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Lifetime Disadvantage

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LIFETIME DISADVANTAGE,
DISCRIMINATION AND THE
GENDERED WORKFORCE

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Lifetime Disadvantage

Two trends – an ageing population and increasing income inequality – complicate the task of meeting the needs of those approaching or in retirement. Crafting effective regulatory responses, however, requires considering the causes of unequal outcomes in later life, especially the gender and other dimensions of the problem. Women workers suffer multiple disadvantages during their working lives, which result in significantly poorer outcomes in old age in comparison to men. This book sets forth our model of lifetime disadvantage, which captures the way in which gender and other factors play out in the lives of girls and women. Law and policy in the United Kingdom and United States fail to neutralise this complex, cumulative, temporally amplified gender disadvantage. We hypothesise that solutions are hampered by regulatory efforts that are disjointed and incremental. Real retirement equality requires that the vulnerability-producing conditions confronting women workers be tackled in a comprehensive and context-sensitive manner. Legal and policy paradigms geared to women’s life course are necessary.

Global Ageing and Income Inequality

As the ‘Baby Boom’ generation begins to retire, the issue of retirement security is becoming more pressing. In some countries, it is apparent that retirement security remains elusive for significant portions of the population. In the United States, for example, a government report reveals that approximately 55 per cent of those aged 55–64 have little or no retirement savings.¹ Another government report found that trends in marriage and work patterns are increasing the retirement vulnerability of women,

¹ US Government Accountability Office, *Most Households Approaching Retirement Have Low Savings* (2015), see www.gao.gov/assets/680/670153.pdf; N. Rhee and I. Boivie, *The Continuing Retirement Savings Crisis* (National Institute on Retirement Security, 2015), see www.nirsonline.org/storage/nirs/documents/RSC%202015/final_rsc_2015.pdf.

especially those never married or divorced after a marriage of less than ten years.² Indeed, older American women have a poverty rate almost twice that of older American men (11.6 per cent versus 6.8 per cent in 2013); the highest poverty rate amongst older Americans is that of Hispanic women who live alone (45.4 per cent in 2013).³ Similar gendered disadvantage is present in the European Union. In 2012, some 21.7 per cent of women, 65 years old and over, were at risk of poverty compared with 16.3 per cent of men.⁴

Two significant trends – one the product of human progress and the other a symptom of its antithesis – stand as brackets to the challenges facing societies in the twenty-first century. Both trends have gender implications. The first is the ageing of the global population. Population ageing is taking place in every region of the planet, and in countries both developed and developing. The pace is staggering. In 1950, those aged 60 or over numbered 205 million. By 2050, the number of those aged 60 or over is predicted to reach two billion persons.⁵ Whilst the trend is the result of improvements in human diet, sanitation, medical care, education, and the like, an ageing population presents considerable policy challenges to societies that aim to maintain the elderly in conditions of economic security and dignity.

The majority of the global older population is female. There are only 84 men for each 100 women aged 60 and over; there are only 61 men for each 100 women aged 80 and over. As the International Labour Organisation (ILO) explains, older women generally experience poorer outcomes in comparison to older men. They are at greater risk of poverty than their male counterparts.⁶ This is due in part to women's greater longevity. More specifically, the income she has to draw from in her later years must last the typical woman longer than the typical man. Just as important, however, is that women experience cumulative disadvantages

² US Government Accountability Office, *Trends in Marriage and Work Patterns May Increase Economic Vulnerability for Some Retirees* (2014), see <http://gao.gov/assets/670/660202.pdf>; J. L. Angel et al., 'Retirement Security for Black, Non-Hispanic White, and Mexican-Origin Women', *Journal of Women, Politics & Policy*, 35 (2014), 222–241.

³ US Administration on Aging, *A Profile of Older Americans: 2014*, see www.aoa.acl.gov/Aging_Statistics/Profile/2014/docs/2014-Profile.pdf.

⁴ European Commission, Directorate-General for Justice, *Tackling the Gender Pay Gap in the European Union* (2014), see http://ec.europa.eu/justice/gender-equality/files/gender_pay_gap/140227_gpg_brochure_web_en.pdf.

⁵ UNFPA & HelpAge International, *Ageing in the Twenty-First Century* (2012), see www.unfpa.org/sites/default/files/pub-pdf/Ageing%20report.pdf.

⁶ ILO, *Social Protection for Older Persons* (2014), see www.ilo.org/wcmsp5/groups/public/-dgreports/-dcomm/documents/publication/wcms_310211.pdf.

in their working lives. They work more frequently in low-paid, part-time, or informal economy jobs. Their work lives are more likely to be interrupted by breaks necessitated by pregnancy, childbirth, or caregiving work. They are more likely to be subject to gender-based discrimination. Women are less likely to have pensions, and those who do generally claim pensions lower in value to those of men due to women's lesser earnings.⁷

Adding to the challenges associated with an ageing population is a second trend: rising income inequality in most, though not all, regions of the globe. Income inequality is especially pronounced in the United Kingdom and the United States, although it is more dramatic in the latter. This trend is a by-product not only of increased globalisation and technological capability but also of policy decisions, beginning in the 1980s, promoting freer trade and financial deregulation; loosening or making more flexible national employment standards and protections; and shrinking the welfare state.⁸ Increasing income inequality is evident when one examines the gap between wage growth and productivity growth. As one economist notes, 'Between 1999 and 2011, average labour productivity growth outpaced average wage growth by a two-to-one ratio in 36 developed countries.'⁹ In the United States, for example, real hourly productivity since 1980 increased 85 per cent but that growth was accompanied by an increase in real hourly wages of only 35 per cent.¹⁰ Whilst employees worked harder and more efficiently, those gains did not translate into enhanced income for them. This is especially true for low- and semi-skilled workers, who experienced scant wage growth.

