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ARTICLE

THE LESSONS OF COMPARABLE WORTH: A FEMINIST VISION OF LAW AND ECONOMIC THEORY

Jeanne M. Dennis*

INTRODUCTION

During the Los Angeles riots of April 29, 1992 to May 2, 1992, I was studying for a tax final at the UCLA School of Law. On my kitchen table lay the United States tax code, demarcating the responsibilities to contribute to the commonweal and reflecting the current calculus of economic efficiency. But from the window of my high-rise apartment, I could see the columns of smoke rising around the city as waves of angry people looted and burned Los Angeles. And this juxtaposition of burning city and boring book kept reminding me of a rumor I had heard some years earlier: that the Federal Emergency Management Agency had once commissioned a study on what would happen to the money supply in the event of a nuclear holocaust — the logic being that the nation's automatic teller machines would be disabled in the confusion and start spewing forth dollar after dollar.

Los Angeles was restored to order. The arrival of the National Guard and the integrity of the majority of Angelenos revived the law that had foundered for the past several days. I took my tax exam, but the practicality of the theory behind the tax code had lost its luster. Laws such as the U.S. tax code, informed by standard economic theory, supposedly provide the

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blueprints to societal prosperity and civil peace. As the unrest in Los Angeles demonstrated, however, law is gossamer held in place by guns and goodwill and fragile to the frustrations of the populace. And the people are frustrated. For vast numbers of women, minorities, and for an increasing number of white men, prosperity and economic stability have become elusive.

The predominant state of law and the economic theory it rests on are well deserving of critique. My intention in this Article, however, is to explore an alternative and feminist vision of law and economic theory,¹ perhaps best articulated in the comparable worth movement of the 1980s. This feminist vision of law and economic theory begins with the experiences of women in the workforce and derives economic lessons from those experiences. Accordingly, it offers policy prescriptions better suited to stabilize the economic system and thus answers some of the frustration prompting the Los Angeles riots.

This growing frustration, evident in many cities, is due in large part to the fact that women and minorities remain in an economic ghetto.² They are separated in low paying occupations, isolated from opportunities that would give true meaning to the phrase "equality under law." To many, the persistence of the ghetto demonstrates that efforts to integrate the United States have not been made in good faith. To others, the ghetto signifies the inferiority of its inhabitants. Thus, recriminations substitute for congratulations as efforts to create a just society divide us further.

Debate over the meaning of the ghetto, however, misses the real root of the problems underlying the racial, gender, and class tensions in our cities. It is neither the fuller participation of women and minorities in the economy, nor the failure of women and minorities to achieve full participation in the economy, that has had the most dramatic effect on late twentieth century American society. Rather, it is the transformation of the very economy that women and minorities have been seeking to join more fully

1. See *infra* notes 117-23 and accompanying text. By "law and economic theory," I mean the synthesis of economic beliefs and public policy goals that shapes our society through law.

2. Women and minorities also, to some extent, remain in a literal and metaphorical ghetto. It is literal in the sense that segregation continues to define the communities in which the men and women of the various races work and live. It is metaphorical in the sense that the experiences of women and minorities may be so vastly different from those of the "normative" white male as to create, in essence, a separate existence.

that has most profoundly affected America. The metamorphosis in the economy that has occurred, and continues to occur, encompasses our society so completely that we have not yet begun to appreciate its impact. This metamorphosis is the deindustrialization of America. It is the economic phenomenon of deindustrialization that has, in large part, made it so difficult, if not impossible, to achieve the social goal of truly making women and minorities full and equal members of society.

There are many definitions of deindustrialization. *The MIT Dictionary of Modern Economics* defines deindustrialization as “[a] development in a national economy towards an increasing share of the GROSS DOMESTIC PRODUCT or of employment being accounted for by SERVICES.”³ Economists Barry Bluestone and Bennett Harrison describe deindustrialization as “a widespread systematic disinvestment in the nation’s productive capacity.”⁴ Although both of these descriptions are correct, this Article offers a third definition that focuses more specifically on the social significance of the workplace. Deindustrialization is the transformation of a society from one in which the majority of households were economically secure, in which the labor of the “head of the household” was compensated by decent wages and good benefits, to one in which large numbers of people have little economic security, work for low wages or at part-time or temporary jobs, and have limited benefits.⁵ Under this definition of deindustrialization, the large-scale loss of jobs in the manufacturing industries, high-technology industries, and the legal and financial service industries has ushered in a new and uneasy era in the economic life of the average American. Although reaction to this phenomenon has been muted so far, deindustrialization has already robbed the middle classes of security and the lower classes of aspirations. Deindustrialization has also stymied the advancement of women and minorities by making the competition for good jobs more acute.

News articles on deindustrialization appear daily and often seek to validate the movement of American factories to foreign countries with cheaper labor, implicitly blaming American work-

3. THE MIT DICTIONARY OF MODERN ECONOMICS 100 (David W. Pearce ed., 3d ed. The Macmillan Press Ltd. 1986) (1983).

4. BARRY BLUESTONE & BENNETT HARRISON, THE DEINDUSTRIALIZATION OF AMERICA 6 (1982).

5. See *infra* notes 124–39 and accompanying text.

ers for not selling their labor for less.⁶ Sometimes the media presents deindustrialization in a positive light. A February 1993 issue of *Business Week* speculated that: “[B]y trimming payrolls, companies have been able to boost productivity, increase profits, and compete better on world markets.”⁷ Myron Magnet, a reporter for *Fortune*, typified the attitudes of many when he commented: “Yes, many jobs are disappearing, and workers who thought they were set are having their lives painfully disrupted and their earnings cut through no fault of their own. Yet it’s worth remembering . . . that ‘the process of job destruction is a very normal process of the economy.’”⁸ Such statements reveal resignation and obeisance to the workings of the “invisible hand” of the market.⁹

But job destruction is not necessarily inevitable — nothing man-made ever was. The danger lies in assuming that we are powerless to staunch the flow of jobs. Feminist theory, of all the academic disciplines, may be best suited to address the problem of deindustrialization because feminist scholars are well-practiced at resisting dominant and disparaging ideologies, especially those ideologies on women. Feminist legal theory, however, remains situated in its own academic ghetto.¹⁰ Feminists speak to each other about women’s issues, which are construed to be those issues that affect women alone. Yet women’s issues should

6. See, e.g., Stephen Baker et al., *The Mexican Worker: Smart, Motivated, Cheap—and a Potent New Economic Force to Be Reckoned with*, BUS. WK., Apr. 19, 1993, at 84, 84.

7. *Jobs, Jobs, Jobs*, BUS. WK., Feb. 22, 1993, at 68, 69.

8. Myron Magnet, *Why Job Growth is Stalled*, FORTUNE, Mar. 8, 1993, at 52. Even more revealing was reporter Kenneth Labich’s comment in *Fortune* that: “[J]obs are not a product of the economy, but a byproduct.” Kenneth Labich, *The New Unemployed*, FORTUNE, Mar. 8, 1993, at 40, 48.

9. See *infra* notes 61–62 and accompanying text.

10. By the academic ghetto, I mean that feminist legal theory has not generally been employed by traditional (male) legal scholars. See, e.g., Patricia A. Cain, *Feminist Legal Scholarship*, 77 IOWA L. REV. 19, 29–39 (1991). Cain states:

As a general rule, institutional responses are greatly influenced by those in power. Thus, male law professors largely determine the institutional response to feminist scholarship. I would characterize the institutional response, law review editors aside, as ranging from silent dismissal to polite questions revealing a significant lack of understanding.

Id. at 29. Thus, feminist ideas have not generally been adopted in areas that affect men and women similarly. This is starting to change, however, as feminist scholars reevaluate traditional areas of legal scholarship. See, e.g., Theresa A. Gabaldon, *The Lemonade Stand: Feminist and Other Reflections on the Limited Liability of Corporate Shareholders*, 45 VAND. L. REV. 1387 (1992) (applying feminist approaches to corporate law).

not be limited to those issues that primarily affect women or affect women differently from men. Women's issues are also those issues that have a major impact on women's lives. These issues may well be "universal" in that they often affect men as well as women in similar ways. Notwithstanding past precedent, it is time that feminist theory addressed these issues, which have historically been reserved for the contemplation of men. It is time for feminists to claim these issues as our own. By addressing the economic policy debate, feminists can ensure that economic policy better serves the needs of both women and men. Moreover, by sharing responsibility with men for the resolution of economic problems that are undermining the stability of our society, women empower themselves and defy the role of victim in a male-dominated society.

Feminist theory has already developed the necessary tools for addressing the "universal problem" of the deindustrialization of America. Feminists began to articulate a feminist vision of law and economic theory through the comparable worth movement, an effort during the 1970s and 1980s to increase women's wages and achieve parity with the wages of men in similar or "comparable" jobs.¹¹ The comparable worth movement challenged the predominant ways of thinking about economics and the role that law plays in the economy. It is this aspect of comparable worth, as an articulation of a unique vision of law and economic theory, that offers new ways to address the "universal problem" of the shrinking labor market of "post-industrial" America.¹²

This Article uses the comparable worth movement as a starting point to explore a new feminist approach to law and economic theory. It departs from earlier attempts to develop a feminist economics, which focused on broadening the traditional tenets of economic theory to include women.¹³ Instead, by employing feminist practical reasoning and feminist narrative, this paper reconstructs economic theory from a feminist perspective. Deviating from the traditional economic analysis that locates individual self-interest and market freedom as the underlying tenets of economic growth, this feminist economic theory begins

11. See *infra* notes 94-96 and accompanying text.

12. See *infra* Parts III, IV.B.

13. For an example of this approach, see MARILYN WARING, *IF WOMEN COUNTED* (1988) (arguing that the national income accounts fail to include the many unpaid services that women perform); see also Janice F. Madden, *The Development of Economic Thought on the "Woman Problem,"* 4 REV. RADICAL POL. ECON., Number 3, July 1972, at 21.

with the worker's view of gendered wage disparity and occupational sex discrimination, and looks to the mitigating role of state power as the basis upon which to build a stable economic system.

