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Pauli Murray

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ECONOMIC AND EDUCATIONAL INEQUALITY BASED ON SEX: AN OVERVIEW

PAULI MURRAY*

INTRODUCTION

Sexual inequality is the oldest and most intransigent form of discrimination in human culture; indeed, it has provided models for the subordination of other oppressed groups.¹ As in the case of racial bias, the individual's status is defined at birth, and legal and social disabilities are imposed by virtue of visible, permanent physical characteristics which identify one's sex. For many purposes, laws and social customs treat *all* women as a separate class inferior to that of men. At the same time, however, unlike a racial or ethnic minority, women are distributed evenly with men throughout the entire population and share the class characteristics of the men with whom they are closely associated as wives, mothers or daughters. This duality of status partly obscures the pervasiveness of discriminatory treatment which cuts across all classes and affects more than half of the population. Notwithstanding a total impact which is far more extensive than other forms of bias, there is a strong tendency to minimize sex discrimination, to avoid the moral implications of so vast a social injustice and to afford it greater immunity from public condemnation.²

The most demonstrable inequality to which millions of working women are subjected is economic discrimination. It lends particular force to the argument that women are an oppressed group because it contributes to the powerlessness to deal adequately with other inequalities. As one writer has put it, "[w]omen have less economic power than men and in a money society personal power is directly related to economic power."³

The case for national action in this area was summarized in the report of President Nixon's Task Force on Women's Rights and Responsibilities in April, 1970. The Task Force pointed out that the

* Professor of American Studies, Brandeis University.

1. See, e.g., Freeman, *The Legal Basis of the Sexual Caste System*, 5 VAL. U.L. REV. 203 (1971).

2. For a discussion of the unique characteristics of sex inequality see Rossi, *Sex Equality: The Beginnings of Ideology*, in VOICES OF THE NEW FEMINISM 59 (M. Thompson ed. 1970).

3. Note, "A Little Dearer Than His Horse": *Legal Stereotypes and the Feminine Personality*, 6 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 269 (1971).

United States "lags behind other enlightened, and indeed some newly emerging, countries in the role ascribed to women," and that the Government should be as seriously concerned with sex discrimination as race discrimination and with women in poverty as men in poverty. Observing "that long-established policies of Federal agencies base their efforts to alleviate poverty and discrimination on the assumption that race discrimination is more inflammatory than sex discrimination," the report declared:

Sex bias takes a greater economic toll than racial bias. The median earnings of white men employed year-round full-time is \$7,396, of Negro men \$4,777, of white women \$4,279, of Negro women \$3,194. Women with some college education both white and Negro, earn less than Negro men with 8 years of education.

Women head 1,723,000 impoverished families, Negro males head 820,000. One-quarter of all families headed by white women are in poverty. More than half of all families headed by Negro women are in poverty. Less than a quarter of those headed by Negro males are in poverty. Seven percent of those headed by white males are in poverty.

The unemployment rate is higher among women than men, among girls than boys. More Negro women are unemployed than Negro men, and almost as many white women as white men are unemployed (most women on welfare are not included in the unemployment figures—only those actually seeking employment.)

Unrest, particularly among poor women and college girls, is mounting. Studies show that 39 percent of the rioters in Detroit were women and in Los Angeles 50 percent were women. The proportion of women among the arrestees was 10 and 13 percent respectively. Welfare mothers are using disruptive tactics to demand greater welfare payments. Radical women's groups, some with a philosophy similar to that of the Students for a Democratic Society are mushrooming on college campuses.

Essential justice requires the Federal government to give much greater attention to the elimination of sex discrimination and to the needs of women in poverty.⁴

4. PRESIDENT'S TASK FORCE ON WOMEN'S RIGHTS AND RESPONSIBILITIES, *A MATTER OF SIMPLE JUSTICE* 18-19 (1970). For proposed legislation in the 92d Congress to implement the recommendations of the Task Force, see the Mikva Bill, H.R. 916, 92d Cong.,

The Task Force report was issued against a background of growing militancy of women's groups which increasingly have resorted to organized pressures and direct action as well as to administrative and judicial remedies to bring their grievances to the public's attention. The purpose of this article is to highlight some of the economic disparities which have precipitated this development and to focus primarily upon sex inequalities in education, an area integrally related to economic opportunity and which has received relatively little consideration by the law.

ECONOMIC INEQUALITY

Job discrimination became the focal point of renewed feminist protest during the early 1960's. Underlying this upsurge of feminism are the dramatic changes in women's role in the economic system, which sociologist Alice Rossi sees as the chief factor in "the renaissance of the women's rights movement . . . after forty years of dormancy."⁵ In

1st Sess. (1971). See note 135 *infra* and accompanying text.

A more recent report from the Women's Bureau on 1969 wage and salary income showed that the gap in median earnings of full-time year-round (worked 35 or more hours a week for 50 to 52 weeks) female and male workers had narrowed slightly since 1968. In 1969 women's median wage or salary income was 60.5% (\$4,977) of that of men (\$8,227) compared with 58.2% (\$4,457) of that of men (\$7,664) in 1968. However, the gap was still wider than it was in 1955, when women earned a median wage or salary income of 63.9% of that earned by men. U.S. Dep't of Labor, Women's Bureau, Fact Sheet on Earnings Gap 1, Feb., 1971. The table reproduced below from the report indicates that women earn substantially less than men with the same education.

Table 1. Median Income in 1969 of Full-Time Year-Round Workers,
by Years of School Completed
(Persons 25 years of age and over)

Years of school completed	Women	Men	Women's income as percent of men's
Elementary school:			
Less than 8 years	\$3,603	\$ 5,769	62.5
8 years	3,971	7,147	55.6
High School:			
1-3 years	4,427	7,958	55.6
4 years	5,280	9,100	58.0
College:			
1-3 years	6,137	10,311	59.5
4 years	7,396	12,960	57.1
5 years or more	9,262	13,788	67.2

Source: U.S. Department of Commerce, Bureau of Census: Current Population Reports, P-60, No. 75.

Id. at 3.

5. The most recent analyses that attempt to explain [the new feminist movement] . . . have stressed the impact of participation in the civil rights movement upon younger women, who drew the same lessons their ancestors did from

1920 women represented only 1 of every 5 workers. By 1970 the 31.2 million working women constituted 38% of the total labor force.⁶ Since 1940 they have contributed the greatest share in the growth of the labor market. Available figures from the 1970 census indicate that 43% of all adult women are now either employed or seeking employment compared with 37% in 1960, 34% in 1950 and 23% in 1920. During the 1960's they filled 8.4 million, or nearly two-thirds, of the 13.8 million new jobs which developed.⁷

involvement in the abolitionist cause in the 19th century. Without detracting from the significance of this point at all, I would only point out that this holds for only one group within the younger generation of women now involved in women's liberation, and that the emergence of the liberation movement all told postdates other significant signs of an awakening among American women much earlier in the decade. In fact, I would argue that it was the changed shape of the female labor force during the period beginning with 1940 that gradually provided the momentum that led to such events as the Kennedy Commission on the Status of Women, and eventually to the formation of new women's rights organizations like the National Organization for Women. So long as women worked largely before marriage while they were single, or after marriage only until a first pregnancy, or lived within city limits where there was a diversity of activities to engage them, there were feeble grounds for any significant movement among women focussed on economic rights, since their motivation in employment was short-lived and their expectations were to withdraw when they became established in family roles. It was the gradual and dramatic change in the profile of the female labor force from unmarried young women to a majority of older married women that set in motion a vigorous women's rights movement. It is only among women who either expect or who find themselves relatively permanent members of the work force whose daily experience forced awareness of economic inequities on the grounds of their sex. This is changing now under the influence of women's liberation groups among the young, but this movement did not exist to trigger the larger movement early in the last decade.

Address by Alice S. Rossi, Barnard College Conference on Women, April 17, 1970, reprinted in *Hearings on Section 805 of H.R. 16098 Before the Special Subcomm. on Education of the House Comm. on Education and Labor*, 91st Cong., 2d Sess. 1060 (1970) [hereinafter cited as *1970 Hearings*].

Section 805 of H.R. 16098 proposed to amend the Civil Rights Act of 1964 to include "sex" in Title VI prohibiting discrimination in federally assisted programs, to extend the provisions of Title VII relating to equal employment opportunity to educational institutions, to extend the jurisdiction of the United States Civil Rights Commission to include "sex," and to apply the equal pay provisions of the Fair Labor Standards Act to "executive, administrative or professional employees, including those employed as academic administrative personnel or teachers in elementary or secondary schools." The bill was not acted upon by the 91st Congress. Similar provisions are contained in the Mikva Bill (H.R. 916) and in the Green Bill (H.R. 7248) currently pending in the 92d Congress. Hearings on the Mikva bill were held before the Special Subcommittee No. 4 of the House Committee on the Judiciary in March and April, 1971. See notes 138-44 *infra* and accompanying text.

6. U.S. DEPT OF LABOR, WOMEN'S BUREAU, *WOMEN WORKERS TODAY* 1 (1970). Congresswoman Edith Green, chairman of the House Special Subcommittee on Education, stated in her opening remarks on section 805, H.R. 16098, that as of April, 1971, "there were 31,292,000 women in the labor market constituting nearly 40 percent of the total." *1970 Hearings* 2.

