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Alice H. Cook was a Professor in Cornell’s ILR School, and one of the first scholars to write on and research issues related to working women. The author of numerous books and articles, her long career included service as Cornell’s first ombudsman.



Lamont E. Stallworth is a Professor at the Institute of Human Resources and Industrial Relations at Loyola University of Chicago; his interests include labor arbitration, management of diverse workforces, and employment discrimination law.

Alice H. Cook and Lamont E. Stallworth

CHALLENGES IN MANAGING THE NEW DIVERSE LABOR FORCE

AMONG THE PURPOSES OF THIS CHAPTER IS (1) TO EXAMINE past and present statuses of demographic groups who earlier suffered discrimination in employment but who today are legally protected. Our purpose is then (2) to appraise the issue of perceptions of fairness and equality, and next (3) to discuss problems still existing in the labor market in achieving “equality” under the law. Finally (4) we will offer some proposals for meeting still existing shortcomings. Because space requirements prohibit a discussion of all these groups,¹ we are focusing on two of the largest: women and African-Americans.

Past and Present

At the end of World War II in 1945, the postwar labor market was already wrestling under the name of “integration” with many aspects of achieving what we now call “diversity.” Women were not so much the focus of this discussion, although “Rosie the Riveter” had dominated in many occupations during the war. The War Labor Board, to be sure, had ordered women’s wage equality with men.² The main focus, however, was on “Negroes” or “colored people,” as they were called.

By the early 1960s continuing discrimination against African-Americans had created a storm of protest among them and many whites, involving not only the labor market but schools, the army, and

civilian activities including transportation, restaurants, voting, and medical facilities. The result was the drafting of Title VII in the Civil Rights Act (1964).³ The rights of gays are still before the Supreme Court. Many of the subjects of equal opportunity or EEO legislation have been adopted in states as well. Federal lawmaking and enforcement regulations thus had to provide for appeal from state to federal prosecution by the Office of Equal Employment Opportunity (OEEO). An examination of the actual effectiveness of the resulting often long-drawn-out procedures has been referred to as the “transmission of the law,” i.e., how and in what respects statutes and legal judgments modify or enhance the effectiveness of the written law, and—both more subtle and more difficult—how these decisions have changed the socioeconomic behavior of institutions and individuals.⁴

Perceptions of Fairness and Equality

An important theme emerging from these circumstances is that of perceptions of “fairness and equality,” in the sense of accepting them as a “majority norm” critical to measurement of any achievement of diversity in the labor force. Courts in deciding Title VII cases have widely based their decisions on concepts of fairness and equality, although these are rarely referred to in nonlegal discussion; indeed, they seem to have been widely forgotten. This circumstance makes their acceptance

as a majority norm problematical. Yet inclusion of such norms serves to strike a balance among the interests of employers, employees, and labor organizations.⁵ Such a balance of interests is of crucial importance even within the shop, and there it applies to attempts at dispute settlement in the hands of grievance stewards, human resource administrators, EEO mediators and arbitrators.

Future Population Changes That Will Affect Diversity Management

Population changes in progress are predicted in the next millennium to work out as follows:⁶

- 47 percent of the growth of the U.S. population will be among Hispanics, 22 percent among persons of African-American background, and 18 percent among Asian-Americans, while whites will account for only 13 percent of the increase.
- During the next millennium, people of color, white women, and immigrants will account for 85 percent of the new growth in the U.S. workforce.
- By the year 2000, African-Americans will make up 12 percent of the labor force; Hispanics, 10 percent; and Asian-Americans, 4 percent. Women will make up nearly half.
- Of the twenty-five largest urban areas in the U.S., people of color will be in the majority in more than three-quarters.
- Employees in the 35–54 age group will increase from 38 percent in 1985 to about 50 percent in 2000. During this period the group composed of those 16–24 will decline by 8 percent.
- The labor force will expand by only 1 percent annually in the 1990s, compared with 2.9 percent in the 1970s.

This new diversity presents a host of questions and challenges for fair and practical management in the workforce. Can women and minorities correct the inferior roles, imposed on them historically and traditionally continued, to achieve employment equality with the white male? In the case of disabled workers, will employers make the accommodations necessary to facilitate their employment? Indeed, as a matter of both public and private policy, to what extent can the parties to collective bargaining—employers and trade unions—accommodate the special needs of the various demographic groups in the new diverse labor force?⁷ After all, what is generally acceptable? What is equitable? What is fair? What does the law require? What is the accepted perception of “fairness and equality”? How differently do employees of different demographic groups perceive these elements? The importance of considering these differences is borne home when we recognize that they are the source of most workplace disputes, including those charging discrimination. They almost invariably underlie the basis for the filing of formal claims before both state and federal EEO enforcement agencies and courts.⁸

In sum, how effectively can we meet the challenges created from the rapidly changing labor market and its re-formation in adjusting to its new structure? Will such changes correspond first and best to law or to the economic pressures arising with market restructure? These changes not only create challenges for human resources professionals and unions, but also require the courts and arbitrators to reconsider what are the appropriate norms or standards in determining acceptable behavior and fairness in workplace matters. The courts have considered two tests, those of “the reasonable woman” and “the reasonable member of a minority group.”⁹ Inevitably a good deal of subjectivity on the part of judges and arbitrators enters into these judgments, and indeed the same must be true of the agency employees who write the interpretive regulations governing the grounds for dealing with these disputes.