Part I of this Article explores the growing role for feminist legal theory on issues that affect men and women similarly. This section considers the insights that the methodologies of feminist practical reasoning and feminist narrative can offer to law and economic theory. Part II discusses the relationship between law and the economy. It then considers traditional economic theory and its critique of the comparable worth movement. Part III explores the lessons of comparable worth. This section argues that comparable worth provides a foundation for formulating a feminist law and economic theory.¹⁴ Part IV examines the deindustrialization of America and then applies the lessons of feminist law and economic theory to the problem of deindustrialization to suggest how this problem may be addressed through tax incentives. Part V is a conclusion.

I. FEMINIST THEORY AND SCHOLARSHIP

Sociologist Jessie Bernard and legal scholar Clare Dalton have aptly described the present expansion of feminist theory as a Feminist Enlightenment.¹⁵ No other modern American intellectual movement has so persistently and critically examined current dogma and doctrine as has feminist theory. Nor has any other intellectual trend shown such promise for changing the most fundamental ways that problems are identified and understood. Within legal scholarship, feminist legal theory has recast traditional debates in new modes. By elevating the perspectives of women, feminist legal theory challenges existing knowledge and ways of knowing.¹⁶ Despite its promise, however, feminist legal theory has not been readily incorporated into the academic mainstream.¹⁷ In revealing how feminist law and economic the-

14. This need not be the only articulation of feminist economics. The essential requirement for feminist economics is that it is economics done by feminists taking the experience of women as a starting point. Thus, it is my contention that traditional economics, which does not take women's perspectives into account, cannot be considered truly feminist.

15. Clare Dalton, *Where We Stand: Observations on the Situation of Feminist Legal Thought*, 3 BERKELEY WOMEN'S L.J. 1, 1-2 (1988).

16. See, e.g., Laura E. Reece, *Women's Defenses to Criminal Homicide and the Right to Effective Assistance of Counsel: The Need for Relocation of Difference*, 1 UCLA WOMEN'S L.J. 53 (1991).

17. See Dalton, *supra* note 15, at 3.

ory offers fresh insight into the problem of deindustrialization, this Article explores the potential of feminist legal theory for contributing to the legal academic mainstream.

A. *Legal Scholarship*

One of the most important contributions of feminist theory is the insight that it offers into the extent to which knowledge is gendered. Women see the world differently from men because they have different experiences from men.¹⁸ The recognition that the experiences of women, and thus, women's knowledge, is as valuable as men's knowledge opens new possibilities for analyzing public policy problems and identifying public policy solutions.¹⁹ The recognition that knowledge is biased by assumptions about gender, as well as by assumptions about race and class, indicates that there is no objective viewpoint from which to observe society.²⁰ Without such an objective perspective from which to learn, our understanding of society should neither be permanent nor preclude the exploration of other conflicting ideas.

This fundamental feminist viewpoint is not novel to American thought.²¹ American thought has long celebrated the multi-

18. See, e.g., Cain, *supra* note 10, at 35-39.

19. Sandra Harding noted: "Feminist theory began by trying to extend and reinterpret the categories of various theoretical discourses so that women's activities and social relations could become analytically visible within the traditions of intellectual discourse." Sandra Harding, *The Instability of the Analytical Categories of Feminist Theory*, in *FEMINIST THEORY IN PRACTICE AND PROCESS* 15, 15 (Micheline R. Malson et al. eds., 1989).

20. *Id.* at 19. Harding states:

It would be a delusion for feminism to arrive at a master theory, at a 'normal science' paradigm with conceptual and methodological assumptions that we presume all feminists accept. Feminist analytical categories *should* be unstable—consistent and coherent theories in an unstable and incoherent world are obstacles to both our understanding and our social practices.

Id.

21. Arthur Schlesinger, Jr. has observed: "[T]he American mind is by nature pluralistic and relativistic." Arthur Schlesinger, Jr., *The Opening of the American Mind*, N.Y. TIMES BOOK REV., July 23, 1989, at 1, 26. I do not mean to suggest that feminist theory should be described solely as relativistic. Feminist theory is consistent with relativism in that it credits the perspectives of many voices. Recently, however, feminist theory has tried to go beyond relativism to encourage conversation among differing viewpoints in the hopes of finding points of reconciliation. See, e.g., Elisabeth Young-Bruehl, *The Education of Women as Philosophers*, in *FEMINIST THEORY IN PRACTICE AND PROCESS*, *supra* note 19, at 35, 46-47. Young-Bruehl states: "What I am trying to suggest is that all of the voices or purposes that are our minds must be heard in order for us to achieve not *an* identity but a more communi-

ple and contradictory nature of truths and the importance of personal perspective and discovery. For example, in *Self-Reliance*, Ralph Waldo Emerson urged: "Speak what you think now in hard words and to-morrow speak what to-morrow thinks in hard words again, though it contradict every thing you said to-day."²² The uniqueness of the female perspective in a male dominated world has also been a constant in American thought. Fanny Fern, the most highly-paid newspaper columnist of the 1850s and 1860s, delighted readers with her caustic commentary on the roles of men and women in society. An 1859 column of Fern's in the *New York Ledger* read:

"FOURTH OF JULY." Well—I don't feel patriotic. . . . Can I have the nomination for "Governor of Vermont," like our other contributor, John G. Saxe? Can I be a Senator, that I may hurry up that millennial International Copyright Law? Can I *even* be President? Bah—you know I can't. "Free!" Humph!²³

Thus, within the American intellectual tradition, the radicalism of late twentieth century feminist theory may be most pronounced by its insistence that its political and philosophical positions be put into practice to change existing social conditions.

Because of the importance of law in adjusting societal norms, feminist legal theory should play a central role in facilitating the incorporation of feminist insights into culture. Yet feminist legal theory has not been readily adopted into the mainstream of legal thought. Instead, feminist legal theory is generally relegated to courses that deal specifically with feminist thought.²⁴ To some extent this is because feminist theory is still

cative form of life — the possibility of conversational reconciling, both in ourselves and with others." *Id.* at 47.

22. RALPH W. EMERSON, *Self-Reliance*, in *SELECTED ESSAYS* 175, 183 (Larzer Ziff ed., Penguin Books 1982) (1841). "I have lived some thirty years on this planet," wrote Henry David Thoreau in *Walden*, "and I have yet to hear the first syllable of valuable or even earnest advice from my seniors. . . . Here is life, an experiment to a great extent untried by me; but it does not avail me that they have tried it." HENRY D. THOREAU, *WALDEN* 9 (J. Lyndon Shanley ed., Princeton U. Press 1988) (1854).

23. FANNY FERN, *Independence*, in *RUTH HALL AND OTHER WRITINGS* 314, 314-15 (Joyce W. Warren ed., Rutgers U. Press 1986) (1859). For a discussion on nineteenth century feminism, see Frances Olsen, *From False Paternalism to False Equality: Judicial Assaults on Feminist Community, Illinois, 1869-1895*, 84 *MICH. L. REV.* 1518 (1986).

24. *See, e.g.*, Dalton, *supra* note 15, at 3. ("In law schools today, feminist legal thought is most commonly offered as a specialized course."). Dalton further suggests that relegating feminist theory to specific courses ensures that feminist theory "will neither affect nor infect the rest of the curriculum." *Id.*

novel and controversial. The great American philosopher William James once noted: "First . . . a new theory is attacked as absurd; then it is admitted to be true, but obvious and insignificant; finally it is seen to be so important that its adversaries claim that they themselves discovered it."²⁵ No doubt, feminist legal theory is still in James's first phase and its movement into the second phase is likely to be slow: Feminist theory and the existing state of legal scholarship do not complement each other.

Treating objectivity as suspect, feminist theory scrutinizes the assumptions underlying what we believe we "know," thereby challenging traditional constructions of what is known. As a branch of feminist theory, feminist legal thought examines why women are subordinated in society and how their position may be improved.²⁶ During the past two decades, however, mainstream legal thought has relied increasingly on disciplines such as economics, philosophy, and psychology to shape the law.²⁷ The law and economics movement exemplifies this trend.²⁸ As Richard Posner has commented:

In several important fields — antitrust, commercial law (including bankruptcy), corporations and securities regulation, regulated industries, and taxation — the economic perspective is already dominant or will soon be, when the older professors and practitioners retire. In other important fields, such as torts, property law, environmental law, and labor law, the economic approach is making rapid strides. In still others, such as criminal law and family, the traditionalists retain the upper hand — but for how long, who can say?²⁹

Thus, in the past twenty years, mainstream legal thought has incorporated more fully the very theories whose underlying tenets are now undergoing challenge by feminist theorists.³⁰

25. WILLIAM JAMES, *PRAGMATISM* 91 (Bruce Kuklick ed., Hackett Publishing Co. 1981) (1907).

26. See Carrie Menkel-Meadow, *Feminist Legal Theory, Critical Legal Studies, and Legal Education or "The Fem-Crits Go to Law School,"* 38 J. LEGAL EDUC. 61, 62-66 (1988).

27. Richard A. Posner, *The Decline of Law as an Autonomous Discipline: 1962-1987*, 100 HARV. L. REV. 761 (1987).

28. For a discussion on the law and economics movement, see *infra* notes 63-73 and accompanying text.

29. Posner, *supra* note 27, at 767-68.

30. Moreover, mainstream legal thought has often adopted the insights from academic disciplines such as economics, philosophy, and psychology with an alarming disregard for these disciplines' underlying assumptions. The study of law and economics offers a case in point. American law is premised on a system of conflicting interests, hence, the adversarial system. Yet, the neoclassical economic theory of the law and economics school is premised on the idea that individual interests are

In addition, because it defies traditional discourses and focuses on women's issues, feminist legal theory often appears irrelevant to mainstream academicians and policymakers.³¹ Thus, feminist theory has had minimal impact on the construction of public policy on issues that affect men and women similarly. Reluctance to apply feminist insights is especially evident in the law and economics movement, which has dominated legal thought throughout the past decade.³² The law and economics school's disregard for feminist theories is not surprising. In part, it arises from a traditional focus on theoretical principles rather than on the real experiences of women.³³ For example, Richard Posner has called for "conservative feminism" in which "women are entitled to political, legal, social, and economic equality to men in the framework of a lightly regulated economy."³⁴ Yet he does not appear to grasp that being entitled to equality is not the same as actually having equality.