7. N.Y. Times, Apr. 11, 1971, at 1, col. 3.

Moreover, contrary to the lingering stereotype that "woman's place is in the home," married women are a permanent and growing sector of the work force. The Bureau of Labor Statistics reported that for the year ending March, 1969, wives supplied 775,000 and married men 400,000 of the 1.8 million increase in the labor force. The proportion of families in which both the husband and another member of the family (most likely to be the wife) worked jumped from 43% in 1960 to 52% in 1969.⁸ Inequality in employment opportunities became increasingly oppressive to growing numbers of women who head families (11% of all families in the United States have female heads) or whose earnings were necessary to lift the family income above the poverty level or raise its standard of living.⁹

A second factor in the growing protest is the head-on collision between the rising expectations of a generation of college-trained women and the continuing climate of opinion in which it is taken for granted by many employers that women will be assigned to inferior positions. This knowledge often comes as a profound shock to a bright young woman who obtains a bachelor's or even master's degree and seeks a job related to her training. She typically experiences the question, "Can you type?" (a stereotype more offensive for what it implies than for the skill involved)¹⁰ and is offered secretarial work while her male counterpart with the same degree is considered for positions in which he can

8. Waldman, *Marital and Family Characteristics of the U.S. Labor Force*, MONTHLY LABOR REV., May, 1970, reprinted in *1970 Hearings* 977, 978.

9. Most women work to support themselves or others. Of the 37 million women who worked at some time in 1968, 17 percent were widowed, divorced, or separated from their husbands; many of these women were raising children in a fatherless home. Another 23 percent of the women workers were single. In addition, married women whose husbands' incomes are inadequate or barely adequate to support their families often are compelled to seek gainful employment. Eight percent of all women who worked in 1968 had husbands with annual incomes below \$3,000. An additional 22 percent had husbands whose incomes were between \$3,000 and \$7,000 at a time when the annual income necessary even for a low standard of living for an urban family was estimated at \$6,567.

U.S. DEP'T OF LABOR, WOMEN'S BUREAU, UNDERUTILIZATION OF WOMEN WORKERS 1 (1971) [hereinafter cited as UNDERUTILIZATION].

10. Traditional counseling emphasizes women's adaptation to their traditional roles in society. Cornell's [University] placement office maintains a "special" bulletin board labeled "Opportunities for Women" which describes "Exciting Secretarial Opportunities" followed by a list of typing school scholarships, with no mention of executive training programs except where it is in a uniquely feminine field like clothes merchandising. . . .

Cornell placement has also allowed visiting recruiters to request to see only male applicants for positions which women are equally qualified for.

Kusnetz & Francis, *The Status of Women at Cornell*, 1969, reprinted in *1970 Hearings* 1078, 1081.

utilize his training and with higher entering pay.

A 1969 survey showed that of 208 companies recruiting at Northwestern University only 63% were considering female graduates.¹¹ The Women's Bureau of the United States Department of Labor reports that the average monthly starting salaries being offered by 110 business firms to 1970 women college graduates in six fields of interest ranged from \$18 to \$86 less than those being offered to male college graduates in the same fields.¹²

The legal profession is one of the worst offenders in this respect. Professor James J. White's study¹³ of female and male law school graduates in the classes of 1956 through 1965 found that

the males make a lot more money than the females. The differential in present income is approximately \$1,500 for those in their first year after graduation, and, with the passage of each year, the males increase their lead over the females until they pass off the graph of the class of 1956 with a \$17,300 to \$9,000 lead and with no substantial appearance of abatement in their rate of gain. In 1964, 9% of the males earned more than \$20,000, but only 1% of the females had reached that level; 21% of the males exceeded \$14,000, as compared with only 4.1% of the females. The converse is true at the levels below \$8,000, where one finds 56.3% of the females but only 33.6% of the males. These figures are not distorted by the inclusion of housewives or others who are not employed full time at a paying job because only those employed full time at a paying job were included.¹⁴

The income differential could not be accounted for by reference to

11. *Special Report: Why Doesn't Business Hire More College Trained Women?*, PERSONNEL MANAGEMENT—POLICIES AND PRACTICES (April, 1969), reprinted in 1970 *Hearings* 174.

12. UNDERUTILIZATION 13. In engineering, monthly starting salaries were \$844 for women, \$872 for men; in accounting \$746 for women, \$832 for men; in economics and finance: \$700 for women, \$718 for men; in mathematics and statistics: \$746 for women, \$733 for men. *Id.* See generally U.S. Dep't of Labor, Women's Bureau, Fact Sheet on the Earnings Gap, Feb., 1970. A more recent report just released, however, shows that the jobs and salaries to be offered to June, 1971, college graduates (in a survey conducted in November, 1970, and covering 191 companies) indicates that while women are consistently offered salaries lower than men, the gap has narrowed somewhat; the 1971 gap "ranges from \$68 down to only \$1 per month difference in engineering." Women's Bureau Report, *supra* note 4, at 5-6.

13. White, *Women in the Law*, 65 MICH. L. REV. 1051 (1967). The study was based upon usable questionnaires returned from 1,298 female and 1,329 male respondents drawn from 108 law schools. *Id.* at 1053.

14. *Id.* at 1057.

prestige of law schools attended, class standings, law review participation, type of work sought or type of work performed, since the male and female samples did not differ significantly in these respects.¹⁵ An analysis of the responses of law school officials showed that of 63 deans and placement officers who answered Professor White's questionnaire, 43 believed that discrimination against women law school graduates is "significant," 14 stated that it is "extensive" and only 6 felt that it is "insignificant."¹⁶

Of the female respondents who replied, 38.2% stated they were "certain" they had been discriminated against; another 9.6% were "almost certain," and 17.6% felt they were "probably" discriminated against. One question asked how many times an employer had stated to the individual respondent a policy against hiring women as lawyers. The replies indicated that on 1,963 separate occasions such a policy had been stated by potential employers. The combined evidence convinced Professor White "that discrimination against women lawyers by their potential employers is at least a substantial cause, and probably the principal cause, for the income differential which we have observed between men and women."¹⁷

Traditionally, women are concentrated in jobs which have less prestige or policy-making power than those to which men have access. The Equal Employment Opportunity Commission's (EEOC) first nationwide survey of patterns of employment in American industry based upon official employers' reports for 1966¹⁸ revealed that while women account for more than two-fifths of all white collar jobs, they hold only one in ten managerial positions and one in seven professional jobs. Conversely, they fill nearly 45% of the lower paying service jobs. The Women's Bureau estimate is even higher: in 1969 women were 59% of all service workers (exclusive of private household employees) compared with 40%

15. *Id.* at 1070-84.

16. *Id.* at 1085.

17. *Id.* at 1087. Note that 982 of 1,298 female respondents reported that at least one statement of a policy against hiring women had been made to them. *Id.* at 1086.

Wage differentials in federal employment are reflected in grade differentials. The National Association of Women Lawyers, in an analysis of figures obtained from the United States Civil Service Commission, found that in 1964 the 634 female attorneys represented 6.2% of the total general attorneys employed by the federal government. "1969 showed a grade distribution difference between men and women attorneys that would indicate about one grade difference for all the levels. Thus, a woman attorney could expect to be hired at a lower grade and/or raised at a slower level." Statement of Margaret Laurance, 1970 *Hearings* 1120, 1121. See Dinerman, *Sex Discrimination in the Legal Profession*, 55 A.B.A.J. 951 (1969); Sassower, *Women in the Law: The Second Hundred Years*, 57 A.B.A.J. 329 (1971).

18. EQUAL EMPLOYMENT OPPORTUNITY REPORT NO. 1, JOB PATTERNS FOR MINORITIES AND WOMEN 1966 (1969).

in 1940. In 1969, less than 5% of all full time women workers earned over \$10,000 per year compared with 35% of all male workers, while 14.4% of women but only 5.7% of men earned less than \$3,000.¹⁹

The pattern does not change significantly in the employment of women by the Federal Government, despite a federal policy of equal employment opportunity without regard to sex which has existed since 1963. Studies by the United States Civil Service Commission show that although women constituted 34% of all full time white collar employees in the federal service in 1967, they filled 62.5% or more of the four lowest grades and only 2.5% or less of the four highest grades.²⁰ In October, 1969, of the 665,000 women in full time white collar civil service positions (33.4% of the total), 77.8% were in grade levels GS-1 through GS-6, while less than 2% were in GS-12 through GS-18. The average

19. Table 2

Earnings of Full-Time Year-Round Workers by Sex, 1969

Earnings	Women	Men
Total	100.0	100.0
Less than \$3,000	14.4	5.7
\$3,000 to \$4,999	36.2	9.8
\$5,000 to \$6,999	29.7	18.2
\$7,000 to \$9,999	14.9	31.2
\$10,000 to \$14,999	4.2	23.9
\$15,000 and over7	11.1

Source: U.S. Department of Commerce, Bureau of the Census: Current Population Reports, P-60, No. 75.

Women's Bureau Report, *supra* note 4, at 3.