Income inequality in the United Kingdom is high, with a rank of sixth amongst the Organisation for Economic Cooperation and Development (OECD) countries in terms of the Gini coefficient, the standard measure for inequality. In particular, the top 10 per cent's average income in 2012 was 10.5 times that of the bottom 10 per cent. Wealth inequality is even higher, with the UK's top 10 per cent owning 47 per cent of the country's net wealth.¹¹ Income poverty is experienced by 10.5 per cent of the

⁷ ILO, *Rights, Jobs and Social Security* (2008), see www.ilo.org/wcmsp5/groups/public/@dgreports/@gender/documents/publication/wcms_098930.pdf.

⁸ J. Berg, 'Labour Market Institutions' in J. Berg (ed.), *Labour Markets, Institutions and Inequality* (Cheltenham, UK: Edward Elgar, 2015), pp. 1–35.

⁹ Ibid.

¹⁰ ILO, *Global Wage Report 2012/13*, see www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/@publ/documents/publication/wcms_194843.pdf.

¹¹ OECD, *In It Together: Why Less Inequality Benefits All ... in the United Kingdom* (2015), see www.oecd.org/unitedkingdom/OECD2015-In-It-Together-Highlights-UnitedKingdom.pdf.

population. Conditions in the United States are worse. The top 10 per cent's average income in 2013 was 19 times that of the bottom 10 per cent. Considering wealth inequality, the top 10 per cent in the United States owns 76 per cent of the net wealth. Poverty affects 18 per cent of the population, considerably above the UK rate and the OECD average, which is 11 per cent.¹²

Income inequality is related to gender disadvantage in women's retirement years in the following way: public and private pension schemes can reflect and even exacerbate gender inequality in the labour market, including wage and benefit inequality. Where such systems fail to account for gendered working patterns, women's ability to prepare for retirement through savings, the accumulation of service credit for public pensions, and eligibility for and contribution to private pensions will suffer. Additionally, the gendered working patterns themselves may require yet fail to attract targeted policy intervention to reduce societally created disadvantage.¹³ A key driver of women's lifetime disadvantage in the United Kingdom and the United States, for example, is the failure of public policy to adequately support women's roles as carers. Although men increasingly contribute to family caregiving responsibilities, women more frequently assume primary responsibility for that role.¹⁴ Women's access to the labour market, and to wages or benefits that might allow adequate preparation for retirement, is affected by the availability or lack of affordable care services for children and ill or elderly relatives.¹⁵ The decisions women make – to accept full-time employment, to opt for part-time or informal work, to withdraw from the labour market altogether – are mediated by the provision or dearth of care services. In turn, those decisions may be enormously consequential in terms of wages and access to benefits and entitlements, including private and public pensions. In short, the way in which pension and other social security systems are designed 'affects overall income inequality in

¹² OECD, *In It Together: Why Less Inequality Benefits All . . . in the United States* (2015), see www.oecd.org/unitedstates/OECD2015-In-It-Together-Highlights-UnitedStates-Embargo-21May11amParisTime.pdf.

¹³ ILO, *Global Wage Report 2014/15*, at 44, 60–61, see www.ilo.org/wcmsp5/groups/public/@dgreports/@dcomm/@publ/documents/publication/wcms_324678.pdf.

¹⁴ *Economic Report of the President*, transmitted to the Congress February 2015 together with the *Annual Report of the Council of Economic Advisors* (Washington: US Government Printing Office), see www.whitehouse.gov/sites/default/files/docs/cea_2015_erp.pdf.

¹⁵ Berg, *supra* n8 at 12.

a country as well as inequality between groups . . . namely women and men'.¹⁶

Having situated the problem of older women's poorer outcomes in later life within two significant twenty-first-century trends, we turn our attention to the central premise of this book. Specifically, policymakers must take the long view – a life course perspective – to fully understand the reasons for suboptimal outcomes for many older women. Our model of women's lifetime disadvantage is designed to facilitate that task. This model aims to illuminate the major factors stymying women workers during their lives. An effective and comprehensive regulatory framework could help compensate for these disadvantages, which cumulate over a lifetime. Using examples from the United Kingdom and the United States, however, we demonstrate that regulatory schemes produced by disjointed incrementalism are unlikely to vanquish systemic inequality resulting from gender-based lifetime disadvantage. Policymaking that fails to articulate a singular, overarching goal, and which takes small rather than grand steps, produces decisions without coordination. A preoccupation with existing resources will lack the remedial breadth and depth necessary to produce fair outcomes for working women in retirement. Recognising the limitations of statutory and policy tinkering is an important step to developing a whole life approach to women workers that will bring greater equality in old age.

