

# African American Women and "Typically Female," Low-Wage Jobs: Is Litigation the Answer?

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## I. INTRODUCTION

Many people expected the elimination of racial stereotypes and job barriers to improve economic conditions for both African American men and women<sup>1</sup> in the labor market. Even as legal victories have opened new and better-paying jobs for African American workers, however, the level of poverty among African American families headed by working women has remained unaffected.<sup>2</sup> Most of the industries newly opened to African Americans through litigation have been industries primarily employing men. African American women—who are overrepresented in service jobs,<sup>3</sup> which pay less than professional or manufacturing jobs—have thus not benefitted equally from these victories in the courtroom. Historical and continuing differences between the occupations in which the majority of men and the occupations in which the majority of women in the United States work demand that different strategies be identified that will benefit both African American men and women.

These comments are informed by the frustrating experiences of a civil rights lawyer whose primary weapon against employment discrimination and poverty among low-wage, working African American women has been a legal action under Title VII of the Civil Rights Act of 1964.<sup>4</sup> The purpose of this

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1. Throughout this paper I have intentionally used the personally inclusive "we," "us," and "our" when referring to women generally, African Americans generally, and African American women in particular because I am an African American woman and belong simultaneously to all of the above categories. I have also intentionally not hyphenated the term "African American" as either a noun or an adjective because I prefer this usage.

2. Between 1970 and 1990, African American families headed solely by females rose from 33% to 56.2% of all African American families. BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, SER. P-23, No. 173, POPULATION PROFILE OF THE UNITED STATES 1991, at 7 (1991).

During the same period, the poverty rate for African American households headed solely by women hovered around 50% and dropped slightly to 46.5% in 1989. However, the overall national poverty rate during this period was between 10% and 15%. An additional seven million people were impoverished during the period 1978-1989. *Id.* at 18. In 1989, African American households with no husband present had a median income of \$11,360, while African American households with no wife present had a median income of \$18,395. The equivalent figures for white female and white male households were \$18,946 and \$30,487, respectively. BLACK AMERICANS: A STATISTICAL SOURCEBOOK 1991, at 269 (Alfred N. Garwood ed., 1990) [hereinafter BLACK AMERICANS].

3. See *infra* notes 12-15 and accompanying text.

4. Title VII, 42 U.S.C. § 2000e-2 (1988).

paper is to alert legal advocates—both in the United States and in other countries—to the limitations of relying on litigation as the primary tool for securing equitable wages for women workers. In the United States, most paying jobs associated with home and family care are believed to be unskilled, menial and subservient, and consequently they pay poorly. These jobs are filled disproportionately by women of color, particularly African American women.<sup>5</sup> Because of these beliefs, which result in the undervaluation of certain work and the people who perform it, biases based on gender and race are imbedded in the wage setting process. In short, jobs dominated by women pay less than jobs dominated by men, regardless of skill level.<sup>6</sup> Advocates for women workers must recognize that hidden inequities are inherent in wage structures, and they thus must work in ways that result in improving the wages of women in "typically female jobs."<sup>7</sup>

A woman who works in a typically female job deserves to be valued for the essential work that she performs. She deserves a wage that allows her to care for her family adequately, and recognition as a critical and necessary worker in the labor force. She should not be required to find other kinds of work to be able to earn a decent wage, particularly when some other woman will most likely replace her and then continue with the same economic disadvantage. Finally, she should be appreciated by society for providing the kind of service and care that is essential to sustain human life.

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5. Most low-wage jobs in which African American women are overrepresented also include disproportionate numbers of other women of color—Latina, Native American, and sometimes Asian women—who often face similar economic and social problems. Although this paper focuses on the experiences of African American women, strategies that improve the economic status of women in poorly paid, "typically female" occupations will benefit all such women and particularly women of color due to their overrepresentation in these jobs.

6. See *infra* note 18 and accompanying text.

7. "Typically female jobs" or "female-dominated occupations" are defined as those occupations in which at least 70% of the positions are held by women. See generally Andrea H. Beller, *Trends in Occupational Segregation by Sex and Race 1960-1981*, in *SEX SEGREGATION IN THE WORKPLACE: TRENDS, EXPLANATION, AND REMEDIES* 11 (Barbara F. Reskin ed., 1984).

In 1987, women constituted 45% of the civilian work force and the following proportions of certain jobs:

Secretaries	99.1%
Child care workers	
Private households	96.9
Other child care workers	96.0
Nurses	
Registered nurses	95.1
Licensed practical nurses	97.0
Teachers of young children	
Elementary school teachers	85.3
Kindergarten and preschool teachers	98.4
Librarians	85.6
Telephone operators	92.2

STEVEN L. WILLBORN, *A SECRETARY AND A COOK: CHALLENGING WOMEN'S WAGES IN THE COURTS OF THE UNITED STATES AND GREAT BRITAIN* 159 (1989).

