-wage workplaces.<sup>275</sup>

In the United Kingdom, where statutory protection for pregnant women is greater than in the United States,<sup>276</sup> pregnancy nonetheless creates disadvantage. A 2005 report found that “almost half of the 440,000 pregnant women in Britain experienced some form of disadvantage at work simply for being pregnant or taking maternity leave.”<sup>277</sup> That report estimated that approximately 30,000 women annually lost employment, through dismissal, layoff, or what is known in the United States as constructive discharge—being treated so poorly that one is forced from the job.<sup>278</sup> A further study of 122 recruitment agencies “found that more than 70 percent of agencies had been asked by clients to avoid hiring pregnant women or those of childbearing age.”<sup>279</sup>

A second stage of caregiving is defined by care for the elderly or sick. One U.S. study, which examined caregiving among those responsible for a child with special needs and/or an adult, estimated that 65.7 million people serve as unpaid family caregivers.<sup>280</sup> That study also found women far more responsible for caregiving than men. Such American caregivers are predominantly female; more specifically, women comprise 66 percent of caregivers under this definition, which excludes ordinary parenting responsibilities.<sup>281</sup>

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274. See Grossman, *supra* note 271, at 576–77.

275. See Stephanie Bornstein, *Work, Family, and Discrimination at the Bottom of the Ladder*, 19 GEO. J. ON POVERTY L. & POL’Y 1, 16 (2012) (noting that “pregnancy discrimination against low wage workers . . . is often blatant, sometimes outrageous, and reveals a total hostility to the idea that a low-wage female worker should become pregnant.”).

276. See *infra* notes 327–94 and accompanying text.

277. EQUAL. & HUMAN RIGHTS COMM’N, *supra* note 72, at 445 (citing EQUAL OPPORTUNITIES COMM’N, GREATER EXPECTATIONS: SUMMARY FINAL REPORT EOC’S INVESTIGATION INTO PREGNANCY DISCRIMINATION 10 (2005), available at [http://www.equalityhumanrights.com/uploaded\\_files/eoc\\_pregnancygfi\\_summary\\_report.pdf](http://www.equalityhumanrights.com/uploaded_files/eoc_pregnancygfi_summary_report.pdf)).

278. *Id.*

279. DEBORAH SMEATON ET AL., POL’Y STUDIES INST., THE EHRC TRIENNIAL REVIEW: DEVELOPING THE EMPLOYMENT EVIDENCE BASE 84 (2010), available at [http://www.equalityhumanrights.com/uploaded\\_files/triennial\\_review/triennial\\_review\\_employment\\_evidence\\_base.pdf](http://www.equalityhumanrights.com/uploaded_files/triennial_review/triennial_review_employment_evidence_base.pdf).

280. See NAT’L ALLIANCE FOR CAREGIVING & AARP, *supra* note 258, at 4.

281. See *id.*; see also LYNN FEINBERG ET AL., AARP PUBLIC POL’Y INST, VALUING THE INVALUABLE: 2011 UPDATE—THE GROWING CONTRIBUTIONS AND COSTS OF FAMILY CAREGIVING 1 (Jun. 2011) (“The ‘average’ U.S. caregiver is a 49-year-old

There was some racial and ethnic variation. The ratio of female to male caregiving remained comparable among whites,<sup>282</sup> Hispanics,<sup>283</sup> and African Americans.<sup>284</sup> Among Asian Americans, however, half of the caregivers were male.<sup>285</sup> U.K. figures show a similar pattern. There are approximately 5.8 million people providing unpaid care in England and Wales, representing just over one-tenth of the entire population.<sup>286</sup> Of these, around 3.7 million provide 1–19 hours of care per week, 775,000 provide 20–49 hours of care, and 1.4 million provide 50 or more hours of unpaid care on a weekly basis.<sup>287</sup>

American caregivers of children with special needs and/or elderly and sick adults are on average 48-years old.<sup>288</sup> Female caregivers spend an average of 21.9 hours a week providing care versus the 17.4 hours provided by men.<sup>289</sup> An overwhelming majority of primary caregivers—70 percent—were female.<sup>290</sup> The study also found that 73 percent of caregivers were employed during some portion of the time they were responsible for caregiving, and that their dual responsibilities to paid and unpaid labor required 66 percent of caregivers to arrive late for work, leave early, or take time off during the work day.<sup>291</sup> Fully 20 percent “took a leave of absence at some point while they were caregiving.”<sup>292</sup> Those who exit the labor force due to caregiving responsibilities lose earnings, Social Security benefits, and may experience a loss of “job security and career mobility, and employment benefits such as health insurance and

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woman who works outside the home and spends nearly 20 hours per week providing unpaid care to her mother for nearly five years.”)

282. NAT’L ALLIANCE FOR CAREGIVING & AARP, *supra* note 258, at 15 (stating that among whites, 34 percent of men were caregivers).

283. *Id.* (stating that among Hispanics, 34 percent of caregivers were male).

284. *Id.* (stating that among African Americans, 30 percent of caregivers were men).

285. *Id.*

286. CHRIS WHITE, OFFICE OF NAT’L STATISTICS, 2011 CENSUS ANALYSIS: UNPAID CARE IN ENGLAND AND WALES, 2011 AND A COMPARISON WITH 2001 2 (Feb. 15, 2013), available at [http://www.ons.gov.uk/ons/dcp171766\\_300039.pdf](http://www.ons.gov.uk/ons/dcp171766_300039.pdf).

287. *Id.*

288. NAT’L ALLIANCE FOR CAREGIVING & AARP, *supra* note 258, at 4.

289. *Id.* at 5.

290. *Id.* at 15. Primary caregivers are “those who provide all or the majority of the unpaid care for” a caregiving recipient. *Id.* at 14.

291. *Id.* at 9.

292. *Id.*

retirement savings.”<sup>293</sup> Evidence indicates that middle aged “working women who begin caring for aging parents reduce paid work hours or leave the workplace entirely.”<sup>294</sup>

In terms of so-called “sandwich caregiving,” increased life expectancy and delayed parenthood are two demographic trends that put caregiving pressures on middle-aged individuals.<sup>295</sup> More women are in the labor force, which makes meeting their traditional caregiving role one that must be juggled with paid employment.<sup>296</sup> One study found that dual-earner, sandwich generation couples comprise between 9–13 percent of American households with an adult 30 years old or older.<sup>297</sup> The youngest minor child in such households was on average 10.8 years old.<sup>298</sup> Women sandwich caregivers provided more hours of care a week to aging relatives than did men.<sup>299</sup> Another study, which focused exclusively on female sandwich caregivers, estimated that “between 1. . .and 33 percent of 45-to-56-year-old women are simultaneously caring for their parents and their children.”<sup>300</sup> That study noted that the “preferred estimate” of middle aged women involved in sandwich caregiving is 9 percent.<sup>301</sup> The peak age for sandwich carers, according to a United Kingdom report, is 40 to 54 years old with, of course, more women than men being such carers.<sup>302</sup>

The final stage where women may assume responsibility for caregiving is when they become grandparents. In the United States, grandparent caregiving, which had been increasing steadily, sustained a significant spike during the first year of the recession beginning in 2007.<sup>303</sup> By one estimate, just over 2.7 million grandparents serve as primary caretakers of their grandchildren, in 2007.<sup>304</sup>

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293. Feinberg et. al., *supra* note 281, at 6.

294. *Id.*

295. See LeaAnne DeRigne & Stephen Ferrante, *The Sandwich Generation: A Review of the Literature*, 9 FLA. PUB. HEALTH REV., 95, 95 (2012).

296. *Id.*

297. See Leslie B. Hammer & Margaret B. Neal, *Working Sandwich-Generation Caregivers: Prevalence, Characteristics, and Outcomes*, PSYCHOLOGIST-MANAGER J. 93, 93 (2008)

298. DeRigne & Ferrante, *supra* note 295, at 99.

299. *Id.*

300. Pierret, *supra* note 260, at 4.

301. *Id.*

302. BEN-GALIM & SILIM, *supra* note 250, at 10.

303. See Livingston & Parker, *supra* note 259, at 1.

304. *Id.*

Such primary caretaking is more common among African Americans and Hispanics than it is among whites and Asians.<sup>305</sup> Grandmothers are more likely to be primary caretakers of grandchildren than are grandfathers: 62 percent of such caregivers are women.<sup>306</sup> A recent MetLife study found 13 percent of grandparents “provide care on a regular basis for at least one grandchild,”<sup>307</sup> with 32 percent babysitting “five or more days per week,”<sup>308</sup> and 15 percent reporting that they are raising a grandchild or grandchildren.<sup>309</sup> Moreover, grandmothers traditionally provide care more often than grandfathers.<sup>310</sup>

Older people in Britain also play a significant role in caring for grandchildren. As noted in a recent report, “[i]n Scotland and Wales, grandparents are the most common source of childcare.”<sup>311</sup> In England, grandparents are the most prevalent source of informal care, providing “26 percent of all childcare used.”<sup>312</sup> The most likely group to provide such caregiving are working age grandmothers with low incomes, many of whom reduce their work hours or leave paid labor in order to become caregivers to their grandchildren.<sup>313</sup> Indeed, grandmothers overall are more likely than their male counterparts to provide their grandchildren with 10 hours a week or more in childcare.<sup>314</sup>

## 2. THE IMPACT OF CAREGIVING ON WORK

Caregiving responsibilities, which affect some men but are disproportionately assumed by women, often place caregivers at a disadvantage in the workplace. This is because caregivers face

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305. *Id.*

306. *Id.* at 3.

307. METLIFE MATURE MARKET INST., GRANDPARENTS INVESTING IN GRANDCHILDREN 4 (Sept. 2012).

308. *Id.*

309. *Id.*

310. *Id.* at 11.

311. HOW FAIR IS BRITAIN?, *supra* note 72, at 564.

312. *Id.*

313. *Id.*

314. SARAH WELLARD, GRANDPARENTS PLUS, DOING IT ALL? GRANDPARENTS, CHILDCARE AND EMPLOYMENT: AN ANALYSIS OF BRITISH SOCIAL ATTITUDES SURVEY DATA FROM 1998 AND 2009 3 (2011), available at [http://www.grandparentsplus.org.uk/wp-content/uploads/2011/03/Doing-it-all\\_Online.pdf](http://www.grandparentsplus.org.uk/wp-content/uploads/2011/03/Doing-it-all_Online.pdf).

conflicting demands on their time.<sup>315</sup> They must juggle to meet the requirements of their employers and the needs of their care recipients. Indeed, in trying to balance these responsibilities, caregivers violate the precepts of “ideal workers,” who can “work full-time and overtime with no interruptions throughout their entire career[s].”<sup>316</sup> Caregiving employees are what one scholar calls “real employees,” “who get the job done—often very efficiently—but do not work as much as their non-caregiver counterparts.”<sup>317</sup> Most workplaces, however, are not designed with caregiving employees in mind. Working hours may be long, inflexible, or unpredictable.<sup>318</sup> Attendance policies may be rigid.<sup>319</sup> Pay may be so low that caregiving workers could not afford to take time off even if such time were available.<sup>320</sup>

Pregnancy too can place working women at a disadvantage. In the low wage sector in particular, pregnant women may be fired,<sup>321</sup> have their assignments transferred or work reduced even when they are able to work as they had before pregnancy,<sup>322</sup> and be denied light duty or refused any kind of work adjustment when they require it.<sup>323</sup> There also, in this sector, seems to be harsher treatment of pregnant women of color—those who might bring intersectional claims.<sup>324</sup> Professional and middle-wage women who become pregnant also face disadvantage both because they may need temporary accommodations during pregnancy<sup>325</sup> and due to harmful stereotypes

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315. See Nicole Buonocore Porter, *Why Care about Caregivers? Using Communitarian Theory to Justify Protection of “Real” Workers*, 58 U. KAN. L. REV. 355, 356 (2010) (“Caregivers face conflicts both at home and at work when work responsibilities clash with responsibilities at home.”).

316. Nicole Buonocore Porter, *Synergistic Solutions: An Integrated Approach to Solving the Caregiver Conundrum for “Real Workers,”* 39 STETSON L. REV. 777, 778 (2010). Professor Joan Williams uses the term “ideal worker” to refer to full-time employees who can devote themselves single-mindedly to paid employment without the constraints of family responsibilities. See JOAN WILLIAMS, *UNBENDING GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT* 1 (2000).

317. Porter, *supra* note 316, at 777.

318. Porter, *supra* note 315, at 361–365.

319. *Id.* at 362.

320. See Bornstein, *supra* note 275, at 1.

321. *Id.*

322. *Id.* at 18.

323. *Id.* at 21.

324. *Id.* at 39–40.

325. See Karen J. Kruger, *Pregnancy and Policing: Are They Compatible? Pushing the Legal Limits on Behalf of Equal Employment Opportunities*, 22 WISC. WOMEN’S L.J.

associated with pregnancy that can adversely affect performance evaluation.<sup>326</sup>

### 3. LEGAL RESPONSES TO FAMILY RESPONSIBILITIES AND PREGNANCY DISCRIMINATION

In the United States, employment laws do not provide sufficient protection to caregiving workers,<sup>327</sup> and discrimination against such workers, commonly called “family responsibilities discrimination,” is widespread.<sup>328</sup> At the federal level, there is no express prohibition on family responsibilities discrimination.<sup>329</sup> Aggrieved workers must attempt to craft protection from a patchwork of “legal theories [based] in federal and state law—for example, as sex discrimination, discrimination based on association with a person with a disability, or a violation of state or federal family and medical leave laws.”<sup>330</sup> Three federal laws are frequently invoked in family responsibilities discrimination litigation: Title VII;<sup>331</sup> the Family and Medical Leave Act (FMLA);<sup>332</sup> and the Americans with Disabilities Act (ADA).<sup>333</sup> As will be described, these laws fall short of what is necessary for caregivers to be able to balance their work and family obligations.

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61, 61 (2007) (arguing that law enforcement agencies should accommodate pregnancy as a temporary physical disability); Cox, *supra* note 273, at 452–54 (discussing the need many pregnant employees have for accommodations).

326. See Joan C. Williams & Nancy Segal, *Beyond the Maternal Wall: Relief for Family Caregivers who are Discriminated against on the Job*, 26 HARV. WOMEN’S L.J. 77, 93–94 (2003) (discussing a relevant study on stereotyping and pregnancy); *Unlawful Discrimination Against Pregnant Workers and Workers with Caregiving Responsibilities*, Hearing Before the Equal Emp’t Opportunity Comm’n (Feb. 15, 2012) (written testimony of Dr. Stephen Bernard) (describing empirical studies of bias against pregnant women).

327. See Porter, *supra* note 315, at 369–80.

328. See Press Release, Equal Emp’t Opportunity Comm’n, Unlawful Discrimination Based on Pregnancy and Caregiving Responsibilities Widespread Problem, Panelists Tell EEOC 1 (Feb. 15, 2012) (“At a time when most pregnant women want and need to work, and more American workers struggle to balance work and family, discrimination against pregnant women and workers with caregiving responsibilities remains a significant problem . . .”).

329. Porter, *supra* note 315, at 370.

330. Williams et al., *supra* note 258, at 2.

331. 42 U.S.C. § 2000e (2012).

332. Family and Medical Leave Act, 29 U.S.C. § 2601 (2012).

333. Americans with Disabilities Act, 42 U.S.C. § 12101 (2012).

Title VII's prohibition of sex discrimination, as noted above, prohibits descriptive and prescriptive sex stereotyping.<sup>334</sup> That prohibition includes gender-based stereotypes related to the roles of mothers and fathers.<sup>335</sup> Claims involving stereotypes may also be brought under other laws, including the FMLA.<sup>336</sup> As one commentator notes:

These cases address head-on the biases that underlie family responsibilities discrimination, including the assumptions that women will prioritize family over work and men should have few family responsibilities. Examples [of cases] include denying a mother a promotion on the belief that she would not want to move her family, terminating a new mother on the presumption that mothers should be at home with children, and refusing to deem a father a "primary caregiver" so he would be entitled to additional leave to care for his newborn on the supposition that only women should care for babies.<sup>337</sup>

Despite the success of some family responsibilities discrimination suits,<sup>338</sup> one weakness in the law's prohibition of sex stereotyping is the insistence of some courts that plaintiffs produce a comparator or similarly situated individual of the other sex who was treated better.<sup>339</sup> A woman denied a promotion, for example, may be unable to find a male employee with similar caregiving responsibilities who was promoted in her stead. Indeed, the person promoted may well be an ideal worker without caregiving responsibilities who works harder than the plaintiff.<sup>340</sup> In short, stereotyping cases may only help those employees who perform as

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334. 42 U.S.C. § 2000e (2012).

335. See CYNTHIA THOMAS CALVERT, CTR. FOR WORKLIFE LAW, FAMILY RESPONSIBILITIES DISCRIMINATION: LITIGATION UPDATE 2010 10, available at <http://worklifelawblog.blogspot.com/2010/02/family-responsibilities-discrimination.html>.

336. See Bornstein, *supra* note 129, at 1320–23 (describing the sex stereotyping prohibition under the FMLA).

337. See CALVERT, *supra* note 334, at 10.

338. The Center for WorkLife Law reports a very high success rate for family responsibility discrimination suits overall: 50.7 percent. Note that for the purpose of calculating this figure, the Center considered an employee to have won if the employee "wins at trial, on summary judgment or on appeal, or settles with the employer." *Id.* at 11.

339. See *Unlawful Discrimination Against Pregnant Works and Works with Caregiving Responsibilities*, Hearing Before the Equal Emp't Opportunity Comm'n (Feb. 15, 2012) (written testimony of Joan C. Williams, Professor of Law, U.C. Hastings).

340. Porter, *supra* note 315, at 372.

ideal workers but face discrimination because of traditional beliefs about women's and men's roles.<sup>341</sup>

Discrimination against pregnant workers also, as noted, continues to be a significant problem in the United States despite an over 30 year prohibition against this form of sex discrimination.<sup>342</sup> One area where pregnant working women have had particular difficulty involves determining the appropriateness of assigning light duty in jobs that require lifting or other physical exertion.<sup>343</sup> While some employers deny light duty to pregnant women who need it, others force pregnant women to take light duty when they are capable of doing the job.<sup>344</sup> Requiring a pregnant woman to take light duty, when she neither wants nor needs it, is based on prescriptive stereotypes about appropriate activities for this group of workers. Even though such stereotyping continues to affect pregnant women, it is clearly illegal.<sup>345</sup> In other words, this is an area where law has had an insufficient impact on managerial culture.

Analyzing a pregnant woman's right to light duty when she requests it has been more complicated, a fact detrimental to pregnant women. Legally, a pregnant worker who can point to a comparator who required light duty for another reason and was accommodated will be able to demonstrate pregnancy discrimination if she is not treated in the same way.<sup>346</sup> Some employers, however, have argued that they will only make light duty available to workers injured on the job, and since pregnancy<sup>347</sup> is not an on-the-job injury, no accommodation is necessary.<sup>347</sup> Shockingly, Professor Joan Williams reports that in "these cases women typically lose" because courts believe ruling in favor of the plaintiffs constitutes preferential treatment of pregnant women.<sup>348</sup> She correctly points out that the

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341. *Id.* at 373–74.

342. *See* Press Release, *supra* note 328, at 1 (noting that "[d]espite the passage of the Pregnancy Discrimination Act more than 30 years ago," pregnancy discrimination continues to be a significant problem).

343. *See* Written Testimony of Joan C. Williams, *supra* note 339, at 6 ("Denial of light duty is to [pregnant] women what high school education requirements were to African-Americans in the 1970s.").