Does the Law's Meaning of Equality Need Reconsideration?

Title VII of the Civil Rights Act (1964), as amended, and the Equal Pay Act of 1963 define equality for women and minorities on norms established primarily by and for the white male. This presents a fundamental problem the moment one considers, as we do shortly, the effect of working conditions on the family, and thus mainly upon women moving from homemaking to wage earning.

For the moment, we postpone discussion of the wisdom of setting this norm, because of the many barriers that stand in the way of its achievement by either women or minorities. Tradition has long held that both African-Americans and women are secondary, inferior members of the workforce; women, because during the nineteenth century the courts and lawmakers perceived them as properly in the private sphere, the home, headed by the male breadwinner-father and beyond the grasp of law. They saw African-Americans as generally poorly and insufficiently educated and trained for industrial work.

Problems That Still Exist

Before running water or electric power, the preparation of food, the making and mending of clothes, and the laundering of soiled garments, together with the conditions surrounding home heating with wood or coal, all totally consumed women's day and evening hours. Unmarried women might work in factories, and so did children, and these two kinds of workers were regarded as a single element, in need of protective legislation, which under no circumstances was to apply to male workers.¹⁰ Conceptions of "women's work" and "women's wages"¹¹ have mainly reflected work they have done in the home, i.e., sewing, food preparation, canning, preservation, serving, care of children, elementary teaching. Once married, many women brought bundles of work into the home, producing garments or performing some few operations in their construction; here, children often were assigned tasks, under the mother's supervision. Because work within the family received no pay, compensation for waged homework was not measured by what men earned in the factory, but rather by the total

lack of payment for women's work in maintaining the family. Women's and children's pay was one set of values, men's quite another.

Tradition has powerfully insisted that the work of maintaining a family belongs to women, even when they enter the labor market. This circumstance is presently called the "double burden."¹² The equality norm says that if a woman is to be a successful participant, she should work as the white male does, i.e., for an eight-hour day, five-day week, overtime as required, and with equivalent productivity. But when equal pay is measured it is typically in relation not to men but to other women in like work in the employment area. Hence, when married and single mothers enter the labor market they have been consistently underpaid in comparison with male breadwinners. It is their gender, not their work, that largely determines their income. The consequence is that if they are solely responsible for maintaining the family economically, they will have to do so with income that brings them close to or below the poverty line.¹³

Development in the twentieth century has gradually presented quite another picture than the Victorian one that obtained in the nineteenth. Postwar inflation and the rising cost of higher education have meant that women have pushed into the labor market to augment family income. At the same time the transition from a predominantly manufacturing labor market to one in which the service trades play the major role has resulted in employers pulling women into work. This "push-pull" phenomenon has resulted in women making up nearly half—about 47 percent—of the wage earners in the United States.¹⁴

The "downsizing" or layoffs in the major manufacturing industries, which since the 1970s has become a standard practice, has thrown tens of thousands of men into the ranks of the unemployed. They are generally unwilling to take women's jobs at women's wages, and only reluctantly and temporarily have they moved in that direction. At the same time, industry is reorganizing, a process that breaks many of the complicated service jobs into new titles and descriptions requiring

shorter bands of skills and paying lower wages. Men are facing a new employment world that also pays fewer benefits.

Part-time work is part of the answer that industry offers. Again, it is mainly women who, out of the pressures the “double burden” puts upon them, accept this as a solution to that problem. Doing so means lower income, of course, but it also means moving into a largely unregulated part of the workforce where overtime is rarely recognized or paid for. Lunch and coffee breaks may not exist. The employer may even pay an entrepreneur who deals in temporary workers and who takes his cut out of the “employer’s” payment to him. Vacations, sick days, and benefits such as pensions and health plans do not exist.¹⁵ Maintenance of a family under these conditions is impossible.¹⁶ Yet the number of part-time workers under a variety of programs and the proportion of women working under these circumstances rise constantly.