B. *Methods of Feminist Theory*

Feminist theory strives to introduce better problem-solving methods than those currently employed in the male dominated world.³⁵ Over the past two decades, feminist theory has developed a variety of methodologies. They include:

harmonized through market relationships. As a consequence, law and economics often takes on an air of surrealism. Mark Kelman has provided an example of this phenomenon, noting: "Workplaces, which progressives have long seen as battlefields over work pace and discipline, are transformed by the 'transaction cost economists' . . . into conflictless mutual cooperatives. 'Managers' are just technocratic problem solvers who might just as well be hired by the workers to supervise themselves." Mark Kelman, *A Critique of Conservative Legal Thought*, in *THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE* 436, 446 (David Kairys ed., 1990).

31. For an example of this blindness to the contributions of feminist theory, see Neil Postman, *Learning By Story*, *ATLANTIC*, Dec. 1989, at 119 (lamenting the lack of dynamism in the academy while completely overlooking the growth of women and minority studies).

32. See Posner, *supra* note 27 and accompanying text.

33. Moreover, the discipline of economics, in general, has not taken account of feminist insights. As William Waller and Ann Jennings note: "Feminist thought within economics has largely taken the form of applying existing economic theory to the 'case' of women rather than entertaining the implications for economic theory of feminist scholarship." William Waller & Ann Jennings, *A Feminist Institutional Reconsideration of Karl Polanyi*, 25 *J. ECON. ISSUES* 485, 485 (1991). Since the base discipline upon which law and economics draws ignores feminist theory, the law and economics movement has similarly ignored feminist theory. See also *infra* notes 83-88 and accompanying text.

34. Richard A. Posner, *Conservative Feminism*, 1989 *U. CHI. LEGAL F.* 191, 192.

35. As Virginia Woolf stated in *Three Guineas* in reply to a barrister's inquiry as to how women can best aid men in preventing war: "We can best help you to pre-

(1) identifying and challenging those elements of existing legal doctrine that leave out or disadvantage women and members of other excluded groups (asking the "woman question"); (2) reasoning from an ideal in which legal resolutions are pragmatic responses to concrete dilemmas rather than static choices between opposing, often mismatched perspectives (feminist practical reasoning); and (3) seeking insights and enhanced perspectives through collaborative or interactive engagements with others based upon personal experience and narrative (consciousness-raising).³⁶

Feminist narrative, which privileges women's stories and women's viewpoints, provides the form to convey the knowledge generated by these methodologies.

Feminist theory has also explored new epistemologies such as feminist empiricism, feminist standpoint theories, and feminist postmodernism.³⁷ Feminist empiricism is the gathering of information by observation without the "misogynist bias" of the observer.³⁸ Feminist standpoint theories propose that "knowledge is always mediated by . . . an individual's particular [social] position . . . at a specific point in history,"³⁹ and that "certain social positions (the oppressor's) produce distorted ideological views of reality, [while] other social positions (the oppressed's) can pierce ideological obfuscations and attain a correct and comprehensive understanding of the world."⁴⁰ Feminist postmodernism denies that any perspective can be objective and so argues for a "commitment to plurality and the play of difference."⁴¹

Among these various feminist methodologies and epistemologies, this Article relies on feminist practical reasoning and feminist narrative to formulate a feminist law and economic theory. Because feminist practical reasoning emphasizes the reality of experience over abstract theory, it enables feminists to eschew

vent war not by repeating your words and following your methods but by finding new words and creating new methods." VIRGINIA WOOLF, *THREE GUINEAS* 143 (1938).

36. Katharine T. Bartlett, *Feminist Legal Methods*, 103 HARV. L. REV. 829, 831 (1990).

37. See Mary E. Hawkesworth, *Knowers, Knowing, Known: Feminist Theory and Claims of Truth*, in *FEMINIST THEORY IN PRACTICE AND PROCESS*, *supra* note 19, at 327, 329.

38. *Id.* at 329. Feminist empiricism is "a process of systematic observation in which subjectivity of the observer is controlled by rigid adherence to neutral procedures designed to produce identical measurements of the real properties of objects." *Id.*

39. *Id.* at 330.

40. *Id.*

41. *Id.* at 331 (footnote omitted).

the theoretical lessons of traditional economics in favor of pragmatic ways to solve economic problems. Feminist narrative is also useful because it privileges the economic stories of women, and thus allows feminists to reconstruct economic knowledge from the viewpoints of women.

1. Feminist Practical Reasoning

Feminist practical reasoning locates knowledge in concrete personal experience. This methodology relies on two insights: (1) the recognition that the different yet co-existing experiences of men and women mold their (often) radically different perceptions of the world;⁴² and (2) the philosophical tradition of pragmatism, which evaluates ideas by their practical consequences.⁴³ Pragmatism mediates between the theoretical abstraction of rationalism and the factual and systematic rigor of empiricism; it relies on practical experience for its factual foundation, but does not limit knowledge to that which can be rigorously proved.⁴⁴

Feminist theory increasingly employs the insights of pragmatism. In developing a feminist understanding of society and nature, feminist scholars rejected the idea that the abstraction of formal logic and the calibrations of empiricism were the only ways to reach truth. Feminist practical reasoning evolved as feminists sought a more flexible approach to the acquisition of knowledge, one that incorporated the perspectives of the subordinated. By looking to the concrete experiences of women — whether in the testimony of working women on sexual harassment⁴⁵ or in the meditations of a black female law professor⁴⁶ —

42. Bartlett, *supra* note 36, at 856.

43. JAMES, *supra* note 25, at 25–39; *see also* Margaret J. Radin, *The Pragmatist and the Feminist*, 63 SO. CAL. L. REV. 1699 (1990).

44. As William James wrote:

Pragmatism is willing to take anything, to follow either logic or the senses and to count the humblest and most personal experiences. She will count mystical experiences if they have practical consequences. She will take a God who lives in the very dirt of private fact — if that should seem a likely place to find him.

Her only test of probable truth is what works best in the way of leading us, what fits every part of life best and combines with the collectivity of experience's demands, nothing being omitted.

JAMES, *supra* note 25, at 38.

45. CATHARINE A. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* 143–213 (1979).

46. PATRICIA J. WILLIAMS, *THE ALCHEMY OF RACE AND RIGHTS* (1991).

feminist legal theory reveals new truths through experiential knowledge.⁴⁷

Because feminist practical reasoning constructs knowledge out of subjective personal experience, it is necessarily pluralistic. By its nature, feminist practical reasoning accepts that new perspectives will emerge as society evolves.⁴⁸ Feminist practical reasoning, however, pays special attention to the knowledge that emanates from the experiences of women and minorities. Yet the privilege accorded to these perspectives is not directed by group affiliation but by the recognition of group subordination. Feminist practical reasoning privileges the perspectives of subordinated groups because that is where the greater necessity is.

2. Feminist Narrative

Feminist narrative is a natural counterpart to feminist practical reasoning.⁴⁹ By employing the narrative to tell of women's experiences, scholars using the feminist narrative express truths that neither the rhetoric of rationalism nor the calculations of empiricism reveal. For example, rationalism cannot capture the experience of a woman in a battering relationship because such relationships belie the definition of "rational." Similarly, empiricism cannot adequately "measure" the degree of suffering endured by women in such relationships. Since theories such as empiricism and rationalism cannot comprehend "unmeasured" suffering, they tend to overlook it. The flexibility of the narrative, however, conveys the pain inherent in such relationships.⁵⁰

By using narrative to describe subordination, feminists can convey more fully the extent to which prejudice stunts women's

47. Martha L. Fineman, *Challenging Law, Establishing Differences: The Future of Feminist Legal Scholarship*, 42 FLA. L. REV. 25, 28 (1990) ("The real distinction between feminist theory (legal and otherwise) and more traditional legal theory is this belief in the desirability of the concrete.").

48. As Katharine Bartlett has noted: "Feminist practical reasoning assumes that no a priori reasons prevent one from being persuaded that a fact that seems insignificant is significant . . ." Bartlett, *supra* note 36, at 857.

49. See Daniel A. Farber & Suzanna Sherry, *Telling Stories Out of School: An Essay on Legal Narratives*, 45 STAN. L. REV. 807, 820-27 (1993); see also Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971, 976 (1991) ("Feminist narratives present experience as a way of knowing that which should occupy a respected, or in some cases a privileged position, in analysis and argumentation.").

50. See Robin L. West, *The Difference in Women's Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WIS. WOMEN'S L.J. 81, 98-99 (1987) (recounting her own experiences of being in a battering relationship).

lives. Moreover, the specificity of the narrative form offers a way to remain sensitive to the diverse perspectives encompassed by feminist theory.⁵¹ Finally, the nature of feminist narrative, like feminist practical reasoning, advances the reconstruction of traditional thought. Not only do feminist narratives tell stories that have not yet been heard, but they also reinterpret old stories from new perspectives. Through the reinterpetive power of the narrative, feminists can develop new ways of constructing traditional academic disciplines. By reconstructing traditional knowledge to reflect feminist insight, feminist legal theory also facilitates its own adoption into the legal mainstream.

II. THE LABOR MARKET AND WOMEN

Because of the dual role of economics in explaining economic phenomena and instructing solutions to economic problems, the exploration and comparison of alternative economic theories is important. Moreover, because of the central role that law plays in the economy, the investigation of the nexus between law and economics is essential.⁵² Different models of law and economics, based on different assumptions and directed towards different results, necessarily produce different policy recommendations. Thus, the failure to contemplate alternatives to neoclassical economics and its law and economics policy prescriptions precludes consideration of theories better suited to resolving difficult social issues.