The Model of Lifetime Disadvantage

How should we conceptualise issues affecting women, including their condition in retirement, when sex discrimination in employment has been prohibited in many countries for half a century? How should we account for differences amongst working and retired women based on race, ethnicity, migration status, and socio-economic status, amongst other characteristics? Finally, at a time when changes in work and the structure of the labour market affect men as well as women, does it make sense to focus only on gender disadvantage? The answer to all three questions is, 'It's complicated.' As an initial and descriptive matter, women's elevated risk of falling into poverty in retirement clearly follows gender lines, and cannot be understood apart from the gender

¹⁶ Ibid. at 24 (discussing C. Behrendt and J. Woodall, 'Pensions and Other Social Security Income Transfers' in J. Berg (ed.), *Labour Markets, Institutions and Inequality* (Cheltenham, UK: Edward Elgar, 2015), pp. 242–262.

dimension. Developing legal and policy responses to overcome this social ill requires recognising that circumstances affect girls and women over the course of their lives, creating poor results for many in their later years. It is not by chance that the poverty rate for retired women in the United States is greater than that for retired men. This is a social problem present not only in the United States but also in other countries – a problem the ILO has observed on the global level.

Gender-conscious analysis must be employed, at least for descriptive purposes, to comprehend the challenges women face in preparing for and living in retirement. Eschewing an analysis sensitive to gender would eclipse what Professor Martha Fineman refers to as women's 'gendered lives', lives that are influenced by 'material, psychological, physical, social, and cultural' experiences that may be similar to those of men and yet remain distinct.¹⁷ Understanding working women's disadvantage requires acknowledging significantly unequal outcomes for women in retirement and determining what produces them. The systemic, cumulative, and sweeping nature of this harm cannot be conceptualised apart from gender. That said, an intellectually robust descriptive analysis explaining why many women fare poorly in retirement must acknowledge and incorporate, inter alia, two significant phenomena: the changing nature of work; and differences amongst women based on a multiplicity of other important characteristics beyond gender. Mindful of this, our multi-factored model of lifetime disadvantage incorporates non-standard work, as well as multiple and intersectional discrimination, as important aspects of women's lives that must be assessed.

Regarding the first issue – the changing nature of work – the model recognises that work in the twenty-first century is organised and performed differently than it was half a century ago. Standard employment relationships are declining and non-standard forms of working seem to be proliferating.¹⁸ The changing nature of work is especially important to

¹⁷ M. A. Fineman, *The Neutered Mother, the Sexual Family, and Other Twentieth Century Tragedies* (Routledge, 1995), pp. 47–49.

¹⁸ See generally K. V. W. Stone, 'The Decline of the Standard Contract of Employment in the United States: A Socio-Regulatory Perspective' in K. V. W. Stone and H. Arthurs (eds.), *Rethinking Workplace Regulation: Beyond the Standard Contract of Employment* (New York: Russel Sage Foundation, 2013), pp. 58–77. In the United States, definitions are fuzzy and disputed but there is general agreement that those in full-time, standard employment relationships typically work for one employer, subject to implicit, indefinite term, at-will contracts, and are often, though not necessarily always, provided with benefits and amenities by their employers, including in some cases, private pensions. Although the term is inconsistently used, in general 'non-standard' work arrangements

the model since workplace statutory protections, rights, and entitlements generally hinge on there being an employment relationship between a worker and a firm.¹⁹ Hence, amongst other things, one working as a freelancer, for example, will not benefit from labour and employment laws in contrast with someone categorised as an employee. Moreover, even where an employment relationship can be established, women's tendency to occupy particular non-standard categories may place them outside the protective ambit of certain workplace laws.²⁰ This is especially the case for part-time workers, who are more likely to be female than male. In the United States, women are almost two times as likely to work part-time as men²¹ and comprise two-thirds of the part-time workforce.²² In the United Kingdom, 43 per cent of employed women work part-time and, as in the United States, women in the United Kingdom comprise two-thirds of the part-time workforce.²³

Finally, across a broad range of occupations, part-time workers, a category occupied by a large majority of women, have in some countries seen their earnings deteriorate in comparison to their full-time counterparts. By one estimate, the wage penalty for working part-time increased in the United States 'from 39 to 46 per cent' between 1979 and 2012.²⁴ In other words, American part-time workers earn a median wage 46 per cent less than that of full-time workers, and their position vis-à-vis

include part-time work, temporary work, independent contracting, leased work, and acquiring employees through professional employer organisations. P. H. Cappelli and J. R. Keller, 'A Study on the Extent and Potential Causes of Alternative Employment Arrangements', *ILR Review*, 65 (2013), 874–901.