344. *Id.* at 6–7.

345. *Id.* at 7.

346. *Id.*

347. *Id.*

348. *Id.*

Pregnancy Discrimination Act<sup>349</sup> mandates pregnant workers “be treated ‘the same’ as other workers with a similar ability or inability to work”<sup>350</sup> and that the site where or the manner in which the incapacity arises is irrelevant.<sup>351</sup>

Another possible way for pregnant workers requiring light duty to obtain legal protection is through the ADA. Amendments to the ADA in 2008 increased the chances that temporary, non-chronic conditions count as impairments that may trigger the employer’s duty to accommodate.<sup>352</sup> Although pregnancy itself is not a disability, the present Interpretive Guidance attached to the amendment’s regulations helpfully states that “a pregnancy-related impairment that substantially limits a major life activity is a disability.”<sup>353</sup> As Professor Williams notes, however, the EEOC needs to clarify that specific types of pregnancy-related conditions, such as those which necessitate lifting restrictions or other forms of light duty, are covered by the ADA and thus, absent any defenses, employers may be obligated to grant requests from pregnant workers for light duty.<sup>354</sup>

Additionally, the ADA prohibits discrimination against an employee based on that worker’s association with a disabled individual.<sup>355</sup> Certainly, this provision would assist an employee with caregiving responsibilities who might face unfounded bias in light of her or his caregiving role for a disabled family member. Unfortunately, the ADA does not provide a right to reasonable accommodation for one’s caregiving responsibilities to a disabled individual.<sup>356</sup> Accommodation, for example, a flexible schedule so that the employee can take a disabled relative to medical appointments, is what many caregivers require in order to balance work and family obligations. They are not, however, legally-entitled to such flexibility. Indeed, an employer with an equitably enforced but strict attendance policy could legally terminate the employment of an

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349. Pregnancy Discrimination Act, 42 U.S.C. § 2000e(k) (2012).

350. Written Testimony of Joan C. Williams, *supra* note 339.

351. *Id.*

352. *Id.* Those temporary conditions must substantially limit a major life activity. *Id.*

353. Interpretive Guidance on Title I of the Americans with Disabilities Act, 29 C.F.R. Pt. 1630 App. (2014).

354. Written Testimony of Joan C. Williams, *supra* note 339.

355. Williams et al., *supra* note 258, at 9.

356. *Id.*

employee whose caregiving responsibilities cause work to be missed on a frequent basis.<sup>357</sup>

Finally, the United States' stingy family leave law, the FMLA, ill serves workers' caregiving needs. The law includes provisions providing unpaid time off to care for children, parents, and spouses. The law, however, does not cover small employers, which are those employers with fewer than 50 employees,<sup>358</sup> and it only covers workers employed more than a year who have labored 1,250 or more hours within the last 12 months.<sup>359</sup> These definitional constraints screen out many women caregivers "since women are more likely than men to work for small businesses, to work part-time, to work in occupations with little job security, and to interrupt their careers due to family responsibilities."<sup>360</sup> Overall, almost 40 percent of U.S. employees go without the FMLA's meager protections either because they work for small employers or are themselves ineligible for leave although working for an eligible employer.<sup>361</sup>

As for those protections, the law provides 12 weeks of unpaid leave, a provision that falls especially harshly on low income workers who often cannot afford to take time off without pay.<sup>362</sup> Additionally, the list of persons for whom one can take time off in order to provide care is quite limited. The FMLA covers spouses, children, and parents; grandparents are not entitled to leave "unless they are in loco parentis."<sup>363</sup> And even if one is covered by the law, and economically able to make use of its provisions, the FMLA only provides for leave time rather than temporary reduced or flexible schedules, which caregivers may need.<sup>364</sup>

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357. See THOMAS R. HAGGARD, UNDERSTANDING EMPLOYMENT DISCRIMINATION 323 (2d ed. 2008) ("[A]n employer may not refuse to hire an applicant that has a spouse or child with a disability on the supposition that the applicant would miss work frequently....Of course, if that turns out to be true, then the employer may later terminate the person for cause.").

358. Porter, *supra* note 315 at 377.

359. 29 U.S.C. § 2611(2)(A) (2012).

360. Porter, *supra* note 315, at 377-78 (quoting Laura Kessler, *The Attachment Gap: Employment Discrimination Law, Women's Cultural Caregiving, and the Limits of Economic and Liberal Theory*, 34 U. MICH. J.L. REFORM 371, 422 (2001)).

361. See Joanna L. Grossman, *Job Security Without Equality: The Family and Medical Leave Act of 1983*, 15 WASH. U. J.L. & POL'Y 17, 37 (2004).

362. Porter, *supra* note 315 at 378.

363. Weaver, *supra* note 259 at 37.

364. Williams et al., *supra* note 329 at 8.

In the United Kingdom, there is a significant amount of legislation intended to protect women during pregnancy and maternity, and legal provisions aim to help parents cope with responsibilities to their dependents. More specifically, provisions in the Equality Act 2010 protect women from discrimination during pregnancy and maternity leave, regulations allow employees to request flexible working conditions, and parents have a right to parental leave and the right to take time off work to deal with dependent-related emergencies.<sup>365</sup>

Pregnancy and maternity have long been viewed as a protected period in the European Union. Since the United Kingdom is an EU member state, its law and policy is governed by the rulings of the Court of Justice of the European Union (CJEU).<sup>366</sup> CJEU rulings hold that discrimination against a woman because she is pregnant or breast feeding or on maternity leave automatically amounts to sex discrimination because only women are capable of pregnancy, lactation, and giving birth. In *Brown v. Rentokil Ltd.*,<sup>367</sup> for example, the CJEU considered the dismissal of a female employee who was absent through most of her pregnancy, and was dismissed under a provision of the contract of employment which allowed for dismissal after 26 weeks of continuous absence through sickness. The Court held that the EU's Equal Treatment Directive "precludes dismissal of a female worker at any time during her pregnancy for absences due to incapacity for work caused by an illness resulting from that pregnancy."<sup>368</sup>

Similarly in *Dekker*,<sup>369</sup> the complainant applied for an instructor's post at a training center for young adults. She subsequently informed the hiring committee that she was three months pregnant.

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365. See *infra* notes 370–78 and accompanying text.

366. Law in the United Kingdom must "conform[] to EU directives, which are binding yet flexible legal measures that member countries translate into national law." Bisom-Rapp & Sargeant, *supra* note 111, at 719. U.K. law is thus influenced by those directives, and the rulings of the CJEU, which often involve the national laws of other member states. *Id.* at 743. The CJEU can decide preliminary rulings regarding the interpretation of EU law when requested to do so by the national courts of the member countries. ROGER BLANPAIN ET AL., *THE GLOBAL WORKPLACE* 395 (2d ed. 2012).

367. *Brown v. Rentokil Initial UK Ltd.*, [1998] C-394/96 (H.L.) I-4185.

368. *Webb v. EMO Air Cargo (UK) Ltd.*, [1994] C-32/93 (H.L.) I-03567.

369. HR 8 november 1990, *Dekker v. Stichting Vormingscentrum voor Jong Volwassenen (VJV-Centrum) Plus*, 1991, C-177/88, I-3941.

The committee nonetheless forwarded her name to the management board as the most suitable candidate for the job. The board then informed Mrs. Dekker that she would not be appointed. The problem was that Mrs. Dekker was pregnant when she submitted her application and the board believed that if she were hired, the center's insurer would not reimburse the daily benefits that the employer would be obliged to pay her during her maternity leave. As a result, the employer would be financially unable to employ a replacement during Mrs. Dekker's absence and would thus be short-staffed. The Court of Justice held that the failure to appoint Mrs. Dekker was in direct contravention of the principle of equal treatment.

The U.K. Equality Act 2010 contains nine protected characteristics, which include both pregnancy and maternity—the two are considered a combined characteristic—and sex.<sup>370</sup> The Act makes unlawful both direct (disparate treatment) and indirect (disparate impact) discrimination in relation to sex.<sup>371</sup> In the case of pregnancy and maternity, the law makes direct discrimination unlawful.<sup>372</sup> Additionally, Section 18(2) of the Act prohibits “unfavourable” treatment by an employer because a person is pregnant or ill in relation to a pregnancy.<sup>373</sup> Moreover, use of the legal term “unfavourable” rather than the term “less favourable,” the latter being the term applicable to most of the other protected characteristics, is deliberate.<sup>374</sup> The legal term “unfavourable” makes the protection against discrimination on the basis of pregnancy or maternity particularly strong. By using the term “unfavourable,” Parliament freed victims from having to prove discrimination by way of a comparator who lacked the characteristic but was treated better.<sup>375</sup> Similar protection is afforded those on maternity leave.<sup>376</sup> There is

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370. Equality Act 2010, c.15, §§ 4, 18 (U.K.).

371. *Id.* at §§ 13, 19.

372. *Id.* at § 13.

373. *Id.* at § 18(2).

374. See DISCRIMINATION AND THE LAW, *supra* note 163, at 71 (“A person discriminates against a woman if, in the protected period in relation to her pregnancy, she is treated unfavourably because of the pregnancy or any illness suffered by her as a result of it. This is different from most of the other protected characteristics, which require ‘less favourable treatment’.”).

375. *Id.* (“In relation to . . . pregnancy/maternity the requirement is for ‘unfavourable treatment’. . . . The reference to unfavourable treatment rather than less favourable treatment clearly shows that no comparator is required.”)

376. Equality Act, 2010, c. 15, § 18(3) (U.K.).

also an entitlement to a maximum of 52 weeks maternity leave, although not all of the leave is paid, and a right to return to one's job, or its equivalent.<sup>377</sup> Many women return to work before taking the whole entitlement for financial reasons. The average length of leave taken is currently 39 weeks.<sup>378</sup>

Such strong protection can lead to difficult situations for employers and employees alike. In *Eversheds v. De Belin*,<sup>379</sup> for example, the male claimant was one of two solicitors whose employer faced a redundancy decision. The employer's choice for layoff was between the claimant and another solicitor, who at the time was absent on maternity leave. The employer adopted a points scheme to decide which person would be let go. One of the factors for gaining points was called "lock up." This was the amount of time between undertaking a piece of work and receiving payment.

The claimant was scored on his actual performance. The solicitor absent on maternity leave, however, was given the maximum possible points for lock up even though she did not have any payments during the chosen period. This enabled her to marginally gain more points than the claimant and so he was the one made redundant. As a result, he made a claim for sex discrimination and unfair dismissal. Given the restrictions on acting against pregnant women or people on maternity leave, the employer argued that it had fulfilled its responsibility to the employee on maternity leave. The court held that the law, which gave pregnant women and those on maternity leave special treatment and protection, nevertheless required the treatment to be a proportionate means of achieving a legitimate aim. In this case, the treatment given to the absent employee was disproportionate, and thus the employer's actions amounted to direct sex discrimination against the male solicitor.

One option for women returning to work in the United Kingdom is a right given all employees to apply to their employer for

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377. The Maternity and Parental Leave etc Regulations, 1999 SI 1999/3312 (U.K.).

378. JENNY CHANFREAU ET AL., DEP'T FOR WORK & PENSIONS, MATERNITY & PATERNITY RIGHTS & WOMEN RETURNERS SURVEY 2009–10 (2011), available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/214367/rrep777.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/214367/rrep777.pdf).

379. *Eversheds Legal Servs. Ltd. v. De Belin*, [2011] UKEAT 0352/101JOJ.

a change in working hours or greater flexibility in working time.<sup>380</sup> The purpose of the application must be the care of a child<sup>381</sup> or an adult.<sup>382</sup> There are complex rules and the employer is able to reject the request for one of a number of specified reasons including the burden of additional costs, the inability to reorganize the work or to recruit extra staff, or if the change would have a detrimental effect on quality or performance of the undertaking.<sup>383</sup> The employer must provide reasons for taking the decision and those reasons must be based on facts.

*Commotion Ltd. v. Rutty*, for example, concerned an individual who was employed as a warehouse assistant.<sup>384</sup> After she became legally responsible for the care of her grandchild, she applied to work three days a week instead of five. Her request was turned down on the grounds that it would have a detrimental impact on performance in the warehouse. The court, however, supported her claim that the employer had failed to establish that it had refused the request on one of the grounds permitted by the legislation. Courts are entitled to investigate to see whether the decision to reject the application is based on facts and whether the employer could have coped with the change without disruption. In this case, the court found that the evidence did not support the employer's assertion. Nor had the employer carried out an investigation to see whether it could cope with the claimant's requested work schedule.

In addition to these rights, parents are entitled to take up to 18 weeks of parental leave for each child under the age of five years.<sup>385</sup> Such leave is unpaid and can normally be taken only in one week periods, with a maximum of four weeks in any one year.<sup>386</sup> The leave

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380. The right applies to employees after 26 weeks of continuous employment; see *The Flexible Working (Eligibility, Complaints and Remedies) Regulations 2002* as amended by SI 2009/595 (U.K.).

381. *The Flexible Working (Eligibility, Complaints, and Remedies) (Amendment) Regulations, 2006*, S.I. 2006/3314, art. 5, ¶ 3A (U.K.).

382. *Flexible Working*, GOV.UK (Mar. 10, 2014 7:13PM), <https://www.gov.uk/flexible-working> (last updated Apr. 30, 2014).

383. *Employee Rights Act, 1996*, c. 18 § 806.

384. *Commotion Ltd. V. Rutty*, [2005] UKEAT 0418\_05\_1310, (U.K.) [2006] IRLR 171, available at [http://www.bailii.org/uk/cases/UKEAT/2005/0418\\_05\\_1310.html](http://www.bailii.org/uk/cases/UKEAT/2005/0418_05_1310.html).

385. See *Parental Leave*, GOV. U.K., <https://www.gov.uk/parental-leave/entitlement> (last updated Jan. 20, 2014). Leave rights for those caring for children with disabilities continue until the child's 18th birthday. *Id.*

386. *Id.*

entitlement is for “any individual child” so that an employee/parent of multiple-birth children will be entitled to 18 weeks for each. Similarly employees/parents with more than one child, of differing ages, will be entitled to 18 weeks of leave for each child. Employees need to give notice of their wish to take this leave but employers are able to postpone the date by up to six months if taking leave at the requested time would disrupt the business. As in the United States, the fact that the leave is unpaid limits its use, especially by men.<sup>387</sup>

U.K. law also recognizes that the best laid plans for dependent care can go wrong or circumstances arise regarding dependents that demand immediate attention. To enable employees to meet their family responsibilities, employees are entitled to a reasonable amount of time off from work to take action needed to provide assistance when a dependent falls ill, gives birth, is injured or assaulted; or to make arrangements for care for a dependent who is ill, injured or dies; or as a result of the unexpected disruption of arrangements for the care of a dependent; or to deal with unexpected incidents resulting from a child being at school.<sup>388</sup>

The details of this employment right have been elaborated by employment tribunals. *Qua v. John Ford Morrison Solicitors*, for example, concerned the dismissal of a legal secretary who had a large number of absences—17 absences to be exact—during a relatively short period of employment of less than one year.<sup>389</sup> The employee, a single mother, stated that most of these absences were due to medical problems experienced by her young son, who suffered from ear, nose, and throat-related conditions.<sup>390</sup> Discussing the meaning of a “reasonable amount of time off,” the court held that there is no statutory maximum to the number of occasions that an employee could be absent.<sup>391</sup> Yet neither is there an entitlement to an unlimited amount of time off.<sup>392</sup> Moreover, the right to time off was to address unexpected circumstances.<sup>393</sup> When it is known that the employee’s

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387. See generally DIRECTORATE GEN. EMP’T & SOCIAL AFFAIRS, EUROPEANS’ ATTITUDES TO PARENTAL LEAVE 18 (May 2004), available at <http://www.fatherhoodinstitute.org/uploads/publications/74.pdf>.

388. Employment Rights Act, 1996. c.18 §§ 57A & 57B.

389. *Qua v. John Ford Morrison Solicitors*, [2003] I.C.R. 482 (EAT).

390. *Id.* at ¶ 4.

391. *Id.* at ¶ 18.

392. *Id.* at ¶ 21.

393. *Id.*

dependent is suffering from a medical condition likely to result in regular recurrences, then the situation no longer comes within the provisions of the legislation because it is no longer unexpected.<sup>394</sup>

All these measures amount to strong recognition that parents, and especially mothers, need protection and assistance in caring for dependents. In this respect, legal regulation in the United Kingdom is superior to that in the United States. Yet, as noted above, there still exists in the United Kingdom much discrimination against pregnant women and those on maternity leave, and it is still mothers, rather than fathers, who take time off to care for dependents, often to the detriment of their careers and future earnings potential.<sup>395</sup> Evidence of this is in the report of a survey of working mothers commissioned by London law firm, Slater & Gordon. The survey found that:

One in four mothers who have returned to work believe that they have been subjected to discrimination, either before or after the birth of their child.

Some fifty-one per cent consider that their employers' and colleagues' attitude towards them changed when they fell pregnant, while two thirds said things have been 'difficult' for them since they returned from maternity leave.

Being overlooked for promotion and being forced to watch more junior employees progress faster up the career ladder were common complaints.

While many women said they felt that their views weren't considered as important as those of staff without children and that they often felt 'left out'.

Nearly half of working mothers felt having children halted their career progression, while a third described rising up the career ladder as a mum 'impossible.'<sup>396</sup>

Such findings underscore the limits of legal regulation and the intractability of the problems related to caregiving which many women face in the workplace.

#### E. Career Outcomes

Not surprisingly, the gender-based factors previously detailed—related to education and training; stereotyping; multiple discrimination; and caregiving roles—take their toll on women's

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394. *Id.*

395. *See supra* notes 280–87 and related text.

396. Press Release, Slater & Gordon, Mums Face Discrimination in the Workplace, (Aug. 8, 2013), available at <http://www.slatergordon.co.uk/media-centre/press-releases/2013/08/mums-facing-discrimination-in-the-workplace/>.

career mobility. The difficulties women face in this regard result in a “glass ceiling”—the unseen, impenetrable barrier that prevents women from advancing to the upper ranks of business,<sup>397</sup> the professions,<sup>398</sup> and even the non-profit sector.<sup>399</sup> Relatedly, women’s occupational progress is impeded by a “maternal wall,” which diverts or even derails career trajectories when women become pregnant, become mothers, or choose to work in part-time or flexible work arrangements.<sup>400</sup>

In many cases, the glass ceiling and the maternal wall are not simply the products of discrete employment decisions. Rather, these barriers are the result of an accumulation over time of mundane “workplace interactions among workers at all levels of an occupational hierarchy.”<sup>401</sup> In other words, institutional practices and workplace dynamics limit the occupational mobility of traditionally underrepresented groups.<sup>402</sup> This so-called “second generation” discrimination, a product of implicit bias and workplace structures,<sup>403</sup>

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397. See Robert B. Reich, *Message from the Chairman*, in GOOD FOR BUSINESS: MAKING FULL USE OF THE NATION’S HUMAN CAPITAL, A FACT-FINDING REPORT OF THE GLASS CEILING COMMISSION at iii (1995) (“The term “glass ceiling” . . . identified a puzzling new phenomenon. There seemed to be an invisible—but impenetrable—barrier between women and the executive suite, preventing them from reaching the highest levels of the business world regardless of their accomplishments and merits.”) The term also is used to describe comparable barriers facing women and men of color. *Id.*

398. See generally MARY BLAIR-LOY, LAURA PECENCO & ERIN CECH, CTR. FOR RESEARCH ON GENDER IN THE PROFESSIONS, THE PERSISTENCE OF MALE POWER AND PRESTIGE IN THE PROFESSIONS: REPORT ON THE PROFESSIONS OF LAW, MEDICINE, AND SCIENCE & ENGINEERING (2013), available at <http://crgp.ucsd.edu/documents/PersistenceofMalePowerandPrestigeintheProfessionsReportwithCaseStudies.pdf>.