Historically, neoclassical approaches to economic theory and the role of law have not taken seriously the discriminatory treatment of women. Instead neoclassical economics has been employed to resist the use of law to change market results that adversely affect women. This section explores the attitudes underlying that resistance and demonstrates how the comparable worth movement challenged fundamental assumptions of neoclassical economic thought.

51. As such, it provides a possible solution to the "anti-essentialist conundrum: the problem that describing people in terms of a group ascribes and denies individual characteristics that differentiate some members of the group from other members." See Anne C. Dailey, *Feminism's Return to Liberalism*, 102 YALE L.J. 1265 (1993) (reviewing *FEMINIST LEGAL THEORY: READINGS IN LAW AND GENDER* (Katharine T. Bartlett & Roseanne Kennedy eds., 1991)). Dailey notes that: "The reconstructive power of narrative lies in its potential for arresting the infinite regress of the anti-essentialist critique." *Id.* at 1274.

52. See Warren J. Samuels, *Some Fundamentals of the Economic Role of Government*, 23 J. ECON. ISSUES 427, 432 (1989).

A. *The Legal Economy*

The economy does not exist apart from law: Law shapes the economy and the economy shapes the law.⁵³ Both are influenced by the dominant voices in society. Capitalism resulted from the enforceability of contracts⁵⁴ and the establishment of private property, which, by forcing peasants from their land, led to the reinvention of labor as a commodity.⁵⁵ Colonial leaders of Boston introduced industrialization to America as a welfare program to provide employment for women widowed by King George's War of the 1740s.⁵⁶ Developments in law resulted in the labor market. Adam Smith in his 1776 classic, *The Wealth of Nations*, observed that: "What are the common wages of labour, depends every where upon the *contract* usually made between those two parties, whose interests are by no means the same."⁵⁷ Adam Smith also recognized that the law preferred the employer to the employee.⁵⁸ Thus, law is not only at the foundation of the economy, but also invidiously reinforces the power structure in the economy.

Government creates the institution of the market economy by establishing and defending legal rights to resources and opportunities and by choosing not to establish other rights. In addition, government shapes the market by establishing trade policies and tax systems, and by exercising control over the currency. But government is itself an institution. As such, it is a function of the

53. *Id.*

54. JOHN R. COMMONS, *LEGAL FOUNDATIONS OF CAPITALISM* 303 (1924). Commons states:

The capitalist system has been built up, as we have seen, on the enforcement and negotiability of contracts, and it is as difficult for the lawyer of today to appreciate the custom of employer and employee in breaking labor contracts as it was for the lawyers of the Sixteenth and Seventeenth Centuries to authorize the custom of merchants in enforcing promises and buying and selling them.

Id.

55. KARL POLANYI, *THE GREAT TRANSFORMATION* 92 (1944) ("The rationalization of agriculture inevitably uprooted the laborer and undermined his social security.")

56. See GARY B. NASH, *The Failure of Female Factory Labor in Colonial Boston*, in *RACE, CLASS AND POLITICS: ESSAYS ON AMERICAN COLONIAL AND REVOLUTIONARY SOCIETY* 119, 119-33 (1986) (discussing efforts by Boston colonial leaders between 1748 and 1753 to import British work-relief programs in the form of factories to provide for widows).

57. ADAM SMITH, *AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS* 74 (Edwin Cannan ed., U. of Chicago Press 1976) (1776) (emphasis added).

58. *Id.*

interests of the polity, the demands of other nations, and of course, the pressures of the market. Thus, the dynamic and interactive change of these institutions creates what we recognize as the only possible reality. Economist Warren Samuels has described this phenomenon, stating: "There is a legal-economic nexus in which it may appear that government and economy interact as separate processes but in which each is actually fundamentally involved in the (re)determination of the other and thereby of social reality."⁵⁹

Neoclassical economics is the predominant economic paradigm today.⁶⁰ Central to neoclassical economics is economist Adam Smith's classical economics concept of the "invisible hand," which guides individuals to make economic decisions that are in the general interest.⁶¹ The invisible hand is the market signals that indicate the varying willingness of people to buy or sell goods. The meaning of the invisible hand is that individual self-interest promotes the general welfare.⁶² The resulting caveat is that government involvement in market transactions constitutes a harm since the invisible hand makes such involvement unnecessary and disruptive. A corollary of the invisible hand is that market transactions harmonize the divergent interests of society. The relative or "comparative" advantage of individuals, nations, or corporations in efficient production of goods determines who produces which goods and who purchases them. In addition, economic actors make cost-benefit assessments when deciding to purchase goods or engage in other activity.

In the 1960s and 1970s, legal scholars and economists began to use neoclassical economics to illuminate legal analysis, creating the theory of law and economics. Describing this phenomenon, economist A. Mitchell Polinsky wrote: "[E]conomic

59. Samuels, *supra* note 52, at 432.

60. See, e.g., HOWARD J. SHERMAN, FOUNDATIONS OF RADICAL POLITICAL ECONOMY 3 (1987).

61. Adam Smith wrote:

[H]e intends only his own security; and by directing that industry in such a manner as its produce may be of the greatest value, he intends only his own gain, and he is in this, as in many other cases, led by an invisible hand to promote an end which was no part of his intention. Nor is it always the worse for the society that it was no part of it. By pursuing his own interest he frequently promotes that of the society more effectually than when he really intends to promote it.

SMITH, *supra* note 57, at 477-78.

62. A more recent take on this sentiment was Ivan Boesky's famous "greed is alright" statement. See JAMES B. STEWART, DEN OF THIEVES 261 (1991).

analysis has been found to be very helpful in the design of public policy in many areas. There is no reason why it should not be just as useful in the examination of the legal system.”⁶³ As a model for law, law and economics rests primarily on the argument that neoclassical economic reasoning, which it adopts, is plausible and beneficial. Law and economics explains Anglo-American law as “a continuing accommodation to changing social and economic circumstances by judges who interpret legal rules so as to produce economically efficient outcomes.”⁶⁴ More important, law and economics scholarship suggests that law *should* be designed to achieve this end.⁶⁵

Since the dominant themes of law and economics mirror those of neoclassical economics, law and economics presupposes that the best law is that which promotes economic efficiency.⁶⁶ Law and economics adopts the following neoclassical assumptions about human behavior: (1) individuals are motivated by benign self-interest; (2) bargaining between individuals produces just and reasonable results; and (3) the privatization of resources promotes their efficient use.⁶⁷ These themes reward those who

63. A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 126 (1983). Mark Kuperberg and Charles Beitz locate the beginning of the law and economics movement with the publication of Ronald Coase's *The Problem of Social Cost*. Mark Kuperberg & Charles Beitz, *Introduction to Part One*, in LAW, ECONOMICS, AND PHILOSOPHY: A CRITICAL INTRODUCTION WITH APPLICATIONS TO THE LAW OF TORTS 3, 4 (Mark Kuperberg & Charles Beitz eds., 1983). They state:

Since most schools of legal thought develop from a variety of sources, it is usually difficult to identify any individual writer or work as the foundation of the school. The economic approach to law is an exception to this generalization, for its origins can be pinpointed exactly: they lie in Professor Ronald H. Coase's article, "The Problem of Social Cost."

Id.

64. Kuperberg & Beitz, *supra* note 63, at 3.

65. *Id.*

66. "Efficiency," Richard Posner explains, "means exploiting economic resources in such a way that value — human satisfaction as measured by aggregate willingness to pay for goods and services — is maximized." RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 10 (3d ed. 1986). Historically, however, we have required something more of law than efficiency. Indeed, efficiency may be inconsistent with justice. As one commentator has noted: "A just economy may require a substantial reduction in output and efficiency." Bernard Saffran, *Markets and Justice: An Economic Perspective*, in *MARKETS AND JUSTICE* 313, 322 (John W. Chapman & J. Roland Pennock eds., 1989).

67. Cf. TERRY L. ANDERSON & DONALD R. LEAL, *FREE MARKET ENVIRONMENTALISM* 4-5 (1991).

hold the entitlements to society's resources.⁶⁸ The effect of law and economics on legal thought has been tremendous. Richard Posner notes: "There is an economics of accidents and accident law, of the family and family law, of property rights and property law, of finance and corporations, even of free speech and the first amendment, and so on through almost the whole law school curriculum."⁶⁹

Modern law and economics scholars have generally discounted the extent to which lawmakers should be involved in the development of the economy.⁷⁰ They tend to argue that the common law is economically efficient.⁷¹ In this respect, law and economics scholars follow the lead of Blackstone, who first suggested that lawmakers validate custom.⁷² But there is nothing neutral about the law preferring one economic interest to another.⁷³ Law reflects political power and shapes it. As such, a particular economic result is not inevitable, although neoclassical economists often present it as though it were.

68. These themes also underlie the positions adopted by many legal scholars with regard to the problems currently facing American corporations and banking institutions. See, e.g., Bernard S. Black, *Agents Watching Agents: The Institutional Promise of the Institutional Voice*, 39 UCLA L. REV. 811 (1992); Jonathan R. Macey & Elizabeth H. Garrett, *Market Discipline by Depositors: A Summary of the Theoretical and Empirical Arguments*, 5 YALE J. ON REG. 215 (1988).

69. Posner, *supra* note 27, at 767.

70. See BERNARD H. SIEGAN, *ECONOMIC LIBERTIES AND THE CONSTITUTION* 248-64 (1980).

71. See POSNER, *supra* note 66, at 21. ("The theory is that the common law is best (not perfectly) explained as a system for maximizing the wealth of society.")

72. See COMMONS, *supra* note 54, at 299. But see RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 24-33 (1990) (describing himself as closer to the "Skeptics," which include Hobbes and Bentham, than the "Legalists," which include Coke and Blackstone). Posner ultimately casts himself as a pragmatist but his pragmatism rests on the incorporation of such conservative social sciences as neoclassical economics into legal analyses. *Id.* at 454-69.