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This paper will discuss briefly: 1) the labor force experiences of African American women; 2) the limitations of traditional employment discrimination litigation in improving the economic status of African American women, who disproportionately occupy low-wage, typically female jobs; and 3) possible alternative strategies for improving the wages of women in low-wage, predominantly female occupations.

### II. THE HISTORY AND STATUS OF WORKING AFRICAN AMERICAN WOMEN

There are two kinds of females in this country—colored women and white ladies. Colored women are maids, cooks, taxi drivers, crossing guards, schoolteachers, welfare recipients, bar maids and the only time they become ladies is when they are cleaning ladies.<sup>8</sup>

Since the introduction of slavery into the United States, African American women have worked both inside and outside the home. By day, African American slave women either worked as field hands or cared for the master's home and children. Nights brought them the responsibilities of caring for their own homes and families, to the extent that they were allowed to keep their children and have families.<sup>9</sup>

Since the days of slavery, African American women have been predominantly employed in jobs that involve cooking, cleaning, washing and the "unskilled" care of children and the ill—i.e., "women's work," or duties that a housewife or mother performs without pay.<sup>10</sup> In 1890, nearly thirty years after the end of slavery, 40% of all African American females worked outside the home, compared to only 12.5% of all white females. Over half of all working African American women, or 52%, worked in domestic and personal services jobs. The rest performed mostly farm work. Only 4% of working African American women held non-farm or non-service jobs. By contrast, 52% of working white women held non-farm, non-service jobs.<sup>11</sup>

By 1940, 70% of all employed African American women worked in domestic and personal service jobs; 60% of them worked in private homes. At the same time, only 22% of employed white women worked as service workers; only 11% of white working women were employed in private homes. By contrast, 52% of white female workers were employed as white-collar

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8. Louise D. Stone, *What It's Like to Be a Colored Woman*, WASH. POST, Nov. 13, 1966, quoted in *BLACK WOMEN IN WHITE AMERICA: A DOCUMENTARY HISTORY* 217 (Gerda Lerner ed., 1972).

9. See generally JACQUELINE JONES, *LABOR OF LOVE, LABOR OF SORROW: BLACK WOMEN, WORK, AND THE FAMILY FROM SLAVERY TO THE PRESENT* (1985) (narrative history of work and family life of African American women throughout U.S. history).

10. In addition to domestic service, such jobs currently include institutional cooking (e.g., in the cafeterias of schools and hospitals), commercial cleaning (e.g., office buildings), laundry and dry cleaning, nursing, and child care.

11. Julianne Malveaux, *Low Wage Black Women: Occupational Descriptions, Strategies for Change 4* (1984) (unpublished paper prepared for the NAACP Legal Defense and Education Fund, on file with author) [hereinafter *Low Wage Black Women*].

workers in clerical, sales, teaching and nursing jobs, while only 6% of African American women were employed in such jobs.<sup>12</sup>

Although there has been significant occupational change among African American women in the past forty years, during the 1980s more than 70% of all working African American women still worked in female-dominated, low-wage jobs.<sup>13</sup> Furthermore, within the occupations dominated by women, African American women continued to be overrepresented in the lowest paying jobs.

Labor economist Julianne Malveaux has observed:

Among clerical workers, black women are more likely to be found as file clerks, typists, calculating machine operators, and social welfare clerical assistants. Except for social welfare clerical assistants, all of these occupations have wages below the median clerical wage. Among service workers, Black women are heavily represented as chamber-maids, nurses aides, and practical nurses. Again, pay was lower in those occupations where black women were heavily represented.<sup>14</sup>

Malveaux describes this phenomenon as "black women crowding," in which African American women are concentrated in only a limited number of female-dominated jobs.<sup>15</sup>

The wide gaps in pay and working conditions between African Americans and whites, and between men and women, have not significantly changed over the years.<sup>16</sup> African American women continue to constitute far more than

12. *Id.* at 5, 74 tbl. 3.