399. See DEBORAH AKEL ET AL., OLDER WOMEN’S LEAGUE, 2012 MOTHER’S DAY REPORT: WOMEN AND THE WORKFORCE—CHALLENGES AND OPPORTUNITIES FACING WOMEN AS THEY AGE 16 (2012).

400. Williams & Segal, *supra* note 326, at 78.

401. Samuel R. Bagenstos, *The Structural Turn and the Limits of Antidiscrimination Law*, 94 CAL. L. REV. 1, 5 (2006).

402. See Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-CL. L. REV. 91, 145 (2003).

403. Professor Susan Sturm coined the term “Second Generation Discrimination” in a widely-cited and debated article. See generally Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001).

is not easily addressed through anti-discrimination law.<sup>404</sup> Before tackling law and policy, however, the extent of the problem in women's career outcomes is detailed below.

#### 1. EVIDENCE OF LACKLUSTER CAREER OUTCOMES

That progress for women has been so slow evidences the intractability of the problem. In business in the United States, for example, in 2013, women held only 4.2 percent of Fortune 500 CEO positions (21 of 500 positions) and 4.6 percent of Fortune 1000 CEO positions (46 of 1000 positions).<sup>405</sup> Additionally, while women occupied 51.5 percent of positions in management, professional, and related occupations, they were only 14.3 percent of executive officers, and held only 16.6 percent of board of directors seats.<sup>406</sup> In terms of women's representation on corporate boards, Professor Douglas Branson points out that the few women who make it to the boardroom often are "trophy directors" who hold positions on up to seven boards.<sup>407</sup> Thus, the percentage figure commonly used—in 2013, 16.6 percent—is misleading.<sup>408</sup> In fact, there are fewer "actual female bodies" in the boardroom.

The picture in the professions is equally of concern. In legal careers, for example, women's underrepresentation at the top levels is apparent. For almost the past quarter century, women have earned over 40 percent of the law degrees in the United States.<sup>409</sup> In the entry level ranks of law firms they comprise 45 percent of associates.<sup>410</sup> Yet women are only 15 percent of law firm equity partners.<sup>411</sup> In the corporate world, only 20 percent of Fortune 500 general counsels are women. In legal education, women are only 21 percent of law school

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404. Bagenstos, *supra* note 401, at 40–41.

405. *Women CEOs of the Fortune 1000*, CATALYST (Apr. 24, 2014), available at <http://www.catalyst.org/knowledge/women-ceos-fortune-1000>.

406. *Catalyst Pyramid: U.S. Women in Business*, CATALYST (Mar. 3, 2014), available at <http://www.catalyst.org/knowledge/us-women-business-0>.

407. See Douglas M. Branson, *Initiatives to Place Women on Corporate Boards of Directors—A Global Snapshot*, 37 J. CORP. L. 793, 799–800 (2012).

408. *Id.*

409. See BLAIR-LOY ET AL., *supra* note 398, at 8.

410. *Id.*

411. *Id.*

deans.<sup>412</sup> And on the bench, women comprise only 27 percent of federal and state judgeships.<sup>413</sup>

Underrepresentation is also evident in the medical profession. Women have earned over 40 percent of medical degrees in the United States since the mid-1990s.<sup>414</sup> They comprise only 34 percent of physicians and surgeons, and are significantly less likely than men to have an ownership share in the medical “practice where they work.”<sup>415</sup>

In medical education, women faculty are only 20 percent of full professors, and in 2007, women occupied only 14 of 124 medical school deanships.<sup>416</sup>

Women similarly experience underrepresentation in the non-profit sector. In the United States, female employees represent two-thirds of the non-profit labor force.<sup>417</sup> Yet only 19 percent of the 400 largest charitable organizations are led by a woman CEO.<sup>418</sup> Female workers also fare poorly in career advancement in sectors that are not considered elite. For example, in *Wal-Mart Stores, Inc. v. Dukes*,<sup>419</sup> a sex discrimination case that would have been one of the largest class actions in history had the U.S. Supreme Court permitted class certification,<sup>420</sup> the statistics were stark and the economic ramifications for women clear:

Women fill 70 percent of the hourly [paid] jobs in [Wal-Mart’s] stores but make up only “33 percent of management employees.” “The higher one looks in the organization the lower the percentage of women.” The plaintiffs’ largely uncontested descriptive statistics also show that women working in the company’s stores “are paid less than men in every region” and “that the salary gap widens over time even for men and women hired into the same jobs at the same time.”<sup>421</sup>

In the United Kingdom, the same phenomenon regarding career outcomes is evidenced by reviewing the gender composition of those in senior positions in industry. In 2011, the U.K. government

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412. *Id.*

413. *Id.*

414. *Id.* at 10.

415. *Id.*

416. *Id.* at 11.

417. AKEL ET AL., *supra* note 399, at 16.

418. *Id.*

419. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).

420. *Id.* at 2547. The class as reviewed by the Supreme Court numbered approximately 1.5 million current and former women employees of Wal-Mart. *Id.*

421. *Id.* at 2563 (Ginsburg, J., concurring in part and dissenting in part).

published the Davies report on women on corporate boards.<sup>422</sup> The report predicted that at the present rate of progress it would be another 70 years before full gender equality was achieved in the boardroom.<sup>423</sup> In 2010, according to the report, only 12.5 percent of directors on FTSE 100 company boards were female, and even less, some 7.8 percent, on FTSE 250 company boards.<sup>424</sup> This equated to 154 female directorships compared to 1,812 male ones.<sup>425</sup> Focusing on the percentages and even the number of directorships can be misleading. Women board members in the United Kingdom are more likely than their male counterparts to hold multiple directorships.<sup>426</sup>

As a corrective, the Davies report recommended that chairmen of public companies set aspirational targets for female board membership; a target of 25 percent by 2015 was suggested.<sup>427</sup> Since publication of the Davies report, there has been progress in the percentage of women serving on U.K. company boards. As of March 2013, 17.3 percent of directors on FTSE 100 company boards were female, an increase of 2.3 percent from 2012.<sup>428</sup> Improvement has also been seen on FTSE 250 company boards; the percentage of female board directorships has increased to 13.3 percent.<sup>429</sup> There is hope the 25 percent target may indeed be met by 2015.<sup>430</sup>

Regarding senior management in the U.K. private sector, women are poorly represented. They occupy only 21.8 percent of chief executives and senior officials, and 38 percent of functional

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422. LORD DAVIES OF ABERSOCH, DEPT. FOR BUSINESS, INNOVATION AND SKILLS, WOMEN ON BOARDS (2011), *available at* <http://www.bis.gov.uk/assets/biscore/business-law/docs/w/11-745-women-on-boards.pdf> [hereinafter DAVIES REPORT].

423. *Id.* at 3.

424. *Id.* at 7. FTSE is an acronym for the Financial Times and London Stock Exchange.

425. *Id.* at 11.

426. *Id.* at 12.

427. *Id.* at 4.

428. *See* DR. RUTH SEALY & SUSAN VINNICOMBE, CRANFIELD UNIV., SCHOOL OF MGMT, THE FEMALE FTSE BOARD REPORT 2013: FALSE DAWN OF PROGRESS FOR WOMEN ON BOARDS? 6 (2013), *available at* <http://www.som.cranfield.ac.uk/som/dinamic-content/media/Research/Research%20Centres/CICWL/FTSE Report2013.pdf>.

429. *Id.*

430. *Id.* at 7.

managers.<sup>431</sup> Not surprisingly, there is gender-based clustering within functional management. For example, women occupy 63 percent of those managers in human resources.<sup>432</sup>

In terms of the judiciary, women in England and Wales make up only 22.6 percent of judges, although “the proportion is considerably lower at the higher reaches of the judicial profession.”<sup>433</sup> There is presently only one female Supreme Court Justice in the United Kingdom, Baroness Hale of Richmond, and she has criticized those at the top of the legal profession for failing to tap women for senior positions in the law.<sup>434</sup> Women have accounted “for over one-half of new entrants to the [legal] profession since 1993” and yet represent only 35 percent of barristers.<sup>435</sup> The proportion of women partners in London’s elite “Magic Circle” law firms is only 18 percent.<sup>436</sup>

Women in the United Kingdom are also underrepresented in higher education careers.<sup>437</sup> In 2011–12, women made up only 20 percent of professors.<sup>438</sup> They fared somewhat better considering all academic professionals. Women in that category held 39 percent of the positions<sup>439</sup> but still only some 14 percent of U.K. vice chancellorships.<sup>440</sup>

The story is repeated in the British medical profession. A 2013 survey of mostly women in the National Health Service (NHS)

431. See CARL BAKER & RICHARD CRACKNELL, *WOMEN IN PUBLIC LIFE, THE PROFESSIONS AND THE BOARDROOM* 15 (May 31, 2013), available at <http://www.parliament.uk/briefing-papers/SN05170>.

432. *Id.* Human Resources is a feminized field in the United States as well. Although few women were evident in the field in the 1960s, women held “70 percent of [human resources] jobs by the late 1990s.” Soohan Kim, Alexandra Kalev, & Frank Dobbin, *Progressive Corporations at Work*, 36 N.Y.U. REV. OF L. & SOC. CHANGE 171, 188 (2012).

433. BAKER & CRACKNELL, *supra* note 431, at 9.

434. See Louisa Peacock, *Law Firms Have ‘Unconscious Bias’ That Stops Women from Getting Promoted, Says Senior City Lawyer*, THE TELEGRAPH, May 24, 2013 (“ . . . [T]he only female [U.K.] Supreme Court Justice said in a public lecture that talented women were not given senior roles in the law because often interviewers were most comfortable hiring men.”).

435. Emma Barnett, *Britain’s Most Senior Female Judge: Our Legal System is Still Not Promoting Enough Women*, THE TELEGRAPH, Mar. 15, 2013.

436. See *Lawyers’ Salaries Favour Men*, NEW L.J., Jan. 31, 2013, available at <http://www.newlawjournal.co.uk/nlj/content/lawyer%E2%80%99s-salaries-favour-men>

437. See BAKER & CRACKNELL, *supra* note 431, at 12.

438. *Id.* at 13.

439. *Id.*

440. *Id.*

showed that almost half (49 percent) of the respondents thought that motherhood disadvantaged their careers and two-thirds reported feeling “greater pressure to prove themselves than their male counterparts.”<sup>441</sup> Women comprise three-quarters of those working in the NHS but hold “just 37 percent of senior roles on clinical commissioning group governing bodies and NHS provider boards.”<sup>442</sup> Some 37 percent of survey respondents also reported experiencing sexual discrimination and over half had experienced workplace bullying.<sup>443</sup>

## 2. LEGAL AND POLICY RESPONSES TO WOMEN’S CAREER OUTCOMES AND PROBLEMS

In both the United States and the United Kingdom, individual lawsuits are a blunt and not very effective way to tackle the lack of career mobility experienced by many women.<sup>444</sup> This Article has already described the ways in which the law falls short in attempting to address key factors that lead to underrepresentation, including stereotyping, multiple discrimination, and women’s roles as caregivers. This Subsection will cover legal and policy efforts not yet addressed. More specifically, we consider below the difficulty of using class action suits, a technique only available in the United States, and legal and other problems associated with the use of quotas and softer diversity initiatives.

The aggregation of many similar, individual discrimination claims into a class action might at first blush seem a potent tool for addressing women’s career mobility deficits. A class action would in theory be a vehicle for making visible and then catalyzing remediation of structural discrimination against the women of a given firm. Yet this form of law suit, which is only relevant in the United States, has been criticized as “produc[ing for underrepresented groups] little or

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441. Press Release, Kings Fund, Women Continue to Face Barriers to Taking Senior Leadership Positions in the NHS, New Research Finds (July 18, 2013), available at <http://www.kingsfund.org.uk/press/press-releases/women-continue-face-barriers-taking-senior-leadership-positions-nhs-new>.

442. *Id.*

443. *Id.*

444. Bagenstos, *supra* note 401, at 12 (“In many of today’s workplaces, then, employment discrimination law is faced with the daunting task of policing innumerable daily encounters between employees at all levels of the occupational hierarchy. Yet the current tools of employment discrimination doctrine are poorly matched to such a task.”)

no substantive change within the corporations [sued].<sup>445</sup> Moreover, to the extent employers subject to a class action endeavor to change, “[m]any of the changes that are implemented tend to be cosmetic in nature and are primarily designed to address public relations problems.”<sup>446</sup> The claimants often receive only very modest monetary awards while the attorneys are compensated handsomely.<sup>447</sup>

Further, the potential for obtaining class certification in an employment discrimination case was recently dealt a blow by the U.S. Supreme Court. In *Wal-Mart Stores, Inc. v. Dukes*,<sup>448</sup> mentioned above, seven named plaintiffs sought to represent women employed by Wal-Mart stores who were subject to the firm’s pay and promotions policy, a class of current and former workers numbering approximately 1.5 million.<sup>449</sup> The plaintiffs alleged that women’s compensation was inferior to that of their male counterparts in comparable positions, women were less frequently promoted to store management positions, and women who were promoted waited longer for such promotions.<sup>450</sup> Plaintiffs argued that Wal-Mart’s policy of delegating pay and promotion decisions to local store managers, had a disparate impact on women, and the company’s knowledge of the effects on women of its policies was the basis of a claim for disparate treatment.<sup>451</sup>

Although class certification was granted at the district court and appellate level, the Supreme Court reversed the grant.<sup>452</sup> Focusing on the commonality requirement of the Federal Rule of Civil Procedure 23(a)(2), which requires the named plaintiffs to demonstrate “questions of law or fact common to the class,”<sup>453</sup> the Court articulated a new, heightened commonality standard that requires “plaintiffs share the ‘same injury,’ raising ‘a common contention,’ the determination of which will resolve an issue that is

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445. Michael Selmi, *The Price of Discrimination: The Nature of Class Action Employment Discrimination Litigation and Its Effects*, 81 TEX. L. REV. 1249, 1250 (2003).

446. *Id.*

447. *Id.* at 150–51.

448. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).

449. See Natalie Bucciarelli Pedersen, *The Hazards of Dukes: The Substantive Consequences of a Procedural Decision*, 44 U. TOL. L. REV. 123, 125–26 (2012).

450. *Id.* at 125.

451. *Id.*

452. *Dukes* 131 S. Ct. at 2561.

453. FED. R. CIV. P. 23(a)(2).

'central' to each of the claims."<sup>454</sup> Commonality was not satisfied, noted Justice Scalia for the majority, because Wal-Mart had no general policy of discriminating nor did it have a common methodology by which supervisors would exercise discretion.<sup>455</sup> There were simply too many employment decisions involved and too many managers, who "left to their own devices . . . would select sex-neutral, performance-based criteria for hiring and promotion that produce no actionable disparity at all."<sup>456</sup> The plaintiffs, he concluded, shared only their gender and the lawsuit at hand.<sup>457</sup>

This decision, based on a procedural requirement that heretofore had been seen as "easy to satisfy,"<sup>458</sup> may make class certification much more difficult to achieve.<sup>459</sup> *Dukes* is viewed by Professor Benjamin Spencer as part of the Court's recent propensity to use procedural decisions to bar disfavored plaintiffs from having their substantive claims heard in court.<sup>460</sup> The decision is seen by other commentators as heralding the demise of employment discrimination class actions and "a blow to women's equality."<sup>461</sup>

There is no provision for class actions in the United Kingdom. In that country, however, unlike in the United States, the dearth of women on corporate boards has become an important issue related to women's career outcomes.<sup>462</sup> Such concern is likely tied to the movement in European countries more generally to increase women's political and economic power through the use of gender quotas.<sup>463</sup>

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454. A. Benjamin Spencer, *Class Actions, Heightened Commonality, and Declining Access to Justice*, 93 B.U. L. REV. 441, 444 (2013).

455. *Dukes*, 131 S. Ct. at 2554–55.

456. *Id.* at 2554.

457. *Id.* at 2557.

458. Spencer, *supra* note 454, at 463.

459. *Id.* at 447.

460. *Id.* at 448, 475–76.

461. Deborah Thompson Eisenberg, *Wal-Mart Stores v. Dukes: Lessons for the Legal Quest for Equal Pay*, 46 NEW ENG. L. REV. 229, 231 (2012).

462. See, e.g., DAVIES REPORT, *supra* note 422.

463. See Ruth Rubio-Marín, *A New European Parity-Democracy Sex Equality Model and Why It Won't Fly in the United States*, 60 AM. J. COMP. L. 99, 100 (2012) ("[A]s opposed to the United States, over the last two decades the unequal distribution of roles, tasks and power between women and men has become a key issue in European democracies resulting in new approaches, including different types of gender quotas, to advance gender equality and to reconceptualize citizenship rights."). Professor Rebecca Lee argues that American business leaders must aim for a notion of "core diversity" within their organizations, a substantive concept that affirmatively changes work culture by promoting empathetic

The U.K. government for now eschews the use of quotas opting instead for the softer, business-led approach of board chairmen setting aspirational goals.<sup>464</sup> That approach, as noted above, has led to some improvement in the percentage of women serving on company boards.<sup>465</sup> Whether aspirational goals will produce gender parity remains to be seen. To the extent they do not, the government “reserve[s] the right to introduce more prescriptive alternatives.”<sup>466</sup>

More importantly, however, the U.K. government has recognized women’s underrepresentation on company boards as a problem to be solved and has embraced the “business case” for increasing female board membership.<sup>467</sup> The Davies report argues that fairer gender representation improves company performance, enables access to the widest talent pool, achieves greater responsiveness to the market, and contributes to better corporate governance.<sup>468</sup> The government also recognizes that the problem itself arises from the gender-based disadvantages suffered by women during their careers:

This leaking pipeline of women qualified to serve on boards may be partially explained by the level of female attrition from the United Kingdom workforce. Male and female graduate entry into the workforce is relatively equal. This equality is maintained at junior management positions but then suffers a marked drop at senior management levels. The reasons for this drop are complex, and relate to factors such as lack of access to flexible working arrangements, difficulties in achieving work-life balance or disillusionment at a lack of career progression.<sup>469</sup>

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leadership, which can be accomplished by ensuring diversity in top leadership ranks. See Rebecca K. Lee, *Implementing Grutter's Diversity Rationale: Diversity and Empathy in Leadership*, 19 DUKE J. GENDER L. & POL'Y 133, 134–35 (2011). Rather than legally mandate core diversity, Professor Lee makes the business case for heterogeneity at the top of the organizational hierarchy. *Id.*

464. See DAVIES REPORT, *supra* note 422, at 2–4.

465. See *supra* notes 427–30 and accompanying text.

466. *Id.* at 2.

467. *Id.* at 3.

468. *Id.* at 7–10. Some scholars question the ability of the “business case” to bring about the diversification of corporate boards and argue that different rationales for diversification might be more effective. See generally Thomas Lee Hazen, *Diversity on Corporate Boards: Limits of the Business Case and the Connection Between Supporting Rationales and the Appropriate Response of the Law*, 89 N.C. L. REV. 887 (2011); see also Lisa M. Fairfax, *Board Diversity Revisited: New Rationale, Same Old Story?*, 89 N.C. L. REV. 855 (2011).