With the use of birth control, family size has diminished. The growth of industry in the immediate postwar decades and its widespread locations encouraged worker mobility, a change that contributed to reducing households from three or four generations to two, while the introduction of household appliances reduced the time spent in housework.¹⁷ The opening of state universities with the adoption of the Land Grant Act contributed to the growing practice of admitting women to higher education. In this atmosphere, women were prepared for work, and many of them chose lifetime careers in the fields open to women, e.g., mainly teaching, nursing, and social work. More adventurous women chose to be missionaries in a life abroad, or to lead movements in this country aimed to improve social and working conditions. Among women unable to go to college, the invention of the typewriter produced a class of female clerical workers,¹⁸ while the spread of factory production with its detailed division of work into simple tasks at “women’s pay” encouraged employers to hire them in ever-larger numbers.

In the case of African-Americans, the history of slavery, with its nonpayment of wages, its dissolution of family, its lack of available education, its use of black workers to do almost back-breaking, unskilled labor, has meant that these notions have been attached to African-Americans in the assignment of work and wages in the modern labor force.¹⁹ The vestiges of slavery persist today in the deep job segregation that continues to characterize the labor market—women work with women, men with men, and blacks with blacks and other persons of color at unskilled maintenance work.

Antidiscrimination law has only slowly and ineffectively produced a “transmission” effect in the social benefit area. Yet it has proceeded with more clarity in the labor market than in many other social institutions. From the pre-Civil War era, when “Negroes” were “articles of merchandise” and therefore had no rights, contractual or otherwise,²⁰ the law *de jure* and *de facto* served to exclude these individuals from the labor market based solely on their demographic group.²¹ Protective labor laws had a similar effect and purpose, namely, that of excluding women from certain areas of the labor market and the professions, and thereby from full participation in the labor market.²²

Although family structure has radically changed, and inflation has made the earnings of a single breadwinner—male or female—inadequate, many reasons why women go to work, including the “push-pull” complex, are by no means generally comprehended. Similarly, the matter of women’s inability to earn compensation at least as good as that of comparable male workers is not understood, much less accepted.

In sum, it may be argued that equal opportunity laws are written primarily in terms of working conditions with white male norms in mind. Thus, a basic source of the opposition to full equality for women and black workers accounts for the slowness of achievements by incremental steps. Its application to equality in the homes of working women has never reached legislation or the courts. In the home, not only men but many women continue to assume that women remain fully responsible for all the work there. Holding this view, women aim to become “super-moms.” Their male partners on whom the law places no family responsibilities only rarely and spasmodically share these household tasks.

One of the few accepted changes affecting males as well as females came with the Supreme Court's decision to open public schools to African-Americans in *Brown v. Board of Education*.²³ This decision, followed as it was by judicial interpretations of Title VII, has considerably altered many blatant forms of discrimination in the workplace.²⁴ Employers and labor unions today know that neither gender nor racial discrimination is lawful. Moreover, with the enactment of the Civil Rights Act of 1991, in its provisions for compensatory and punitive damages, employers and labor unions are keenly aware of the societal legal standard for fair and equitable treatment in the workplace and of the sanctions that may be imposed for intentional violation of these norms of fairness. However, whether we can say that these laws and regulations have largely accounted for the improved status of women and minorities is debatable.²⁵ Certainly, parity or complete equity in the workplace has yet to be fully established.

The most one can hope is that the transmission of law will contribute to changing behavior and even attitudes. To the extent that the transmission of law has contributed to accomplishing this goal, it is worth noting.

One positive aspect of the effect of civil rights workplace statutes on behavior is evident most clearly among employees in their exercise of "voice," i.e., attempting to vindicate or assert one's rights and interests. Women and members of racial minorities now widely believe that they should be free of discrimination. Women are demanding that employers and labor organizations address family and workplace issues, such as maternity and parental leave, in collective bargaining contracts to further strengthen the impact of the law in workplace agreements.²⁶

"Voice" from every type of women's organization explains Congress's adoption of the 1993 Family and Medical Leave Act. Voice, more recently, is demonstrated in the increase in claims alleging sexual harassment, and in the staggering number of statutory-based claims against employers and labor organizations alleging discrimination and wrongful discharge. The result, however, has been an insurmountable backlog of cases both at state and federal levels and at the EEOC. Although the "transmission of antidiscrimination law" has

provided the legal basis for women and racial minorities to seek equality, it has also led to frustration among all parties to its procedures because of these long delays,²⁷ which strongly suggest the need for useful procedural remedies.

Proposals for Better Achieving Equality

One suggestion for cutting the backlog of cases at EEO enforcement agencies and in the courts has been to encourage the use of private methods to resolve statutory-based diversity disputes. This involves "alternative dispute resolution" (ADR), a process supported by the Supreme Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*²⁸ ADR is also supported by the Civil Rights Act of 1991 and the Americans with Disabilities Act (ADA).²⁹ ADR is relatively new to the effectuation of the various civil rights workplace statutes. Whether settlement of civil rights cases rests on arbitration or court decisions, safeguards must be heeded, particularly when an imbalance of power exists between employee and employer or labor organization.³⁰ Furthermore, as ADR and internal conflict management systems become more popular, practitioners must now become more aware of and sensitive to issues of demographic diversity, including claimants' perception of fairness.³¹ Otherwise, this promising and still evolving process will be short-lived.