13. African American women make up about 6% of the U.S. work force and roughly 12% of all women workers. But we constitute over 28% of low-income women who work. Younger African American women tend to be clustered in public-sector clerical employment, particularly in lower levels. *Id.* at 10. More mature African American women tend to be clustered in service jobs, such as food service, cleaning service, and health service. *Id.* at 10-11. It was estimated that in the early 1980s, more than 70% of all African American working women were employed in low-wage jobs—as clerical, service, private household, retail sales, and textile workers, and as sewers and stitchers, packers, and laundry workers. *Id.* at 12, 17. Around 20% of all African American women work in traditionally male white-collar jobs, including managerial and professional jobs; however, most professional women are crowded into elementary school teaching, social work, nursing, and similar traditionally female jobs. *Id.* at 13; *see also* Natalie J. Sokoloff, *The Increase of Black and White Women in the Professions: A Contradictory Process*, in *INGREDIENTS FOR WOMEN'S EMPLOYMENT POLICY* 53 (Christine Bose & Glenna Spitze eds., 1987).

14. Julianne Malveaux, *Comparable Worth and its Impact on Black Women*, in *SLIPPING THROUGH THE CRACKS: THE STATUS OF BLACK WOMEN* 47, 53 (Margaret C. Simms & Julianne Malveaux eds., 1986) (citation omitted).

15. *Id.* at 54.

16. Several studies have documented the continuing wage gaps between men and women, between African Americans and whites, and between white men and all other workers. Depending on how the wages are measured, women's salaries average between 55% and 75% of men's salaries. In 1989, the median income of full-time, year-round working women was 68.7% of the income of comparable men. African American women earned 60.9% of white men's wages. White women earned 66.3%, and African American men 71.6%, of white men's wages. African American women earned 91.9% of the income of white women and 85.1% of African American men's earnings. *BLACK AMERICANS*, *supra* note 2, at 277.

The occupational category of precision production, craft, and repair includes mostly male-dominated jobs. The 1985 mean income in that occupational category for men of all races was \$20,277; for women, \$12,595. On the other hand, the service occupations category mostly comprises female-dominated jobs. In 1985 the mean income for that occupational category for men of all races was \$12,549, while it was only \$6,104 for women. *Id.* at 274.

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our share of the working poor—those individuals whose wages are too low to raise their family incomes above the poverty line. Although African American women constitute only about 6% of the U.S. labor force, we account for 12% of all women workers and over 28% of low-income working women. Because of our race and color, African American women continue to face and experience the consequences of racism.<sup>17</sup>

In addition, African American women are also burdened by the current and lingering effects of sexism, especially in the workplace.<sup>18</sup> African American and white women share many of the problems created by society's undervaluation of traditionally female jobs. However, the so-called "women's movement" has failed to attract significant numbers of African American women to support its agenda.<sup>19</sup> Is this lack of involvement due to the movement's failure to include issues that are important to African American women?<sup>20</sup> Is there a problem of racism within the women's movement? Many

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17. In 1987, death rates from all causes per 100,000 population were 384.1 for white women, 586.2 for African American women, 668.2 for white men, and 1,023.2 for African American men. *Id.* at 62 (citing statistics compiled by U.S. Census Bureau). Maternal mortality rates were 14.3 for African American mothers and 4.9 for white mothers. *Id.* at 63 (citing statistics compiled by U.S. Department of Health and Human Services). Unemployment rates for all ages in 1989 were 11.5% for African American men, 11.4% for African American women, and 4.5% for both white men and women. *Id.* at 244 (citing statistics compiled by U.S. Department of Labor). In 1989, the median income of workers 15 years and older who worked for 50 to 52 weeks was \$17,389 for African American women, \$18,922 for white women, \$20,426 for African American men, and \$28,541 for white men. *Id.* at 277.

18. An example of bias affecting opportunities for individual workers and also pay structures for women as a group is illustrated by a survey of the federal government's *Dictionary of Occupational Titles*, which rates the complexity of tasks in some 30,000 jobs (and which has influenced many public and private compensation plans).

Among the occupations rating lowest in the 1965 *Dictionary* edition were foster mother, nursery school teacher, and practical nurse, all of which were thought equally or less demanding than parking lot attendant and 'offal man,' whose respective responsibilities were to park cars and 'shove[] ice into [a] chicken offal container' . . . . Although repeated criticisms prompted substantial revisions in a later *Dictionary* edition, the legacy of earlier biases has been difficult to eliminate.

THE AMERICAN WOMAN 1990-91: A STATUS REPORT 184 (Sara Rix ed., 1990) (citations omitted) [hereinafter THE AMERICAN WOMAN 1990-91].

19. Few, if any, white women liberationists are willing to acknowledge that the women's movement was consciously and deliberately structured to exclude black and other non-white women and to serve primarily the interests of middle and upper class college educated white women seeking social equality with middle and upper class white men . . . . It is precisely the racism and classism of exponents of feminist ideology that has caused a large majority of black women to suspect their motives, and to reject active participation in any effort to organize a women's movement.