Table 3

Median Wage or Salary Income of Full-Time Year-Round Workers, by Sex and Selected Major Occupation Group, 1969

Major occupation group	Median wage or salary income		Women's median wage or salary income as percent of men's
	Women	Men	
Professional and technical workers.....	\$7,309	\$11,266	64.9
Non-farm managers, officials, and proprietors	6,091	11,467	53.1
Clerical workers	5,187	7,966	65.1
Sales workers	3,704	9,135	40.5
Operatives	4,317	7,307	59.1
Service workers (except private household) ..	3,755	6,373	58.9

Source: U.S. Department of Commerce, Bureau of the Census: Current Population Reports, P-60, No. 75.

Women's Bureau Report, *supra* note 4, at 2.

20. U.S. CIVIL SERVICE COMM'N, BUREAU OF MANAGEMENT SERVICES, STUDY OF EMPLOYMENT OF WOMEN IN THE FEDERAL GOVERNMENT 1967 at 17 (1968).

grade level for males was GS-9.6; for females, GS-5.2. In the three-year period 1966-1969, women's share of jobs in grade levels GS-13 and above rose only from 3.5% to 3.8%.²¹

Women in the professions in the United States have not kept pace with women in other countries. In the Soviet Union, for example, women constitute 79% of the physicians, 36% of the lawyers and 32% of the engineers compared with 7%, 3% and 1% for these professions respectively in the United States.²²

As previously indicated, unemployment rates and the incidence of poverty are consistently higher for women than for men. In 1969, the average rate of unemployment for adult women was 4.7, compared to 2.8 for men. Among Negro women the unemployment rate was 7.8, compared to 5.3 for Negro men. Among Negro teenagers, the unemployment rate for females was 27.1; among males, 21.3.²³

Despite the greater need for job opportunities among disadvantaged women, inequities continue to exist in the manpower training programs of the federal government. The President's Task Force reported that only 31.7 percent of the 125,000 trainees in the on-the-job training programs conducted under the Manpower Development and Training Act in the fiscal year 1968 were women; only 24% of those hired in the JOBS (Job Opportunities in the Business Sector) program were women;

21. Statement of Irving Kator, Assistant Executive Director, U.S. Civil Service Commission, in *1970 Hearings* 727-34.

22. In comparison to world-wide or even black and other minority groups in the United States, these figures [on women lawyers] could not be more depressing. Of the nation's 320,000 lawyers, 8,000 are women and approximately 3,000 are Negroes. . . . This means that one of every 7,300 Negroes is an attorney and only one of every 12,500 women is an attorney. A United Nations Commission report ten years ago shows that in Denmark where women comprise approximately the same proportion of the population as they do in the U.S., 50% of the lawyers are women. In the Soviet Union 36 percent of the attorneys are women, and in Germany women are 33 percent of the lawyers. France has 14 percent women attorneys and Hungary claims 9 percent of its public prosecutors are women, while Poland indicates that 25 percent of its judges are women.

Statement of Margaret Laurance, *supra* note 17, at 1127, citing 1959 U.N. Commission on the Status of Women Report. The Laurance statement also cites the *Directory of American Judges*, indicating that in 1967 there were only 200 women of 9,000 judges on the bench. *Id.* at 1122. See also Statement of the Women's Rights Committee of New York University School of Law, reprinted in *1970 Hearings* 584.

In 1965, women constituted 6.7% of all physicians in the United States, significantly lower than the Philippines (24.7%), Finland (24.2%), Israel (24%), Thailand (23.8%), Germany (20%), Italy (18.8%), Scotland (17%) and England and Wales (16%). Of 29 reporting countries only 3 (South Vietnam, Madagascar and Spain) had a smaller percentage of women physicians than the United States. See U.S. Dep't of Labor, Women's Bureau, *Facts on Prospective and Practicing Women in Medicine* (1968), reprinted in *1970 Hearings*, 523, 538-39. See also note 45 *infra*.

23. UNDERUTILIZATION 17-19.

and only 29% of the 33,000 enrollees in the Job Corps in June, 1968 were women. Meanwhile, by 1968 the number of unemployed young women (16 to 24 years of age) had increased to 697,000, and the unemployment rate for young women had increased while decreasing for young men in the same age group. Slight improvement in some training programs was reported in 1970.²⁴

At the bottom of the economic ladder are the 1.6 million (1969 figures) employed as private household workers—including baby-sitters—about two-thirds of whom are nonwhite and whose median wage for full-time year-round employment in 1968 was \$1,523. Nearly 200,000 of the women in this occupation were heads of families in March, 1969, and almost three-fifths of the women who reported private household work as the job longest held during 1968 had incomes below the poverty level. These women are the least protected of all workers. While they are eligible for coverage under the Social Security Act, they are not covered by the Federal Fair Labor Standards Act and are generally excluded from the benefits of labor standards legislation and social insurance which most other workers enjoy.²⁵

The foregoing figures are illustrative and point to disparities which cannot be explained by purely social and cultural factors; nor can they

24. PRESIDENT'S TASK FORCE, *supra* note 4, at 20-21. Dr. Ann Scott testified at hearings held on H.R. 16098 on June 19, 1970, that of 278,000 registered apprentices under the Bureau of Apprenticeship Training in 1968, less than 1% were women; of the 370 occupations represented, women were being trained for only 47. *1970 Hearings* 209, 211. On July 31, 1970, Mrs. Elizabeth Duncan Koontz, Director of the Women's Bureau, testified at the hearings on H.R. 16098, and in answer to a question by Mrs. Green, Chairman of the House Special Subcommittee on Education, as to whether there had been any improvement of women's position in the various job training programs, replied: I think the percentage of increase, according to our latest figures out of 1969, do suggest some increases.

MRS. GREEN. Do you know what—and in manpower training or retraining programs?

MRS. KOONTZ. In the various programs under MDTA, 44 percent, and on the job, 35 percent. I feel the New Careers program, indicating 70 percent at this time, is one of the most encouraging. With the Job Corps, it is still 29 percent, which indicates room for much improvement and encouragement.

1970 Hearings 691, 700.

25. U.S. Dep't of Labor, Women's Bureau, *Women Private Household Workers*, May, 1970, reprinted in *1970 Hearings* 357. For data on the special problems of Negro women, see U.S. Dep't of Labor, Women's Bureau, *Negro Women in the Population and the Labor Force*, December, 1967; U.S. Dep't of Labor, Women's Bureau, *Fact Sheet on Educational Attainment of Nonwhite Women*, May, 1967; PRESIDENT'S COMMISSION ON THE STATUS OF WOMEN, *REPORT OF CONSULTATION ON PROBLEMS OF NEGRO WOMEN* (1963); Pressman [Fuentes], *Job Discrimination and the Black Woman*, CRISIS, March, 1970, at 103; Murray, *The Liberation of Black Women*, in *VOICES OF THE NEW FEMINISM* 87 (M. Thompson ed. 1970); Reid, "Together" Black Women, 1970, unpublished study prepared for the Black Women's Community Development Foundation, Washington, D.C.

be explained by differences in education. In March, 1968, the median number of years of school completed by women in the work force was 12.4 compared with 12.3 for working men. Of the total number of working women, 7.4% had completed 4 years of college compared with 7.7% of all working men. Only in the category of workers with 5 or more years of college education was there a noticeable difference between the sexes: 3.1% of all women workers and 5.9% of all male workers were in this group. In March, 1969, the median years of school completed for female and male workers in clerical occupations were identical: 12.6. But the median salary of full-time women workers in clerical jobs was only 65.1% (\$5,187) of that of male workers (\$7,966) in the same field.²⁶ The conclusion seems inescapable that a principal factor in the inferior economic position of women who work is the persistence of extensive patterns and practices of discrimination based solely on sex in the major institutions responsible for training and employment. In view of the massive public investment in higher education as the chief means of economic advancement, opportunities for women in this area are crucial to their achievement of economic equality. We turn, therefore, to a consideration of the position of women in higher education.

INEQUALITY IN EDUCATION

Colleges and universities play a strategic role in employment opportunity because the educational process determines *access* to professional training and careers. "Undergraduate and graduate programs in universities are analogous to the training and apprenticeship programs of industry," Congresswoman Martha Griffiths has pointed out.²⁷ The integral relationship between training and employment has led women to focus attention upon the paradox of continuous emphasis upon higher education as the gateway to economic opportunity while simultaneously there exists in our colleges and universities what Dr. Bernice Sandler, psychologist, has described as "*a massive, consistent and vicious pattern of sex discrimination.*"²⁸

26. See U.S. Dep't of Labor, Women's Bureau, Background Facts on Women Workers in the United States 11-12, Tables 7 and 8, 1970. See also Table 3, *supra* note 19.

27. 116 CONG. REC. H1588 (daily ed. March 9, 1970).

28. Statement to the House Special Subcommittee on Education, in *1970 Hearings* 298, 301 (emphasis in original). Dr. Sandler, who is Chairman, Action Committee on Federal Contract Compliance in Education, WEAL, summarized women's activities to eliminate discriminatory practices as follows:

Women on campuses all over the country have begun to form groups, across departmental and professional lines. They are beginning to do more than complain; they are examining their own university's commitment and treatment of women. Women faculty, women staff, and women students are all participating.