The present loyalty of many modern law and economics scholars to Blackstone-like conservatism, however, is not consistent with the historically progressive nature of American social engineering. Although Blackstone was influential in the development of early American law, it was the creation of state legislation and American equity law that made American law unique. MARY R. BEARD, *WOMEN AS FORCE IN HISTORY* 122-44 (1946).

73. As John R. Commons noted in *Legal Foundations to Capitalism*: "Customs are, indeed, the raw material out of which justice is construed. But customs differ, customs change, customs are good and bad, and customs conflict. . . . Somebody must choose which customs to authorize and which to condemn or let alone." COMMONS, *supra* note 54, at 299-300. Commons identified the persons who chose from among the customs as "the lawgivers." *Id.* at 300.

B. *Comparable Worth and the Legal Economy*

During the 1980s, feminists pushed hard for comparable worth programs. Their efforts were often met with biting criticism. According to one commentator, comparable worth was "the feminist road to socialism."⁷⁴ Clarence Pendleton, Reagan's chairman of the United States Civil Rights Commission, described comparable worth as "the looniest idea since loony tunes."⁷⁵ Others were more circumspect. Legal scholar Paul Weiler concluded that the rewards of comparable worth were tenuous, and proposed instead that employers should be "pressured" rather than required by law to institute comparable worth reforms.⁷⁶

Yet these commentators missed the point of the comparable worth movement. Comparable worth reforms have considerable significance as a feminist resistance to the continued marginalization of women in American economic life. Instead, economists, legal scholars, and commentators restricted the meaning of comparable worth to the merits of its economics. For them, comparable worth was incompatible with the status quo, and therefore, was suspect. The real import of comparable worth, however, was that women were attempting to redefine the economic parameters of society. Comparable worth challenged the existing economic order and instituted new principles for its explanation.⁷⁷

1. The Status Quo

Women have always worked and they have generally been paid less than men.⁷⁸ Statistical studies show that in 1987, women earned sixty-five percent of what men earned.⁷⁹ The pay disparity between men and women challenged the economists of the early twentieth century, resulting in curious explanations.

74. Michael Levin, *Comparable Worth: The Feminist Road to Socialism*, COMMENTARY, Sept. 1984, at 13.

75. MARK ALDRICH & ROBERT BUCHELE, *THE ECONOMICS OF COMPARABLE WORTH* 54 (1984).

76. See Paul Weiler, *The Wages of Sex: The Uses and Limits of Comparable Worth*, 99 HARV. L. REV. 1728, 1806 (1986). But see Laurie Schrage, *Should There Be a Legally Enforceable Right to Comparable Worth? A Reply to Paul Weiler's "No,"* 10 FRONTIERS, Number 2, 1988, at 45.

77. This is consistent with Commons's observation that: "The widening of the suffrage introduced additional participants in formulating the collective will." COMMONS, *supra* note 54, at 325.

78. See, e.g., *infra* notes 80-82 and accompanying text.

79. NATIONAL COMMITTEE ON PAY EQUITY, BRIEFING PAPER NUMBER 1: THE WAGE GAP 1 (1989).

One economist speculated that the wage differential resulted from employers paying men a premium to swear at them.⁸⁰ Another thought men were paid more because of their obligation to support their families.⁸¹ Indeed, these explanations for the wage disparity rested upon cultural assumptions about appropriate male and female roles and were reinforced by the segregation of women into jobs where they did not compete with men.⁸²

The premise that women are paid *unfairly* because they are paid less than men contradicts neoclassical economic theory. According to neoclassical economists, workers are paid a wage that reflects the marginal productivity of their labor.⁸³ The market awards high wages to more productive workers and lower wages to less productive workers. Accordingly, if women are paid less than men, they must be less productive. Otherwise, women could demand and receive higher wages from their employers. This vision of the relationship between workers and wages denies that a workers' productivity may be determined independently of the invisible hand.⁸⁴

Neoclassical economists have developed several theories to explain why the invisible hand allocates earnings so inequitably. Nobel laureate Gary Becker suggested that employers have a taste for discrimination and, as a consequence, are willing to pay a premium to hire more desirable male workers rather than em-

80. A.C. Pigou mused: "The principal allowances are, first, a small extra for men, because, since, at need, they can be put on night-work and can be sworn at more comfortably, it is rather more convenient to employ them . . ." A.C. PIGOU, *THE ECONOMICS OF WELFARE* 567 (4th ed. 1932).

81. F.Y. Edgeworth, *Equal Pay to Men and Women for Equal Work*, 32 *ECON. J.* 431, 431-57 (1922).

82. See, e.g., PIGOU, *supra* note 80, at 567 n.1 (discussing gender segmentation of the labor market).

83. See WALTER NICHOLSON, *MICROECONOMIC THEORY* 492 (3d ed. 1985) ("A firm should hire any input up to the point at which the value of its marginal product is equal to its cost."); see also *THE MIT DICTIONARY OF MODERN ECONOMICS*, *supra* note 3, at 260-61. *The MIT Dictionary of Modern Economics* states:

[A]n employer who seeks to maximize his profits will be guided by the law of diminishing marginal productivity whereby successive units of LABOUR hired successively diminishing returns to OUTPUT. At a given level of wages the entrepreneurs will continue to hire labour until the contribution of the last unit employed is equal to the wage paid.

Id.

84. The value of work, thus, is always determined by the supply and demand of workers and other factors of production and the supply and demand of the employer's product. NICHOLSON, *supra* note 83, at 656-64.

ploy women.⁸⁵ This is inconsistent with other neoclassical tenets, however, since in a free market, employers that did not discriminate would soon drive the discriminating employers out of business since the nondiscriminating employer would have lower costs. Another neoclassical explanation for women's lower earnings is the monopsonistic theory that men collude against women to prevent women from competing for desirable male jobs.⁸⁶ Yet it seems unlikely that men would find it in their interest, presuming, of course, a rational neoclassical profit-maximizing man, to discriminate against women, let alone that such complete collusive behavior would be possible to coordinate. The human capital theory argues that women are paid less because women make smaller investments in their human capital and, thus, are really less productive. Finally, the statistical discrimination model suggests that employers make gross and inaccurate generalizations about how effective women are relative to men in their hiring and promotion decisions.⁸⁷

As can be seen, all of these theories are either at odds with neoclassical economic theory (the taste for discrimination and statistical discrimination models) or at odds with the actual experience of women in the labor market (the human capital and monopsony models). More important, these economic theories suggest that there is little that law can do to remedy the problem of male and female wage differentials, since to do so would interfere with the market's optimizing of economic inputs. Thus, influenced by the dominant ideology, the law has been slow to address the problems of gendered wage disparity and occupational sex discrimination.⁸⁸

85. See Charles C. Fischer, *Towards a More Complete Understanding of Occupational Sex Discrimination*, 21 J. ECON. ISSUES 113, 119 (1987).

86. See *id.* at 114-16.

87. See *id.* at 117-19.

88. By contrast, when women receive lower pay than men for the same work, the law has been slightly more responsive. This has been due to labor union pressure. Since the nineteenth century, labor unions have agitated for equal pay for equal work, often to protect their male employees. In 1868, the National Labor Union announced its support for equal pay for equal work and the Knights of Labor joined them ten years later. ALDRICH & BUCHELE, *supra* note 75, at 8. The Progressive social reformers of the late nineteenth century also adopted the equal pay agenda as a means to improve the status of women workers. *Id.* Although several equal pay acts were passed during World War II, it was not until 1963 that the comprehensive Federal Equal Pay Act was adopted. *Id.* at 29.

2. Comparable Worth

After the passage of the Equal Pay Act of 1963⁸⁹ and the passage of Title VII of the Civil Rights Act of 1964,⁹⁰ feminists began to focus on the problems of wage discrimination in segregated labor markets. Although employers could no longer legally discriminate against women in their hiring and compensation decisions, many women had already established careers in lower-paying female occupations. Moreover, many women preferred these traditionally sex-segregated jobs.⁹¹ Linda Blum described this problem:

[J]ob integration, even if it were to occur on a larger scale, might not lead to improved conditions for many women workers at this time. . . . For some women, to change occupations might require the sacrifice of job satisfaction Better pay for a stable, satisfying, long-accepted type of work may be a wiser strategy for many women workers than a direct attack on the gendered occupational structure.⁹²

Congress had considered instituting comparable worth policy in the Equal Pay Act of 1963 but ultimately decided against it.⁹³ Nevertheless, by the late 1970s and 1980s, comparable worth had become one of the major women's issues.⁹⁴ Women campaigned for the adoption of comparable worth by the public sector and educated the public about its merits.⁹⁵ These efforts were, in part, successful as states such as Minnesota and Washington began to implement comparable worth programs.⁹⁶

89. 29 U.S.C. § 206(d) (1988). The Equal Pay Act mandates that: "No employer . . . shall discriminate . . . between employees on the basis of sex by paying wages to employees . . . at a rate less than the rate at which he pays wages to employees of the opposite sex . . ." *Id.*

90. 42 U.S.C. § 2000e (1988). Title VII provides: "It shall be an unlawful employment practice . . . to fail or refuse to hire or to discharge any individual . . . because of such individual's race, color, religion, sex, or national origin . . ." 42 U.S.C. § 2000e-2 (1988).

91. See Linda M. Blum, *Possibilities and Limits of the Comparable Worth Movement*, 1 GENDER & SOC'Y 380, 389-91 (1987).

92. *Id.* at 389.

93. ALDRICH & BUCHELE, *supra* note 75, at 29-30.

94. Eleanor Holmes Norton, President Carter's Chair of the Equal Employment Opportunity Commission, described comparable worth as "the civil rights issue of the eighties." Heidi I. Hartmann et al., *An Agenda for Basic Research on Comparable Worth*, in COMPARABLE WORTH: NEW DIRECTIONS FOR RESEARCH 3, 3 (Heidi Hartmann ed., 1985).

95. Peggy Kahn, *Introduction: Equal Pay for Work of Equal Value in Britain and the USA*, in EQUAL WORK/COMPARABLE WORTH IN THE UK AND THE USA 1, 1 (Peggy Kahn & Elizabeth Meehan eds., 1992).