BELLE HOOKS, AIN'T I A WOMAN: BLACK WOMEN AND FEMINISM 147-48 (1981).

20. Dorothy Bolden, an African American activist and former maid, said of the women's movement: I was very proud to see them stand up and speak up when it started. I'm glad to see any group do that when they're righteous and I know they have been denied something. But they're not talking about the masses of people. You've got different classes of people in all phases of life and all races, and those people have to be spoken up for too . . . . You can't talk about women's rights until we include all women. When you deny one woman of her rights, you deny all. I'm getting tired of going to those meetings, because there's none of us participating.

They're still trying to put their amendment to the constitution, but they're not going to be able to do it until they include us. Some of these states know this, that you don't have all women

African American women who consider themselves feminists certainly believe that racism plays a major role.<sup>21</sup>

Moreover, the women's movement has also failed to attract the majority of white women to its ranks.<sup>22</sup> A primary problem has been the focus of the movement's legal efforts on removing those barriers which prevent women from occupying traditionally male jobs, and its failure to address the issues that are most important to working, and especially low-income, women. Increased wages, flexible working schedules, adequate parental leave, child care services provided at the work site or subsidized by the employer, guaranteed maternity benefits and leave with pay, employer-provided medical coverage for workers and their dependents, and portable pensions are some of the issues that must be addressed if working women with families are to have *truly* equal access to employment opportunities in both the traditionally female and traditionally male sectors.

### III. LITIGATION TO REMOVE EMPLOYMENT BARRIERS

The early focus of the recent epoch of the women's movement was on equalizing the position of men and women within U.S. society.<sup>23</sup> With the modest exception of pay equity theories,<sup>24</sup> early legal efforts to achieve this

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up front supporting that amendment. They are talking about women's rights but which women? Quoted in *id.* at 148.

21. See, e.g., Combahee River Collective, *The Combahee River Collective Statement*, in HOME GIRLS: A BLACK FEMINIST ANTHOLOGY 272 (Barbara Smith ed., 1983) (statement of collective of African American feminists who "felt the necessity of forming a separate Black feminist group . . . that was anti-racist, unlike those of white women, and anti-sexist, unlike those of Black and white men").

22. See Willa Mae Hemmons, *The Women's Liberation Movement: Understanding Black Women's Attitudes*, in THE BLACK WOMAN 285, 289-90 (La Frances Rodgers-Rose ed., 1980). This study of the attitudes of African American and white women towards the women's liberation movement found that white women's attitudes varied with their class: 73% of white working class women scored low on female liberalism, while only 46% of white middle class women scored low, indicating that middle-class white women were more likely to accept and join the women's liberation movement than working class-white women.

23. See PAULI MURRAY, SONG IN A WEARY THROAT 347 (1987). Murray contends that President John F. Kennedy's creation of the Commission on the Status of Women in 1961 was "the most significant and exciting development affecting women in decades." Murray served on the Committee on Civil and Political Rights, which "review[ed] and [made] recommendations on 'differences in legal treatment of men and women in regard to political and civil rights, property rights, and family relations.'" See also Deborah Rhode, *Gender Equality and Employment Policy*, in THE AMERICAN WOMAN 1990-91, *supra* note 215, at 170-71 ("Women's continuing workforce disadvantages stem in part from the law's traditional focus on gender differences rather than gender disadvantages. The law's primary objective has been to secure similar treatment for persons similarly situated; less effort has centered on remedying the structural factors that contribute to women's disadvantaged status.").

24. Pay equity or comparable worth is defined as "equal pay for work of equal value." Under pay equity theories, the true value of a job can be determined by a job evaluation analysis that applies point values to compensable factors such as skill, effort, responsibilities, and working conditions. Gender bias may influence the job evaluation system when compensable factors are identified and when points are assigned, resulting in less pay for jobs dominated by women than those dominated by men. One focus of pay equity is to correct biases that exist in job evaluation systems; another is to ensure that those similarly evaluated receive similar pay. Compensation for typically female jobs should be the same as typically male

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goal within the employment context targeted the removal of barriers and the movement of women into occupations from which we historically had been excluded—law and accounting firms,<sup>25</sup> university faculties,<sup>26</sup> police and fire departments.<sup>27</sup> The goal was to allow women access to the same jobs as white men.