Obviously, the more highly trained a woman is, the greater has been her investment in preparing for a career and the more likely she is to seek permanent employment and be concerned with career advancement. Work force participation of women increases at every level of education. In 1968 it ranged from 71% of all women with 5 or more years of college to only 17% of those women with less than 8 years of elementary school education.²⁹ Dr. Helen S. Astin's study of 1,547 women who had received their doctorates in 1957 and 1958 revealed that 91% were in the labor force in December, 1965.³⁰

Yet it is precisely in those areas which require intensive training that women are most vulnerable to both overt and unconscious discrimination—namely, in academic life and the leading professions. The Equal Pay Act of 1963,³¹ which amended the Fair Labor Standards Act, is limited by the exemption of "executive, administrative, or professional employees, including those employed as academic administrative personnel or teachers in elementary or secondary schools."³² Academic women are not covered by Title VII of the Civil Rights Act of 1964,³³ which does not

Women's rights are being included in a variety of student protest activities.

Women in the professions are becoming highly sensitive to the need for the recognition of the inequities within their professions. At the Fall 1969 meeting of the American Psychological Association, women psychologists charged that organization with accepting "male" job openings (WEAL [Womens' Equity Action League] has since filed formal charges against the American Psychological Association and the American Personnel and Guidance Association for this very reason). The women proceeded to form a new group, the Association for Women Psychologists. In other professional organizations such as the American Sociological Association, the Modern Language Association, The American Historical Association, the American Political Science Association, the American Society for Microbiology, and the American Association for the Advancement of Science, women have begun to form caucuses and organize as pressure groups to end discrimination within their respective professions. In April 1970, a Professional Women's Caucus emerged which will represent all professional women. These are but a few examples of activity by women in the academic and professional worlds.

1970 Hearings 307.

29. U.S. DEP'T OF LABOR, WOMEN'S BUREAU, *supra* note 6, at 3. Of all women with 8 years of elementary school education, 31% are in the work force; of those with 4 years of high school education, 48%; of those with 4 years of college, 54%.

30. Astin, *Factors Associated with the Participation of Women Doctorates in the Labor Force*, PERSONNEL & GUIDANCE J., Nov., 1967, reprinted in 1970 Hearings 843. Compare the statement of Dr. Muirhead of the Office of Education, Health, Education and Welfare, citing a 1966 OEO study which found that 85% of women receiving doctorates between 1958 and 1963, were working full time. 1970 Hearings 645. According to Dr. Sandler, "79% of women Ph.D.'s have had uninterrupted careers."

31. 29 U.S.C. § 206(d) (1964). For a discussion of the Equal Pay Act, see Berger, *Equal Pay, Equal Opportunity and Equal Enforcement of the Law for Women*, 5 VAL. U.L. REV. 326 (1971).

32. 29 U.S.C. § 213 (1964).

33. 42 U.S.C. §§ 2000e et seq. (1964). See Fuentes, *Federal Remedial Sanctions:*

apply to any "educational institution with respect to the employment of individuals to perform work connected with the educational activities of such institution."³⁴ Title VI of the Act, which prohibits discrimination in federally assisted programs and activities, does not refer to sex discrimination.

Pressures for remedial action by Congress led to extensive hearings in June and July, 1970 before the House Special Subcommittee of the House Committee on Education and Labor.³⁵ The Subcommittee, chaired by Congresswoman Edith Green, developed more than 1250 pages of testimony and statistical data which substantiated Dr. Sandler's indictment. Although the scope of the hearings covered economic discrimination against women generally, in government, private industry and the professions, the bulk of the testimony and exhibits related to women in academia and in law and medicine. With respect to colleges and universities, representatives of women's groups called for investigation and remedial legislation particularly in the following areas: 1) admission quotas in undergraduate and graduate schools; 2) discrimination in financial assistance for graduate study (scholarships, fellowships, research grants, teaching assistantships, etc.); 3) hiring practices; 4) promotions and 5) salary differentials.³⁶ What follows is a sampling of the information received by the Subcommittee which illustrates the dimensions of the problem.

Discriminatory Admissions Policies

The charge that women are subjected to higher admission standards than men throughout the levels of higher education was supported by considerable evidence. Dr. Peter Muirhead, Associate Commissioner of Education, Office of Education, Department of Health, Education and Welfare, told the Subcommittee that, according to the annual survey of college freshmen by the American Council on Education, women enter college with slightly better high school records than men. This background of higher achievement continues at graduate levels, "suggesting a tendency to require higher standards of women for admission." He noted that a 1965 sampling by the Office of Education of graduate degree-credit students in the arts and sciences revealed that 68% of the women

Focus on Title VII, 5 VAL. U.L. REV. 374 (1971); Mink, *Federal Legislation to End Discrimination Against Women*, 5 VAL. U.L. REV. 397 (1971).

34. 42 U.S.C. § 2000e-1 (1964).

35. See note 5 *supra*.

36. See Letter from Nancy E. Dowding, President, Women's Equity Action League, to Hon. George P. Schultz, Secretary of Labor, Jan. 31, 1970, reprinted in *1970 Hearings* 742.

but only 54% of the men had B or better undergraduate grade averages.³⁷

Dr. Ann Sutherland Harris of Columbia University, citing a report on women at the University of Chicago as "evidence that it is easier for a man than for a woman to get into graduate school," testified:

The most conclusive evidence is the grade point average of the women, which is significantly higher than the men. 9.1% of the women reported straight A averages compared with 6.8% of the men; 24.9% of the women reported A- averages compared with 20.1% of the men; and 32.2% of the women had B+ averages compared with 31.6% of the men. Only 30% of the women compared with 41% of the men had grade averages of B or lower.³⁸

A correspondent from Cornell University informed the Subcommittee that there were quotas on women applicants operating at all the schools in the institution. For example, in the State School of Agriculture "quotas exist such that the mean SAT scores of entering women freshmen are higher than those of men by 30-40 points."³⁹

Dr. Muirhead's testimony showed that restrictive admissions policies against women are applied at public universities as well as private institutions:

We know that many colleges admit fixed percentages of men and women each year, resulting in a freshman class with fewer women meeting higher standards than it would contain if women were admitted on the same basis as men. At Cornell University, for example, the ratio of men to women remains 3 to 1 from year to year; at Harvard/Radcliffe it is 4 to 1. The University of North Carolina at Chapel Hill's fall 1969 "Profile of the Freshman Class" states, "admission of women on the freshman level will be restricted to those who are especially well qualified." They admitted 3,231 men, or about half of the male applicants, and 747 women, about one-fourth of the female applicants. Chapel Hill is a State-supported institution.⁴⁰

37. 1970 Hearings 642, 643. A ten-year survey (1961-1970) of graduates of the School of Arts and Sciences at Brandeis University showed that during that period women were awarded 49.1% of all degrees conferred but took 51.7% of all honors and 40.2% of the highest honors. *Id.* at 336.

38. *Id.* at 242, 248-49.

39. Letter from Shiela Tobias, then assistant to the vice-president for academic affairs at Cornell University (now Associate Provost, Wesleyan University) to Hon. Edith Green, July 12, 1970, reprinted in 1970 Hearings 1077.

40. 1970 Hearings 643.

It should be noted here that discriminatory policies of state-supported institutions violate the equal protection clause of the fourteenth amendment.

The application of the "equal rejection" theory is apparently widely accepted by graduate and professional schools' admissions officers. For example, a university insists that it is not biased if it accepts 50 of 100 male applicants and only 10 of 20 female applicants. The inference of overt discrimination in admissions policies is strengthened by the fact that the faculties and college administrators who make these decisions are predominantly male. Significantly, the Cornell correspondent pointed out "that when a woman professor in one graduate field was put in charge of graduate student admissions, the ratio of women admitted to her field alone approached 50%. In other fields the ratio is very low."⁴¹

A consistent use of discriminatory quotas to limit the admission of women to medical school was revealed in data submitted by Dr. Frances S. Norris, M.D.⁴² She testified that while women applicants to medical school have increased over 300% since 1930, the proportion of women accepted has fallen. From 1930 to 1939, women's share of the total number of admissions rose only from 4.5% to 9.7%, but the percentage of women applicants actually accepted over this same period *decreased* from 65.5% to 46.5%. Of the 2,097 women who applied for admission to medical school in 1968-69, only 976 were accepted. A study published in the *Journal of Medical Education* comparing men and women applicants between 1960 and 1969 shows that the number of women entering has been limited to a range of 7% to 10% of the total admissions.⁴³

Dr. Norris charged that the low percentage of women accepted to medical school results from admitted prejudice on the part of medical school admissions committees and the use of the equal rejection formula. "Interviews with admissions officers at 25 northeastern medical schools" revealed that "19 admitted they accepted men in preference to women unless the women were demonstrably superior." The segregation of male and female applicants into two categories and the rejection of an equal percentage of each means that women applicants "are not judged on an equal competitive basis, but are placed in a disadvantageous category requiring special justification for acceptance." Studies of medical school admissions policies make it "apparent that the women rejected from the

41. Tobias letter, *supra* note 39.

42. *1970 Hearings* 510-79.