96. Often such implementation was under court order. See UNITED STATES GENERAL ACCOUNTING OFFICE, PAY EQUITY: WASHINGTON STATE'S EFFORTS TO

Comparable worth programs are based on the premise that certain occupations are undervalued because they are performed chiefly by women — hence, the name “pink-collar ghetto.” Such jobs require the same level of skills and responsibility that higher-paid male occupations require. Thus, comparable worth attempts to realign women’s wages with those of men so that women will no longer suffer the pecuniary effects of sex discrimination.

Comparable worth theorists offer a simple solution. Objective job evaluation systems allow comparisons among jobs inside and outside the pink-collar ghetto. Jobs are evaluated through the consideration of several factors: (1) the knowledge and skills required; (2) the mental demands made; (3) the level of responsibility; and (4) the working conditions of the job.⁹⁷ If a discrepancy exists between the wages paid for male and female occupations that share the same characteristics, women’s wages will be adjusted upward to correct for the gender bias.⁹⁸ In this way, comparable worth attempts to realign women’s wages with those of men.

3. Criticism of Comparable Worth

Comparable worth has elicited much criticism from economists and legal scholars.⁹⁹ In response to such attacks, many proponents of comparable worth try to minimize the extent to which comparable worth conflicts with neoclassical economic principles. Arguing that comparable worth was simply a way to align women’s wages with those of men, economist Barbara Bergmann stated:

In the future, after sex (and race) discrimination have been eliminated, the pattern of occupational wages will be determined in a market that is more free and competitive. The wage structure that then results from the interplay of supply and demand will surely look very different from the existing one, because the supply of and the demand for labor in each

ADDRESS COMPARABLE WORTH (1992); Elissa McBride, *The Minnesota Pay Equity Bills: Increasing Wages for Women Workers*, 10 FRONTIERS, Number 2, 1988, at 31. As of 1984, approximately 24 states had some form of law relating to comparable worth but many of these were only an affirmation of the Equal Pay Act. ALDRICH & BUCHELE, *supra* note 75, at 46.

97. See ALDRICH & BUCHELE, *supra* note 75, at 53.

98. The actual measuring of jobs is much more complicated. For a discussion as to how jobs are evaluated, see *id.* at 46.

99. See *infra* notes 110–16 and accompanying text.

occupation will no longer be affected by discrimination as they now are.¹⁰⁰

However, great skepticism has remained as to whether comparable worth is compatible with existing economic theory. Daphne Greenwood observed: "[T]he comparable worth issue is a fundamental one for economists and the modern U.S. economic system, striking as it does at the heart of value theory and 'naturally' efficient and optimal market outcomes."¹⁰¹

The relationship between neoclassical economic theory and comparable worth programs is complicated by the fact that they do not lend themselves easily to comparison. Neoclassical economic theory is theory. Comparable worth, and the wage discrimination it seeks to rectify, is practice. Catharine MacKinnon has pointed out how theory often fails practice. She states:

It is common to say that something is good in theory but not in practice. I always want to say, then it is not such a good theory, is it? To be good in theory but not in practice posits a relation between theory and practice that places theory prior to practice, both methodologically and normatively, as if theory is a terrain unto itself. The conventional image of the relation between the two is first theory, then practice.¹⁰²

Further, while neoclassical economic theory operates conventionally,¹⁰³ feminism is not conventional. "Feminism," MacKinnon observes, "was a practice long before it was a theory. On its real level, the women's movement — where women move against their determinants as women — remains more practice than theory."¹⁰⁴

Given the difficulties in comparing neoclassical economics and comparable worth, traditional attacks on comparable worth have fallen into three broad categories: (1) the belief that a job

100. Barbara Bergmann, *The Economic Case for Comparable Worth*, in *COMPARABLE WORTH: NEW DIRECTIONS FOR RESEARCH*, *supra* note 94, at 71, 72.

101. Daphne Greenwood, *The Institutional Inadequacy of the Market in Determining Comparable Worth's Implications for Value Theory*, 18 *J. ECON. ISSUES* 457, 458 (1984).

102. Catharine A. MacKinnon, *From Practice to Theory, or What is a White Woman Anyway?*, 4 *YALE J.L. & FEMINISM* 13, 13 (1991).

103. For an extreme example of how the principles of neoclassical economic theory may be used to rationalize certain practices, see David N. Laband & Christopher N. Taylor, *The Impact of Bad Writing in Economics*, 30 *ECON. INQUIRY* 673 (1992) (finding that the notoriously poor writing style of economists is economically efficient). For an amusing reply to Laband and Taylor's article, see Donald N. McCloskey, *Writing as a Responsibility of Science: A Reply to Laband and Taylor*, 30 *ECON. INQUIRY* 689 (1992).

104. MacKinnon, *supra* note 102, at 14.

evaluation scheme will not value jobs better than market forces; (2) the belief that increasing women's wages will have detrimental repercussions on the labor market; and (3) the belief that comparable worth (as a form of wage control) will allow the government to intervene too extensively in the labor market.¹⁰⁵ These three criticisms are interrelated and, on different levels, address the role of the market in a liberal capitalist society.¹⁰⁶ Accordingly, this Article proceeds by addressing all three.

Neoclassical economics posits that the fairest measure of comparable worth is that set by the market.¹⁰⁷ Richard Posner commented on comparable worth:

[A] competitive labor market will achieve comparable worth; for that is the equilibrium condition of such a market. If a particular job classification happens to be overpaid relative to skill, responsibility and other considerations that determine the value and cost of workers' time, workers will flow into the classification, reducing the wage until the excess demand is eliminated. And if the job classification happens to be underpaid, workers will leave for better jobs, causing the wage to rise.¹⁰⁸

The neoclassical economist distrusts a wage arrived at through a job evaluation system mandated by law. Government involvement in the market, being unnecessary, is necessarily disruptive since it imposes additional costs on employers, which lead to further market distortions. Moreover, job evaluation systems cannot capture all the relative determinants of a job; such systems may be arbitrary, or they might fail to reflect adequately the demand for labor.¹⁰⁹

In the neoclassical economic world view, interference with the invisible hand of the market, as exemplified by comparable worth, leads to a plethora of economic problems. If women's

105. Comparable worth has also been criticized for its social ramifications. One charge is that comparable worth retains and reinforces a hierarchical segmentation of labor. See Johanna Brenner, *Feminist Political Discourses: Radical Versus Liberal Approaches to the Feminization of Poverty and Comparable Worth*, 1 GENDER & SOC'Y 447 (1987). Another charge is that comparable worth will encourage women to stay in traditional occupations. See *The Comparable Worth Controversy: An Interview with Heidi Hartmann and June O'Neill*, NEW PERSPECTIVES, Spring 1985, at 28, 30 (statement of June O'Neill).

106. For an observation on how comparable worth conflicts with neoclassical economics, see Greenwood, *supra* note 101, at 458.

107. See *supra* notes 61-62 and accompanying text.

108. Richard A. Posner, *An Economic Analysis of Sex Discrimination Laws*, 56 U. CHI. L. REV. 1311, 1330 (1989).

109. See ALDRICH & BUCHELE, *supra* note 75, at 54-56.

wages are raised above the "market" level, women's employment will decrease. As Paul Weiler observed: "Overall, though, the 'Catch-22' of implementing comparable worth is that it is likely to dampen employment prospects (especially for women) in precisely those firms where a tangible improvement in the relative wage rates for female jobs occurs."¹¹⁰ Thus, women harm their own interests by trying to implement comparable worth.¹¹¹ Similarly, neoclassical economists argue that increasing women's wages in certain occupations may cause women (and men) to move into these occupations, thus creating labor shortages in the abandoned occupations and surpluses in the revalued occupations.¹¹² In addition, an increase in women's wages could lead to inflation.¹¹³

Finally, some commentators criticize comparable worth for inviting the government to take control of the labor market.¹¹⁴ As one commentator observed: "The only alternative to the market is systematic state control. Comparable worth can be implemented only by endless government intervention."¹¹⁵ Not only will government be inefficient and inept if required to manage the labor market, but, by the process of managing the labor market, it will encroach on liberty. As Michael Levin warned, "the willingness to supplant the market price of labor or anything else means the willingness to override the liberty of exchange, association, and contract expressed by market prices. In each particular comparable-worth proposal, the question is only one of determining where freedom is to be suppressed."¹¹⁶ In conclusion, the implementation of comparable worth threatens neoclassical economic theory and its attendant vision of the liberal state.

110. Weiler, *supra* note 76, at 1776.

111. Such an argument is a typical example of the "reactionary rhetoric" that conservatives use to argue that efforts to assist subordinated groups will only worsen the position of those groups. See Albert O. Hirschman, *Reactionary Rhetoric*, ATLANTIC, May 1989, at 63.

112. See ALDRICH & BUCHELE, *supra* note 75, at 55; see also Bergmann, *supra* note 100, at 72 (suggesting that such movement would be beneficial as it could have an integrating effect on the labor market). It is interesting to note that acute labor shortages in the traditional female occupation of nursing have not forced the market to revalue nurses' wages but have instead resulted in legislation allowing for the special admission of foreign nurses into the United States. See 8 U.S.C. § 1182(m)(1)(B) (Supp. III 1991) (providing special H-1A visas to foreign nurses).

113. STEVEN L. WILLBORN, A COMPARABLE WORTH PRIMER 30 (1986).

114. See ALDRICH & BUCHELE, *supra* note 75, at 46.

115. Levin, *supra* note 74, at 18.

116. *Id.* at 16.

III. FEMINIST LAW AND ECONOMIC THEORY

This section explores the assumptions underlying comparable worth programs to identify a feminist approach to law and economic theory. As discussed earlier in this Article,¹¹⁷ feminist practical reasoning, by privileging the experiences of women, is a powerful tool for creating new knowledge and motivating feminist action. Using feminist practical reasoning, women can rely on the validity of their personal experience to challenge the existing male-dominated power structure. Comparable worth exemplifies such a challenge.