At the same time, little attention was being paid to improving conditions in traditionally female occupations. Nor was much attention paid to traditional women's issues—those that are related to the family. In some respects, the measure of a true feminist appeared to be how far that woman's life varied from the homemaker/mother model.<sup>28</sup> As a result, women's groups paid little attention to the basic problems facing many working women: the problems of poverty often experienced by women in low-wage, female-dominated occupations. These are the occupations in which the majority of women still work.<sup>29</sup>

Both women's advocacy groups and civil rights organizations focused on moving women "upward" (to white-collar, male-dominated occupations) or "outward" (to blue-collar, male-dominated occupations) to improve the economic position of women in the workforce. Employment discrimination lawsuits became the chief method of attempting these improvements. This type of litigation benefits the woman with additional skills who seeks to advance up the promotional ladder or to branch out into nontraditional occupations. Title VII of the 1964 Civil Rights Act can be a fairly useful tool for addressing discriminatory barriers to hiring or promotion.<sup>30</sup> By strengthening damage

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jobs when the jobs have similar point value.

Pay equity theories can also apply to biases based on race where particular jobs filled by African Americans or other people of color are undervalued when compared to comparable jobs that are filled primarily by whites. See NATIONAL COMM. ON PAY EQUITY, PAY EQUITY: AN ISSUE OF RACE, ETHNICITY AND SEX (1987).

For a discussion of the unsympathetic reception pay equity theories have received in U.S. courts, see *infra* notes 34-38 and accompanying text.

25. See, e.g., *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (challenge to accounting firm's failure to select female plaintiff for partnership); *Hirshon v. King & Spalding*, 467 U.S. 69 (1984) (challenge to law firm's failure to select female plaintiff for partnership).

26. See, e.g., *Sweeney v. Board of Trustees of Keene State College*, 569 F.2d 169 (1st Cir.), *vacated and remanded per curiam*, 439 U.S. 24 (1978).

27. See, e.g., *Dothard v. Rawlinson*, 433 U.S. 321 (1977) (height and weight requirements for prison guards discriminate against women); *Blake v. City of Los Angeles*, 595 F.2d 1367 (9th Cir.), *cert. denied*, 446 U.S. 928 (1980) (height and physical ability test discriminate against females).

28. See GLORIA I. JOSEPH & JILL LEWIS, COMMON DIFFERENCES: CONFLICTS IN BLACK AND WHITE FEMINIST PERSPECTIVES 127-48 (1981) (discussing patriarchy, female subordination and male dominance, and institutions of family, marriage and motherhood).

29. Ninety-one percent of all working women are employed in jobs considered to be traditional women's occupations; i.e., sex-segregated jobs. See RISKS & CHALLENGES: WOMEN, WORK & THE FUTURE 147 (Wider Opportunities for Women ed., 1990) (giving statistics from National Commission of Working Women of Wider Opportunities for Women). African American women still disproportionately occupy the lowest-paying, lowest-skilled jobs in the work force and are overwhelmingly employed in female-dominated occupations. *Id.* at 146-48.

30. Title VII, 42 U.S.C. § 2000e-2 (1988), states in relevant part:

(a) It shall be an unlawful employment practice for an employer—

awards for cases of intentional discrimination and by making other improvements to federal employment discrimination law, the Civil Rights Act of 1991 may add clout to the litigation arsenal.<sup>31</sup>

However, relying solely on employment discrimination litigation to improve the economic condition of working African American women is wholly inadequate. To bring a successful lawsuit that challenges an employer's failure to hire a qualified applicant because of the person's race and/or sex, two prerequisites must be met: the employer must have an available job, and the applicant must be qualified.<sup>32</sup>

In today's recessive economic times, well-paying jobs are not being created as fast as they are disappearing.<sup>33</sup> Thus the first prerequisite, an available job, is often an option only for those women who seek employment within the realm of traditional female occupations. Many women are unable to satisfy the second prerequisite as well. The government's insufficient financial support for higher education and skills training prevents many students from low- and

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

31. Signed into law on November 21, 1991, the Civil Rights Act of 1991, S. 1745, 102d Cong., 1st Sess. (1991), amends Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (1988); the Civil Rights Act of 1866, 42 U.S.C. § 1981 (1988); the Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988 (1988); the Americans with Disabilities Act of 1990, 42 U.S.C. § 1201 (1988); and the Age Discrimination in Employment Act of 1967, 29 U.S.C. § 626 (1988). It also reverses parts of seven U.S. Supreme Court decisions that were adverse to the interests of victims of employment discrimination: *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989) (disparate impact and business necessity); *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989) (bias after hiring); *Martin v. Wilks*, 490 U.S. 755 (1989) (challenges to consent decrees); *Lorance v. AT&T Technologies*, 490 U.S. 900 (1989) (timeliness of challenges to seniority systems); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (mixed motives); *West Virginia Univ. Hosp. v. Casey*, 111 S. Ct. 1138 (1991) (witness fees); and *EEOC v. Arabian Am. Oil Co.*, 111 S. Ct. 1227 (1991) (extraterritoriality). Other provisions allow compensatory and punitive damages, jury trials, and "race norming" of test scores. Other provisions create a "glass ceiling" commission, establish an award for diversity in U.S. executive management, provide that the major civil rights laws cover Senate and presidential staffs, and require the Equal Employment Opportunity Commission to carry out educational and outreach activities and to establish a Technical Assistance Training Institute.