43. *Id.* at 526, 574. In 1968-69, of 19,021 male applicants to medical school, 9,116, or 47.9% were accepted. *Id.* at 574.

small female applicant pool were equal to or better than men accepted and that they were rejected because their sex quota was filled."⁴⁴ Dr. Norris also pointed out that these discriminatory policies are carried out with government aid. Federal grants to medical colleges in 1968-69 totalled \$775 million, or more than half of the total expenses of these institutions.⁴⁵

Similarly, the woman applicant to law school receives "special attention." "Although no law school uses either a formal or informal quota system to limit the number of females enrolled," writes Beatrice Dinerman, "they do admit to scrutinizing female applicants more closely for ability and motivation. Some schools give close consideration to the marital status of women before granting admission, and other schools take into account that a female student might not graduate and continue to practice. It follows that a male applicant is often chosen over an equally qualified female."⁴⁶

Financial Assistance

Although women have voiced strong suspicions that they are discriminated against in financial aid, evidence of bias in this area has been more difficult to obtain than in the area of admissions. Data from the Office of Education indicated that women undergraduates share in student assistance funds in approximately the same proportion as their percentage of enrollment. Dr. Muirhead stated that 43% of college undergraduates are women; that women constitute about 43% of all students receiving national defense loans, 49% of students benefiting from the work-study college program, 40.2% of those receiving equal opportunity grants and 36.5% of those participating in the guaranteed loan program.⁴⁷

44. *Id.* at 511-12.

45. *Id.* at 522-23. A 1968 report of the Women's Bureau emphasized an urgent need for the training of additional health workers, including physicians, to meet the growing health needs of the nation due to continuing population growth, increased longevity, expanded medical services under medicare and medicaid programs and increasing awareness of the health problems of disadvantaged groups. The United States Public Health Service estimated that 400,000 physicians would be needed by 1975—100,000 more than were active in 1968. Tables in the report compared the proportion of women graduates from medical schools in the United States with other countries in 1965. The 503 women graduates from medical schools in the United States for that year constituted only 7.3% of the total. By contrast, the Republic of Germany reported 921 women graduates from medical school, or 35.8% of the total. In India, Thailand, Austria and the combined countries of England, Scotland, and Wales, women represented one-fourth or more of the total medical school graduates in 1965. In 10 additional countries, they were between 10% and 20% of the total. In only 2 (New Zealand and the Republic of China) of 22 reporting countries was there a smaller proportion of women graduates than in the United States. *See 1970 Hearings* 537-38.

46. Dinerman, *supra* note 17, at 951.

47. *1970 Hearings* 645.

Complaints of discrimination have centered upon financial assistance for graduate study. Scattered testimony suggested that women fare slightly worse than men in receiving graduate fellowships. In 1969 women represented 33% of the graduate student population; they received 28% of the awards given under the NDEA Title IV fellowship program for graduate students and 29.3% of graduate academic awards under NDEA Title VI.⁴⁸ Other testimony indicated that women are less likely to receive graduate fellowships than men because they are less likely to complete their doctoral programs than men are,⁴⁹ or because of the departmental judgment "that among Ph.D.'s women are less likely than men to make full use of the training throughout their lifetimes and that accordingly scarce fellowship money should be given more frequently to men."⁵⁰ Women refute this argument by pointing to the high proportion of women with Ph.D.'s who are working.⁵¹ They also charge that attrition rates among women graduate students are aggravated because of disparagement and lack of support from the faculty.

The higher rate of attrition among women than men in college and graduate degree programs cannot be explained by any lack of high degree of commitment on the part of women students if the findings of a report on women at the University of Chicago are typical. A 1969 study of students at that institution produced responses "challenging the commonly held notion that women are less committed as students than men."

When asked what they expected to be doing ten years from now, 91 percent of the women respondents expected to be involved in a career as compared with 94 percent of the men. Only 5 to 6 percent of our women respondents said they would like or expected to be occupied with family alone ten years from now. Women and men appear to feel equally favorable about going to or being in graduate school. Furthermore, 62 percent of the women and 53 percent of the men respondents indicated that they would be "very disappointed" if they left school before completing their education.⁵²

Dr. Harris, commenting on the report, pointed out that the average

48. *Id.* at 646.

49. Statement of Dr. Ann Sutherland Harris, Assistant Professor of Art History, Columbia University [hereinafter cited as Harris statement], in *1970 Hearings* 247.

50. Report of the Committee on University Women, Women in the University of Chicago 43, May 1, 1970, reprinted in *1970 Hearings* 753, 804 [hereinafter cited as Chicago Report].

51. See note 30 *supra* and accompanying text.

52. Chicago Report, *supra* note 50, at 43, reprinted in *1970 Hearings* 805.

difference in attrition rates among men and women was 5% which she believed to be "statistically insignificant" and noted that at the College of Physicians and Surgeons at Columbia University, for example, the attrition rate of men students was equal to or greater than that of women students. She asserted that, in the opinion of those who have thought about this problem,

the slightly higher attrition rates of women than of men graduate students . . . are largely explained by the lack of encouragement and by the actual discouragement experienced by women graduate students for their career plans. They are continually told that they will not finish, that women's minds are not as good as men's minds, that the "difficulties of combining the career (sic) of marriage and motherhood with a career as a scholar and teacher" will be beyond the physical and mental energies of all but the "exceptional woman" (but never, of course, of men, who are presumed to spend no time at all being husbands and fathers). Women are told that they are welcome first and foremost as decoration for the male academic turf. Even in academe, women are sex objects.

. . . It is not surprising that some women decide that they are not cut out to be scholars or teachers. Rather it is surprising that the dropout rates are not far higher than they are. That they are not I take to be evidence of women graduate students' higher degree of commitment, produced as a natural defense mechanism in response to the sexual discrimination that they meet in their daily lives.⁵³

The point was made that the higher attrition rate of women is used as an excuse to deny fellowships, which will "almost certainly increase their attrition rate, thus making the prophecy self-fulfilling."⁵⁴

Women are further disadvantaged because they tend to be concentrated in those fields where aid is lowest. Jo Freeman of the University of Chicago suggested "that there is a relationship between those fields into which women are channeled by their undergraduate advisers and social expectations and those fields which have lower social and economic prestige as indicated by the funds available in such fields."⁵⁵ Another disadvantage is the failure of scholarship programs to make provision for part time study. Dr. Sandler testified:

53. Harris statement, *supra* note 49, in 1970 Hearings 247.

54. *Id.*

55. Chicago Report at 116, reprinted in 1970 Hearings 878.

Practically all Federal scholarship and loan aid is for full-time study—a practice that works to virtually eliminate married women with families from receiving such aid, since they need a part-time schedule. Indeed, many schools forbid or discourage part-time study, particularly at the graduate level, thus punishing women who attempt to combine professional training and home responsibilities simultaneously.⁵⁶

Direct evidence of discrimination in the award of scholarships and fellowships was presented against two institutions. The Women's Rights Committee of the New York University Law School submitted a statement pointing out that until the women's group pressed for reforms in 1969, "NYU had totally excluded women, for more than 20 years, from the prestigious and lucrative Root-Tilden and Snow Scholarships. Twenty Root-Tilden Scholarships worth more than \$10,000 each were awarded to male "future public leaders" each year. Women, of course, can't be leaders, and NYU contributed its share to making that presumption a reality by its exclusionary policy."⁵⁷ A similar charge against Cornell University stated that the Cornell catalogue lists scholarships and prizes open to Arts and Science undergraduates totalling \$5,045 annually to be distributed on the basis of sex. Women are eligible to receive only 15% or \$760 of this amount compared with \$4,285 for men.⁵⁸

The Problem of Disparagement

Despite the high potential demonstrated by superior achievement records at high school and undergraduate school, numerically women steadily lose ground as they move up the academic ladder. In 1968, women were 50.4% of high school graduates, 43.4% of those receiving B.A. degrees, 35.8% of those awarded master's degrees, 12.6% of those receiving doctorates, and 4.6% of those receiving first professional degrees.⁵⁹ Dr. Muirhead, while recognizing that "this pattern of dropping percentages of women as the degree scale goes up results from a complex mix of factors," stressed the role of admissions policies and disparagement. He told the Subcommittee:

Both the reality and fear of higher admissions standards certainly play a part.

56. Statement of Dr. Bernice Sandler, in *1970 Hearings* 301.

57. Statement of Mrs. Diane Blank and Mrs. Susan Deller Ross, in *1970 Hearings* 584, 588.

58. Kusnetz & Francis, *The Status of Women at Cornell, 1969*, in *1970 Hearings* 1078, 1080.

59. Statement of Peter Muirhead, in *1970 Hearings* 643.

Women are generally encouraged to think of themselves as potential wives and mothers, and discouraged from thinking of themselves as potential professionals. Professors, counselors, and parents often discourage women from taking postgraduate training, except in "women's fields". They may argue that it is too hard for a woman to get a job in the professions, that she'll only get married and stop working anyway, and so on.⁶⁰

Other testimony also emphasized the negative effects upon women students of low expectations on the part of faculty and apathy on the part of counselors.⁶¹

The fact that many remarks addressed to women students by male faculty are often meant to be humorous does not remove the sting or the impact of the disparagement. Dr. Harris told the Subcommittee, "When President Nathan Pusey of Harvard realized that the draft was going to reduce the number of men applying to Harvard's graduate school, his reaction was 'We shall be left with the blind, the lame and the women.'" She asserted that the Chicago report on women "confirmed what most of us have known from personal experience for a long time, namely, that women receive significantly less support for career plans than men do."⁶²

The most common manifestation of disparagement is the failure of male faculty members to take women students "seriously." Dr. Harris declared:

One remark above all is repeatedly made to women students . . . [who] are asked again and again "Are you really serious?" Since the vast majority of women students are as serious as the men students, the women start questioning themselves. Are they supposed to be more serious than men are? Are male students more serious than women students? How serious do you have to be? It is even asked of women who have completed their PhD's at great personal and financial cost when they apply for their first jobs.⁶³

Typical remarks collected and reported by women students on various campuses are illustrative of the low expectations of faculty:

"You're so cute, I can't see you as a Professor of anything."