The juxtaposition of comparable worth programs with the tenets of neoclassical economic theory reveal a coherent and feminist approach to law and economic theory, inspired by the experiences of women. For example, comparable worth programs emphasize that wages should be equal for jobs that have the same characteristics. In contrast, neoclassical economic theory suggests that since wages reflect the marginal productivity of workers, workers with the same wage must have the same marginal productivity. Thus, neoclassical economic theory focuses attention on the merits of individual workers to explore how wages are set, while comparable worth programs look at how jobs are categorized.

Because job categories determine wages, comparable worth programs ascribe less volition to workers than does neoclassical economic theory. Since comparable worth recognizes that the institutional nature of job categories limits the job choices of women, comparable worth programs assume that a worker can be exploited although she "freely" entered the labor contract. Accordingly, comparable worth recommends state action to adjust the labor market. As Jeanne Gregory observed: "[C]ampaigns around equal value and comparable worth have from the outset been very much concerned with legal concepts and the legal process."¹¹⁸ By comparison, neoclassical economic theory downplays the role of law in structuring the economy, viewing the construction of law as an effort by judges to promote economic efficiency.¹¹⁹

117. See *supra* notes 35–48 and accompanying text.

118. Jeanne Gregory, *Equal Value/Comparable Worth: National Statute and Case Law in Britain and the USA*, in *EQUAL VALUE/COMPARABLE WORTH IN THE UK AND THE USA*, *supra* note 95, at 33.

119. See Kuperberg & Beitz, *supra* note 63, at 4.

The assumptions underlying comparable worth may be stated more broadly: comparable worth programs posit that the free market does not always work correctly and, consequently, government intervention is necessary at times. This assumption is roughly the inverse of neoclassical economic thought, which posits that free markets work and government interference with such markets entails costs to society. Comparable worth programs do not assume a command economy, however, but selectively adjust the market when the market fails to compensate women adequately for their labor.¹²⁰

The assumptions underlying comparable worth programs contain the seeds of a coherent feminist law and economic theory. Instructed by feminist practical reasoning and feminist narrative, feminist law and economic theory seeks to rectify economic inequities by looking at the context of economic decisions.¹²¹ Feminist law and economic theory, like comparable worth, recognizes that the pursuit of self-interest often results in the subjugation of women. Taking the historical discrimination against women in the labor market as a starting point, feminist law and economic theory does not assume that free markets produce the best solutions.¹²² Therefore, a feminist approach to law and economic theory, like comparable worth, looks to state power to address market inequities.

Where neoclassical economic theory takes the individual as the fundamental economic unit, the feminist vision of law and economic theory, reflected in the practice of comparable worth, views institutions such as job categories as the primary economic units. Where neoclassical economic theory measures the health

120. Of course, the fact that women are paid only 65% of what men are paid suggests that, in this respect, the economy is working very poorly. See *supra* note 79 and accompanying text.

121. Thus, the fact that women have historically been treated differently from men cannot be abstracted from current wage disparities.

122. In its skepticism as to the merits of markets, feminist law and economics resembles institutional economics thought. As Janice Peterson observed:

[M]arkets are socially constructed, defined for and by a particular set of rules, laws, and socially acceptable behaviors. There is no one market outcome, but a variety of possible outcomes associated with different institutional frameworks. Different market outcomes reflect different distributions of power. To argue that the existing outcome is the socially optimal one implies acceptance of the status quo distribution. It legitimizes a highly unequal distribution of power in the name of market efficiency.

Janice Peterson, *The Challenge of Comparable Worth: An Institutional View*, 24 J. ECON. ISSUES 605, 609 (1990).

of the national economy by the aggregation of gross national wealth, feminist law and economic theory emphasizes that economic health is tied to the distribution of individual wealth. Finally, neoclassical economic theory encourages massive overall economic growth. In contrast, feminist law and economic theory, as articulated by the comparable worth programs, promotes a stable economy, capable of providing decent wages to a greater number of people.

Thus, based on the experiences of women as validated by feminist practical reasoning, this feminist law and economic narrative meets William Waller and Ann Jennings' criteria that: "[A] truly feminist economics, as opposed to economics done by feminists or economics about women, will necessarily be the result of feminist explorations in epistemology and methodology."¹²³ The merit of a feminist law and economic theory is that it provides a model different from that of the predominant neoclassical economic theory with which to consider economic problems.

IV. DEINDUSTRIALIZATION: THE SHRINKING LABOR MARKET OF POST-INDUSTRIAL AMERICA

Over the past two decades, dramatic changes have been occurring in the American labor market. The most pronounced of these changes has been the loss of hundreds of thousands of manufacturing jobs. This section explores how feminist law and economic theory could instruct public policy to address the issue of massive job loss.

123. William Waller & Ann Jennings, *On the Possibility of a Feminist Economics: The Convergence of Institutional and Feminist Methodology*, 24 J. ECON. ISSUES 613, 613 (1990). In many respects, the insights of feminism are similar to those of institutional economics, which locates institutions as the fundamental unit of economic analysis. See Jon D. Wisman & Joseph Rozansky, *The Methodology of Institutionalism Revisited*, 25 J. ECON. ISSUES 709, 714 (1991). Institutional economics views the family, government, and markets as socially-constructed institutions. As William Waller and Ann Jennings have noted: "[I]nstitutionalism and feminism share non-cartesian epistemological roots that lead to a recognition of knowledge as socially constructed." Waller & Jennings, *supra*, at 614. Moreover, institutional economics has a long history of questioning the role of women in the economy. See, e.g., THORSTEIN VEBLÉN, *THE THEORY OF THE LEISURE CLASS* 80-85 (Random House 1934) (1899) (discussing the role of the housewife in a consumer culture).

A. *The Problem of Deindustrialization*

This Article defines deindustrialization as the large-scale loss of jobs, initially in the manufacturing sector, which historically has paid high wages and provided good benefits.¹²⁴ During the past thirty years, the proportion of Americans employed in the manufacturing sector has decreased considerably. In 1960, there were 20.4 million workers in the manufacturing sector of the American economy as compared to 33.8 million workers in the lower-paying service sector.¹²⁵ By 1984, the number of workers in the service sector had doubled to 66.7 million, but the number of manufacturing workers had stayed relatively constant at 23.4 million.¹²⁶ As the decade progressed, jobs in the manufacturing sector became increasingly scarce. Companies such as General Motors and IBM laid off tens of thousands of workers.¹²⁷ The loss of manufacturing jobs resulted, in part, from the low rate of productivity growth in the United States¹²⁸ and the relocation of American manufacturing plants to countries with lower labor costs such as Mexico.¹²⁹ Moreover, by the early 1990s, white collar workers were becoming increasingly affected by the bad economy. During the recessions of the 1980s, the number of white collar workers who lost their jobs between 1987 and 1991 was fifty percent higher than the number who lost their jobs between 1979 and 1983.¹³⁰

The loss of these jobs has had major cultural repercussions. Workers used to high-paying jobs with good benefits have been forced to join the contingent work force, hired for temporary and part-time jobs.¹³¹ In addition, the contingent labor market rarely

124. John Miller, *Silent Depression: Economic Growth and Prosperity Part Company*, DOLLARS & SENSE, Apr. 1992, at 6, 8.

125. William S. Brown, *Institutional Structure and Deindustrialization*, 22 J. ECON. ISSUES 589, 589 (1988).

126. *Id.*

127. Miller, *supra* note 124, at 8.

128. *Id.* at 87. *But see* Harry Bernstein, *Pay of U.S. Workers Doesn't Match Output*, L.A. TIMES, Apr. 27, 1993, at A5 (suggesting that among nations productivity does not correlate with compensation).

129. *See* Baker et al., *supra* note 6, at 87 (observing that American auto makers were manufacturing their cars in Mexico by the late 1980s).

130. *See* Lawrence Hishel & Jared Bernstein, *Job Destruction: Worse Than We Thought*, CHALLENGE, Sept.-Oct. 1992, at 4, 6. These two periods correlate roughly with the recessions of the early and late 1980s.

131. Between 1980 and 1987, the contingent work force doubled and real wages, calculated in constant 1977 dollars, declined from \$191.41 per week in 1972 to \$171.07 in 1986. *See* KEVIN PHILLIPS, *THE POLITICS OF RICH AND POOR* 18, 21 (1989).

provides benefits.¹³² As Kevin Phillips noted, “[t]he high-paying jobs lost in Hibbing or River Rouge had been more than just employment; they had been cultural and economic ladders to middle-class status for millions of families all across industrial America.”¹³³

The economic disruption of deindustrialization has permeated almost every aspect of American life. Financial pressures undermine marital stability.¹³⁴ Workers, especially single parents, find that the new service sector jobs offer little in the way of pecuniary compensation or compatibility with a healthy family life. A March 1993 article in the *Los Angeles Times* described the life of Kim Barger, a service sector worker from Canton, Ohio:

Divorced from a husband who has left the state and stopped paying child support, Barger must support all three kids on a wage of \$5 an hour. She receives no health benefits.

Even though it means she won’t get to see her kids at all, she’s looking “desperately” for a second job to make ends meet — a tough assignment because her hours at Taco Bell vary.¹³⁵

Kim Barger’s experiences are not atypical in an America characterized by declining job prospects. A March 1993 article that appeared in *Fortune* related Shirley Martin’s story:

Shirley Martin, 52, of Maryville, Tennessee, had been working at a Levi Strauss plant for 11 years when her shop was shut down. “They said that workers’ comp was costing too much, and that’s why they closed the plant,” she says. “In reality, they moved our work overseas.” Martin found a job in a smaller sewing factory after about two years, but her pay dropped from \$8 an hour to \$4.25. She was recently laid off from that job as well.¹³⁶

The aggregation of hundreds of thousands of stories of individual distress has meant a rise not only in the number of people living in poverty, but also of those living on the cusp of pov-

132. See Peter T. Kilborn, *New Jobs Lack the Old Security in Time of “Disposable Workers,”* N.Y. TIMES, Mar. 15, 1993, at A1.