32. In *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), the Supreme Court set out the order and allocation of proof for establishing whether or not discrimination exists. In the hiring context, a *prima facie* case is established by a plaintiff's showing:

(i) that he belongs to a racial minority [or protected class]; (ii) that he applied and was *qualified for a job for which the employer was seeking applicants*; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

*Id.* at 802 (emphasis added).

If the worker is not qualified for the position in question, or if there is no available job, the plaintiff cannot make her threshold showing of a *prima facie* case of discrimination and will lose.

33. *See, e.g., SAR A. LEVITAN & ISSAC SHAPIRO, WORKING BUT POOR: AMERICA'S CONTRADICTION* 38 (1987) (90% of growth in jobs from 1984 to 1995 were in service sector, where wages are lower than manufacturing jobs being eliminated).



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moderate-income families from obtaining the additional education or skills that would qualify them to move up or out into traditionally male employment.

Ideally, litigation need not be directed solely at removing barriers to employment. Litigation could also be directed at equalizing the disparate pay received by men and women, and African Americans and whites. Theoretically, this approach could provide a better tool for improving the lot of many African American women than litigation based on the upward and outward models. African American women stuck in jobs because of past discrimination, and who lack the skills to move either upward or outward, should be able to obtain remedies today—in the form of pay and benefits that reflect the value of their work—rather than having to wait for the theoretical possibility of compensation in the future.

Unfortunately, judicial interpretation of Title VII has all but foreclosed the possibility of using litigation to improve the economic position of African American women relative to that of white men. Early proponents of using the equal pay provisions of Title VII to advance pay equity theories received some encouragement from *County of Washington v. Gunther*,<sup>34</sup> in which the Supreme Court allowed a Title VII claim from prison matrons who were paid less than male guards, even though the women's duties differed from those of the men. Since *Gunther*, however, lower courts, almost without exception, have been unwilling to construe Title VII to require equal pay for traditionally female jobs which are dissimilar from typically male jobs but have comparable values.<sup>35</sup> In particular, courts have refused to accept an objective disparity between wages in traditionally male positions and wages in traditionally female posts as proof of sex discrimination. Attempts to bring this sort of claim for female nursing professors who were paid less than male law professors,<sup>36</sup> female nurses who were paid less than sanitation men,<sup>37</sup> and female social workers who were earning less than male psychologists,<sup>38</sup> were unsuccessful. Without wholesale changes in the law, it is impossible to equalize the pay between traditionally male and female jobs through Title VII.

As this brief review suggests, litigation based on employment discrimination law, as it now stands, can do little to help women in traditionally female occupations.<sup>39</sup> Litigation has opened jobs from which qualified African American men and all women have been excluded. Women without the necessary

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34. 452 U.S. 161 (1981).

35. See *supra* note 24 for a discussion of the meaning of "comparable values."

36. *Spaulding v. University of Wash.*, 740 F.2d 686 (9th Cir. 1984).

37. *Briggs v. City of Madison*, 536 F. Supp. 435 (W.D. Wis. 1982).

38. *Schulte v. New York*, 37 Fair Empl. Prac. Cas. (BNA) 1438 (E.D.N.Y. 1981).

39. See MARGARET A. BERGER, FORD FOUNDATION, LITIGATION ON BEHALF OF WOMEN 33 (1980) ("[N]o legal handle currently exists for redressing the low-wages found in sex segregated jobs in which the majority of women work. Title VII has had no impact on these jobs except to make them eligible for males, who are not interested in the majority because of the unattractive pay.").

skills, however, cannot obtain skilled positions through lawsuits. The limited availability of skills training and the inadequacy of the government's financial support for education disadvantage African American women in low-wage positions who want to move up and out. Moreover, litigation under current law can do little to remedy the inequities in pay between white men and all other workers, particularly African American women, who are left in the low-wage, typically female occupations.