60. *Id.* at 643-44.

61. *See 1970 Hearings* 200-01, 289, 805, 810.

62. Harris statement, *supra* note 49, in *1970 Hearings* 243, 246.

63. *Id.* at 246.

“Why don’t you find a rich husband and give all this up.”
 “There are already too many women in this Department.”
 “We expect women who come here to be competent good students, but we don’t expect them to be brilliant or original.”
 “Women are intrinsically inferior.”⁶⁴

The impact of such remarks is described in an analysis by a group of women graduate students at the University of Chicago, which stated in part:

Comments such as these can hardly be taken as encouragement for women students to develop an image of themselves as scholars. They indicate that some of our professors have different expectations about our performance than about the performance of male graduate students—expectations based not on our ability as individuals but on the fact that we are women. Comments like these indicate that we are expected to be decorative objects in the classroom, that we’re not likely to finish a PhD, and if we do, there must be something ‘wrong’ with us. . . .

Expectations have a great effect on performance. Rosenthal and Jacobson (1968) have shown that when teachers expected randomly selected students to “bloom” during the year, those students’ IQs increased significantly above those of a control group. . . . It would be surprising to find that graduate schools are immune to this phenomenon. When professors expect less of certain students, those students are likely to respond by producing less.⁶⁵

The enormous waste of talent and human resources in this process is indicated by a National Manpower Council report that only one of 300 women in the United States who have the potential to earn a Ph.D. degree actually obtains it, compared to one in 30 men.⁶⁶

Placement

College placement officials are also charged with acquiescence in the

64. *Id.* at 245.

65. *Id.* at 245-46, citing R. ROSENTHAL & L. JACOBSON, *PYGMALION IN THE CLASSROOM: TEACHER EXPECTATION AND PUPIL’S INTELLECTUAL DEVELOPMENT* (1968). For a discussion of psychological barriers to female achievement, see HORNER, *Fail: Bright Women*, *PSYCHOLOGY TODAY*, Nov., 1969, reprinted in *1970 Hearings* 896.

66. Shaffer & Shaffer, *Job Discrimination Against Faculty Wives*, 36 *J. OF HIGHER EDUC.* 10-15 (Jan., 1966). See also *1970 Hearings* 1022-23.

discriminatory practices of private employers. Since colleges and universities are important recruiting centers for employment, one witness stressed the impact of the refusal of educational institutions to recommend students to potential employers with a record of sexual discrimination. "I cannot think of any single action that would have more beneficial effect for women than for all institutions of higher education to refuse to cooperate with sexist employers," she told the Subcommittee.⁶⁷ Dr. Sandler called attention to the "blatant discriminatory ads" labelled "male only" and "female only" contained in the *College Placement Manual* published by the College Placement Council to which over 1,000 colleges and universities belong. Noting that this publication is used on practically every college campus as well as by the Department of Defense and that such advertising violates Title VII of the Civil Rights Act of 1964 as well as Executive Order 11246, as amended by Executive Order 11375, Dr. Sandler observed:

University administrators who would be horrified if a placement bulletin for their students listed job openings for "whites only," apparently see little or nothing wrong with job openings that read "male only."⁶⁸

Faculty Appointments, Income, Promotions and Tenure

Inequities based upon sex exist at every level of the teaching profession. Although teaching in elementary and secondary schools is commonly considered to be a "woman's field," as in other areas women are concentrated at the lower levels. More than two-thirds (67.6%) of the teachers in the elementary and secondary schools are women, but they constitute only 22% of the elementary school principals and only 4% of the high school principals. A recent survey by the National Education Association (NEA) reported that of 13,000 school superintendents only 2 women were found.⁶⁹

At the college faculty level the attrition noted in the degree ladder becomes even more pronounced. They are not only a small minority but also tend to remain in the lower, non-tenured positions, are promoted more slowly and paid less than their male colleagues. Women view discrimination in this area as particularly blatant because of the highly select group of well qualified academic women who complete their doctoral programs against numerous odds and because,⁷⁰ "contrary to

67. Harris statement, *supra* note 49, in *1970 Hearings* 256.

68. Statement of Bernice Sandler, in *1970 Hearings* 320.

69. Muirhead statement, *supra* note 59, in *1970 Hearings* 644.

70. See Harris statement, *supra* note 49.

academic mythology, a higher percentage of women with doctorates go into college teaching than do men with doctorates."⁷¹ Noting that the rigorous pre-selection process and other disadvantages to which women students are subjected are such that "only the hardiest survive," Dr. Harris told the Subcommittee:

As a group, women PhDs have higher IQs, higher G.P.A.s, and higher class rank, than their male counterparts. How ironic that women who have demonstrated such promise and such dedication to their chosen fields should continually be treated as though their work is and should be peripheral and of secondary importance to society. Like all women, even this select group is treated as second-class citizens.⁷²

Reports from various institutions⁷³ revealed that while the number of women receiving doctorates is steadily increasing, the proportion of doctorates awarded to women bears little relationship to their opportunities for faculty positions. For example, a study of Columbia University showed that from 1957 to 1968 the proportion of doctorates earned by women rose from 13% to 24%, but the percentage of women in tenured positions on the graduate faculty remained constant—at slightly over 2%.⁷⁴ A 1970 report on the University of Wisconsin revealed that

71. *1970 Hearings* 739.

72. *Id.* at 249.

73. See *1970 Hearings* for statistical reports and statements on the status of women for the following colleges and universities: Brandeis, *id.* at 336; University of Buffalo, SUNY, *id.* at 212; California State College at Fullerton, *id.* at 202; University of California at Berkeley, *id.* at 1143; University of Chicago, *id.* at 753, 994; Columbia University, *id.* at 242, 260; Cornell University, *id.* at 1077-78; Eastern Illinois University, *id.* at 1222, 1223; Harvard University, *id.* at 183; University of Illinois, *id.* at 1225; Kansas State Teachers College, *id.* at 1226; University of Maryland, *id.* at 1024; New York University Law School, *id.* at 584; University of Wisconsin, *id.* at 190.

74. Muirhead statement, *supra* note 59, in *1970 Hearings* 645. A comparison of doctorates earned by women in various departments of Columbia University and the percentage of women in full time faculty positions in these departments showed the following:

French: 66.6% of their doctorates go to women—no full-time female faculty.

Art history and archeology: 54% of the doctorates are earned by women. 26% of the tenured faculty and 71% of the non-tenured faculty are women.

Biological Sciences: 45% of the doctorates are awarded to women; 9.5% of the tenured faculty and 33% of the non-tenured faculty are women, *i.e.*, 2 men and 1 woman.

Anthropology: 44% of doctorates go to women—no full-time female faculty.

Psychology: 36% of doctorates go to women—no female faculty.

English and comparative literature: 27% of doctorates are earned by women. One tenured woman listed in Graduate Faculty (4% of the tenured faculty).

Sociology: 26.6% of doctorates go to women; one woman assistant professor (1967-68).

History: 17% of doctorates earned go to women. One tenured woman; one non-tenured woman.

the proportion of women in the Ph.D. programs in ten departments varied from 26% to 58%, but that the proportion of women faculty members in these departments ranged from 9.6% to 19.3%.⁷⁵ In 1968-69, women constituted 22% of the graduate students and were awarded 19% of the Ph.D.'s in the Harvard University Graduate School of Arts and Sciences, but there were no women among the more than 400 tenured professors of that graduate school.⁷⁶

Dr. Alice Rossi's study of 188 graduate departments in sociology in 1968-69 graphically illustrates the downward spiral of women in sociology as they move from undergraduate majors to the chairmanship of a graduate department of sociology. According to her findings, women are:

- 43% . . . of college seniors planning graduate work in sociology
- 37% . . . of master's candidates in graduate school
- 30% . . . of Ph.D. candidates in graduate school
- 27% . . . of full-time lecturers and instructors
- 14% . . . of full-time assistant professors
- 9% . . . of full-time associate professors
- 4% . . . of full-time professors
- 1% . . . of chairmen of graduate sociology departments
- 0% . . . of the 44 full professors in the five elite departments (Berkeley, Chicago, Columbia, Harvard, and Michigan).⁷⁷

A similar nationwide survey of the position of women in English and modern foreign language departments conducted by the Modern Language Association's Commission on Women in 1970 produced findings strikingly similar to those of the Rossi study. Replies from 595 questionnaires, or 60% of the sample, showed that while women represented 69% of all seniors planning graduate study in foreign languages, 65% of those planning graduate study in English, 55% of the graduate

Philosophy: 17% of doctorates go to women; no women on faculty.