Proposals of Alternative Work Schedules

Preceding the settlement of disputes, and in the hope of avoiding them so as better to accommodate the demands of family on both men and women workers, several large corporations have introduced alternative work schedules.³² Understandably, corporations are most committed to such programs when they speak to their own needs as well as to those of their employees. The widespread introduction of

part-time work, particularly for women, in banking and other “pink collar” clerical jobs to adjust to hours of high consumer demand is a prominent example. Working women, who are still mainly responsible for after-school care of children, respond to this kind of offer, although it means a lower income than full-time work. It takes the less usual form of an offer to women of working at home on a variety of computer tasks. Such work at home may even be presented to the would-be worker as a solution to care of preschool children or similar child care obligations. The worker who sees no better solution to her problem of combining work with parenting and housekeeping will eventually find that combining them with work in the home may be just as difficult as trying to do so with home and workplace separated. The introduction of this alternative is sometimes referred to as “flex-place.”³³ The problem of supervision of work quality and efficiency is usually solved by a computer connection that allows listening in on the “home worker” to ascertain when she works, and with what consistency and accuracy. Workers in such arrangements most often mention this unheard and invisible “intrusion” as the most undesirable feature of their employment.³⁴

“Flexitime” is another, more frequent innovation. It offers some adjustment in hours of arrival and departure, providing, however, that the employee be present during a given period of about six hours every workday, and providing as well that during the work week, he or she puts in a full forty-hour week, the norm set in the Wage and Hour Law.

“Job sharing” is also on the list of possible adjustments to hours of work outside the home. It demands locating two persons who know and are compatible enough to be able to adjust their working and home hours closely to each other. It may even mean that they alternate work with care of the children in the two families. Their full communication about the demands and accomplishments in the work they

share is essential. In some cases their schedules overlap about once a week to insure full informational exchange.

Child Care

Where the woman worker is also a mother, and especially of preschool children, no concern outranks child care on her agenda of needed benefits.³⁵ Industry, when it responds to this need, does so along a considerable scale. It may offer child care in or near the workplace on a full-time basis. Occasionally it allows for one or both parents to join the child at lunch; more often, it allows two periods a day for the mother to come to the child care center to breast-feed her infant. At the other end of this scale, the company’s assistance is limited to advising the parent(s) about available child care in the community, and they must find a place that fits their needs in respect to the child’s age and their ability to pay for care. A variation on full-day care for the children of workers, provision for short-term care for periods when the mother is ill or for other reasons unavailable, is seriously needed. A few large law firms in New York City are known to provide this kind of assistance to their staffs of male parents.

This matter of payment is often controlling for the parents. If they turn to public accommodation, it may be linked to a sliding scale of parental income. Under all circumstances, quality care is expensive, even when the caretaking staff is poorly paid, as is widely the case. It represents an important portion of what the mother’s wages add to family income. Under these circumstances, the parent(s) may turn to relatives or neighbors, who, if paid at all, are expected to charge less than the certified institutions. While quality may suffer, this type of care has the advantage of keeping the child within his or her own extended family.

As for after-school care of school-age children, many schools are beginning to provide it, although not as a part of school budgets, and thus at some cost to the parents, because it involves hiring a special staff of part-time teachers.

The most difficult problem is care of sick children.³⁶ The child is unwelcome in a situation where other children may be exposed to

his or her illness; caretakers themselves must resist such contacts for fear of being then the further source of infection. There is little recourse except for parental care. The Family and Medical Leave Act (FMLA) might be used or expanded to meet this need, namely, to allow either mothers or fathers to take time away from the job for a given number of days to care for their own children. In this country, however, it must always be remembered that under FMLA neither parent receives reimbursement during this time away from work, whereas all the industrialized countries except ours offer some percentage of salary during such a period. Here, the father, usually the higher-paid of the two parents, must remain at work while the lower-paid mother takes leave under these conditions.³⁷ Those in seasonal industries such as construction and garments rarely dare to ask for leave during a busy period, for fear they may not be retained when work is slack.

Another piece of legislation is directed to gaining support payment from the fathers of children who move from the jurisdiction where they were ordered to make payments to the custodial female partner. Formerly, a move across a state boundary was enough to free a father from the jurisdiction of the state court that granted the divorce. Under recent federal legislation, states are reporting the collection of millions of dollars from such wanderers to be awarded to both unmarried and divorced single female custodians of children. The state's interest in pursuing such delinquents is measured in the relief to the welfare system (AFDC) it allows.

It is clear that both state and federal legislators have adopted laws in this decade that respond to some needs of single and divorced custodial mothers, although the bureaucratic motivation has often been one of saving costs to the government rather than of responding to the needs and voice of female parents. Indeed, in marginal income cases these actions may temporarily result in adding certain other family costs to the state.