#### IV. LEGISLATIVE REFORM AND OTHER ALTERNATIVES TO LITIGATION

The emphasis on lawsuits to eliminate intentional discrimination and barriers to equal employment opportunities has prevented legal advocates from directing enough attention to developing strategies to improve the economic status of women who work in typically female occupations. Many of these jobs are closely related to homemaker duties. Caring for children, the elderly, or the sick, and cooking and cleaning, whether in private, institutional or commercial settings, are the occupations still overwhelmingly filled by the women who constitute the working poor—those whose wages are too meager to support families.

Most women working in these occupations either: 1) like their work and have no interest in changing their position; 2) believe that they are not capable of moving into a different type of work; or 3) do not know either how to change occupations or where to acquire skills that would make them qualified for higher-paying positions in male-dominated jobs. Women who choose traditionally female, nurturing jobs should not be penalized economically for that choice. Certainly, there is a need for someone to perform those duties.

An agenda addressing the needs of African American women should include both programs to train and aid women who wish to move into male-dominated occupations where wages are usually higher, as well as to aid women who seek employment in female-dominated, low-wage jobs. Unfortunately, the current legislative scheme matches the litigation thrust too closely: it targets the elimination of discriminatory barriers in the workplace and provides limited help for women who want to move up or out. Truly improving conditions for the women in traditionally female jobs will require new legislative initiatives and new methods of restructuring the workforce, including economic development.

A full analysis of what a contemporary social program for African American working women might resemble is beyond the scope of this paper. But such a program might include:

1) Subsidized or affordable, educationally enriched child care and after-school programs, to diminish the costs and problems of finding child care for

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low-income, working women and to enhance the academic development of their children.<sup>40</sup>

2) Health coverage for uninsured, working, poor families. This would particularly aid African Americans, 22.6% of whom were not covered by any health insurance in 1986. Only 14% of whites were similarly uninsured.<sup>41</sup>

3) Increases of the minimum wage and tax credits for the working poor.

4) Education and training programs that provide incentives:

a) to job training programs, to encourage them to direct their services to the less skilled working poor and unemployed. Many present-day initiatives, such as the Jobs Training and Partnership Act, the principal employment and training program for economically disadvantaged persons, implicitly encourage the training program operators to concentrate their efforts on individuals who already have acquired job skills and experiences. That is because the training services operate under performance-based contracts that require them to meet performance standards based on actual job placements of trainees. This encourages providers to serve only those individuals who will be the easiest to place in new jobs and to avoid serving less-skilled individuals. Legislation that changes this bias would improve the programs' interest in serving minimally skilled women.

b) to employers, to encourage them to improve the training of less-skilled employees. For example, public funds could be provided to employers to compensate them for granting leave time to employees who wish to upgrade their skills by attending education or training programs. Those training programs could be provided by the employer at the job site to encourage participation and decrease travel costs and time.

c) to the working poor, to enhance the likelihood of their participation in those programs. Publicly funded programs could be made available to pay for or reimburse participants for the costs of education or training, as well as child care and transportation expenses incurred as a result of attending the programs. Furthermore, accessible locations for the training, such as the job site, and work-release time by the employer, could also enhance attendance by single women who head households and have limited additional time due to family responsibilities.

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40. Primary issues concerning child care include the definition of "quality" care; whether it is federal or state responsibility to develop and enforce standards; the problems of quality associated with high turnover and low pay among day care workers (almost all of whom are women, and who average nearly two more years of education than the average U.S. worker, but earn about half of what the average worker earns). Fern Marx & Michelle Seligson, *Child Care in the United States*, in *THE AMERICAN WOMAN 1990-91*, *supra* note 18, at 152. Additional issues include strategies to address affordability of care and who should pay (i.e., families, local, state or federal government, employers, or some combination thereof), and whether federal financing should take the form of 1) direct expenditures (primarily via Social Services Block Grants to the states) or 2) indirect expenditures (through the tax system, which allows various child care related tax deductions or credits to employers as well as parents). *Id.* at 146-69.

41. *BLACK AMERICANS*, *supra* note 2, at 106.

5) Pension reform that requires employers to provide pension plans and that requires portability of pensions for intermittent and part-time workers. As with health insurance, low-wage jobs generally do not provide pension plans as a benefit of employment. Furthermore, many of the industries and jobs in which women predominate are part-time or seasonal; pensions are generally not available unless an individual is employed full-time year-round.<sup>42</sup>

6) Some form of guaranteed job protection and pay for workers who take leave from work because of child birth, child adoption and family illness.<sup>43</sup>

7) Pay-equity legislation that would require employers to conduct gender and race studies of compensation plans and to implement remedies if inequities are found.<sup>44</sup>

In addition to promoting legislative reform, legal advocacy groups could broaden the scope of their activities. Instead of traditional employment discrimination lawsuits, legal advocacy groups could provide assistance to nonprofit organizations interested in creating jobs or employing individuals in typically low-wage occupations.<sup>45</sup> Advocates could assist with finding the resources for the nonprofit organization's business formation, locate private grants or

42. See U.S. COMM'N ON CIVIL RIGHTS, 1 DISCRIMINATION AGAINST MINORITIES AND WOMEN IN PENSIONS AND HEALTH, LIFE AND DISABILITY INSURANCE 72-76 (1978) (statement of Gayle Thompson, Office of Research & Statistics, Social Security Administration).