¹⁹ T. P. Glynn, 'Taking the Employer Out of Employment Law? Accountability for Wage and Hour Violations in an Age of Enterprise Disaggregation', *Employee Rights & Employment Policy Journal*, 15 (2011), 201–235

²⁰ For example, employees who work less than 1,000 hours annually (about 20 hours per week) may be excluded from employer-provided pension plans. D. Bakst and P. Taubman, 'From the Great Depression to the Great Recession: Advancing Women's Economic Security through Tough Economic Times and Beyond', *Women's Rights Law Reporter*, 32 (2010), 25–44. Those employees who work under 1,250 hours per year (about 24 hours per week) are not covered by the Family and Medical Leave Act.

²¹ Institute for Women's Policy Research, *The Status of Women in the States 2015*.

²² US Joint Economic Committee, *The Earnings Penalty for Part-Time Work: An Obstacle to Equal Pay* (2010), see www.jec.senate.gov/public/_cache/files/00e50917-a323-49d6-8214-d961bf2f732d/equal-pay-report-final.pdf.

²³ See Chapter 5.

²⁴ A. Bernhardt, 'Labor Standards and the Reorganization of Work: Gaps in Data and Research', IRLE Working Paper #100–4, U.C. Berkeley 2014, see www.irlle.berkeley.edu/workingpapers/100-14.pdf.

full-time workers has changed for the worse. Although not entirely comparable, there is a part-time pay penalty in the United Kingdom as well.²⁵

The second aspect— multiple discrimination²⁶ — is important to the model because many women workers occupy statuses or have characteristics that complicate the way they are viewed and subject them to exclusion or disadvantage not experienced by women as a whole.²⁷ Whilst multiple discrimination is a necessary component of the model, equal employment opportunity law has proven to be a blunt tool for addressing complex discrimination. This is due to the difficulty some victims may have in identifying this form of discrimination when they are subject to it,²⁸ as well as doctrinal and evidentiary barriers to evaluating such claims, and judicial scepticism.²⁹ Thus, for descriptive purposes, multiple discrimination is important to acknowledge, and is no doubt essential to evaluating necessary policy changes. But it has proven to be a difficult concept to shoehorn into traditional employment discrimination law.

Turning to our model of lifetime disadvantage, we consider the major factors which on average create unequal outcomes for working women at the end of their careers. One set of factors falls under the heading ‘Gender-Based Factors’. This category concerns phenomena directly connected to social or psychological aspects of gender, such as gender stereotyping and women’s traditionally greater roles in family caring activities. A second set of factors is titled ‘Incremental Disadvantage Factors’. Whilst they are connected to gender, these factors are notable since they produce disadvantage incrementally over time. Factors in this second category include non-standard working (part-time work, temporary work, etc.) and career breaks.

The model is illustrated below:

²⁵ A. Manning and B. Petrongolo, ‘The Part-Time Pay Penalty for Women in Britain’, *Economic Journal*, 118 (2008), F28–F51.

²⁶ Instead of ‘intersectionality’, the model uses the European term ‘multiple discrimination’ since European scholars have described complex discrimination manifesting itself in three distinct ways. S. Bisom-Rapp and M. Sargeant, ‘It’s Complicated: Age, Gender, and Lifetime Discrimination against Working Women – The United States and the U.K. as Examples’, *Elder Law Journal*, 22 (2014), 1–110.

²⁷ C. Sheppard, ‘Multiple Discrimination in the World of Work’, International Labour Organization Working Paper No. 66 (2011); see also International Labour Office, *ABC of Women Workers’ Rights and Gender Equality* 146 (2d ed., International Labour Office, 2007).

²⁸ S. Moore, ‘Age as a Factor Defining Older Women’s Experience of Labour Market Participation in the UK’, *Industrial Law Journal* 36 (2007), 383–387 (study describing how women had trouble identifying what kind of discrimination they faced when multiple bases – race, sex, age – were potentially in play).

²⁹ Bisom-Rapp and Sargeant, *supra* n26 at 23–27.

Table 1.1 *Model of lifetime disadvantage*

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

Gender-Based Factors

The model lays out a set of gender-based factors, which from a very early point in their lives links girls, and later women, to particular characteristics, traits, interests, and roles, and which ultimately impacts the trajectories of many women's careers. As illustrated in Table 1.1, the first factor in the model is education and training. Here we focus on the formative experiences that can place girls at a disadvantage in their later years. Whilst education and training is an area where girls and young women have made significant progress, challenges remain. Intractable problems of access remain for girls in many developing countries. Even in the developed world, more needs to be done to ensure girls and young women maximise their potential, necessitating a nuanced view of current statistics and trends. In terms of educational access, attainment, and ambition, for example, girls and young women in OECD countries fare well. Amongst OECD countries, girls on average are more likely than boys to anticipate working in high-status careers.³⁰ Young women also clearly outpace their male counterparts in educational attainment. On average, in OECD countries, young women are 59 per cent of university graduates. The catch is that these degrees are far less likely to be in the science, technology, engineering, and mathematical (STEM) fields. This is a concern because there is a smaller gender wage gap in those fields than in other occupations.³¹ Moreover, the failure to populate fields where men predominate reinforces occupational segregation in the labour market. Ultimately, tackling the problem of gender

³⁰ OECD, *Education at a Glance* (2012), see www.oecd.org/edu/highlights.pdf.