Public law and government: 16% of doctorates earned by women; one female instructor (non-tenured). There are 35 men in the department, 26 of whom are full professors.

Columbia Women's Liberation, Report From the Committee on Discrimination Against Women Faculty, Columbia University, reprinted in *1970 Hearings* 260, 264.

75. Report of Women's Research Group, Women at Wisconsin (1970), reprinted in *1970 Hearings* 190, 196.

76. Sandler statement, *supra* note 68, in *1970 Hearings* 299. See also Preliminary Report on the Status of Women at Harvard, March 9, 1970.

77. Rossi, *Status of Women in Graduate Departments of Sociology 1968-1969*, 5 AMERICAN SOCIOLOGIST, Feb., 1970, reprinted in *1970 Hearings* 1242, 1252.

students in modern languages, 55% of the master's degrees awarded in the past five years and 31% of the Ph.D.'s received in the past five years, they constitute only 33% of the faculty with full-time appointments and only 18% of the full-time professors.⁷⁸

A nationwide study of degree-granting institutions conducted by NEA in 1966 found that women represented 18.4% of the full-time faculty, distributed as follows: 32.5% of instructors, 19.4% of assistant professors, 15.1% of associate professors and 8.7% of full professors.⁷⁹ These figures, however, do not reveal the complete picture. Women comprise 40% of the faculties in the teachers colleges and 10% or less in the prestigious private institutions and large state universities.⁸⁰ A report on the distribution of women faculty at ten high endowment institutions of higher education in 1960 showed that the proportion of women faculty ranged downward from 9.8% of instructors to 2.6% of full professors.⁸¹ Similarly, in ten high enrollment institutions, women comprised 20.4% of all instructors, 12.7% of all assistant professors, 10.1% of all associate professors and 4.3% of all full professors.⁸²

Other testimony noted that more than half of all academic women are concentrated in the fields of English, fine arts, health, education and physical education; that they are more likely to teach beginning college students—freshmen and sophomores—than upperclassmen or graduate students, and that they tend to cluster in the lower non-tenured ranks.⁸³ While it was suggested that “concentration in the untenured ranks may be attributed to fewer advanced degrees among women, to their youth, to the recency of appointment, or to the fact that it is not always easy to find a woman in the proper field,”⁸⁴ other testimony stressed dis-

78. Report on the Status of Women, Modern Language Association Commission on Women (undated), circulated in April, 1971. Available in manuscript from F. Howe, Goucher College, Towson, Md. 21204.

79. Muirhead statement, *supra* note 59, in 1970 Hearings 644.

80. See statements of Hon. Martha Griffiths and Dr. Bernice Sandler, in 1970 Hearings 299, 739.

81. Harris statement, *supra* note 49, in 1970 Hearings 253, citing study by John Parrish. The ten high endowment colleges were: Chicago, Columbia, Cornell, Harvard, Johns Hopkins, M.I.T., Northwestern, Princeton, Standard and Yale. Parrish's figures were based upon eight reporting institutions. *Id.*

82. *Id.* The ten high enrollment institutions were: Berkeley, C.C.N.Y., Indiana, Illinois, Michigan, Michigan State, Minnesota, N.Y.U., Ohio State and Pennsylvania State.

83. Testimony of Miss Virginia Allan, Chairman, The President's Task Force on Women's Rights and Responsibilities, in 1970 Hearings 450, 453, citing Simpson, Sex Discrimination in the Academic World (Business and Professional Women's Foundation, 1970).

84. Testimony of Dr. Victoria Schuck, Professor of Political Science, Mount Holyoke College, in 1970 Hearings 469, 471.

criminary hiring patterns and policies of promotion as significant factors in the lower percentage and low status of women on college faculties. It was also charged that women are losing ground to men even in faculty positions at women's colleges, which traditionally have provided the best teaching opportunities for women.⁸⁵

Law schools, particularly, have made a poor showing in hiring women as faculty. The enrollment of women in law school has almost tripled from 1962 to 1969, when women numbered 5,000, or 6.9% of the 72,000 students enrolled in law school.⁸⁶ The White study showed that in 1966, of 2,355 teaching faculty members in 134 accredited law schools, only 51 women were full-time teaching faculty members in 38 law schools—slightly over 2%.⁸⁷ No appreciable change has occurred since 1966. The 1969-70 Directory of Law Teachers lists 53 women full-time faculty in 45 of a total of 144 accredited law schools.⁸⁸

The pattern of inequality continues in the area of academic salaries. A 1965-66 NEA survey found that the median annual salary of female faculty members was 16.6% lower than the median salary of men: \$7,732 compared with \$9,275.⁸⁹ In every faculty rank women earned less than their male counterparts. The median salary for women full professors was \$11,649 compared with \$12,678 for male full professors. Differentials ranged from 6% among instructors to 8.8% among full

85. Only Wellesley, in fact, of the Seven Sisters colleges has more female than male faculty in tenured ranks and in chairmanships. In the rest, male faculty dominate the upper levels and in some cases the lower levels as well. At Vassar, women have dropped from 55.6% of the faculty in 1958-59 to 40.5% in 1969-70. The number of women with full professorships has dropped during the same period from 35 to 16. At Vassar it was thought that a co-educational faculty provided a healthier atmosphere for the women students. The reverse does not apparently apply to Harvard, Princeton, Yale or Brown. Barnard has two more female than male full-time faculty but the men have 78% of the full professorships and chairmanships. . . . Women learn to confine their job applications to co-educational institutions and to women's schools. Men may work anywhere, on the other hand, and can even expect to receive preferential treatment at the best women's colleges.

Harris statement, *supra* note 49, in 1970 Hearings 252.

86. Statement of Margaret Laurance, National Association of Women Attorneys, in 1970 Hearings 1125. In 1962, there were 1,800 women, or 3.8%, of the 49,000 students enrolled in law school.

87. White, *Women in the Law*, 55 MICH. L. REV. 1051, 1112 n.107 (1967).

88. Laurance statement, *supra* note 86, in 1970 Hearings 1124. The Women's Rights Committee of N.Y.U. Law School reported only 35 women faculty members in 36 leading law schools for the period 1968-1970. It also noted that 20% of the N.Y.U. Law School 1971 graduating class are women but that the percentage of female faculty at N.Y.U. is only 1.3%. *Id.* at 586, 591.

89. National Education Association, Research Division, *Salaries in Higher Education Continue to Grow*, NEA RESEARCH BULLETIN, May, 1966, at 50-57. See also Bayer & Astin, *Sex Differences in Academic Rank and Salary Among Science Doctorates in Teaching*, J. OF HUMAN RESOURCES, Spring, 1968, reprinted in 1970 Hearings 1031.

professors.⁹⁰ Dr. Muirhead concluded from these and other facts that even taking into account such factors as low expectations, lack of day care centers, or institutional practices, "the inequities are so pervasive that direct discrimination must be considered as paying a share, particularly in salaries, hiring, and promotions, especially to tenured positions."⁹¹

Prejudice against hiring academic women is manifested in departmental practices as well as in the attitudes of hiring officials. The use of the informal grapevine to fill job openings almost automatically excludes women. For example,

[t]he cliché opening, "Do you know a good man for the job", results in continuous but largely unconscious discrimination against women. Most of the men who use this phrase would deny vigorously that they are discriminating and would not also consider a "good woman," but the "good man" is an effective subconscious roadblock because the image we all tend to carry in our minds of a scholar is a masculine one.⁹²

Graduate faculties "receive regular requests for graduate students with all but their PhDs completed, man preferred."⁹³ Professional organizations accept "male" openings. Dr. Lawrence A. Simpson discovered in his study of attitudes of hiring agents—deans, departmental chairmen and faculty—that while a statistically significant number of females were preferred over less qualified males, when men and women were equally qualified, hiring officials strongly favored the selection of males for faculty appointments. "Women should recognize," he concluded, "well in advance of their adventure into the academic marketplace, that they typically may not be selected on an equal basis with men. Prospective academic women must recognize that they should, in effect, *be more highly*

90. National Education Association, *Salaries in Higher Education, 1965-1966*, RESEARCH REPORT 1966-R 2, Feb., 1966. See also U.S. Dep't of Labor, Women's Bureau, Fact Sheet on the Earnings Gap, Feb., 1970, reprinted in *1970 Hearings* 17.

Comparison of the salaries of male and female academicians at the University [of Illinois] is possible based on responses to a questionnaire distributed by the American Association of University Professors. Approximately 400 questionnaires were sent to all known female academicians and a sample of males who matched them on department membership rank. For all 84 matched pairs of respondents, the mean salaries reported for 1969-70 were \$11,880.38 for men and \$10,461.05 for women. These data strongly suggest that men and women within the same departments, holding the same rank, tend not to be paid the same salaries: women on the average earn less than men.

Loeb, Report on the University of Illinois, Urbana-Champaign, Ill., in *1970 Hearings* 1225.