469. DAVIES REPORT, *supra* note 422, at 16.

Although the U.K. government is not supportive of such a move, there is no legal impediment in the United Kingdom to adopting gender-based quotas for company boards.<sup>470</sup> In debates within the European Union about gender quotas, the United Kingdom has argued that time is required to assess the efficacy of more voluntary measures.<sup>471</sup> Rather than opting for a quota provision, in November 2012, the European Commission proposed a Directive with a 40 percent goal for women on the boards of publicly listed firms, a proposal that does not yet have legal effect.<sup>472</sup> Viviane Reding, the E.U. Justice Commissioner, notes that the proposal is already making a difference, with the share of women on publicly listed company boards in the E.U. rising significantly.<sup>473</sup>

Gender quotas, which have had marked success in Norway,<sup>474</sup> and have been embraced in Belgium, Iceland, Italy, France, the Netherlands, and Spain,<sup>475</sup> are legally problematic in the United States. Race-based quotas are unconstitutional,<sup>476</sup> and there is reason to assume that gender quotas or mandated gender preferences, although subject to lesser scrutiny than race, would fail to pass constitutional muster.<sup>477</sup> Rather, in the United States, where the issue of corporate

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470. See James Kanter, *New European Push for Women in Boardroom*, N.Y. TIMES, Nov. 13, 2012, available at [http://www.nytimes.com/2012/11/14/business/global/eu-officials-expected-to-support-new-quota-proposal.html?\\_r=0](http://www.nytimes.com/2012/11/14/business/global/eu-officials-expected-to-support-new-quota-proposal.html?_r=0).

471. See *id.*

472. Press Release, European Comm'n, Women on Boards: Vice-President Viviane Reding and Markus Klimmer, Managing Director at Accenture Discuss Challenges and Opportunities, (May 14, 2013), available at [http://europa.eu/rapid/press-release\\_MEMO-13-430\\_en.htm](http://europa.eu/rapid/press-release_MEMO-13-430_en.htm).

473. *Id.*

474. In 2003, Norway adopted its quota law requiring that 40 percent of a public corporation's directors be female. Branson, *supra* note 407, at 797. In just eight years, the percentage of women on boards jumped from 6.8 percent to 40.3 percent. *Id.* at 798.

475. See Terry Morehead Dworkin et al., *The Role of Networks, Mentors, and the Law in Overcoming Barriers to Organizational Leadership for Women with Children*, 20 MICH. J. GENDER & L. 83, 87 (2013).

476. *Id.* at 89; see *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).

477. We are grateful to our Thomas Jefferson School of Law colleagues Professors Ken Vandeveld, Marybeth Herald, Bryan Wildenthal, and Julie Greenberg for consultation on this issue. See also Dworkin et al., *supra* note 475, at 89 (noting that "courts in the United States would likely find mandated preferences illegal as 'reverse discrimination.'"). Professor Mike Zimmer notes that while a gender-specific classification would be evaluated for equal protection purposes under intermediate scrutiny, it would be possible to craft the classification in gender-neutral terms—in terms of over- and under-represented

board gender parity is not articulated as a pressing one, only the softest of government initiatives is in evidence. More specifically, the Securities and Exchange Commission (SEC) recently amended a regulation, which “dictates what material public companies must disclose.”<sup>478</sup> Companies now must reveal:

1. [W]hether diversity is a factor in considering candidates for the company’s boards of directors; 2. how diversity is considered in the process of selecting board candidates; and 3. how the company assesses the effectiveness of whatever policy and process it has chosen to adopt.<sup>479</sup>

It is far from clear, however, that a majority of companies take the disclosure requirements to heart. One study found that many companies simply state that diversity is factored into board selection without revealing exactly how that factoring takes place and whether those diversity efforts are effective.<sup>480</sup> Indeed, it is possible for a firm to circumvent the SEC’s diversity disclosure requirements entirely by simply indicating that it has no board member selection diversity policy.<sup>481</sup> The disclosure is required but having a diversity policy is not.

#### F. Gender-based Factors: Conclusion

Part II of this Article provides details on a set of gender-based factors, which from a very early point links girls, and later women, to particular characteristics, traits, interests, and roles, and ultimately impacts the trajectories of many women’s careers as they encounter the so-called maternal wall and glass ceiling. Those characteristics, traits, interests, and roles are in some cases further complicated, and some girls and women further disadvantaged, by multiple discrimination on the bases of race, ethnicity, disability, religion, and sexual orientation, among other statuses. Regarding multiple

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genders and that then the lowest level scrutiny would be imposed: rational basis scrutiny. Michael J. Zimmer, *Binders Full of Women & Closing the Gap*, 8 FLA. INT’L L. REV. 541 (2013), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2342404](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2342404). Nevertheless, he also observes that an effort like the E.U.’s proposed directive to increase women’s representation on corporate boards to 40 percent “seems to be far off the radar in the United States.” *Id.* at 16.

478. Branson, *supra* note 407, at 812.

479. *Id.*

480. *Id.*

481. *Id.* at 813.

discrimination, aging, in particular, affects women differently, more negatively, and earlier than men. Part II also explains that law and policy in the United States and United Kingdom has proven a blunt tool for ameliorating the gender-based factors' lifetime effects on women. In Part III, below, we delineate a set of incremental disadvantage factors, which in a cumulative fashion produce poorer outcomes for many women during their working lives and inferior results for them in retirement.

### III. Incremental Disadvantage Factors

This portion of the Article shifts attention to the second part of our Model of Lifetime Disadvantage and considers a series of factors that incrementally and increasingly produce disadvantage for women over time.<sup>482</sup> The most significant of these factors is gender-based pay inequality, a subject that will be addressed first. Tied closely with pay inequality, and explaining some of the gender wage gap, are the following additional factors: occupational segregation, non-standard working, and career breaks. A final factor, women's experience in saving for and living in retirement, closes out Part III. As noted in the Introduction, women are much more likely than men to fall into poverty during retirement.<sup>483</sup> The incremental disadvantage factors discussed below make clear why that is so.

#### A. Pay Inequality

Pay inequalities based on gender are notable because they reflect the suboptimal state of women's opportunities for financial progress, the accumulation of wealth, and retirement planning. In OECD countries, women's wages still compare poorly to those of men.<sup>484</sup> A recent report notes that in most OECD countries, the gender wage gap, which is computed by comparing full-time worker median earnings of men and women to the full-time median earnings of men,

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482. For a fascinating treatment of the accumulation of racial disadvantage see MICHAEL K. BROWN ET AL., *WHITE-WASHING RACE* (2003) (describing how cumulative racial inequality persists across multiple domains, including the educational system, the criminal justice system, and the labor market).

483. See *supra* notes 7, 9–12, and accompanying text.

484. IFO INST., *THE GENDER WAGE GAP IN OECD COUNTRIES* 69 (2013), available at <http://www.cesifo-group.de/DocDL/dicereport113-db3.pdf>.

is between 10 and 20 percent.<sup>485</sup> The United States and United Kingdom, assessed in terms of this measure, scored poorly. The 2010 gender wage gap in the United States and United Kingdom was 18.8 percent and 18.4 percent respectively.<sup>486</sup> This is so even though equal pay legislation exists in both countries. The report concluded that “direct and indirect wage discrimination . . . seems to have a considerable impact on female earnings.”<sup>487</sup>

Although the gender pay gap in the United States has narrowed over time, white males still earn significantly more than white women and women of color.<sup>488</sup> In the United States, for example, the pay gap for fulltime workers<sup>489</sup> is well documented:

There are multiple ways to measure the pay gap—but under all of them, and with or without considering occupation, female and minority workers earn significantly less than white male workers. According to the latest Bureau of Labor Statistics data, women’s weekly median earnings are about eighty-one percent of men’s. And looking at annual earnings reveals even larger gaps—approximately twenty-three cents less on the dollar for women compared with men, [or seventy-seven percent]. Ultimately, no matter how you look at the data, a persistent pay gap remains. Decades of research shows a gender gap in pay even after factors such as the type of work performed and qualifications (education and experience) are taken into account. These studies consistently conclude that discrimination likely explains at least some of the remaining difference.<sup>490</sup>

One way to measure the male-female wage differential is to compare by occupation. The male-female gap differs considerably when viewed this way. One U.S. study looked at 2011 median weekly earnings of full-time workers and identified ten occupations with the greatest gaps and ten occupations with the smallest gaps.<sup>491</sup> The following occupations had among the largest gaps in women’s earnings as a percentage of men’s earnings: property, real estate, and

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485. *Id.*

486. *Id.*

487. *Id.*

488. NAT’L EQUAL PAY TASK FORCE, FIFTY YEARS AFTER THE EQUAL PAY ACT: ASSESSING THE PAST, TAKING STOCK OF THE FUTURE 23 (2013), [hereinafter FIFTY YEARS AFTER THE EQUAL PAY ACT].

489. See Sarah Jane Glynn & Nancy Wu, *The Gender Wage Gaps Differ by Occupation*, CTR. FOR AM. PROGRESS (Apr. 9, 2013), available at <http://www.americanprogress.org/issues/labor/news/2013/04/09/59698/the-gender-wage-gap-differs-by-occupation/>.

490. FIFTY YEARS AFTER THE EQUAL PAY ACT, *supra* note 486, at 23.

491. See Glynn & Wu, *supra* note 489.

community association managers (60.6 percent); financial managers (65.9 percent); marketing and sales managers (67.9 percent); chief executives (69 percent); and education administrators (69.3 percent).<sup>492</sup>

Lower gaps were seen in other occupations, some of which saw women making more money than men. The lower gap occupations include: computer and information systems managers (96.7 percent); police and sheriff's patrol officers (99 percent); receptionists and information clerks (99.8 percent); medical scientists (102.3 percent); and stock clerks and order fillers (102.7 percent).<sup>493</sup> Overall, 97 percent of women in the full-time labor force work in occupations where women earn less than men,<sup>494</sup> and the gaps are particularly high in senior managerial positions.<sup>495</sup>

Pay differentials are enormously consequential over time. For example, a 25-year-old American working woman will have earned \$5,000 less during her career than her 25-year-old male counterpart.<sup>496</sup> When that same woman reaches age 65, her earnings loss amounts to "hundreds of thousands of dollars over her working lifetime."<sup>497</sup> Estimates vary regarding the size of the working lifetime loss, but the U.S. Department of Labor recently quoted a female cumulative earnings loss of \$380,000 over the course of a woman's career.<sup>498</sup> Another estimate pegged the cumulative earnings loss for women college graduates at \$1.2 million.<sup>499</sup>

As noted above, using the OECD gender pay gap measure, the United Kingdom rated poorly. There are other ways to calculate the gap, and the U.K. government has done so. For example, using median hourly earnings, and excluding overtime, the full-time gender wage gap in 2012 was 9.6 percent.<sup>500</sup> Yet if weekly rather than hourly

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492. *Id.*

493. *Id.*

494. *Id.*

495. *Id.*

496. Pamela Coukos, *Myth Busting the Pay Gap*, WORK IN PROGRESS (June 7, 2012), <http://social.dol.gov/blog/myth-busting-the-pay-gap/>.

497. *Id.*

498. See Sara Manzano-Diaz, *Where's my 20?*, WORK IN PROGRESS (Apr. 12, 2011), available at <http://social.dol.gov/blog/where%E2%80%99s-my-20/>.

499. See EVELYN F. MURPHY & E.J. GRAFF, WHY WOMEN DON'T GET PAID LIKE MEN – AND WHAT TO DO ABOUT IT 26 (2005).

500. See DAVID PERFECT, U.K. EQUAL AND HUMAN RIGHTS COMM'N. GENDER PAY GAPS 5 (2011), available at [http://www.equalityhumanrights.com/uploaded\\_files/research/gender\\_pay\\_gap\\_briefing\\_paper2.pdf](http://www.equalityhumanrights.com/uploaded_files/research/gender_pay_gap_briefing_paper2.pdf).

earnings are used as the basis, the full-time gender wage gap in 2012 was 17.8 percent.<sup>501</sup> The weekly earnings gap is steeper than the hourly earnings gap because men working full-time tend to work slightly more basic hours and more overtime than women.<sup>502</sup> Moreover, “the mean based full-time gender pay gaps for hourly, weekly and annual earnings were 14.8, 20.6 and 24.5 percent respectively.”<sup>503</sup> In general, the U.K.’s Office of National Statistics (ONS) prefers to focus on median rather than mean earnings because the mean is affected by extreme values, such as those of high earners.<sup>504</sup>

Trends seen in the United States, in terms of different pay gaps for different occupations, are seen in the United Kingdom as well. For example, the following occupations exhibit larger gender gaps in women’s full-time median weekly earnings as a percentage of men’s earnings: managers, directors and senior officials (78.4 percent); skilled trades (72.7 percent); and process, plant and machine operatives (70.5 percent).<sup>505</sup> Somewhat smaller gaps are evident in the following occupations: sales and customer service (91.4 percent); administrative and secretarial (88.5 percent); professional occupations (88.3 percent).<sup>506</sup> One area where women in the United Kingdom fare especially poorly is with respect to bonuses paid to company managers. A recent survey found that male company managers earned bonuses worth over twice<sup>507</sup> as much as women did—£6,442 (U.S. \$10,000) to women’s £3,029.

#### 1. THE REASONS FOR PAY INEQUALITY ARE COMPLICATED

A number of reasons are proffered to explain gender-based pay differentials. Among these are that: women and men work in sex-segregated occupations; reward mechanisms affect female and male workers differently; women’s skills and work are undervalued; few

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501. *Id.*

502. *Id.*

503. *Id.*

504. *Id.*

505. *Id.* at 9. Calculations were performed by the authors based on the data provided in Table 4.

506. *Id.*

507. See Fergal O’Brien, *U.K. Pay Gap for Women Widens on Bonus Payouts*, BLOOMBERG, Aug. 19, 2013, available at <http://www.bloomberg.com/news/2013-08-19/u-k-pay-gap-for-women-widens-on-bonus-payouts.html>.

women occupy leadership positions either in policymaking or in the labor force; gender roles and traditions shape educational choices and working patterns; women on average carry greater family responsibilities and so work fewer hours than men; and women are the victims of discrimination.<sup>508</sup> The gender-based factors discussed previously, including gender differences in education and training, gender stereotyping, and women's caregiving roles and lackluster career outcomes, are relevant to many of the reasons offered as explanations for the pay gap. Additionally, details on occupational segregation and women's working patterns, including non-standard working and career breaks, will be covered in the Subsections below. Before those issues are addressed, however, the legal and policy responses to the last proffered reason—sex discrimination in compensation—are discussed below in Subsection 2.

## 2. LEGAL AND POLICY RESPONSES TO PAY INEQUALITY

In terms of law and policy, the United States has had legislation prohibiting gender-based pay discrimination for decades. Two statutes, Title VII<sup>509</sup> and the Equal Pay Act (EPA),<sup>510</sup> dating to 1964 and 1963 respectively, may be used to address pay discrimination. When Title VII is used, the plaintiff may rely on disparate treatment theory, which requires that the plaintiff prove that the employer acted with a discriminatory state of mind; in other words, the plaintiff in question must show the employer intentionally paid her less money because she is a woman.<sup>511</sup> Yet as Professor Deborah Eisenberg notes, this conception of how the pay discrepancy came about “ignores the complex, subtle realities of pay discrimination,” which often occurs because of highly discretionary pay systems that allow supervisors to assign different pay for employees doing the same work.<sup>512</sup> Indeed, many employers do not consciously desire to pay women less than men even though the end result is that women are paid less than their male counterparts.<sup>513</sup>

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508. EUR. COMM'N, TACKLING THE GENDER PAY GAP IN THE EUROPEAN UNION 5–7 (2013), available at [http://ec.europa.eu/justice/gender-equality/files/gender\\_pay\\_gap/gpg\\_brochure\\_2013\\_final\\_en.pdf](http://ec.europa.eu/justice/gender-equality/files/gender_pay_gap/gpg_brochure_2013_final_en.pdf).

509. See Eisenberg *supra* note 461, at 232.

510. 29 U.S.C. §206(d) (2012).

511. See Eisenberg, *supra* note 461, at 232.

512. *Id.* at 233.

513. *Id.* at 234.

Unintentional discrimination might be addressed under Title VII's disparate impact theory, a theory that allows a plaintiff to challenge a neutral practice, like subjective decisionmaking on pay, by demonstrating that the practice produces discriminatory outcomes.<sup>514</sup> Unfortunately, however, the U.S. Supreme Court, in *Wal-Mart Stores, Inc. v. Dukes*, which was discussed above, eviscerated the theory's broad use in the class action context.<sup>515</sup>

The EPA initially appears more promising. Under the EPA, the plaintiff need only show she is compensated less for equal work; the employer's state of mind is not relevant.<sup>516</sup> Even so, courts have so strictly construed the "prima-facie standard of substantial equality between compared positions so . . . as to exclude most working women . . . from the Act's coverage."<sup>517</sup> Moreover, the EPA's "factor other than sex" defense has been employed broadly by courts to shield employers from liability for pay disparities. Additionally, the EPA does not permit class actions, inhibiting groups of women from challenging their employer's pay policies collectively.<sup>518</sup>

Limiting the utility of both Title VII and the EPA are two other factors. First, outside the public sector, it is very difficult for an employee to discover what her colleagues are paid.<sup>519</sup> If one does not know one is being paid less than one's coworkers, it is impossible to challenge any differential that exists.<sup>520</sup> Moreover, although the National Labor Relations Act (NLRA)<sup>521</sup> makes illegal the blanket prohibition of wage discussions by employees,<sup>522</sup> there is no such ban

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514. *Id.* at 234–35.

515. *See id.*

516. *Id.* at 235.

517. *Id.* at 236; *see also* Deborah Thompson Eisenberg, *Shattering the Equal Pay Act's Glass Ceiling*, 63 SMU L. REV. 17 (2010).

518. Eisenberg, *supra* note 461, at 236.

519. *See generally* Gowrie Ramachandran, *Pay Transparency*, 116 PENN ST. L. REV. 1043, 1046 (2012).

520. *Id.* at 1053.

521. 29 U.S.C. § 152(3) (2012).

522. *See* NLRB v. Main St. Terrace Care, 218 F.3d 531, 538 (6th Cir. 2000); *Wilson Trophy Co. v. NLRB*, 989 F.2d 1502, 1510–11 (8th Cir. 1993); *NLRB v. Vanguard Tours, Inc.*, 981 F.2d 62, 66–67 (2d Cir. 1992); *see generally* Rafael Gely & Leonard Bierman, *Pay Secrecy/Confidentiality Rules and the National Labor Relations Act*, 6 U. PA. J. LAB. & EMP. L. 121 (2003). *See* Marianne DelPo Kulow, *Beyond the Paycheck Fairness Act: Mandatory Wage Disclosure Laws—A Necessary Tool for Closing the Residual Gender Wage Gap*, 50 HARV. J. ON LEGIS. 385, 422 (2013).

in Title VII or the EPA.<sup>523</sup> Indeed, despite the NLRA's apparent protections, many employers nonetheless ban or discourage employee discussions of salary.<sup>524</sup> Additionally, courts have created loopholes that allow some of these policies to stand.<sup>525</sup> Pending legislation, known as the Paycheck Fairness Act, would ban employer retaliation against employees who discuss their pay.<sup>526</sup> Unfortunately, the U.S. Congress has failed to move quickly to enact the proposed law.<sup>527</sup>

Second, as noted above, although significant and costly pay losses may accrue over time, Title VII caps back pay at two years.<sup>528</sup> Recovery under the EPA is similarly limited in all cases except when the employer has acted willfully, in which case an additional year's worth of backpay damages may be available.<sup>529</sup> Thus, full compensation for losses due to gender-based pay differentials may not be available in cases that go undetected for long periods of time.<sup>530</sup>

U.K. equal pay legislation and practice has been heavily influenced by E.U. law and decisions of the CJEU. Indeed, the original Treaty of Rome, which established the European Community in 1957, contained Article 119, which required member states to ensure the principle of equal pay between men and women for equal work or work of equal value.<sup>531</sup> This principle was further enforced by the European Union's Equal Pay Directive in 1975.<sup>532</sup> The CJEU has

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523. Kulow, *supra* note 522, at 391.