43. The federal Family Medical Leave Act, H.R. 2, 102d Cong., 1st Sess. (1991); S. 5, 102d Cong., 1st Sess. (1991), which has been vetoed by President Bush twice, would have required employers with 15 or more employees to guarantee the job, seniority, and health insurance coverage of workers who need to take leave to care for a newborn, newly adopted, or seriously ill child, or to care for a seriously ill parent or spouse, or in the event of the worker's illness. Although most working poor cannot afford to be without pay for 12 weeks, the Act would have assisted by protecting the job. A survey of studies by the Women's Legal Defense Fund found that lower-income workers—especially unmarried mothers, part-time employees, and younger workers—are the least likely of all workers to be covered by employer-leave policies. WOMEN'S LEGAL DEFENSE FUND, FAMILY AND MEDICAL LEAVE FACT SHEET: LOW-INCOME AMERICANS MOST NEED THE FMLA (1990).

44. A 1987 study by the National Committee on Pay Equity documented the continuing wage gap between men and women and examined the role that discrimination on the basis of race, ethnicity and sex plays in the setting of wages. The study found that wages in occupations where people of color are employed are significantly lower than those in occupations dominated by white men. Significantly, occupations with high concentrations of women of color are the lowest paid of all occupations. Using a hypothetical model based on education and experience factors to assess whether these factors are applied discriminatorily in the setting of wages for people of color, the study predicted that women and men of all races would benefit considerably from implementation of wage adjustments which rewarded these factors among people of color and white women in the same manner they are rewarded for white males. Specifically:

The lowest paid women would benefit the most: Black women (37.8%), Latina women (35.6%), and Native American women (35.9%) gain slightly more than white women (30.8%) . . . White men benefit slightly (5.5%) due to the few white men working in female-dominated or minority-dominated occupations. Black men would gain 13.2%, Latino men 10.4%, Native American men 8.7%, and Asian men 5.7%.

NATIONAL COMM. ON PAY EQUITY, *supra* note 24, at 12.

45. For example, a nonprofit organization could act as the employer of home health workers, child-care workers, or other service workers who receive limited amounts of training and poor wages. Instead of paying dividends to corporate shareholders or higher salaries to executives from any profits that the business makes, the nonprofit organization could pay workers higher wages or provide better health, vacation and pension programs.

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loans, prepare business and financial plans, and develop benefit plans and employee training programs. Although not ordinarily considered the type of activities a civil rights or public interest lawyer performs, these would be activities which reach the desirable result of improving the wages in typically female occupations.<sup>46</sup>

### V. CONCLUSION

If advocates work only in ways that validate the proposition that women who seek the occupational choices of the white male model are the only women deserving better wages, the nurturing, caring and essential occupations of typically women's jobs will continue to be denigrated and undervalued in society. Furthermore, these activities also serve to denigrate and devalue the women who historically and currently fill those jobs.

In the long run, society's overall attitudes and beliefs about "women's work" and its limited value need to be recast, enlightened, and improved. However, in the short term there are activities which can produce the desired result of increasing the earnings of women in typically female low-wage jobs. Through creative wage restructuring, many service industry jobs that are typically female, poorly paid jobs may be made economically equitable. Many of these jobs historically have been the province of African American women, and currently they are filled with an overrepresentation of women of color.

African American women and all other women in typically female occupations deserve the option to move into new occupations, to move up the skill ladder, or to stay where they are if they so choose. In each respect, they should be paid decent and liveable wages and they should be provided with benefit plans for their families and their futures. Advocates should work in every arena possible in order to ensure such options. They should avoid legal jousting that primarily benefits only some women, rather than all women, and that does not reach women in the workforce where they are currently located. Rather, they should push for programs that would remedy the all-too-commonplace poverty of women working in traditionally female occupations.

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46. As another example, advocates could also assist in similar ways when workers seek to buy out their employer's interest in the business. Worker-owned cooperatives allow for improving job quality and real control over the work and profits. Each worker has one vote in the ownership and control of the business. Although primarily used to buy out closing manufacturing plants, worker-owned cooperatives could be used in the service sector also.