Taxation is an area that at first glance may seem rather far afield from family need. In the U.S., we collect taxes on a graduated system by household rather than on individual earnings. Although a wife's

earnings may be low, when she goes to work, they may still be enough to raise the married couple into a higher tax rate. Again, Sweden was the first country to adjust income tax to each worker's income.

Conclusion

As an industrial society, we are in the process of making basic changes in the nature of work and consequently of the structure of the labor market and its institutions. This process has contributed to the ever-increasing employment of women at the same time that legislation has called for equal opportunity and gender and racial diversity within the labor market. The law and its regulations are clear that these—and other—population categories of applicants for available jobs must be qualified for them. Although gender and race alone are insufficient characteristics for eligibility, nevertheless achievement of diversity requires their presence. “Qualification” is defined primarily by the white male standard. Because many women have come through school without high levels of mathematics or science, which technical jobs in the growing sections of the labor force now require, they may need pre-training to qualify for training before they can apply for the wanted jobs. A number of women's organizations have moved in to fill this pre-training gap.³⁸

At the same time, white men are not moving into what have been designated as women's jobs, mainly because of their poor pay.³⁹ In general, the wage gap between the genders has only slowly narrowed from women's average earnings of 59 percent of men's average pay in the late 1970s and early 1980s to something like 75 percent during the late 1990s. To the degree that such positive change in racial and gender diversity has occurred, and particularly in public employment, transmission of the law has brought about much of the improvement. Always, however, this improvement has been achieved under circum-

stances that raise both old and new problems such that the employers still fall short of adequate response to these workers' needs.

Academic research on questions arising from the interrelationships between work and family under the ongoing changes in both institutions often suggests that labor market programs would do well to adjust work to family needs in some of the ways touched on above. To do so calls for wider use of alternative schedules and for regularization of these schedules so as to include both collectively bargained and legally required programs. It also calls for renewed attention to pre-training and full-scale training programs both for women and for men who have been subject to discrimination. Child care, as we have seen, is central to this adjustment, and care of sick children is its most baffling and neglected aspect. But even that is not insoluble. A 1990 paragraph in the contract between Hughes Aircraft and the Machinists Union (IAM) included a pilot program for care of sick children.⁴⁰ One suggestion for enhancing companies' interests in child care is to provide some tax incentives to the companies concerned with making adjustment to family problems.⁴¹

All in all, although a certain number of employers have introduced programs that positively affect problems raised here, the list is still short. Nor is it growing rapidly. It may be, however, that employers' interest in these matters will bring them to support government aid for themselves as they establish and maintain such programs.⁴² If employers choose to meet the problems that two-career families experience, we may once again turn to legislation for enactment and enforcement. Under this latter heading, we shall resort to the variety of alternative dispute resolution methods to effectuate the purpose of these statutes and provide cost-effective, fair, and efficient means to resolve statutory-based workplace disputes. ■

Notes

- 1 Among these are persons over forty years of age, the disabled, gays and lesbians, and the obese. See James Frierson, "Obesity, as a Disability under the ADA, Rehabilitation Act and State Handicapped Employment Laws," *Labor Law Journal* (May 1993): 266-96; on homosexuality, e.g., Howard A. Simon and Erin Daly, "Sexual Orientation and Workplace Rights: A Potential Land Mine for Employers," *Employee Relations Law Journal* (Summer 1993): 29-59, and Roger Magnuson, "Are Gay Rights Right? A Report on Homosexuality and the Law" (St. Paul: Berean League Fund, 1985); on the white male, see e.g., *McDonald v. Santa Fe Trails Transportation*, 427 S. 273 (1976), and Alfred Blumrosen, "Strangers No More: All Workers Are Entitled to 'Just Cause' Protection under Title VII," *Industrial Relations Law Journal* 2 (1978): 519-66.
- 2 *Brown and Sharpe Mfg Co.*, #2226-D, Sept. 25, 1942. Protective legislation for women, governing hours and types of work, was for the most part put on hold "for the duration." President Roosevelt issued an executive order pronouncing the "duty of all employers and all labor organizations to eliminate discrimination . . . because of race, creed, color or national origin." Although gender is not listed as an integrative factor, little protest arose, because these conditions were generally assumed to protect the conditions men had won and deserved and that they would apply when men returned to their former positions at the end of the war, replacing women as their temporary substitutes.
- 3 The original draft of Title VII applied solely to blacks. Senator Howard Smith of Virginia proposed an amendment to protect white women similarly from employment discrimination. His reason, he said, was to avoid giving protection only to black women which white women would otherwise not enjoy. His hope was that by making his radical proposal he would succeed in defeating the entire bill. He was wrong. The Department of Justice, however, which had begun the preparation for opening an Office of Equal Employment Opportunity (OEEEO), had not included women. When the legislation containing this amendment passed, it took some time to write additional regulations, employ staff, and put this part of the law into operation.
- 4 Alfred Blumrosen, *Modern Law: The Law Transmission System and Equal Employment Opportunity* (Madison: University of Wisconsin Press, 1993). The author defines the concept as focusing on how society moves from a legislated statement of policy to a situation where common consent applies that policy to the ordinary course of events. The concept is especially applicable to modern legislation that seeks to channel the behavior of business and government in directions desired by the lawmakers. Id. at 3-4. Here, we use "transmission of law" instead of "law transmission system."