524. *Id.* at 419.

525. See NAT'L WOMEN'S LAW CTR., FACT SHEET: COMBATING PUNITIVE PAY SECRECY POLICIES 2 (2012), available at <http://www.nwlc.org/sites/default/files/pdfs/paysecrecyfactsheet.pdf>.

526. *Id.*

527. *Id.* at 3. In an effort to address the gender pay gap, President Obama recently signed an Executive Order barring "federal contractors from retaliating against employees who discuss their salaries..." Peter Baker, *Obama Signs Measures to Help Close Gender Gap in Pay*, N.Y. TIMES (Apr. 8, 2014), [http://www.nytimes.com/2014/04/09/us/politics/obama-signs-measures-to-help-close-gender-gap-in-pay.html?\\_r=0](http://www.nytimes.com/2014/04/09/us/politics/obama-signs-measures-to-help-close-gender-gap-in-pay.html?_r=0).

528. Ramachandran, *supra* note 519, at 1053.

529. See Kulow, *supra* note 522, at 416.

530. *Id.*

531. Article 119 is now contained in Article 157 of the Treaty on the Functioning of the European Union (TFEU). (TFEU) Consolidated Version of the Treaty of the Functioning of the European Union art. 157, Mar. 30, 2010, 2010 O.J. (c. 83) 117. For a general description of EU equal pay law, including Article 157 of the TFEU, see BLANPAIN ET AL., *supra* note 367.

532. 1975 O.J. (L 45) 19. The equal pay principle has been incorporated into the 2006 Equal Treatment Directive, see 2006 O.J. (L 204) 23.

traditionally given a broad interpretation of the meaning of “pay” to include, for example, occupational pension schemes.<sup>533</sup>

The Equality Act of 2010 contains a provision requiring that men and women be paid equally.<sup>534</sup> A Code of Practice on Equal Pay describes the legal mandate for equal pay as ensuring compensation is calculated without sex discrimination.<sup>535</sup> Under the Equality Act, a sex equality clause is implied into the employment contract of every employee.<sup>536</sup> That implied clause requires that each term of employment be equivalent among male and female comparators where they engage in equal work.<sup>537</sup> If no comparator exists to assist a woman in mounting an equal pay claim but she suspects she is underpaid on the basis of her gender, she might bring a sex discrimination claim instead.<sup>538</sup>

The Equality Act lists three ways of determining whether work done by a woman and a man is equal so that the man’s pay may be used as a point of comparison. “A’s work is equal to B’s work if it is: a) like B’s work; b) rated as equivalent to B’s work; or c) of equal value to B’s work.”<sup>539</sup> The final item in the list—the equal value formulation—considers the work of A to be of equal value “if it is neither like B’s work or rated equivalent to B’s work but is nevertheless equal to B’s work in terms of the demands made on A by reference to factors such as effort, skill and decision making.”<sup>540</sup> This formulation appears to go considerably beyond what would be allowed in a suit in the United States. More specifically, in the United States, the theory known as *comparable worth*, under which pay is equalized “across job categories traditionally worked by one gender

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533. See *Barber v. Guardian Royal Exchange Assurance Group*, [1990] C-262/88 (Eng.) (holding that U.K. law, which set different pension entitlement ages for women and men, violated the principle of equal treatment).

534. SARGEANT, *supra* note 163, at 118. The United Kingdom’s original equal pay legislation first became operative in 1975, the year the Equal Pay Act of 1970 took effect. *Id.*

535. *Id.*

536. *Id.*

537. *Id.*

538. *Id.*

539. Equality Act 2010, 2010, c. 3, § 65(1) (U.K.); SARGEANT, *supra* note 163, at 121.

540. Equality Act 2010, 2010, c. 3, § 65(6) (U.K.); SARGEANT, *supra* note 163, at 121.

or the other”<sup>541</sup> is akin to the conception in the United Kingdom of “equal value.”<sup>542</sup> Yet, comparable worth has been largely rejected by American federal courts “as a method of establishing a violation of Title VII.”<sup>543</sup>

In the United Kingdom, the interaction of equal pay legislation with anti-discrimination legislation is clear from the above-described insertion of a sex equality clause into all employment contracts, where it does not already exist.<sup>544</sup> This has the effect of modifying any terms of the contract that are less favorable to one sex.<sup>545</sup> The employer, however, has a defense if it can show that the difference is due to a factor other than the difference in gender, or if the factor is a proportionate means of achieving a legitimate aim.<sup>546</sup> Thus, for example, although one might argue that “market forces” justify a pay differential between occupations that are male and female-dominated, there is still a requirement of proportionality; in other words, although the aim might be legitimate, the means must also be appropriate and necessary in order to achieve that aim.

This principle was illustrated in a 1994 CJEU decision, *Enderby v. Frenchay Health Authority*.<sup>547</sup> That case involved the Health Authority’s proffered justification in the pay differential between speech therapists, an almost exclusively female occupation, and pharmacists, an occupation that was 63 percent female. The compensation of speech therapists was approximately 40 percent less than that of pharmacists, an occupation with a greater number of men. The employer argued that market forces were responsible for the difference. Yet, evidence indicated that a mere ten percent compensation premium was sufficient to attract the required number of pharmacists. The CJEU noted that where the portion of the pay increase “attributable to market forces” is ascertainable, that portion,

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541. Donald C. Dowling, *International HR Best Practice Tips: Spring 2010*, 19 (2) INT’L HUMAN RES. J. 1, 4 (2010).

542. *Id.*

543. See Kulow, *supra* note 522, at 413.

544. Equality Act, 2010, c.15, § 66 (U.K.).

545. *Id.*

546. *Id.* at § 69. Section 73 of the Equality Act 2010 also incorporates a maternity equality clause into contracts of employment.

547. Case C-127/92 *Enderby v. Frenchay Health Authority*, 1993 E.C.R. 1-05535.

and no more, “is objectively justified.”<sup>548</sup> Any more than that would not be necessary.<sup>549</sup>

Additional features of U.K. law designed to aid women workers in attaining pay equity include the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000, which will be discussed in more detail in the section of the model covering non-standard working.<sup>550</sup> As will be noted below, a much greater proportion of women work part-time as compared to men. Although the position of women in relation to low pay has been improving,<sup>551</sup> they still make up the bulk of the low paid in the United Kingdom.

The U.K. government also supports transparency in pay as one means to achieve equal pay and recently launched a campaign called “Think, Act, Report.” This campaign consists of “a voluntary approach to tackling and overcoming barriers that prevent organisations making the most of their entire workforce.”<sup>552</sup> The Equality Act 2010 actually contained a provision to make larger companies disclose gender pay gaps,<sup>553</sup> but the incoming government, in 2010, decided to retain a voluntary policy rather than implement a statutory one. The government did, however, enact a statutory prohibition on clauses in employment contracts that would forbid pay discussions.<sup>554</sup> These so-called “gagging” or “confidentiality” clauses are said to inhibit discussions about pay and therefore make it more difficult for women to discover whether they are being paid less than their male colleagues.<sup>555</sup>

In short, the United Kingdom has extensive protection offered, which has been adopted over the years, but the country is still left with unequal pay levels. Senior ministers in the U.K. government

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548. *Id.* at ¶ 27.

549. *Id.*

550. *See supra* notes to 633–40 and accompanying text.

551. *See* MATTHEW WHITTAKER & ALEX HURRELL, RESOLUTION FOUND., *LOW PAY IN BRITAIN 2013* 19 (2013), available at [http://www.resolutionfoundation.org/media/media/downloads/Low\\_Pay\\_Britain\\_2013.pdf](http://www.resolutionfoundation.org/media/media/downloads/Low_Pay_Britain_2013.pdf).

552. GOV'T EQUALITIES OFFICE, *THINK, ACT, REPORT: ONE YEAR ON 3* (2012), available at <https://www.gov.uk/government/publications/think-act-report-one-year-on>.

553. Equality Act, 2010, c.15, § 78 (U.K.).

554. Equality Act, 2010, c.15, § 77 (U.K.).

555. *See* EQUAL. & HUMAN RIGHTS COMM'N, *Protected Conversations with Colleagues and Others about Pay*, <http://www.equalityhumanrights.com/advice-and-guidance/tools-equal-pay/discussing-pay-with-colleagues/protected-discussions-with-colleagues-and-others-about-pay/> (last visited May 1, 2014).

continue to appeal for transparency and for employers to tackle the gender pay gap.<sup>556</sup>

## B. Occupational Segregation

Occupational segregation by gender is linked closely to income inequality.<sup>557</sup> Despite great changes in the labor market, including significant increases of women entering paid work, many occupations continue to be occupied primarily by women or by men.<sup>558</sup> Moreover, there is a negative relationship between the wages an occupation pays and the share of women who engage in that occupation.<sup>559</sup> President Obama's National Equal Pay Task Force recently estimated that "every 10 percentage point increase in female [occupational] share [is] associated with a 4 percent decline in average wages."<sup>560</sup> Feminized occupations—those occupations filled predominantly by women—are linked not only to disadvantage regarding pay but also to poorer outcomes in terms of power and prestige for women and men working in those occupations.<sup>561</sup> Regression analyses disturbingly reveal, however, that within feminized occupations, women's pay is impacted more greatly than men's pay.<sup>562</sup> As Professor Marianne Kulow notes, women in feminized occupations "are twice disadvantaged—first by being in a 'female' field and second by being

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556. See Nick Clegg Calls for More Openness on Gender Pay Gap, BBC NEWS UK, (Oct. 5, 2013, 12:07 P.M.), <http://www.bbc.co.uk/news/uk-24411079>.

557. See ARIANE HEGEWISCH ET AL., INST. FOR WOMEN'S POL'Y RESEARCH, SEPARATE BUT NOT EQUAL? GENDER SEGREGATION IN THE LABOR MARKET AND THE GENDER WAGE GAP 2 (2010), available at <http://www.iwpr.org/publications/pubs/separate-and-not-equal-gender-segregation-in-the-labor-market-and-the-gender-wage-gap> ("[F]emale-dominated occupations have been shown to pay less than male-dominated occupations at the same skill level.").

558. *Id.*

559. See FIFTY YEARS AFTER THE EQUAL PAY ACT, *supra* note at 27.

560. *Id.*

561. See Jennifer Jarman, Robert M. Blackburn, & Girts Racko, *The Dimensions of Occupational Gender Segregation in Industrial Countries*, 46 SOC. 1003, 1004 (2012), available at <http://soc.sagepub.com/content/46/6/1003> ("For over a century, researchers have linked occupational feminization to disadvantaged outcomes in terms of pay, prestige, power and attractiveness of the occupation concerned, both for the women entering the occupation, and also for the occupation as a whole."). This study goes on to surmise that the truth is more complicated and nuanced. *Id.* at 1014 ("[T]hese findings...show that the implications of the feminization of an occupation are complicated . . . . One can no longer simply read off an interpretation of 'inequality' from the fact of a segregated labour market . . . .").

562. See Kulow, *supra* note 522, at 404.

a woman in that field, since men make more than women even in 'female' fields."<sup>563</sup>

#### 1. THE EXTENT OF OCCUPATIONAL SEGREGATION IS STAGGERING

Occupational segregation is evident in both the United States and the United Kingdom. In the United States, almost 20 percent of women workers are concentrated "in just five occupations: secretaries, registered nurses, elementary school teachers, cashiers, and nursing aids."<sup>564</sup> In 2012, more than half of American women working fulltime worked in low-paying positions in administrative support, service, and sales, occupying jobs "such as secretaries, cashiers, retail sales persons, maids, child care workers, and customer service representatives."<sup>565</sup> The U.S. Department of Labor's Women's Bureau tracks the 20 leading occupations of employed women. That list contains many jobs that are stereotypically female. The percentage of women in the following occupations drawn from the list illustrates this point: secretaries and administrative assistants (96.1 percent); childcare workers (94.7 percent); receptionists and information clerks (92.7 percent); teacher assistants (92.4 percent); registered nurses (91.1 percent); bookkeeping, accounting, and auditing clerks (90.9 percent); maids and housekeeping cleaners (89 percent); nursing, psychiatric, and home health aides (88.2 percent); and elementary and middle school teachers (81.8 percent).<sup>566</sup>

Race and ethnicity adds another layer of complexity to the gender-segregated American landscape. Women of different races and ethnicities display divergent occupational patterns.<sup>567</sup> More specifically, "[w]hite and Asian women are more likely to work in higher-paying management" and professional jobs. African American women and Latinas "are more likely to work in lower-paying service occupations and significantly more likely to be among the working poor."<sup>568</sup> Yet even when they work in professional jobs, women are

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563. *Id.*

564. See WOMEN IN AMERICA, *supra* note 42, at 33.

565. FIFTY YEARS AFTER THE EQUAL PAY ACT, *supra* note 488, at 4.

566. See U.S. DEP'T OF LABOR, 20 LEADING OCCUPATIONS OF EMPLOYED WOMEN (2010), available at <http://www.dol.gov/wb/factsheets/20lead2010.htm>.

567. See HEGEWISCH ET AL., *supra* note 557, at 13.

568. FIFTY YEARS AFTER THE EQUAL PAY ACT, *supra* note 488, at 7.

over-represented in the lower-paying fields of education and health care.<sup>569</sup>

Turning to the United Kingdom, in England and Wales, working women predominate in only two of nine industrial groups: public administration, education and health; and other services.<sup>570</sup> Moreover, 92 percent of women work in the service industry.<sup>571</sup> Women occupy 77 percent of administration and secretarial posts but only 6 percent of engineering roles; they make up just 14 percent of architects, planners and surveyors; some 83 percent of people employed in personal services are women.<sup>572</sup> As a result, women occupy lower paid and often part-time jobs. This process can result from media images of women at work and poor career advice in school.<sup>573</sup> One report noted:

Women and men tend to do different jobs. Women tend to work in lower paid occupations, in particular dominating the five “c”s—caring, cashiering, catering, cleaning, and clerical. The occupations which are regarded as “women’s work” are undervalued.<sup>574</sup>

Men comprise the vast majority of workers in construction (88 percent), energy and water (78 percent), manufacturing (75 percent), transport and communication (75 percent), and agriculture and fishing (72 percent).<sup>575</sup> In terms of occupations, a 2005 U.K. Parliamentary report noted that 60 percent of women workers labor “in just ten out of 77 recognised occupations, with the heaviest concentrations being . . . the five Cs.”<sup>576</sup> A 2013 House of Commons

569. WOMEN IN AMERICA, *supra* note 42, at 33.

570. See OFFICE FOR NAT’L STATISTICS, 170 YEARS OF INDUSTRIAL CHANGE ACROSS ENGLAND AND WALES (2013), available at <http://www.ons.gov.uk/ons/rel/census/2011-census-analysis/170-years-of-industry/170-years-of-industrial-changeponent.html> [hereinafter 170 YEARS OF INDUSTRIAL CHANGE].

571. *Id.*

572. HOW FAIR IS BRITAIN?, *supra* note 72.

573. For the Scottish government’s response and plans to tackle occupational segregation, see SCOTTISH GOV’T, GENDER EQUALITY: OCCUPATIONAL SEGREGATION, available at <http://www.scotland.gov.uk/Topics/People/Equality/18500/OccSeg> (last visited May 1, 2014).

574. WOMEN & WORK COMM’N, SHAPING A FAIRER FUTURE 4 (2006), available at <http://www.ukces.org.uk/assets/ukces/docs/publications/women-and-work-shaping-a-fairer-future.pdf>.

575. See 170 YEARS OF INDUSTRIAL CHANGE, *supra* note 570.

576. TRADE & INDUSTRY COMM., OCCUPATIONAL SEGREGATION ON THE GENDER PAY GAP, 2004–05, H.C. ¶ 6 (2005), available at

report found that the most common jobs for women age 22–29 are: sales assistants and retail cashiers; caring personal services; teaching and education professionals; elementary services occupations; and childcare and related personal services.<sup>577</sup>

## 2. REASONS FOR OCCUPATIONAL SEGREGATION

The reasons for gender-based occupational segregation are complex. In the United Kingdom, the 2005 report mentioned above identified four broad factors that discouraged young women from taking jobs in non-traditional fields: (1) lack of knowledge about various non-traditional occupations; (2) disincentives and difficulties associated with obtaining training in non-traditional occupations; (3) a workplace culture in male-dominated sectors that appeared inhospitable to women; and (4) a lack of flexibility associated with non-traditional jobs that would prevent women from balancing work and family obligations.<sup>578</sup> In the United States, the President's National Equality Task Force noted that:

Two general frameworks can explain occupational segregation: one based on workers and one based on employers. On the employer side, occupational segregation may be due to discrimination that can take several forms, including outright refusal to hire, severe harassment of women in non-traditional jobs, or policies and practices that screen qualified women out of positions but are not job related. An alternative framework emphasizes worker differences. For example, one group may be more willing to accept unpleasant or dangerous work, longer hours, or physical strain in return for higher wages. As another example, women may enter occupations that require less investment and result in less earnings growth because they expect abbreviated or discontinuous labor force activity.<sup>579</sup>

The two frameworks might interact and shore up gendered-notions of appropriate occupation.<sup>580</sup> Using the STEM fields as an example, the task force noted that women continue to be underrepresented in educational programs that would train them for

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<http://www.publications.parliament.uk/pa/cm200405/cmselect/cmtrdind/300/30005.htm>.

577. BUS., INNOVATION & SKILLS COMM., WOMEN IN THE WORKPLACE, 2013, H.C., available at <http://www.publications.parliament.uk/pa/cm201314/cmselect/cmbis/342/34205.htm>.

578. See OCCUPATIONAL SEGREGATION, *supra* note 576, at ¶ 11.

579. FIFTY YEARS AFTER THE EQUAL PAY ACT, *supra* note 490, at 26.

580. *Id.*

computer science and engineering careers.<sup>581</sup> Studies of women's perceptions and experiences help explain the lack of interest. One study of undergraduate university students found that young women expected they would be unwelcome in the STEM fields and overestimated the potential difficulty of the training.<sup>582</sup> Another study, which focused on why women drop out of particular fields, found that as compared with other occupations, women were more likely to leave engineering due to unhappiness over compensation and promotion opportunities.<sup>583</sup> Thus, perceptions about and experiences related to computer science and engineering, act as disincentives for women to invest in training, and maintain those occupations as heavily male-dominated.

Distressingly, gender desegregation in the United States has stalled since the late 1990s.<sup>584</sup> Lack of progress in integrating occupations is manifest in jobs requiring a four-year university degree as well as for jobs with lesser educational requirements.<sup>585</sup> Occupational segregation is even stronger for younger working women at the present time than it was at the start of the twenty-first century.<sup>586</sup> One study surmised that significant occupational desegregation would not resume without women gaining significant ground in traditionally male blue-collar jobs and in STEM fields.<sup>587</sup>

### 3. LEGAL AND POLICY RESPONSES TO OCCUPATIONAL SEGREGATION

In terms of law and policy, in order to break down occupational segregation, the Obama administration is committed to enforcing existing law,<sup>588</sup> which for the reasons discussed above, may prove a blunt instrument for bringing about what would need to be massive change in the labor market. The government also recommends educational efforts to encourage girls and women to

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581. *Id.* at 26–27.