³¹ D. Beede et al., *Women in STEM: A Gender Gap to Innovation* (U.S. Department of Commerce, 2011), see www.esa.doc.gov/sites/default/files/reports/documents/womeninstemagaptoinnovation8311.pdf.

differentials in educational outcomes requires carefully attending to three aspects which impact girls' lives: the role of their families, their schools, and the norms of society at large.

Stereotyping is the second factor in the model. Beginning in the classroom and extending into the workplace, gendered beliefs about the differing characteristics of males and females may lead to differential treatment. In the classroom boys tend to receive more praise than girls; boys' contributions to class discussions are more frequently accepted.³² Research reveals that girls are more likely to be rewarded for quiet and compliant behaviour.³³ Despite the long-standing prohibition of sex discrimination in employment generally and gender stereotyping specifically, descriptive and prescriptive stereotypes continue to pervade the workplace as well.³⁴ These biases may infect articulation of a given job's description and skill requirements, and the way employment decisions are made. Needless to say, stereotyping has enormous ramifications for women's occupational advancement over time.

Multiple discrimination is the model's third factor. Simply stated, women may occupy statuses that further complicate the way in which they are viewed, treated, and function. One significant complicating factor for working women is the issue of ageing. Older workers are seen as less competent, more difficult to train, and more expensive than younger workers.³⁵ Moreover, research reveals that women are stereotyped in particular ways as they age. Women also may occupy other statuses that further complicate their identity and position in the workplace, including minority race, ethnicity, migration status, religion, disability, and sexual orientation, amongst others. Employment discrimination law, however, has proven especially ill-suited as a tool for redressing multiple discrimination. A 2011 study found that multiple discrimination, in terms of plaintiff characteristics and causes of action, dramatically decreased plaintiffs' chances of winning in

³² M. Bohan, Study on *Combating Gender Stereotypes in Education* (Steering Committee for Equality between Women & Men, Council of Europe, 2011), see www.coe.int/t/dghl/standardsetting/equality/03themes/gender-mainstreaming/CDEG_2011_16_GS_education_en.pdf.

³³ N. C. Cantalupo, 'Comparing Single-Sex and Reformed Coeducation: A Constitutional Law Analysis', *San Diego Law Review*, 49 (2012), 725–789.

³⁴ K. T. Bartlett, 'Making Good on Good Intentions: The Critical Role of Motivation in Reducing Implicit Workplace Discrimination', *Virginia Law Review*, 95 (2009), 1893–1972.

³⁵ B. E. Blaine, *Understanding the Psychology of Diversity* (Sage, 2013), pp. 177–178.

court.³⁶ Research in the United Kingdom points to another problem associated with multiple discrimination claims. A 2007 study revealed that victims themselves often have trouble identifying the specific effects of multiple characteristics.³⁷

The model's fourth factor encompasses women's traditional role of caregiving. There is no doubt that balancing caregiving with paid work is as challenging for men as it is for women.³⁸ Men, however, whilst increasingly assuming caregiving roles, are still less likely to do so than women. When they engage in caregiving, men on average spend less time at it.³⁹ Men are also less likely than women to drop out of the labour market or reduce their work hours as a result of their caregiving responsibilities. Caregiving responsibilities place caregivers at a disadvantage in the workplace because caregivers face conflicting demands on their time.⁴⁰ Most workplaces are not designed with caregiving in mind; working hours may be long, inflexible, or unpredictable and attendance policies may be rigid. In many countries, and specifically in the United Kingdom and United States, law and policy related to caregiving has not been able to eliminate family responsibilities discrimination, which is widespread.⁴¹

The fifth factor dealt with in the model is women's career outcomes. We find especially that the conflict between work expectations and caregiving responsibilities creates adverse effects for women. Given the gender-based factors described earlier, it is no surprise that women's occupational mobility is affected by the so-called glass ceiling – the invisible yet impenetrable barrier that prevents women's rise to the upper echelons of their chosen profession or occupation. Additionally, those with children may collide with a 'maternal wall', which diverts or even terminates career paths when women become pregnant, give birth,

³⁶ R. K. Best, L. B. Edelman, L. H. Krieger, and S. R. Eliason, 'Multiple Disadvantages: An Empirical Test of Intersectionality Theory in EEO Litigation', *Law & Society Review*, 45 (2011), 991–1025.

³⁷ Moore, *supra* n28.

³⁸ S. Bornstein, 'The Law of Gender Stereotyping and the Work-Family Conflicts of Men', *Hastings Law Journal*, 63 (2012), 1297–1345.

³⁹ Bisom-Rapp and Sargeant, *supra* n26 at 39.

⁴⁰ N. B. Porter, 'Why Care About Caregivers? Using Communitarian Theory to Justify Protection of "Real" Workers', *Kansas Law Review*, 58 (2010), 355–414.