- 5 See, e.g., Blair H. Sheppard, Roy J. Lewicki, and John W. Minton, *Organizational Justice: The Search for Fairness in the Workplace* (New York: Lexington Books, 1992); D.W. Ewing, *Justice on the Job* (Boston: Harvard Business Review Press, 1989); Morton Deutsch, *Distributive Justice: A Social-Psychological Perspective* (New Haven: Yale University Press, 1985); "Looking Fair v. Being Fair: Managing Impressions of Organizational Justice," in B. M. Staw and L. L. Cummings, eds., *Research in Organizational Behavior* (Greenwich, Conn.: JAI Press), 12: 111–57; and Allen Lind and Tom R. Tyler, *The Social Psychology of Procedural Justice* (New York: Plenum Press, 1988).
- 6 See, e.g., Bruce Fraser, "A New Diversity in the Workplace—The Challenge to Arbitration: The U.S. Experience," in *Arbitration 1991: The Changing Face of Arbitration in Theory and Practice*, Proceedings of the 44th Annual Meeting, National Academy of Arbitrators, ed. Gruenberg (BNA Books, 1991), 143.
- 7 Bonnie Tucker and Bruce Goldstein, *Legal Rights of Persons with Disabilities: An Analysis of Federal Law* (Horsham, Pa.: LRP Publications, 1991).
- 8 *Trans World Airlines v. Hardison*, 432 U.S. 63 (1977), and *Ansonia Board of Education v. Philbrook*, 187 S.Ct. 367 (1986).
- 9 See *Ellison v. Brady*, 924 F.2d 872 (C.A., 1991); *Andrews v. City of Philadelphia*, 895 F.2d 1469, 1482 (C.A. 3, 1990); *Yates v. Avco*, 819 F.2d 630 (C.A. 6, 1987); *Babidue Yard Inc.*, 760 F. Supp. 1486 (M.D. Fla. 1991). Also see *Harris v. International Paper*, 765 Supp. 1509, 61 FEP Cases 152 (1991), where the federal district court applies "a reasonable Black person standard" in a racial harassment case.
- 10 "The first ten-hour law for women was passed by Ohio in 1852, and the first enforceable law was enacted by Massachusetts in 1870. By 1920, maximum hour laws for women had been enacted in 43 states, the District of Columbia and Puerto Rico. In 1960, nine states had no maximum hour laws for women, 18 states limited hours to eight or less a day, 14 set nine hours as a maximum, and 11 permitted no more than 10 hours." Clyde C. Dankert et al., eds., *Hours of Work* (New York: Harper and Row, 1965), 46.
- 11 When the issue of the money value of women's work in the home has been treated, it has been mainly by a few academics and rarely pursued as a practical matter. None of this work is in fact paid or appraised for payment. See Katherine Walker and William Gauger, "The Dollar Value of Household Work," *Social Sciences, Consumer Economics, and Public Policy*, #5 *Information Bulletin* 60, New York College of Human Ecology, Cornell University.

measure the value of women's comparable work in the labor market.

Recently the International Labour Office has stated that its statistics on gross national product (GNP) country by country will include such evaluations, but national statistical offices have not yet fallen into line, and it is doubtful that the United States, which has ratified very few ILO conventions, will take this one as a model with which to comply.