582. *Id.* at 27.

583. *Id.*

584. *See* HEGEWISCH ET AL., *supra* note 557, at 13.

585. *Id.*

586. *Id.*

587. *See* Francine D. Blau, Peter Brummund, & Albert Yung-Hsu Liu, *Trends in Occupational Segregation by Gender—1970-2009: Adjusting for the Impact of Changes in the Occupational Coding System* 27 (IZA Discussion Paper Series, April 2012).

588. *Id.* at 34–35.

consider non-traditional jobs.<sup>589</sup> The two most promising legal strategies to address occupational segregation—comparable worth and affirmative action—are presently controversial and therefore likely not viable in the United States.<sup>590</sup> Comparable worth, which was discussed above and would seek to equalize pay across occupational categories that are gender segregated, has largely been rejected by the courts.<sup>591</sup>

Affirmative action, known as positive discrimination in the United Kingdom, is viewed by many in the American public as programming “forcing employers to hire less qualified employees [from underrepresented groups such as women and persons of color] over more qualified members of the majority group.”<sup>592</sup> Most of the recent court battles over affirmative action have concerned the admissions process for higher education and those decisions appear to narrow rather than broaden the use of this tool for integration.<sup>593</sup> As such, while in theory affirmative action might be a useful mechanism for integrating traditionally male occupations, the lawful parameters of its use in the employment context remain unclear and far from promising.<sup>594</sup>

As noted above, occupational segregation is recognized as being a cause of the gender pay gap and a reason for inequality of opportunity between men and women. A commission in the United Kingdom, the Women and Work Commission, estimated that removing the barriers to women working in occupations traditionally reserved for men, as well as increasing female participation in the labor market, could be worth between 1.3 to 2 percent of the GDP.<sup>595</sup> While gender segregation has declined somewhat in the United Kingdom, this is partly due to the service related occupations such as medicine, pharmacy, law, and accountancy. The U.K. government appears concerned enough to at least articulate the need for change but change is a complicated process. There are policy initiatives for increasing the number of women and girls studying STEM subjects, setting up work placement opportunities for women returning to

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589. *See id.* at 34–35.

590. *See Kulow, supra* note 522, at 413–14.

591. *Id.*

592. *Id.* at 414.

593. *Id.*

594. *Id.*

595. WOMEN & WORK COMM'N, *supra* note 574, at vii.

work after leaves and career breaks, increasing the opportunity for flexible working, broadening career advice, and encouraging vocational and work-related training.<sup>596</sup>

Yet the difficulty associated with eliminating occupational segregation exemplifies the problem with incremental policies. Clearly, there are issues related to education, vocational training, and career choices that cannot be tackled in a piecemeal way. Additionally, despite incremental policy-making, women are likely to end up in low paid work because of caring responsibilities and discrimination, whether implicit or overt. Without a comprehensive initiative that includes the government, employers, and employee representatives, the issue of “women’s work” is unlikely to be solved.

### C. Non-standard Working

Compared with those in full-time, “standard” work for a single employer, those who lack continuous, full-time employment generally will lag in career progression and will experience inferior financial outcomes. This latter kind of work is often referred to as non-standard work. In the United Kingdom, non-standard work is commonly defined as encompassing part-time work, temporary work, fixed term work, and seasonal work.<sup>597</sup> Agency work and work by freelancers is increasingly evidenced in the United Kingdom as well.<sup>598</sup> Indeed, it has been suggested that trends in non-standard working might mean that there may no longer be a standard model of employment.<sup>599</sup>

In the United States, the terminology is inconsistently used but in general, non-standard work arrangements include part-time work,

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596. See generally GOV’T EQUALITIES OFFICE, WOMEN AND THE ECONOMY: GOVERNMENT ACTION PLAN (2013), available at [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/255595/1270-B\\_Women\\_WEB.PDF](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/255595/1270-B_Women_WEB.PDF).

597. See PAUL EDWARDS, INDUS. RELATIONS RESEARCH UNIT, WARWICK BUS. SCHOOL, UNIVERSITY OF WARWICK, NON-STANDARD WORK AND LABOUR MARKET RE-STRUCTURING IN THE UK 2 (2006), [http://www2.warwick.ac.uk/fac/soc/wbs/research/irru/publications/recentconf/pe\\_rome.pdf](http://www2.warwick.ac.uk/fac/soc/wbs/research/irru/publications/recentconf/pe_rome.pdf).

598. *Id.*

599. See Trish McOrmond, *Changes in Working Trends Over the Past Decade*, 112 LABOUR MARKET TRENDS 25 (2004), available at <http://www.ons.gov.uk/ons/rel/lms/labour-market-trends--discontinued-/volume-112--no-1/changes-to-working-trends-over-the-past-decade.pdf> (noting that “The standard model of work – Monday to Friday, nine to five – may no longer be standard.”).

temporary work, independent contracting, leased work, and acquiring employees through Professional Employer Organizations (PEOs).<sup>600</sup> Americans also use the term “contingent work” to refer to positions that are relatively insecure or precarious.<sup>601</sup> Additionally, those engaged in informal work—work that is conducted “outside tax and regulatory policies”<sup>602</sup>—labor in situations that are insecure, although non-standard work also “may operate in the formal sector.”<sup>603</sup> To complicate matters further, some people earn income by mixing non-standard, formal, and informal work.<sup>604</sup> They will, for example, work an extra job or make extra money “off the books” or under the table.<sup>605</sup> In the United States, studies indicate that contingent workers are somewhat more likely to be female, young, and members of racial minorities, especially African Americans and Latinos.<sup>606</sup>

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600. See Peter H. Cappelli & JR Keller, *A Study on the Extent and Potential Causes of Alternative Employment Arrangements*, 66 INDUS. & LAB. REL. REV. 874 (2013). PEOs are entities that are the legal employers of people who then work for the PEOs’ clients and are managed by the clients on a day-to-day basis. *Id.* at 876. Contract or leased employees are “similar to temporary help except that the relationships are often long-term.” *Id.* Temporary workers, hired on a short-term basis, may be hired directly or through an agency. *Id.*

601. *Id.* at 874–75.

602. DEMETRA SMITH NIGHTINGALE & STEPHEN A. WANDNER, *THE URBAN INST., INFORMAL AND NONSTANDARD EMPLOYMENT IN THE UNITED STATES: IMPLICATIONS FOR LOW-INCOME WORKING FAMILIES* (2011), available at <http://www.urban.org/UploadedPDF/412372-informal-nonstandard-employment-in-us.pdf>.

603. *Id.*

604. *Id.*

605. *Id.*

606. See, e.g., NIGHTINGALE & WANDNER, *supra* note 602, at 1 (“Individuals in both informal and nonstandard employment have relatively high poverty rates and low earnings, and women represent a disproportionate share of the workers.”); Steven Hipple, *Contingent Work: Results from the Second Survey*, MONTHLY LAB. REV. 22 (1998), (noting that “[w]omen continued to be somewhat more likely than men to hold contingent jobs . . . . Employment among women tends to be concentrated in many of the occupations and industries in which contingent work arrangements are most common.” and “[s]imilar to women, blacks and Hispanics . . . continued to have higher contingency rates than whites . . . .”); Anne E. Polivka, *A Profile of Contingent Workers*, MONTHLY LAB. REV. 10, 11 (1996), (“[C]ontingent workers were slightly more likely to be women or blacks than were non-contingent workers.”).

Yet in the United States, there is a paucity of data on contingent, flexible, or alternative working arrangements.<sup>607</sup> The last study conducted by the U.S. Bureau of Labor Statistics on contingent and alternative employment arrangements was published in 2005.<sup>608</sup> As for total numbers, a Government Accountability Office report in 2006, “using a broad definition of contingency—workers who do not have standard full-time employment—estimated contingent workers, including independent contractors, constituted almost one-third of the 2005 workforce, or approximately 42.6 million people.”<sup>609</sup> Many believe contingent work is proliferating in the United States, though exact numbers are not available.<sup>610</sup>

### 1. PART-TIME WORK AS A FEMINIZED PHENOMENON

One category of non-standard work—part-time work—has particular implications for working women.<sup>611</sup> American women are two times as likely to work part-time as men.<sup>612</sup> Indeed, women comprise almost two-thirds of the part-time workforce.<sup>613</sup> Moreover,

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607. See Susan Bisom-Rapp et al., *Decent Work, Older Workers, and Vulnerability in the Economic Recession: A Comparative Study of Australia, the United Kingdom, and the United States*, 15 EMP. RTS. & EMP. POL'Y J. 43, 101 (2011).

608. *Id.* at 102.

609. *Id.*

610. See, e.g., Erin Hatton, *The Rise of the Permatemp Economy*, N.Y. TIMES, Jan. 27, 2013, at SR3 (“Low-wage, temporary jobs have become so widespread that they threaten to become the norm.”); Steven Wishnia, *A Nation of Temps*, SALON (Aug. 22, 2012), [http://www.salon.com/2012/08/22/a\\_nation\\_of\\_temps/](http://www.salon.com/2012/08/22/a_nation_of_temps/) (“Almost one-third of American workers now do some kind of freelance work—and they lack almost every kind of economic security that permanent full-time workers have traditionally had.”).

611. The U.S. Department of Labor’s Bureau of Labor Statistics counts as part-time workers those who work less than 35 hours per week. See U.S. DEPT. OF LABOR, LABOR FORCE STATISTICS FROM THE CURRENT POPULATION SURVEY, available at <http://www.bls.gov/cps/lfcharacteristics.htm> (last modified Apr. 25, 2014).

612. U.S. DEPT. OF LABOR, WOMEN’S EMPLOYMENT DURING THE RECOVERY 1 (2011), available at [http://www.dol.gov/\\_sec/media/reports/FemaleLaborForce/FemaleLaborForce.pdf](http://www.dol.gov/_sec/media/reports/FemaleLaborForce/FemaleLaborForce.pdf).

613. See CAROLYN B. MALONEY, JOINT ECON. COMM., THE EARNINGS PENALTY FOR PART-TIME WORK: AN OBSTACLE TO EQUAL PAY 2 (2010) available at [http://www.jec.senate.gov/public/?a=File.Serve&File\\_id=74203874-3821-44e4-b369-4efbe14d8745](http://www.jec.senate.gov/public/?a=File.Serve&File_id=74203874-3821-44e4-b369-4efbe14d8745).

the propensity of women to work part-time increased during the Great Recession and its aftermath.<sup>614</sup> As one government report notes:

In 2010, 26.6 percent of women worked part time compared to just 13.4 percent of men. More women are currently working part-time than were doing so prior to the recession, reflecting the increase in women working part-time because they can't find full-time work. One in five women working part-time are doing so because they can't find full-time work. Prior to the recession, less than one in ten women working part-time were doing so because they couldn't find full-time work.<sup>615</sup>

Women's part-time median weekly earnings are slightly higher than those of part-time men—\$229 compared to \$222 per week—a counter-intuitive ratio explained by the Department of Labor as being tied to age.<sup>616</sup> More specifically, male part-time workers are more likely to be in the youngest group of workers, those who have low earnings. Thus, 43 percent of male part-time workers are in the 16–24 year old age group, while only 29 percent of female part-time employees fall in that youngest group.<sup>617</sup>

Women in the United Kingdom are also more likely to work part-time than men.<sup>618</sup> In total, 24 percent of the U.K. workforce works part-time. The part-time gender differential is even larger in the United Kingdom than in the United States. A whopping 43 percent of employed women work part-time compared with 13 percent of working men.<sup>619</sup> A little less than 13 percent of women

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614. In the United States, the economic downturn that began in December 2007 is often referred to as the "Great Recession" given its severity in terms of depth and duration. See SHARON COHANY, U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, RANKS OF DISCOURAGED WORKERS AND OTHERS marginally ATTACHED TO THE LABOR FORCE RISE DURING RECESSION, ISSUES IN LABOR STATISTICS, 09-04, 1 (2009), available at [www.bls.gov/opub/ils/pdf/opbils74.pdf](http://www.bls.gov/opub/ils/pdf/opbils74.pdf).

615. WOMEN'S EMPLOYMENT DURING THE RECOVERY, *supra* note 612, at 1.

616. U.S. DEPT. OF LABOR, BUREAU OF LABOR STATISTICS, HIGHLIGHTS OF WOMEN'S EARNINGS IN 2009, 2 (2010), available at <http://www.bls.gov/cps/cpswom2009.pdf>.

617. *Id.*

618. See JANE MILLAR ET AL., DEPT. FOR WORK & PENSIONS, RESEARCH REPORT NO 351—PART-TIME WORK AND SOCIAL SECURITY: INCREASING THE OPTIONS 10 (2006), available at [http://www.academia.edu/669835/Part-time\\_work\\_and\\_social\\_security\\_increasing\\_the\\_options](http://www.academia.edu/669835/Part-time_work_and_social_security_increasing_the_options). Part-time work in the United Kingdom is usually defined as working less than 30 hours per week. *Id.* at 8.

619. The percentages were calculated using the figures for November 2012–January 2013. See OFFICE FOR NAT'L STATISTICS, LABOUR MARKET STATISTICS, EMPLOYMENT AND JOBS: FULL-TIME, PART-TIME & TEMPORARY WORKERS tbl.3, (2013) available at [http://www.ons.gov.uk/ons/dcp171778\\_301631.pdf](http://www.ons.gov.uk/ons/dcp171778_301631.pdf).

work part-time because they could not find full-time work compared with almost 32 percent of men.<sup>620</sup> The need to balance work and family obligations is much more frequently articulated by women as the reason they work part-time than it is for men. Very few men say they work part-time for family reasons in comparison with large percentages of women.<sup>621</sup> As in the United States, in the United Kingdom, women working part-time earn more per hour than men working part-time—about 5 percent more.<sup>622</sup> This differential is attributed to the female part-time workforce being made up of at least a portion of higher earning women who cut back their hours in order to care for family.<sup>623</sup>

Part-time work is a costly work option for women. In the United States, for example, across of range of occupations part-time workers earn wages vastly inferior to full-time workers. For example, a part-time worker in sales receives 58 cents for every dollar earned by a full-time worker.<sup>624</sup> The same is true for computer and mathematical occupations, where part-time workers make 63 cents for every full-time dollar earned.<sup>625</sup> Moreover, in the United States, part-time workers frequently do not receive employer-provided benefits such as medical and dental insurance; pension or other retirement benefits; or paid vacation or paid sick leave.<sup>626</sup>

In the United Kingdom, the measurements on pay differentials are calculated differently but women working part-time are found to suffer a “part-time pay penalty.”<sup>627</sup> A comparison of earnings of full-time employed women and women employed part-time, which was based on the New Earnings Survey (NES) and the Labour Force Survey (LFS), revealed part-time hourly earnings as 26 percent below those of full-time earnings using NES figures and 22 percent below

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620. *Id.*

621. See MILLAR, *supra* note 618, at 11.

622. Steve Doughty, *Female Workers Earn MORE: Part-time Jobs are 5% Better Paid for Women than Men*, DAILY MAIL (Mar. 21, 2012), <http://www.dailymail.co.uk/news/article-2118538/Part-time-jobs-better-paid-women.html>.

623. *Id.*

624. See MALONEY, *supra* note 613, at 2.

625. *Id.*

626. See Dina Bakst & Phoebe Taubman, *From the Great Depression to the Great Recession: Advancing Women's Economic Security Through Tough Economic Times and Beyond*, 32 WOMEN'S RTS. L. REP. 25, 40 (2010).

627. Alan Manning & Barbara Petrongolo, *The Part-Time Pay Penalty for Women in Britain 1* (Discussion Paper No. 2419 2006).

full-time earnings using LFS data.<sup>628</sup> One reason for the differential lies in occupational differences between those women who work full-time and those who work part-time. Controlling for occupations, the differences are smaller. In fact, one study estimated that the intra-occupational part-time penalty is between 3 and 10 percent.<sup>629</sup> In other words, occupational segregation is the culprit behind the part-time pay penalty.<sup>630</sup> Women who work part-time—some 43 percent of working women—tend to work in jobs “associated with downward mobility.”<sup>631</sup> Since most of the policies addressing equality between full and part-time employment inadequately account for occupational segregation, those policies have had scant effect on the part-time pay penalty.<sup>632</sup>

## 2. LEGAL AND POLICY RESPONSES ADDRESSING PART-TIME WORK

Responding to the E.U.’s Part-Time Work Directive,<sup>633</sup> the United Kingdom adopted the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000.<sup>634</sup> The Regulations provide the right of part-time workers to equal treatment vis-à-vis their full-time working counterparts. Critics, however, charge that implementation has been problematic due to the necessity of litigants identifying an actual full-time comparator and the flexibility given to employers to justify less favorable treatment of part-timers.<sup>635</sup> In particular, the actual comparator requirement is fairly stringent, and requires the part-timer “demonstrate that she is performing broadly similar work to the comparator, but also that this work is for ‘the same employer under the same type of contract.’”<sup>636</sup> In fact, these requirements were adopted with the government’s knowledge that only around one-sixth of part-timers would be able to identify a

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628. *Id.*

629. *Id.*

630. *Id.*

631. *Id.*

632. *Id.* at 18.

633. Council Directive 97/81, 1997 O.J. (L14) 9 (EC).

634. Mark Bell, *Achieving the Objectives of the Part-time Work Directive? Revisiting the Part-Time Workers Regulations*, 40 *INDUS. L.J.* 254, 254–55 (2011).

635. *Id.*

636. *Id.* at 257.

comparable full-time worker whose terms and conditions would serve as a comparison.<sup>637</sup>

Problems also arise regarding the proper causation standard in direct discrimination cases, especially where employers argue that they are motivated by commercial concerns rather than bias against part-timers.<sup>638</sup> Although case law is sparse on the defense of justification, at least one Employment Appeals Tribunal case applied it “with considerable deference to the employer.”<sup>639</sup> Thus, while certainly an improvement over having no regulation at all, the Part-Time Workers Regulations present steep barriers for litigants.<sup>640</sup>

Legal regulation to protect part-time workers is sorely lacking in the United States. Those who work less than 1000 hours annually (about 20 hours per week) may be excluded from employer-provided pension plans.<sup>641</sup> Those who work under 1250 hours per year (about 24 hours per week) are not covered by the Family and Medical Leave Act.<sup>642</sup> Some states exclude part-time workers from unemployment compensation coverage.<sup>643</sup> There is no federal legislation requiring proportional pay for part-time workers.<sup>644</sup> While there are federal proposals to require employers to pro-rate benefits for part-timers,<sup>645</sup> the political viability of such legislation is questionable. The Affordable Care Act will require employers to make health insurance available to their employees; but those working less than 30 hours per week are not covered by the employer mandate.<sup>646</sup>

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637. Aileen McColgan, *Missing the Point? The Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000*, 29 *INDUS. L.J.*, 260, 263 (2000).

638. See Bell, *supra* note 634, at 261–62.

639. *Id.* at 263.

640. *Id.* at 265.

641. See Bakst & Taubman, *supra* note 626, at 40–41.

642. *Id.*

643. *Id.*

644. *Id.*

645. See Nancy Folbre, *Full Time, Part Time, Good Jobs, Bad*, N.Y. TIMES ECONOMIX (Aug. 26, 2013), [http://economix.blogs.nytimes.com/2013/08/26/full-time-part-time-good-jobs-bad/?\\_php=true&\\_type=blogs&\\_r=0](http://economix.blogs.nytimes.com/2013/08/26/full-time-part-time-good-jobs-bad/?_php=true&_type=blogs&_r=0) (noting that Representative Jan Schakowsky has introduced a bill that would require pro-rating of certain benefits for part-time workers).