⁴¹ J. C. Williams et al., *Protecting Family Caregivers from Employment Discrimination*, AARP Public Policy Institute 2012, see www.aarp.org/content/dam/aarp/research/public_policy_institute/health/protecting-caregivers-employment-discrimination-insight-AARP-ppi-ltc.pdf.

or choose to work in part-time or flexible work arrangements in order to meet family caregiving responsibilities.⁴² Negative career outcomes can exact an emotional toll. Women workers responsible for family caregiving in the United Kingdom, for example, report social isolation, difficulties in personal relationships, strain regarding their interactions with work colleagues, and assumptions that they are less occupationally ambitious.⁴³

Incremental Disadvantage Factors

Having delineated a set of gender-based factors, the model of lifetime disadvantage turns to a series of factors, which incrementally and increasingly produce disadvantage for women over time. The model's sixth factor is pay inequality. Gender-based pay inequality reflects the subpar state of women's opportunities for financial progress, wealth accumulation, and retirement planning. Across OECD countries, women's wages are less than of those of men. In fact, one report noted that in OECD countries, the pay gap between male and female full-time worker median earnings is between 10 and 20 per cent.⁴⁴ Using 2013 statistics, the United States scored poorly with a gap of 17.9 per cent. The United Kingdom evidenced a gap of 17.5 per cent. No matter how one measures the pay gap – and there are many ways – White male workers make more money than do White women and women of colour.⁴⁵ For example, in the United States, the gap persists even when controlling for occupation, education, and experience. Moreover, these pay differentials are enormously consequential over time. Gender-based pay gaps are connected to other factors in the model, including stereotyping, multiple discrimination, caregiving roles, occupational segregation, non-standard working, and

⁴² J. C. Williams and N. Segal, 'Beyond the Maternal Wall: Relief for Family Caregivers Who Are Discriminated against on the Job', *Harvard Women's Law Journal*, 26 (2003), 77–162.

⁴³ Carers UK, *Alone and Caring* (2015).

⁴⁴ Center for Economic Studies, Ifo Institute, *The Gender Wage Gap in OECD Countries* (2013), see <https://www.econbiz.de/Record/the-gender-wage-gap-in-oecd-countries-nikolka-till/10010941741>; see OECD.stat, *Employment: Gender Wage Gap*, 2013 data, last accessed 27 July 2015, <http://stats.oecd.org/index.aspx?queryid=54751>.

⁴⁵ National Equal Pay Task Force, *Fifty Years after the Equal Pay Act: Assessing the Past, Taking Stock of the Future* (2013), see www.whitehouse.gov/sites/default/files/image/image_file/equal_pay-task_force_progress_report_june_10_2013.pdf.

career breaks. Present legal and policy efforts are characterised by anaemic efficacy.

Occupational segregation is the model's seventh factor. This phenomenon is closely linked to gender-based pay inequality, and thus produces cumulative economic disadvantage. In the United Kingdom and the United States, many occupations continue to be dominated either by women or by men.⁴⁶ Significantly, there is a negative relationship between the wages an occupation pays and the share of women who engage in that occupation. One US task force report found that 'every 10 percentage point increase in female [occupational] share [is] associated with a 4 per cent decline in average wages'.⁴⁷ Additionally, feminised occupations – those occupations where women predominate – are linked not only to poorer pay but to poorer outcomes in terms of power and prestige for those working in them.⁴⁸ Of concern is that within feminised occupations, women's pay is impacted more greatly than men's pay.⁴⁹ Race and ethnicity are additional factors observable in occupationally segregated labour markets.⁵⁰ The possible reasons for occupational segregation are complex, and law and policy has failed to vanquish this troublesome fact of many women's working lives.

Non-standard working is our model's eighth factor. Here we highlight those forms of work that deviate from the full-time standard employment contract and tend to attract women. These include part-time work, and the United Kingdom's controversial 'zero-hours' contracts. As noted previously, to the extent women work outside of standard employment relationships, they may be ineligible for the rights and benefits associated

⁴⁶ Office for National Statistics; *170 Years of Industrial Change Across England and Wales* (2013), available at www.ons.gov.uk/ons/rel/census/2011-census-analysis/170-years-of-industry/170-years-of-industrialchangeponent.html; Equality and Human Rights Commission, *How Fair Is Britain? Equality, Human Rights and Good Relations in 2010* (2011), at 301, available at www.equalityhumanrights.com/uploaded_files/triennial_review/how_fair_is_britain_-_complete_report.pdf; White House Council on Women and Girls, *Women in America: Indicators of Social and Economic Well Being* (2011), see www.whitehouse.gov/sites/default/files/rss_viewer/Women_in_America.pdf.

⁴⁷ National Equal Pay Task Force, *supra* n45, at 27.

⁴⁸ J. Jarman et al., 'The Dimensions of Occupational Segregation in Industrial Countries', *Sociology*, 46(6) (2012), 1003–1019.

⁴⁹ M. D. Kulow, 'Beyond the Paycheck Fairness Act: Mandatory Wage Disclosure Laws – A Necessary Tool for Closing the Residual Gender Wage Gap', *Harvard Journal on Legislation*, 50 (2013), 385–435.