- 12 Alice H. Cook, "Can Work Requirements Accommodate to the Needs of Dual-Earner Families?" in *Dual-Earner Families: International Perspectives*, ed. Suzan Lewis, Dafna N. Izraeli, and Helen Hootsman (London: Sage Publications, 1992); Alison Leigh, "Women's Gains on the Job: Not without a Heavy Toll," *New York Times*, March 21, 1989, p. A-14; Arlie Hochschild (with Anne Ma-chung), *The Second Shift: Working Parents and the Revolution at Home* (New York: Viking Penguin, 1989).
- 13 For this history in full, see Alice Kessler-Harris, *A Working Woman's Wage: Historical Meanings and Social Consequences* (Lexington: University of Kentucky Press, 1990).
- 14 A General Accounting Office (GAO) study in 1992 comparing the labor force makeup in that year with 1950 showed that in the earlier year only 18.6 percent of married women with children were employed, compared with 60 percent in 1990. One aspect of this change is the increase in the percentage of dual-earner families. In 1960, they made up 31.6 percent of all families headed by two adults; in 1990, they were 70 percent of that group. Diane Priest, "Major Changes Seen in Female Workforce," *Washington Post*, March 25, 1992, p. A-21.
- 15 See chapter 8, "Health and Safety," in Alice H. Cook, Val Lorwin, and Arlene Kaplan Daniels, *The Most Difficult Revolution: Women and Trade Unions* (Ithaca, N.Y.: Cornell University Press, 1992).
- 16 "The Numbers Game: The Data behind a Policy: Making Ends Meet with Part-time Work," *National Journal*, Oct. 27, 1966; "Firms Cut Costs with Part-timers," *USA Today*, Nov. 6, 1990; "Growth in Part-Time Jobs Cited," *Detroit News*, Oct. 17, 1990; Robert J. Samuelson, "Temps: The New Work Force," *The Washington Post*, July 12, 1989; "Growing Numbers of Part-Timers and Self-Employed," *New York Times*, Jan. 6, 1992, p. D1; Institute for Women's Policy Research, "The Economic Impact of Contingent Work on Women and Their Families," Research-in-Brief, Roberta Spalter-Roth and Heidi Hartmann, #C-337, September 1995.

Exceptions occasionally occur in the case of a husband who sues after the death of his wife in an accident, as he seeks to put a money value on her work and therefore on his loss, but such assessments have not yet carried over to

- 17 It also raised the standard both of housing and of the attention to cleanliness. Laundry, for example, became a weekly task, whereas it had been a monthly one—or something done a few times a year. These reactions on the part of the housewife also influenced some of them to continue to be fully occupied with unpaid housework.
- 18 See Ilene A. DeVault, *Sons and Daughters of Labor: Class and Clerical Work in Turn-of-the-Century Pittsburgh* (Ithaca, N.Y.: Cornell University Press, 1990), 194.
- 19 *Dred Scott v. Sandford*, 60 U.S. 119, How. 393 (1857), and *Plessy v. Ferguson*, 163 U.S. 357 (1896). See Alex Haley, *Roots: The Saga of an American Family* (Garden City, N.Y.: Doubleday, 1976); and Herbert Hill, *Black Labor and the American Legal System: Race, Work, and Laws*, vol. 1 (Washington, D.C.: BNA Books, 1977).
- 20 *Dred Scott v. Sandford*, 60 U.S. 119 How. 393 (1857), and Hill, *Black Labor*.
- 21 *Dred Scott v. Sandford* and *Plessy v. Ferguson*, supra note 19.
- 22 *Muller v. Oregon*, 208 U.S. 412, 28 S.Ct. 324 (1908); and Judith Baer, *The Chains of Protection: The Judicial Response to Women's Labor Discrimination* (Boston: Little, Brown, 1974).
- 23 For the significance of this decision, see Part II, "Brown and After: The Legal Struggle," in Herbert Hill and James Jones, *Race in America* (Madison: University of Wisconsin Press, 1993), 73–196.
- 24 See, e.g., John J. Donohue III and Peter Siegelman, "The Changing Nature of Employment Discrimination Litigation," *Stanford Law Review* 43 (May 1991). These authors find that there has been a 2200 percent increase in filing of employment discrimination claims since 1969.
- 25 See Blumrosen, "Strangers No More." In this article he debates whether a causal relationship exists between the legalization and improvements in the economic status of blacks or women.
- 26 See, e.g., Bureau of Labor and Management Relations, *Cooperation Programs, Work and Family: Provisions in Major Collective Bargaining Agreements*, BLMR 144 (Washington, D.C.: U.S. Dept. of Labor, 1992), and Family and Medical Leave Act, 1993.
- 27 Historically, grievance arbitration began as a "mechanism of accommodation": of the rights, interests, and needs of individual workers who had been excluded from the workplace. This accommodation was to occur whether it was done under the umbrella of traditional just cause, equal pay, or other nondiscrimination provisions. See Martin H. Malin and Lamont E. Stallworth, "Grievance Arbitration Accommodating an Increasingly Diversified Work Force," *Labor Law Journal* (Aug. 1991): 551–56; "Departing EEOC General Counsel Sees Need for New Direction at Overwhelmed Agency," BNA, *Daily Labor Report* 111 (June 11, 1993): AA-1 to AA-2, where former EEOC General Counsel Donald Livingston recommends, *inter alia*, that EEOC consider exploring alternative dispute resolution as a method to assist in reducing the agency's overwhelming case load. See also "EEOC's Pilot Mediation Program Off to Slow Start, Official Says," BNA, *Daily Labor Report* 84 (May 4, 1993): A-14–15.
- An alternative to methods of settlement other than the courts has long been arbitration as settlement for disputes arising from alleged violation of union contracts. This approach has been suggested for use wherever disagreements between employer and union employee fail to reach settlement. It can, however, only succeed when both parties agree to using a third party for this purpose.
- 28 U.S. Lexis 2529, 111 S. Ct. 1647 (1991). In this case, the Supreme Court held that mandated private agreements to arbitrate any employment disputes were enforceable in court.
- 29 Civil Rights Act of 1991, entitled "Alternative Disputes Resolution," and Section 513, Americans with Disabilities Act, entitled "Alternative Means of Dispute Resolution." See *Gilmer v. Interstate/Johnson Lane Corp.*, note 28 above. Administrative Dispute Resolution Act, Public Law 101–552 (Nov. 15, 1990), 104 Stat. 2736; Judicial Improvements Act of 1990, Public Law 101–650 (Dec. 1, 1990); and Negotiated Rulemaking Act of 1990, Public Law 101–648, 101st Congress 104 Stat. 4969, 5 U.S.C. 581.
- 30 Harry Edwards, "Alternative Dispute Resolution: Panacea or Dilemma?" *Harvard Law Review* 99 (1986): 668, 671–72. Also see "Arbitration of Employment Discrimination Cases: A Proposal for Employer and Union Representatives," *Labor Law Journal* 27 (1976): 265, 273; Alan Westin and Alfred Peliu, *Resolving Disputes without Litigation* (Washington, D.C.: BNA Books, 1988); and Douglas McCabe, *Corporate Nonunion Complaint Procedures and Systems: A Strategic Human Resources Management Analysis* (Washington, D.C.: BNA Books, 1994).
- 31 Martin S. Malin and Lamont E. Stallworth, chapter 6, "How to Deal with Conflicts Arising out of Workforce Diversity," in *Proceedings of the Annual*