646. *Id.* The so-called employer mandate, which requires larger employers—those with 50 or more full-time workers—to provide health care to their employees, has been delayed until 2015. Jackie Calmes & Robert Pear, *Crucial Rule is Delayed a Year for Health Law*, N.Y. TIMES, July 3, 2013, at A1.

However, the Obama administration wisely made full federal funding for states under the American Recovery and Reinvestment Act contingent on the states updating their unemployment insurance programs to ensure benefit eligibility for unemployed part-time workers.<sup>647</sup> As a result, unemployment insurance coverage for part-timers improved in a number of states.<sup>648</sup>

#### D. Career Breaks

The period during which women give birth to children coincides with the ages at which many people are actively engaged in the labor market.<sup>649</sup> Tension between these two activities, however, coupled with women's traditional and greater caring roles,<sup>650</sup> places women who bear children at risk of intermittent employment.<sup>651</sup> Indeed, childbirth "significantly raises the likelihood that a woman will exit the labor force . . . and most women withdraw from [the] labor force after childbirth for at least a short period."<sup>652</sup> Such work interruptions are associated with decreases in "status, prestige, and wages."<sup>653</sup> Of course, career breaks can also occur for reasons other than childbirth such as caring for a special needs child or an elderly or sick adult.<sup>654</sup>

Moreover, the existence of a wage penalty for intermittent employment, or career breaks, is well-documented<sup>655</sup> and has implications for women's ability to save for retirement. A frequently cited U.S. study found that the pay of women who temporarily exit the labor market not only lags upon their return to work, but

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647. Bakst & Taubman, *supra* note 626, at 41.

648. *Id.*

649. See Megumi Omori & Shelley A. Smith, *Women's Occupational Mobility After Work Interruption*, 4 SOC. TODAY (2006), available at <http://www.ncsociety.org/sociationtoday/v41/women.htm>.

650. See generally Part II (D).

651. See Omori & Smith, *supra* note 649.

652. *Id.*

653. *Id.*

654. See NAT'L ALLIANCE FOR CAREGIVING & AARP, *supra* note 258, at 9; Feinberg, *supra* note 281, at 6.

655. See Julie L. Hotchkiss et al., *To Work or Not to Work: The Economics of a Mother's Dilemma* 1 (Fed. Reserve Bank of Atlanta, Working Paper No. 2011-2, 2011), available at <http://www.frbatlanta.org/documents/pubs/wp/wp1102.pdf>.

subsequently never catches up.<sup>656</sup> The penalty remains evident more than two decades after the end of the final career break.<sup>657</sup> More specifically, women whose last gap “occurred more than 20 years ago still earn between 5 percent and 7 percent less than women who never left the labor force.”<sup>658</sup> This, of course, is money lost in addition to forgone wages during the career break itself.<sup>659</sup> In fact, career breaks are significant contributors to the pay differential between women and men.<sup>660</sup>

### 1. QUANTIFYING THE CAREER BREAK PENALTY

A study published in 2009, finds the career break pay penalty operative in the United States and the United Kingdom detrimental to women with children.<sup>661</sup> Focused on the motherhood wage penalty and its causes, the study examined longitudinal data related to five cohorts of women from three countries: the United Kingdom (one cohort), the United States (two cohorts), and Germany (two cohorts).<sup>662</sup> The results from Germany are not relevant to the present discussion, but the U.S. and U.K. findings are instructive.

Career gaps were costly for women in the United States.<sup>663</sup> American women also were penalized in terms of pay when they changed employers after career interruptions related to childcare.<sup>664</sup> Thus, “the wage penalty for the first year of a child-related work interruption amounts to some 7 percent in the older U.S. cohort and even 11 percent in the younger one, and the full wage penalty of an employer change at return to the labor market is estimated at 3%–4%.”<sup>665</sup> The pay penalty for childcare-related occupational gaps in Britain was even greater with “one year of childcare-related work interruption carry[ng] a wage penalty of a full 16%” and a change of

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656. See Joyce P. Jacobsen & Laurence M. Levin, *Effects of Intermittent Labor Force Attachment on Women's Earnings*, MONTHLY LAB. REV. 14, 18 (1996).

657. *Id.*

658. *Id.*

659. *See id.*

660. Hotchkiss et al., *supra* note 655, at 1.

661. Marcus Gangl & Andrea Ziefle, *Motherhood, Labor Force Behavior, and Women's Careers: An Empirical Assessment of the Wage Penalty for Motherhood in Britain, Germany, and the United States*, 46 DEMOGRAPHY 341 (2009).

662. *Id.* at 342.

663. *Id.* at 359.

664. *Id.*

665. *Id.*

employer after a career break representing “a 5%–6% wage cost for British women.”<sup>666</sup> Interestingly, marital status has no effect on the wage penalty for U.S. women, but British single women experience a smaller wage penalty for career breaks than those who are married.<sup>667</sup>

The study also calculated the wage penalty shouldered by mothers on a per child basis. In the United States, the wage penalty per child for the older cohort of women (born in the late 1950s) was 9 percent<sup>668</sup> while the wage penalty per child of the younger cohort (born from 1960–64)<sup>669</sup> was 16 percent.<sup>670</sup> British women (born between 1965–69) experienced a penalty of 13 percent per child.<sup>671</sup> A significant portion of the penalty is explained by mothers with career gaps simply having less work experience than other workers.<sup>672</sup> And, for women in the United States and Britain, most of the rest of the wage penalty is explained by how long the career gaps are, and whether the women changed employers at labor market reentry.<sup>673</sup> The implications of the family leave policies of the two countries on these findings will be explained in Subsection 2 below.

Although they are actually less likely to exit the labor force due to the high opportunity costs associated with intermittent employment,<sup>674</sup> one segment of the female work force has received a great deal of attention: highly qualified women. Economist Sylvia Ann Hewlett is the researcher credited with studying this group in the United States and employing the phrases “off-ramps” and “on-ramps” as metaphors to describe the non-linear career trajectories of those high earning women who leave the workplace for a period of time and then reenter paid labor.<sup>675</sup> In two studies, conducted five years apart, Hewlett and her colleagues discovered that about one-third of highly qualified women voluntarily leave employment for

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666. *Id.*

667. *Id.* at 362.

668. *Id.* at 357.

669. *Id.* at 349.

670. *Id.* at 357.

671. *Id.*

672. *Id.* at 358.

673. *Id.*

674. Hotchkiss et al., *supra* note 655, at 21.

675. See Sylvia Ann Hewlett & Carolyn Buck Luce, *Off Ramps and On-Ramps: Keeping Talented Women on the Road to Success*, HARV. BUS. REV. 44 (March 2005).

extended periods of time.<sup>676</sup> In the 2005 study, women averaged 2.2 years out of the labor force,<sup>677</sup> while the 2010 study found that the period out of the workforce had increased by about six months.<sup>678</sup>

More than 93 percent of these women desire to return to their careers but only 74 percent of that group actually do so, and, among them, only 40 percent on-ramp back to full-time professional employment.<sup>679</sup> In the United States, the penalties for taking time away from a high-paying career are great. Women lose on average “18 percent of their earning power” when they off-ramp and “a staggering 37 percent . . . when they spend three or more years out of the workforce.”<sup>680</sup> Anecdotal accounts bring the statistics to life.<sup>681</sup> In fact, career interruptions, and the tendency of women to work, on average, fewer hours than their male counterparts, explain most of the “talented” female to male pay deficit.<sup>682</sup>

## 2. LAW AND POLICY REGARDING CAREER BREAKS AND (DIS)INCENTIVES TO WORK

Paid family leave law and public support for childcare are legal entitlements that influence women’s responses to motherhood. As noted by the authors of the 2009 study referenced above:

In a nutshell, subsidized or publicly provided childcare will raise women’s incentives to paid work. Higher public childcare support should hence, all other things being equal, reduce the duration of post-birth interruptions, thus also limiting potential loss of women’s human capital. These effects contrast with the implications of maternity or parental leave mandates. Evidently, protecting mothers from labor market risk associated with leave-taking will encourage parents to take time off for childcare. However, because maternity and parental leave mandates impose potentially significant non-wage costs to employers, they

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676. *Id.* at 45; see also Sylvia Ann Hewlett, Laura Sherbin, & Diana Forster, *Off-Ramps and On-Ramps Revisited*, HARV. BUS. REV. 30 (June 2010).

677. See Hewlett & Luce, *supra* note 675, at 5.

678. See Hewlett, Sherbin & Forster, *supra* note 676, at 30.

679. See Hewlett & Luce, *supra* note 675, at 45–46.

680. *Id.* at 5.

681. See *e.g.*, Judith Warner, *The Opt out Generation Wants Back In*, N.Y. TIMES MAGAZINE, August 7, 2013.

682. See Eduardo Porter, *Motherhood Still a cause of Pay Inequality*, N.Y. TIMES, June 12, 2012, at B1, available at <http://www.nytimes.com/2012/06/13/business/economy/motherhood-still-a-cause-of-pay-inequality.html> (explaining the work of economists Claudia Goldin, Lawrence Katz, and Marianne Bertrand, who investigated the career paths and pay of 3,000 M.B.A. graduates over a 15-year period).

potentially also generate...effects disadvantaging working women because employers would either directly pass on these costs through statistical discrimination against women or working mothers in hiring and promotion decisions.<sup>683</sup>

As noted above, the United States has very meager family leave provisions, with many U.S. employees falling outside the coverage of the FMLA either because they work for small employers or are otherwise ineligible for leave under the law.<sup>684</sup> Even those covered by the law are entitled merely to 12 weeks of unpaid leave.<sup>685</sup> Additionally, most publicly provided childcare is geared to the needs of severely disadvantaged groups, leaving childcare for most families to be provided by private firms at considerable cost.<sup>686</sup> Indeed, increasingly middle class working parents in the U.S. struggle to pay for childcare.<sup>687</sup>

The United Kingdom presently has superior maternity leave provisions to the United States. All employees who give birth are entitled to take up to 52 weeks of maternity leave.<sup>688</sup> If the employee has at least 26 weeks continuous service, the employee will be entitled to 90 percent of their average earnings for six weeks and, thereafter a flat rate payment for a further 33 weeks.<sup>689</sup> Yet in the 1980s and 1990s, women in the United Kingdom had less protection, including limitations on reinstatement rights, which screened out significant percentages of women.<sup>690</sup>

Moreover, expensive childcare in the United Kingdom has historically represented, and continues to represent a barrier to full-time work for many women.<sup>691</sup> Ironically, while public expenditure on childcare support is much higher in the United Kingdom than in

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683. Gangl & Ziefle, *supra* note 661, at 345.

684. See *supra* notes 358–63 and accompanying text.

685. *Id.*

686. Gangl & Ziefle, *supra* note 661, at 345.

687. *Id.* at 1 (“[I]ncreasingly, middle- and upper-middle-class parents are finding that day care is hard to find or access and that even when it is available it is startlingly costly.”).

688. DISCRIMINATION AND THE LAW, *supra* note 163, at 76.

689. For a full summary of maternity leave and pay see the U.K. government website at <https://www.gov.uk/maternity-pay-leave/overview>. The statutory regulation is contained in the Maternity and Parental Leave etc Regulations 1999 SI 1999/3312.

690. *Id.*

691. ORG. FOR ECON. COOPERATION & DEV., CLOSING THE GENDER GAP: UNITED KINGDOM (Dec. 17, 2012), <http://www.oecd.org/gender/Closing%20the%20Gender%20Gap%20-%20UK%20FINAL.pdf>.

the United States,<sup>692</sup> childcare in the United Kingdom is some of the most costly in the world.<sup>693</sup> In 2004, a median income couple with two children in full time care spent over 30 percent of their “disposable income on childcare, compared to an OECD average of 13%.”<sup>694</sup> Subsequent public investment in childcare has brought this down to 21 percent in 2008 and some 19 percent in 2012.<sup>695</sup> These figures, however, have been affected by more recent government cuts and the picture is complex because of the mix of benefits and tax allowances that can be claimed at various income levels.<sup>696</sup> Childcare costs appear to hit middle income families the most. In the United Kingdom it is often a combination of the loss of benefits and the complexities of the tax system that create a disincentive to work.<sup>697</sup>

Not surprisingly, time out of the labor market is very costly to American women in the United States because statutory paid leave is unavailable, “and the U.S. labor market consistently tends to most strongly reward continuous labor market attachment.”<sup>698</sup> Thus, women in the United States take less time off for maternity leave and childcare, “and . . . are much less likely to enter part-time jobs, typically female jobs, or low-prestige occupations in response to childbirth than mothers in Britain.”<sup>699</sup> Still, the high wage penalties in the United Kingdom indicate that mothers continue to be

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692. ORG. FOR ECON. COOPERATION & DEV., SOC. POL’Y DIV., OECD FAMILY DATABASE: PUBLIC SPENDING ON CHILDCARE AND EARLY EDUCATION 1–3 (July 29, 2013), <http://www.oecd.org/els/family/PF3.1%20Public%20spending%20on%20childcare%20and%20early%20education%20-%20290713.pdf>. Public spending is defined as “all public financial support (in cash, in-kind or through the tax system . . . ) for families with children participating in formal day-care services and pre-school institutions . . . .” *Id.* at 1. Public spending on childcare support per child is calculated by referencing the expenditure on childcare divided by the number of children in a particular country under age three. *Id.*

693. VIDHYA ALAKESON & ALEX HURREL, RESOLUTION FOUND., COUNTING THE COSTS OF CHILDCARE 3 (Oct. 2012), available at [http://www.resolutionfoundation.org/media/media/downloads/Counting\\_the\\_costs\\_of\\_childcare\\_2.pdf](http://www.resolutionfoundation.org/media/media/downloads/Counting_the_costs_of_childcare_2.pdf).

694. *Id.*

695. *Id.* at 8. This figure is based on earnings equivalent to 150 percent of the average wage. *Id.*

696. Due to the reduction in the tax credit system, a couple earning 200 percent of the average wage with a two-year old and a three-year old in full time child care spends 30 percent of their disposable income to childcare. *Id.* at 1. Had the cuts not been made, they would have paid 25 percent of their disposable income. *Id.*

697. *Id.* at 22–23.

698. Gangl & Ziefle, *supra* note 661, at 365.

699. *Id.*

disadvantaged as a group.<sup>700</sup> It is possible that the costs of paid maternity leave in the United Kingdom are passed onto mothers creating unintended consequences for them.<sup>701</sup> Neither law nor policy in the United States or United Kingdom sufficiently addresses or ameliorates the economic disadvantages faced by women who take career breaks.

### E. Retirement and Pensions

The final incremental disadvantage factor is retirement and pensions. It is within this arena that women's systemic disadvantage is most keenly felt. For many women who have worked, retirement is hampered by the conditions that preceded it—significantly lower lifetime earnings, resulting in the accumulation of fewer assets, and periods of “unemployment, part-time employment, and absence from the labor market,”<sup>702</sup> which are linked to conflicts between paid labor and caregiving.<sup>702</sup> Such disadvantage for the retired is especially notable among women of color.<sup>703</sup> As one report put it, “[f]or too many women, retirement is the culmination of an entire career—an entire lifetime—of pay and income inequality.”<sup>704</sup> Add to these factors that elderly women have greater longevity than men and are more likely than men to live alone, and it is hardly surprising that they are at greater risk of falling into poverty and vulnerability, having depleted any retirement savings they may have amassed.<sup>705</sup>

#### 1. WOMEN, MEN, AND LONGEVITY

Women make up the bulk of the world's older population due to their greater longevity.<sup>706</sup> Globally, women represent 55 percent of older people.<sup>707</sup> In the United States, the older population—those 65

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700. *Id.*

701. *Id.*

702. CARROLL ESTES ET AL., INST. FOR WOMEN'S POL'Y RES. ET AL., *BREAKING THE SOCIAL SECURITY GLASS CEILING: A PROPOSAL TO MODERNIZE WOMEN'S BENEFITS 2* (May 2012).

703. *Id.*

704. *Id.*

705. See RETIREMENT SECURITY, *supra* note 6, at 1.

706. *Rights Jobs and Social Security*, *supra* note 1, at 4.

707. *Id.*

and older—numbers 41.4 million.<sup>708</sup> In gender terms, “[i]n 2011, there were 23.4 million older women and 17.9 million older men, or a sex ratio of 131 women for every 100 men.”<sup>709</sup> In slightly different terms, older women are 56.5 percent of the older population. Those women attaining age 65 outlive their male counterparts by 2.4 years.<sup>710</sup> Among the oldest old—the population 85 and over—there are “203 women for every 100 men.”<sup>711</sup>

Trends in the United Kingdom are roughly similar. In 2011, the older population, consisting of those sixty-five and up, numbered 10.3 million.<sup>712</sup> The sex ratio for this group is 79 men for every 100 women. Women are therefore 56 percent of the older population in the United Kingdom. Among the oldest old—those over 90—there are “2.56 women. . .for every man.”<sup>713</sup> In terms of life expectancy at birth, females in the United Kingdom can expect to live 82.1 years while male life expectancy is 78.1 years.<sup>714</sup>

## 2. WOMEN MORE FREQUENTLY LACK PRIVATE PENSIONS

In both the United States and the United Kingdom, government provided retirement income aims to provide a minimum foundation of income security that is meant to be supplemented through private pensions, and savings and investment.<sup>715</sup> For example, the American metaphor of the “three-legged stool” for the national Social Security program was meant to illustrate a desired

708. U.S. DEP’T OF HEALTH & HUM. SERVS., A PROFILE OF OLDER AMERICANS 2 (2012), available at [http://www.aoa.gov/Aging\\_Statistics/Profile/index.aspx](http://www.aoa.gov/Aging_Statistics/Profile/index.aspx).

709. *Id.*

710. ESTES ET AL., *supra* note 702, at 3.

711. U.S. DEP’T OF HEALTH & HUM. SERVS., *supra* note 708, at 2.

712. TOM RUTHERFORD, POPULATION AGEING: STATISTICS, HOUSE OF COMMONS LIBRARY 2 (Feb. 10, 2012), available at <http://www.parliament.uk/briefing-papers/sn03228>.

713. *Id.*

714. *Id.*

715. See generally Bisom-Rapp et al., *supra* note 607, at 89 (“The [U.K.’s] post-1945 old age pension arrangements were intended to allow people to retire on an income that only partially came from the state; there was an expectation that individual savings would be an important part of retirement income.”); see also MIKKI D. WAID, AARP PUB. POL’Y INST., SOCIAL SECURITY: A BRIEF OVERVIEW (Mar. 2012), available at [http://www.aarp.org/content/dam/aarp/research/public\\_policy\\_institute/econ\\_sec/2012/social-security-brief-overview-fs-AARP-ppi-econ-sec.pdf](http://www.aarp.org/content/dam/aarp/research/public_policy_institute/econ_sec/2012/social-security-brief-overview-fs-AARP-ppi-econ-sec.pdf) (“by its design, Social Security provides a lifeline for low-income retirees, disabled workers, and survivors of a deceased worker and is the basis for a secure retirement for countless others.”).

model.<sup>716</sup> Government retirement payments through the Social Security system represent one leg of the stool.<sup>717</sup> Private company pensions provided a second.<sup>718</sup> The third leg was comprised of investment and savings.<sup>719</sup> This tripartite model was the key to stable income during retirement.<sup>720</sup>

Retirement security in the United States, however, has declined significantly for many decades.<sup>721</sup> In large part this is due to a monumental shift in the type of private pensions offered by employers to their employees.<sup>722</sup> More specifically, many employers ceased providing defined benefit pensions, which guarantee lifetime benefits to retirees, instead offering defined contribution pension plans.<sup>723</sup> The latter are plans in which employer contributions and/or employee deferred salary are placed into tax sheltered accounts that are invested, frequently in stocks or bonds, with the hope that a sufficient sum will be generated to sustain workers once they retire.<sup>724</sup> In terms of retirement security, the movement to defined contribution plans has been a failure.<sup>725</sup> For those employees able to participate, market fluctuations, especially during the Great Recession, took a significant toll on pension savings, resulting in losses in both financial and in well-being for older workers.<sup>726</sup>

Moreover, the private pension picture has a gender dimension. In the United States, women are far less likely to receive private pension income than men. One report noted, for example, that “only 28 percent of women age 65–74 receive pension income compared to

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716. Larry DeWitt, *Research Note #1: The Origins of the Three-Legged Stool Metaphor for Social Security*, SSA HISTORIAN'S OFFICE (1996), available at <http://www.ssa.gov/history/stool.html>.