⁵⁰ A. Hegewisch et al., *Separate But Not Equal? Gender Segregation in the Labor Market and the Gender Wage Gap* (Institute for Women's Policy Research, 2010), see www.iwpr.org/publications/pubs/separate-and-not-equal-gender-segregation-in-the-labor-market-and-the-gender-wage-gap.

with the standard employment contract. Their pay may also suffer for working in such positions, thus over time greatly affecting retirement savings and planning. Women may also find difficulties reconciling the scheduling unpredictability of certain forms of non-standard work – for example, temporary work with just-in-time scheduling or zero-hours contracts – with their caregiving responsibilities. Law and policy have yet to address effectively the disadvantage faced by non-standard working although the UK effort to implement the EU Part-Time Work Directive⁵¹ through the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000⁵² is certainly superior to the US situation, where there is no such legal protection.

Career breaks comprise the model's ninth factor. Whilst not all women give birth to children, the majority of women do so,⁵³ a biological fact which has profound, lifetime implications for their careers. Women may also adopt children or be responsible for stepchildren. Like those who raise biological children, mothers of adopted or stepchildren actively engage in child-rearing. For women, disadvantage is rooted in timing since the childbearing and child-rearing years coincide with the period in which career paths are traditionally forged. More pointedly, the conflict between childbearing and child-rearing, on the one hand, and work, on the other, places women at risk of intermittent employment. Women's career breaks, which may also be triggered by the responsibility for caring for a special needs child or elderly or ill adult, are associated with long-lasting and acute penalties in occupational advancement and pay. These penalties hinder women in planning and saving for retirement. We consider the disadvantage suffered by women during pregnancy and maternity leaves, the cumulative impact of intermittent employment, and the role of law and policy in diminishing or exacerbating those effects.

⁵¹ Council Directive 97/81, 1997 O.J. (L14) 9 (EC).

⁵² M. Bell, 'Achieving the Objectives of the Part-Time Work Directive? Revisiting the Part-Time Workers Regulations', *Industrial Law Journal*, 40(3) (2011), 254–279.

⁵³ Current statistics on global fertility and childlessness are available from the United Nations. *World Fertility Report: 2012* (United Nations, Economic and Social Affairs, 2013), see www.un.org/en/development/desa/population/publications/dataset/fertility/wfr2012/MainFrame.html. Although childlessness is rising in the developed world, the majority of women still bear children. For example, the United States has one of the highest rates of childlessness worldwide and yet over 80 per cent of American women give birth to children. G. Livingston, *In Terms of Childlessness, U.S. Ranks Near the Top Worldwide* (Pew Research Center, 2014), see www.pewresearch.org/fact-tank/2014/01/03/in-terms-of-childlessness-u-s-ranks-near-the-top-worldwide/.

The tenth and final factor in the model is retirement and pensions. It is in this final phase of life that women's systemic disadvantage is most keenly experienced. For many women who have worked for pay, retirement is hampered by the conditions that preceded it – significantly lower lifetime earnings, resulting in the accumulation of fewer assets, and periods of withdrawal from the labour market or the embrace of part-time employment linked to conflicts between paid work and caregiving.⁵⁴ The culmination of a gendered work life places many women in a significantly inferior position to men, a situation especially notable amongst women who are racial or ethnic minorities.⁵⁵ Pensions themselves have a gender dimension. Women are far less likely to receive a private pension than men, and when they do and contribute to it, women's contributions are significantly lower than those of their male colleagues.⁵⁶ Public pensions too may be structured in ways which disadvantage and fail to account for women's particular life experiences and career trajectories.⁵⁷ Whilst the United Kingdom has made efforts to reform the state pension system with gendered disadvantage in mind, still more needs to be done to ensure equality for retired women. In the United States, whilst policymakers are aware of the shortfall for retired women, decisive action is yet to be taken.

Our consideration of the gendered workforce concludes in the final chapter by addressing how our countries might transcend and vanquish women's lifetime disadvantage. Firstly, several theoretical approaches – rationalist economics, sociological approaches, and comparative institutional approaches – are referenced in order to better comprehend the problems girls and women confront. Next we suggest that vulnerability theory, a subject of significant debate in several fields including feminist theory, might catalyse legal and policy reform in the United Kingdom and the United States. Surveying existing law and policy designed to address and ameliorate the factors in our model, we find the United States sorely lacking. In contrast, we find that regulation in the United Kingdom that aims to cushion women's vulnerability falls into four

⁵⁴ C. Estes et al., *Breaking the Social Security Glass Ceiling: A Proposal to Modernize Women's Benefits* (Institute for Women's Policy Research, 2012).

⁵⁵ Ibid.

⁵⁶ US Government Accountability Office, *Retirement Security: Women Still Face Challenges* (2012), see www.gao.gov/assets/600/592726.pdf.

⁵⁷ C. Behrendt and J. Woodall, 'Pensions and Other Social Security Income Transfers' in J. Berg (ed.), *Labour Markets, Institutions and Inequality* (Cheltenham, UK: Edward Elgar, 2015), pp. 242–262.

categories: (1) measures aimed at tackling sex discrimination and equal pay; (2) measures to facilitate working time flexibility and protect non-standard work from second-class status; (3) measures protecting women during pregnancy and maternity leave; and (4) efforts geared specifically to help women in retirement. Even so, empirical reality for British women – in terms of pregnancy discrimination, pay inequality, gender stereotyping, and retirement disadvantages – continues to fall far short of the promise of the law. We hypothesise that this shortfall is tied to policymaking that is disjointed and incremental, and that fails to be driven by overarching goals. We conclude by providing some examples of how vulnerability theory might ground a holistic and life course approach to legal and policy reform which is attuned to eliminating women's lifetime disadvantage whilst simultaneously improving work life for men.