- Meeting of the National Academy of Arbitrators* (Washington, D.C.: BNA Books, 1994).
- 32 The approach to introducing alternative schedules in Europe mainly takes the form of shortening working hours below eight per day or forty per week. These approaches have found acceptance from employers and legislators in the hope or expectation that they will possibly effect a decrease in unemployment. In the U.S. no major labor market organization has advocated such changes. Instead, in the name of benefiting full-time employees, both management and labor have preferred to offer them time-and-one-half overtime to augment their take-home pay. As a result the number of hours worked per individual in the U.S. labor force has gradually increased while compensation in dollars paid to them has not seriously decreased, although basic hourly increases have failed to keep up with the rapid inflation of the 1970s and 1980s.
- 33 See Barney Olmsted and Suzanne Smith, "Creating a Flexible Workplace: How to Select and Manage Alternative Work Office Systems," chapter 1, in American Management Association, AMACRON, *Flexible and Restructured Full-Time Work* (1989).
- 34 See "Today's Bosses Use Electronics to Keep Watch Over Workers," *Ithaca Journal*, Sept. 5, 1996, p. 7A.
- 35 Alice H. Cook, *The Working Mother: Problems and Programs in Nine Countries* (Ithaca, N.Y.: ILR Press, 1978), 31–36.
- 36 Of all the industrialized countries, only Sweden has sought to provide this kind of assistance. U.S. parents who are entitled to a number of paid sick days are often tempted to use them for care of a sick child, even when doing so runs counter to the health plan's provisions. Like all illegal activity within the health care field, such attempts, when discovered, can lead to job loss or severe fine or both.
- 37 In the U.S., the male parent's sole inducement to take such leave is that his job, on return to work, is presumably protected. Many employers, however, have made it difficult to impossible for men to ask for this leave. This is particularly the case in seasonal industries—construction and garments are examples. If the employer has had to replace the employee during such absence, it may not be possible to give the absentee his old job back again. He may well see the replacement job found for him as less desirable than his accustomed location and duties. If this dissatisfaction amounts to a conviction of discrimination, he has, however, few grounds for a formal complaint.
- 38 Sharon L. Harlan and Ronnie J. Steinberg, *Job Training for Women: The Promise and Limits of Public Policies* (Philadelphia: Temple University Press, 1989).
- 39 Nursing may be in the process of becoming an exception to this observation, as men trained for this work in the defense forces seek these jobs in civilian life. Pay for nurses has also risen in recent years, partly because hospital nurses have joined unions that have consistently bargained for higher pay.
- 40 BNA, *Daily Labor Report* 213 (Nov. 20, 1990): A-2.
- 41 Commerce Clearing House, "Tax Incentives for Employer-Sponsored Day Care Programs" (Chicago, 1982).
- 42 See Sue Sellenbarger, "If You Want a Firm That's Family-Friendly, the List Is Short," *Wall Street Journal*, Sept. 6, 1995, p. B1; Sheila Kamerman, *Meeting Family Needs: The Corporate Response* (New York: Pergamon Press, 1983).