717. *Id.* (noting that Social Security is the “foundation” upon which workers build a secure retirement).

718. *Id.*

719. *Id.*

720. *Id.*

721. See generally Bisom-Rapp et al., *supra* note 607, at 110.

722. *Id.*

723. *Id.*

724. *Id.* at 110–11.

725. Paul Krugman, *Expanding Social Security*, N.Y. TIMES, Nov. 22, 2013, at A29, available at <http://www.nytimes.com/2013/11/22/opinion/krugman-expanding-social-security.html> (“Employers took advantage of the switch to surreptitiously cut benefits; investment returns have been far lower than workers were told to expect; and, to be fair, many people haven’t managed their money wisely.”)

726. Bisom-Rapp et al., *supra* note, 607, at 110–11.

42 percent of men” for the same age group.<sup>727</sup> When they do contribute to employer pension plans, women’s rates of contribution are significantly lower than those of men.<sup>728</sup> A U.S. Government Accountability Office report highlighted three factors that account for women’s lower participation in and contribution to private pension plans as compared with men; women are more likely to work part-time, have less on-the-job tenure, and to be single parents.<sup>729</sup> This deficit can be assessed in bottom line terms. The median income of American women age 65 and over is 25 percent lower than that of men, and women are almost twice as likely to be living in poverty as a result.<sup>730</sup>

Conditions in the United Kingdom are similarly challenging. While it is a struggle for many people, both male and female, to provide financially for their old age and retirement, it is clear that because of working life experiences, women in the United Kingdom are at a disadvantage compared with men. Regarding private pensions, around 70 percent of the female pensioner population has no private pension at all.<sup>731</sup> This is due to women’s lower level of participation in the labor force and the receipt, on average, of lower rates of pay and shorter working hours as the majority of part-time workers are women.<sup>732</sup> Where there are savings or private pension provisions, as a result of a longer life expectancy, retired women’s savings are required to last longer and investments to produce an annuity result in less income than that received by men.<sup>733</sup> Also of note is that the majority of annuities taken out by husbands are done so on a single life basis so the surviving wife has little or no continuing benefit after the death of her spouse.<sup>734</sup>

The bottom line for older British women is as much of a concern as that of their American sisters. The situation for older

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727. ESTES ET AL., *supra* note 702, at 3.

728. See RETIREMENT SECURITY, *supra* note 6, at 17 (noting that women’s contributions to defined contribution plans “were consistently around 30 percent lower than those of men”).

729. *Id.*

730. *Id.* at 18.

731. Bisom-Rapp et al., *supra* note 607, at 89.

732. PENSIONS COMM’N, PENSIONS: CHALLENGES AND CHOICES: FIRST REPORT OF THE PENSIONS COMMISSION 262 (2004), available at <http://image.guardian.co.uk/sys-files/Money/documents/2005/05/17/fullreport.pdf>.

733. *Id.* at 266.

734. *Id.* at 262.

women pensioners in the United Kingdom has been summarized by the following:

[O]ne in five single women pensioners risk being in poverty in retirement . . . By 2020 it is estimated that there will be as many divorced women aged 65 to 75 as widows. Almost two thirds of divorced and separated older women have no private pension income at all . . . the number of women<sup>735</sup> who are saving for retirement halves when they have a baby.

Of course, the state pension systems in the United Kingdom and the United States might be responsive to the life course realities faced by women. The extent to which those systems respond to the needs or disadvantages of women will be discussed below.

### 3. LAW AND POLICY RESPONSES TO WOMEN'S RETIREMENT INSECURITY

There have been efforts to account for women's life course in the United Kingdom state pension system but those reforms fall short of what is needed to produce equality for British women in retirement. The United Kingdom requires a number of years' national insurance contributions to build up an entitlement to the basic state pension. As noted above, the state pension provides a minimum income<sup>736</sup> and there is an expectation that this will be supplemented by an occupational or personal pension plan.<sup>737</sup> To qualify for a full state pension, a person needs to have made contributions for 30 years.<sup>738</sup>

In 2006, the U.K. government published a white paper discussing, inter alia, why women generally received lower pensions

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735. EQUAL. & HUM. RIGHTS COMM'N., TACKLING PENSIONER POVERTY (Jan. 16, 2007).

736. In 2013, this figure is £107.45 per week (approximately \$162). See Press Release, Steve Webb, MP, Dep't for Work & Pensions, *Benefit Rates 2012—including biggest ever cash increase to the Basic State Pension as it rises to £107.45 in 2012/13* (Dec. 6, 2011), available at <https://www.gov.uk/government/news/benefit-rates-2012-including-biggest-ever-cash-increase-to-the-basic-state-pension-as-it-rises-to-107-45-in-2012-13>.

737. See *supra* note 715 and accompanying text.

738. See *The Basic State Pension: Eligibility*, GOV. U.K., available at <https://www.gov.uk/state-pension/eligibility> (last updated Apr. 11, 2014). There are provisions to enable women who take time out to have children to add those years to their working years in order to get nearer or achieve the 30 years of contributions required. *Id.*

than men.<sup>739</sup> Prior to 1978, the system did not recognize caring responsibilities that took women out of the labor force. Thus, women's career gaps led to periods without pension contributions, which resulted in a lesser likelihood of women reaching the 39 years' worth of contributions needed for a full basic state pension prior to reforms that took effect in 2010.<sup>740</sup> As previously noted, career gaps also create pay deficits for many women.<sup>741</sup> One study, found that on average, women experience a drop in pay of around 16 percent after a year out of the labor market, which is double that faced by men.<sup>742</sup> As a result, on average, women's income during their lifetime is some £250,000 less than men's income, with an income in retirement that is 57% less.<sup>743</sup>

The historic result of these disadvantages is that only 30 percent of women reaching state pension age are entitled to a full basic state pension compared with 85 percent of men.<sup>744</sup> The government has tackled some aspects of this problem in the Pensions Acts of 2007 and 2008 but the reforms only took effect in 2010 for women retiring from that date.<sup>745</sup> The most significant of these reforms was to reduce the qualifying period to 30 years.<sup>746</sup> Also important were changes regarding contribution credits for parents and caregivers.<sup>747</sup> From 2010 on, parents, registered foster parents, or carers reaching state pension age will be allowed to earn credits of up to 22 years toward a state pension.<sup>748</sup> Nevertheless, with respect to the qualifying period, the existing women pensioners were left to suffer from the old system.<sup>749</sup>

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739. DEP'T FOR WORK & PENSIONS, SECURITY IN RETIREMENT: TOWARDS A NEW PENSIONS SYSTEM (2006), available at [www.official-documents.gov.uk/document/cm68/6841/6841.pdf](http://www.official-documents.gov.uk/document/cm68/6841/6841.pdf).

740. *Id.* at 104.

741. See *supra* note 655 and accompanying text at 1.

742. See DISCRIMINATION AND THE LAW, *supra* note 163, at 118.

743. AGE REFERENCE GROUP ON EQUAL. & HUMAN RIGHTS, AGE AND MULTIPLE DISCRIMINATION AND OLDER PEOPLE—A DISCUSSION PAPER 13 (2005), available at [http://www.ageuk.org.uk/Documents/en-GB/For-professionals/Research/Age%20and%20Multiple%20Discrimination%20\(2005\)\\_pro.pdf?dtrk=true](http://www.ageuk.org.uk/Documents/en-GB/For-professionals/Research/Age%20and%20Multiple%20Discrimination%20(2005)_pro.pdf?dtrk=true).

744. See DISCRIMINATION AND THE LAW, *supra* note 164, at 118.

745. Malcolm Sargeant, *Gender Equality and the Pensions Act 2007-2008*, 38 INDUS. L.J. 143, 147 (2008).

746. *Id.* at 144.

747. *Id.* at 145.

748. *Id.*

749. *Id.*

In the United States, due to the shortfall in access to private pensions and savings and investments, women age 65 and over are generally more dependent than men on state-provided Social Security retirement benefits.<sup>750</sup> Indeed, over 26.5 percent of older women rely on this state pension system “for 90 percent or more of their family income, compared to 20 percent of older men.”<sup>751</sup> Women’s reliance on the program is greatest among widows, for whom Social Security is close to the sole source of income for more than one-third, and divorced women, of whom 27% are almost entirely reliant.<sup>752</sup>

However, many older minority women—more specifically those who are Asian or Hispanic—are ineligible to receive benefits either due to immigration status or, for naturalized citizens, lack of sufficient years of work to qualify for benefits.<sup>753</sup> Moreover, while Social Security retirement benefits are credited with keeping close to 40 percent of white, older women out of poverty, in comparison to 32 percent of their male counterparts, the program is far less effective for forestalling poverty among minority women.<sup>754</sup> In fact, of concern, and related to all older women, “extreme poverty rates increased significantly for women 65 and older to 3.1 percent in 2012 from 2.6 percent in 2011 [and] for older women 65 and living alone, to 4.7 percent in 2012 from 3.6 percent in 2011.”<sup>755</sup>

Social Security provides full retirement and disability benefits to older workers with 40 quarters (10 years) of work.<sup>756</sup> While the work credits may be earned at any time over the course of a lifetime, the disability portion of the benefits requires that an individual must have been employed half of the decade preceding the disability in order to receive disability benefits.<sup>757</sup> In gender terms, 91 percent of men are fully insured for retirement benefits and 81 percent are insured for disability benefits.<sup>758</sup> For women, 85 percent qualify for

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750. Alison Shelton, *Social Security: A Key Retirement Resource for Women*, AARP PUB. POL’Y INST., Aug. 2013, at 3.

751. *Id.* at 5.

752. *Id.*

753. *Id.*

754. *Id.* at 7.

755. Joan Entmacher et al., *Insecure & Unequal: Poverty and Income Among Women and Families 2000-2012*, NAT’L WOMEN’S L. CTR., 2013.

756. ESTES ET AL., *supra* note 702, at 5.

757. *Id.*

758. *Id.* at 5–6.

full retirement benefits but only 74 percent are eligible for disability benefits.<sup>759</sup>

Social Security is an old program, established in 1939, and the benefits it provides have attempted, to some extent, to take account of women's life course.<sup>760</sup> Thus, married women may either qualify for benefits on their own earnings or be eligible for payments as a spouse or widow based on the earnings of their husbands.<sup>761</sup> Yet qualifying for such benefits requires that the marriage lasted at least a decade, and many women, especially among the Baby Boomers, begin retirement without having had a marriage of that duration; others have never been married.<sup>762</sup> For such women, who had caregiving responsibilities for children or elderly parents—responsibilities that may have taken them out of the labor market for significant periods of time—there is no credit toward retirement for that important societal work.<sup>763</sup>

The result of years of lower earnings than men when they do work, and years spent outside the labor force providing uncompensated care work, take a substantial toll on the annual income provided to older women through Social Security. While in 2009, the average annual government provided income to retired men was \$15,620, retired women received an annual income of only \$12,155.<sup>764</sup> Moreover, those who do receive spousal benefits experience a 33 to 50 percent reduction in benefits upon the death of the spouse,<sup>765</sup> an occurrence that can produce significant financial hardship.

Proposals to strengthen Social Security for women are plentiful. Advocacy groups recommend, for example, improving surviving spousal benefits,<sup>766</sup> providing, as is done in the United Kingdom, state pension credits for caregivers,<sup>767</sup> and improving the Special Minimum Benefit “so that it is equal to 150 percent of the

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759. *Id.*

760. *Id.* at 7.

761. *Id.* at 8.

762. *Id.*

763. *Id.*

764. *Id.* at 9.

765. *Id.* at 10.

766. *Id.*; see also Shelton, *Social Security: A Key Retirement Resource for Women*, *supra* note 750, at 8.

767. ESTES ET AL., *supra* note 702, at 10–11; see also Shelton, *Social Security: A Key Retirement Resource for Women*, *supra* note 750, at 8.

poverty level for a single aged person.”<sup>768</sup> The United States government is aware of other proposals that might help women, including counting time unemployed as creditable employment for Social Security retirement benefits,<sup>769</sup> and providing an additional Social Security retirement benefit to the oldest old—perhaps those over 80 or 85 years of age, who are more likely to be women.<sup>770</sup> Such proposals compete, however, with calls from fiscally conservative quarters to increase the early or full retirement ages for Social Security,<sup>771</sup> to means test the benefit formula to decrease its generosity for some categories of earners,<sup>772</sup> and to switch to a different consumer price index to account for Social Security cost of living increases.<sup>773</sup> These latter proposals may actually harm rather than assist the women who rely on Social Security the most.<sup>774</sup>

More importantly, however, is the lack of coordination by policymakers to guide reasoned law and policy reform across women’s entire life course. Instead, policies proliferate in a legislative climate of gridlock, and the most one can hope for is tinkering around the margins through a process of disjointed incrementalism. The systemic problem described extensively throughout this article, however, will never be solved through such means. In the Conclusion below, we touch briefly on what would be necessary in order to vanquish the lifetime disadvantages faced by girls and women in the United Kingdom and the United States.

#### IV. Conclusion

As law professors we are sensitive to the conventions of our discipline, which place significant value on scholarly work that develops legal solutions to thorny societal problems. Proposing

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768. ESTES ET AL., *supra* note 702, at 12; *see also* Shelton, *Social Security: A Key Retirement Resource for Women*, *supra* note 750, at 8.

769. *See* RETIREMENT SECURITY, *supra* note 6, at 39.

770. *Id.* at 44.

771. ESTES ET AL., *supra* note 702, at 17 (arguing against a recommendation by the 2010 National Commission on Fiscal Responsibility and Reform recommendation that the retirement age be increased). For a thoughtful treatment of the issue, *see* Benjamin A. Templin, *Social Security Reform: Should the Retirement Age Be Increased?*, 89 OR. L. REV. 1179 (2011).

772. *Id.* at 17.

773. *Id.*

774. *Id.*

regulatory innovations is an important task and this article by no means casts aspersions at efforts to do so, including those we ourselves have undertaken in the past. The fiftieth anniversary of the United States' Title VII of Civil Rights Act of 1964,<sup>775</sup> however, seems an opportune time to step out of the trees constructed by legal doctrine and statutory interpretation to view the forest of equality law that aims to protect girls and women and foster sex equality. To that end, we ask not whether sex equality law has made things better for women than they were without it. Surely things are much better than they were a half century ago when most working women were limited despite their aspirations to the secretarial pool, nursing, or maid service, and sexual harassment was better known as a simple hazard of everyday life.

Rather, we have endeavored to construct a model of how girls and women live their lives within a system that was not designed with them in mind, and how law has failed to support them in ways that would allow far fewer to end their days in poverty. This story is resonant not only in the United States but also in the United Kingdom, where the legal protections for women are significantly stronger. Indeed, in considering the range of seemingly progressive law enacted in the United Kingdom to advance the women's interests, four types emerge: (1) measures aimed at tackling sex discrimination and equal pay; (2) measures to facilitate working flexibility and protect non-standard work from second class status; (3) measures aimed to protect women during pregnancy and periods of maternity leave; and (4) efforts specifically geared to help women in retirement.

In the United States, which lacks the second type of protective measures, has done little with the fourth, and has critical deficiencies with respect to the first and third, it is tempting to advocate U.K.-style innovation as a solution. Yet as this article has demonstrated, despite much stronger sex equality law, empirical reality for British women workers does not vary much from that experienced by American working women.<sup>776</sup> Understanding why this is so requires looking at

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775. 42 U.S.C. § 2000e (2012).

776. That said, the authors do agree with Professor Bill Corbett that the United States's penchant for legislatively overruling poorly analyzed Supreme Court employment discrimination decisions in a sometimes piecemeal fashion is suboptimal. Professor Corbett recently wisely recommended that the U.S. Congress embrace the approach of the U.K. Parliament and "undertake comprehensive reform of employment discrimination laws, as Parliament did in

the complexity of women's lives and the extent to which existing law fails to capture that complexity. It also requires acknowledging that our present policymaking approach in both countries—disjointed incrementalism—will fail to bring about the kind of massive societal change necessary to place women on even footing with their male counterparts. Policy changes that differ little from the status quo<sup>777</sup> and that are arrived at not rationally and comprehensively but through the “interplay between myriad interested individuals and groups”<sup>778</sup> will leave women at the end of their working lives in economic conditions inferior to those of men.

Instead, as this Article has argued from the beginning, tackling the lifetime disadvantages experienced by girls and women in the United States and the United Kingdom requires a coordinated approach with the goal of equality of outcomes. Such a project would require significant political support, which we acknowledge may well be lacking, and is inherently redistributionist in orientation, which might doom it from the start. The specific components of such a project are beyond the scope of this article because as has been amply discussed, the problem is complicated. Even in the countries with the greatest commitment to sex equality—more specifically Scandinavian countries like Sweden—recent scholarly work critiques governmental efforts to challenge occupational segregation, “the uneven distribution of economic and political power . . . and to fulfil[1] the political goal of shared parental responsibilities.”<sup>779</sup> Until the day arrives when our people are ready to embrace gender equality as a foundational principle—a true cornerstone of society<sup>780</sup> as a Swedish government

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the Equality Act of 2010.” William R. Corbett, *Calling on Congress: Take a Page from Parliament's Playbook and Fix Employment Discrimination Law*, 66 VAND. L. REV. 135, 136 (2013).

777. See Lisa Dubay et al., *Advancing Toward Universal Coverage: Are States Able to Take the Lead?*, 7 HEALTH CARE L. & POL'Y 1, 3 (2004) (noting in the context of health care reform that public policy characterized by disjointed incrementalism limits its focus to alternatives “differing only slightly from status quo policies”).

778. Lainie Rutkow et al., *Balancing Consumer and Industry Interests in Public Health: The National Vaccine Injury Compensation Program and Its Influence During the Last Two Decades*, 111 PENN ST. L. REV. 681, 708 (2007).

779. Eva-Maria Svensson & Asa Gunnarsson, *Gender Equality in the Swedish Welfare State*, 2 *feminists@law* 1–2 (2012), available at <http://journals.kent.ac.uk/index.php/feministsatlaw/article/view/51>.

780. See SWEDISH INST., GENDER EQUALITY: THE SWEDISH APPROACH TO FAIRNESS (2013), available at <http://sweden.se/wp-content/uploads/2013/11/>

pamphlet puts it—it is likely that a detailed recitation of a coordinated approach in the United States and the United Kingdom is premature. Nonetheless, it is the aim of this article to take a small step toward that goal.