The Limitations of Disjointed Incrementalism

As noted in this chapter, the lifetime disadvantages shouldered by women might be significantly lessened, and ultimately eliminated, through a comprehensive regulatory framework sensitive to the way women's gendered lives unfold. Such an approach would of necessity aim to eradicate the poor outcomes many older women experience at the end of their lives. Neither the United Kingdom nor the United States, however, has taken such an approach to addressing gender equality. Our observation is based on the methods by which law and policymaking take place in our respective countries. More specifically, law and policymaking typically proceeds in one of two ways: through a process of disjointed incrementalism or one of comprehensive rationality.⁵⁸

Professor Charles Lindblom, an emeritus professor of economics and political science at Yale University, notably argued that policymaking generally develops through the former. Disjointed incrementalism is policymaking characterised by: considering a limited number of familiar policy options, mixing goals and values with empirical analysis, emphasising the limited social ills to be cured rather than a grand goal to be achieved, proceeding slowly through trial-by-error and correction, examining only some of the potential effects of a policy alternative, and providing space for partisan interest groups to influence policymaking

⁵⁸ C. S. Diver, 'Policymaking Paradigms in Administrative Law', *Harvard Law Review*, 95 (1981), 393–434.

through negotiation.⁵⁹ Policymaking thus takes place through small steps, not too far removed from the status quo; those making policy gradually learn from their mistakes, and make adjustments over time.⁶⁰ In theory, disjointed incrementalism diffuses societal value conflicts by allowing multiple stakeholders to negotiate sequential rather than radical change.

Juxtaposed with disjointed incrementalism is another method of policymaking: comprehensive rationality. In terms of mechanics, comprehensive rationality is said to proceed in four steps. The first stage involves specifying a particular goal. Second, the policymaker identifies the possible methods of attaining that goal. Third, the effectiveness of those mechanisms must be assessed. In the fourth phase, the policymaker selects the method or methods 'that will make the greatest progress toward the desired outcome'.⁶¹ Lindblom, who advocated for policymaking by disjointed incrementalism, criticised this so-called synoptic method because he questioned the ability of decision-makers to reason their way through complex problems, feared that they would be unable to agree upon values and objectives, and was concerned about the limited resources available for the policymaking process.⁶² Yet, as noted by Lindblom's critics, in some areas, a synoptic approach is absolutely necessary and an incremental approach may magnify a social ill. Such is the case, for example, with an incremental approach to gun control, school racial desegregation,⁶³ and climate change.⁶⁴ Disjointed incrementalism as applied to such thorny and complicated but pressing problems can, amongst other things, produce no effect, worsen the problem, create unintended consequences, prevent developing better alternatives, and lull the public into thinking the problem is being effectively addressed.

We maintain, and demonstrate throughout this book, that women's lifetime disadvantage and poorer outcomes in later life are problems

⁵⁹ C. E. Lindblom, 'Still Muddling, Not Yet Through', *Public Administration Review*, 39(6) (1979), 517–526.

⁶⁰ M. T. Hayes, *Incrementalism and Public Policy* (New York: Longman, 1992).

⁶¹ *Ibid.* at 396.

⁶² A. Rostron, 'Incrementalism, Comprehensive Rationality, and the Future of Gun Control', *Maryland Law Review*, 67 (2008), 511–569.

⁶³ J. L. Hochschild, *The New American Dilemma: Liberal Democracy and School Desegregation* (New Haven, CT: Yale University Press, 1984).

⁶⁴ C. Conglianese and J. D'Ambrosio, 'Policymaking under Pressure: The Perils of Incremental Responses to Climate Change', *Connecticut Law Review*, 40 (2008), 1411–1429.

unlikely to be corrected through disjointed incrementalism. Half a century of piecemeal efforts to promote gender equality have failed to eradicate women's greater economic vulnerability in comparison to their male counterparts. Moreover, decades of research and policy analysis reveal the causes of female disadvantage and an available catalogue of correctives. What is required in the United Kingdom and the United States is a national commitment to gender equality and a willingness to take the bold steps necessary to achieve it. We cannot say whether such a commitment is achievable. But we agree with one commentator 'that deviation from incrementalism is possible when an abrupt shift in how a problem is perceived . . . opens a "window of opportunity" for policy innovation'.⁶⁵ We hope that our model of women's lifetime disadvantage will encourage such a shift.

⁶⁵ L. Dubay et al., 'Advancing Toward Universal Coverage: Are States Able to Take the Lead?', *Journal of Health Care Policy and the Law*, 7 (2004), 1–41 (paraphrasing J. W. Kingdon, *Agendas, Alternative, and Public Policies* (New York: Longman, 1995), pp. 165–170).