133. PHILLIPS, *supra* note 131, at 19.

134. William M. Dugger, *The Last Gasp of Liberal Capitalism in America*, 20 J. ECON. ISSUES 325, 328 (1986) (“Grinding poverty is pulling apart the working-class family, leaving abandoned women trying as best they can to raise their children.”).

135. Michael Ross, *“It’s Hard To Be A Philanthropist If You’re Struggling To Feed Your Own Kids,” Says Mayor of Troubled Steel Town,* L.A. TIMES, Mar. 30, 1993, at H1, H5.

136. Labich, *supra* note 8, at 40, 48.

erty.¹³⁷ Moreover, the hope that ending occupational sex discrimination would allow women access to better jobs, better wages, and better living conditions has, to a large extent, not been realized. As more people — white men, women, and minorities — compete for jobs in a shrinking job market, tensions between groups invariably rise. That the failure to find a good job is largely treated as an individual failing rather than as an economic phenomenon further augments the social problems — discrimination, the ghettoization of large segments of the population, and social unrest — that America faces today.

Feminists have particular reasons to be concerned about the social and economic effects of deindustrialization. Since women are on the bottom of the economic ladder, they have borne the brunt of the declining job prospects. Audrey Rowe reports that: “[A]bout half of female-headed households have incomes that are less than 50% of the poverty level”¹³⁸ Yet these aspects of the American experience — economic insecurity and social dislocation — tend to be blithely ignored. “[F]ar from sinking into decline,” wrote Robert L. Bartley, editor of the *Wall Street Journal*, “America is now at the center of one of the great, exciting moments in mankind’s economic history.”¹³⁹

B. *Feminist Law and Economic Theory: A Tax Recommendation*

Traditional neoclassical economic analysis does not provide a solution to deindustrialization. Just as neoclassical economic theory does not promote the eradication of wage discrimination because profit-maximizing behavior does not encompass paying women more if they will work for less, deindustrialization may be entirely consistent with neoclassical economic theory. If the objective of business is to maximize profits, and profit maximization is more readily achieved in countries with lower labor costs, deindustrialization is not only rational but also laudable under a neoclassical economic regime. If individual self-interest is the model for what law should promote, it is not surprising that law

137. See Ann Mariano, *Nation's Poor Sink Deeper in Poverty*, WASH. POST, June 26, 1993, at F1 (“Americans living in poverty are poorer th[an] they were 20 years ago and their numbers have increased . . .”).

138. Audrey Rowe, *The Feminization of Poverty: An Issue for the 90's*, 4 YALE J.L. & FEMINISM 73, 76 (1991) (citing DIANA M. PEARCE, WOMEN & POVERTY PROJECT, *THE FEMINIZATION OF POVERTY: A SECOND LOOK* 9, 14 (1989)).

139. Robert L. Bartley, *Is America on the Way Down? No*, COMMENTARY, Mar. 1992, at 15, 25.

advances deindustrialization by validating and encouraging the very self-interest that leads companies to relocate in foreign countries. If market results are unquestionably the best results, there is no temptation to consider alternative policy scenarios. As such, neoclassical economic theory does not provide solutions to the deindustrialization of America. Instead, the construction and agendas of neoclassical economic theory may serve to promote the deindustrialization of America.

But such a pessimistic appraisal of neoclassical economic theory cannot occur in a vacuum. If neoclassical economic theory is the only model, it cannot be challenged because it is the only reality known. We may not even be able to see its weaknesses. Instead, we believe that neoclassical economic theory captures objective reality.¹⁴⁰ But such a vision of and a faith in neoclassical economic theory is inconsistent with the insight of feminist postmodernism: There is no one truth or ultimate explanation.¹⁴¹ As Mary Hawkesworth has stated: “[T]he argument that knowledge is the result of invention, the imposition of form on the world rather than the result of discovery, undermines any belief that the Order of Being could be known even if it exists.”¹⁴² Thus, we should be alert to the potential for flexibility in thought to resolve crucial social problems, recognizing that in a postmodern world, there is not a single answer, but many solutions. Feminist law and economic theory, informed by the practical experiences of occupational sex discrimination and comparable worth programs, starts with assumptions and agendas different from those of neoclassical economic theory. Accordingly, it offers a different analysis of deindustrialization and, consequently, different policy prescriptions.

By employing the feminist practical reasoning and feminist narrative methods of focussing on concrete personal experiences, a feminist law and economics analysis takes the plight of Kim Barger and Shirley Martin seriously. Supporting three children

140. Thus, we have the argument that neoclassical economics is positive economics because it is verifiable. See THE MIT DICTIONARY OF MODERN ECONOMICS, *supra* note 3, at 332–33 (defining positive economics). But see Karl Polanyi, *Our Obsolete Market Mentality*, 3 COMMENTARY 109, 115 (1947) (observing that with regard to the market ideology, “[i]t was almost impossible to avoid the erroneous conclusion that as ‘economic’ man was ‘real’ man, so the economic system was ‘really’ society.”).

141. Hawkesworth, *supra* note 37, at 330 (“‘feminist postmodernism’ rejects the very possibility of a truth about reality.”).

142. *Id.*

on five dollars an hour or being laid off at the age of fifty-two is not market realignment; it is something much uglier. Through the stories of real people, we can understand the human costs of the economic dislocation caused by the deindustrialization of America. Feminist law and economic theory does not reduce the experiences of women like Barger and Martin to mere data points in a statistical analysis of labor market trends, nor are such experiences disavowed for failing to comport with abstract conceptions of how the labor market functions under the invisible hand.

Because feminist practical reasoning and feminist narrative privilege the perspectives of the subordinated, feminist law and economic theory scrutinizes public policy problems from the viewpoints of groups historically excluded from economic policymaking. Thus, workers rather than management or shareholders are the focus of feminist inquiry into the problem of deindustrialization. From the viewpoint of workers, deindustrialization has been a disaster, involving the large-scale loss of jobs and the death of communities. Comparable new jobs have not replaced those lost. Instead, workers have been relegated to low-paying temporary or part-time jobs with no benefits and little long-term security.

Since the "free" market does not protect the interests of subordinated groups, state action must correct this market malfunction. To determine what type of state action will be most useful, feminist law and economic theory scrutinizes the context of deindustrialization. Deindustrialization occurs in a context in which it is cheaper to produce goods in foreign countries with lower labor costs than it is to produce those same goods in the United States. Deindustrialization also occurs, in practical effect, when employers substitute machines for people. Thus, in certain forms, the pursuit of self-interest by corporate management and shareholders injures workers.

While this Article does not attempt to create a comprehensive remedy to deindustrialization, one solution, informed by feminist law and economic theory, would be as follows: The federal government should reduce a corporation's income tax in relation to the number of persons the corporation employs and the type of compensation they receive. Thus, corporations that build or maintain large manufacturing plants in the United States, employing large numbers of workers at reasonable rates of compensation, would pay lower taxes. By contrast, the federal

government could impose higher tariffs on corporations that relocate to other countries, thus reducing the wage differential between the United States and the foreign country. Money raised from such a tax and tariff system could be used to provide for dislocated workers, perhaps in employing them in public works. Thus, multinationals that located their manufacturing enterprises in low-wage countries would contribute to the American commonweal in exchange for participating in the American market.

Obviously, such a plan would be unpopular among corporate management and shareholders since either the labor costs of manufacturing would rise, or the tax burden on manufacturers would rise. The proponents of the neoclassical economic agenda would probably complain that a program linking jobs to taxes would raise the costs of doing business and thereby make the affected businesses uncompetitive. Such criticism, however, does not account for other and more important agendas. The passage of the Equal Pay Act of 1964 raised the costs of doing business but the nation survived and was a better place for it. Comparable worth, although unpopular with some groups, has improved the economic and social situation of women by recognizing the merit of their labor.

Adoption of a feminist law and economic theory necessarily requires rethinking traditional neoclassical economic assumptions. Some neoclassical economic assumptions do not adequately serve the interests of the vast majority of people, especially those who are less powerful. Thus, under feminist law and economic theory, the neoclassical economic obsession with encouraging profit-maximizing behavior may have to give way to the creation of viable long-term employment.

V. CONCLUSION

The present expansion of feminist thought has justly been called a Feminist Enlightenment. Feminist theory has raised new challenges to the traditional ways of thinking about what we know and how we know it. Feminist methods such as feminist practical reasoning and feminist narrative create new knowledge by valuing new insights and, as a consequence, coming to new conclusions. Feminist legal theory has looked for practical solutions to address the problems women face in society. Comparable worth constitutes one such practical solution to the problems of discriminatory wage treatment and occupational sex segrega-

tion. Comparable worth adopts the perspectives of women on unequal wage treatment and suggests a practical solution to the discriminatory treatment of women. This solution was for employers to cease discriminating against women and to raise women's wages to be comparable to men's wages in similar occupations.

Comparable worth provides a practical solution because it focuses on the real experiences of women rather than on the abstract assumptions underlying neoclassical economics. The comparable worth movement articulates an alternate and feminist approach to law and economic theory and, as such, challenges the tenets of neoclassical economic theory. Building on the insights of the comparable worth movement, feminist law and economic theory recognizes markets as problematic and emphasizes the societal significance of economic policy. Moreover, feminist law and economic theory, as articulated by the comparable worth movement, looks to state action to correct market malfunctions.

Using the insights of feminist law and economic theory, this Article examined the problem of deindustrialization. This Article demonstrated that feminist law and economic theory can be used to develop policy to counteract the economic hardship of deindustrialization, mitigating the social dislocation brought about by a shrinking job market. For example, one practical solution to deindustrialization is to make it more expensive for industries to avoid hiring American workers if they want to do business in America. Although this Article does not provide a comprehensive policy prescription for solving the economic dislocation of deindustrialization, it provides a framework and a beginning for applying a feminist law and economic analysis. Feminist law and economic theory as informed by the comparable worth movement suggests that economic dislocation is not necessarily inevitable. Instead, market forces can and should be subsumed to the social needs of the nation, such as the comparable compensation of women and men or the provision of good employment opportunities for women and men.