91. *1970 Hearings* 645.

92. Harris statement, *supra* note 49, in *1970 Hearings* 256.

93. *Id.*

qualified than their male competitors for higher education positions."⁹⁴

Simpson's findings are consistent with the Astin study of women with doctorates.⁹⁵ One-third of the respondents listed that employer discrimination had been a problem in their career development. The types of discrimination most frequently encountered were: differential salaries for men and women with the same training and experience (40%), differential policies based on sex with respect to tenure, seniority, and promotions (33%), unwillingness to delegate administrative responsibility and authority to professional women (33%), and prejudices against hiring women (25%). Significantly, the Astin study also found that the women who reported employer discrimination were more likely to have more publications to their credit and more honors and awards for professional achievement than those who did not. The high correlation between achievement and the reporting of discrimination by employers suggested that these women's "complaints cannot be interpreted as a form of rationalization or as an excuse for their failure to achieve recognition. Furthermore, their comments are not based on hearsay, but reflect their own experience as professionally active women."⁹⁶

Evidence of discrimination in promotions was substantiated by studies of differences in rates of promotion of men and women with similar training who have spent comparable periods of time in their professions. Drawing upon the Harmon 1968 study of Ph.D.'s, Dr. Rossi developed a table which

confines attention to those men and women whose employment has "always" been academic, and compares the ascent to the pinnacle of full professorship of men holding social science doctorates with that of single women and of married women. *After twenty years of an academic career, 90 per cent of the men had reached a full professorship, something achieved by only 53 per cent of the single women and 41 per cent of the married women.* From these data it seems clear that it is sex and not the special situation of married women that makes the greatest difference to career advancement.⁹⁷

94. Simpson, *A Myth is Better Than a Miss: Men Get the Edge in Academic Employment*, COLLEGE AND UNIVERSITY BUSINESS, Feb., 1970, reprinted in *1970 Hearings* 920, 922 (emphasis supplied). See also Simpson, *A Study of Employing Agents' Attitudes Toward Academic Women in Higher Education*, Sept., 1968 (unpublished doctoral thesis, the Pennsylvania State University).

95. H. ASTIN, *THE WOMAN DOCTORATE IN AMERICA* (1969) reprinted in *1970 Hearings* 968.

96. *Id.* at 971-73.

97. Rossi, *supra* note 77, in *1970 Hearings* 1250 (emphasis in original). See also

A similar conclusion was reached by women investigating rates of promotion of men and women faculty members at a single institution. Dr. Harris described the study as follows :

At Columbia, we tried the crude but we think useful procedure of simply counting the numbers of men and women on the faculty in fulltime positions who received their PhDs in the 1960s and then studying their distribution by rank. There were 195 male faculty at Columbia who received doctorates in the 1960s. 47% are assistant professors, 38% are associate professors and 15% are full professors. There are 25 women full-time faculty at Columbia in the same category. 96% (24) are assistant professors, one is an associate professor (tenure granted this year, PhD 1961); there are no female full professors who obtained their PhD in the 1960s at Columbia. Well over 50% of the men who earned their PhDs in 1963 and 1964 have been given tenure. None of the women in that group has been promoted to the rank of associate professor with tenure, although one woman is an assistant professor with tenure, an anomaly brought about by the extreme reluctance of her department to promote her. These differences in promotion rates are too great for discrimination against women not to be a large part of the story.⁹⁸

Anti-Nepotism Rules, "No-Inbred-Hiring" Rule, Tenure System

Rules against nepotism, the "no-inbred hiring" rule and the tenure system are cited as among those policies which perpetuate discriminatory patterns. While nominally neutral, these rules fall more heavily upon women, who are already a disadvantaged group. About one-half of all institutions of higher education and over two-thirds of the large public colleges in the United States have regulations which prohibit or restrict the employment of more than one member of a family, according to a recent study by the American Association of University Women.⁹⁹

Harmon, *Careers of Ph.D.'s: Academic versus Nonacademic* (Career Patterns Report No. 2, National Academy of Sciences) 1968.

98. *1970 Hearings* 253.

99. Shaffer & Shaffer, *supra* note 66. See also *1970 Hearings* 1022, 1023. The Modern Language Association's Commission on Women reported that during 1969-70, five women filed a class action for declaratory judgment challenging the validity of the Arizona Board of Regents' anti-nepotism regulation at the University of Arizona. Upon the advice of the state's attorney's office that the anti-nepotism regulation was probably constitutionally indefensible, the Regents rescinded the regulation during the litigation and the plaintiff's suit was subsequently dismissed as moot. MLA Commission on Women, "On Nepotism" (undated). See note 78 *supra* and accompanying text.

Originally formulated to discourage favoritism based upon family relationships, anti-nepotism rules impose a disproportionate burden upon academic women married to academic men. In many instances a faculty wife holding a Ph.D. is barred from teaching at the same university in which her husband holds an appointment. If employed at all, she is likely to hold a temporary or part-time position in a low category, work as a research associate or teach in a department outside of her own field. A report on nepotism at the University of California, Berkeley, included a survey of 23 faculty wives with Ph.D.'s, and found that "most feel that their talents are not fully utilized in their present positions, and that they are actually qualified for regular positions on the University faculty."¹⁰⁰

A committee on the status of women of the American Political Science Association has recommended that rules against nepotism be abolished, that employment and advancement be based solely upon professional qualifications, and that consideration be given to the formulation of "conflict of interest rules to serve the legitimate functions nepotism rules served in the past."¹⁰¹

According to Dr. Ann Scott of the University of Buffalo, the "no-inbred-hiring" rule, under which a department or university refuses to hire any person who holds a degree from that university, "works like the nepotism rule, to deprive women of equal employment opportunities." The rule penalizes women who may marry faculty men and move to universities where their husbands have been appointed and who may wish to start or complete their studies. It also penalizes women graduate students who marry faculty men. When these women earn their degrees, Dr. Scott pointed out, they discover that the university will not employ them. She felt that the "no-inbred-hiring" policy "by its very existence, discourages many women from coming back for degrees at all, because there seems to be simply no way of using a long and expensive training." In her view, the rule was established in an era when there was much less movement from campus to campus, when universities were smaller in every respect, and when there was much less variety in subject, discipline and approach. "Today's university, however, needs no such discriminatory restrictions."¹⁰²

Dr. Scott characterized "the arteriosclerotic tenure system" as "one

100. Committee on Senate Policy, Report of the Subcommittee on the Status of Academic Women on the Berkeley Campus, May 19, 1970, reprinted in *1970 Hearings* 1143, 1154. For additional statements and data on nepotism regulations, see *1970 Hearings* 209, 223-24, 1153-58.

101. *1970 Hearings* 494.

102. *Id.* at 223-24.

of the most powerful and unexamined areas of discrimination against women in the university world." The thrust of her complaint is that the system is culturally biased against women because of its emphasis upon "production" and the secret conditions under which selections are made, all of which "create a competitive situation in which her cultural conditioning puts her at the greatest disadvantage." Dr. Scott argued that the criterion of publication emphasized in tenure proceedings is "inherently favorable to men" because, as studies indicate, "the professional work of women, regardless of quality, is granted less credence than that of men, publication is probably harder for women to achieve when they do produce, especially in a world of male dominated editorial boards." While recognizing that the University cannot "automatically repeal cultural conditioning," nevertheless

in the matter of tenure it can effect some reforms to bleed the system of sexist bias. It can adopt a broader base of tenure criteria to include emphasis upon teaching, service to the University and the community, and the necessity of women as visible life models. Because tenure means promotion, and because the patterns clearly show that as presently practiced it discriminates against women as a *selection system*, the whole tenure procedure should be subjected to a validation study on this basis alone.¹⁰³

Reforms of the tenure system are long overdue and, in fact, would benefit men as well as women. The medieval flavor of secret proceedings in which a candidate's future career is decided *ex parte* seems incongruous in an institution dedicated to free and open inquiry. There is support for the view that tenure proceedings should be modified to permit a candidate to appear before the ad hoc tenure committee and answer questions, defend his or her record, or present his or her views, as is common practice in other personnel situations. An analogy to such a proceeding is the appearance of a doctoral candidate to defend his or her doctoral thesis.

Administration

If women fare poorly in academic posts, they fare even worse in college administration. Dr. Scott, describing the "progressive evaporation of women as we climb the academic ladder" at the University of Buffalo, noted that while women are only 5% of the full professors at that institution, they are only 1% of the top administration.¹⁰⁴ "The almost

103. *Id.* at 226.

104. *Id.* at 210.

total exclusion of women from visible responsible positions in the administration of Columbia and all other institutions of higher education (with the possible exception of some women's schools) is clear evidence of discrimination against women," declared Dr. Harris.

As Dr. Rita W. Cooley, professor of political science at New York University said, 'The universities tend to think automatically in terms of men when filling a new position. In a sense it's like racism. This discrimination exists at an unconscious level. There is no opportunity for women in administration. We are up against a strong cultural phenomenon, mass male chauvinism. If a woman wants to be an administrator, the field is very narrow.'¹⁰⁵

Effects of Underutilization of Trained Women

As the foregoing discussion indicates, colleges and universities are deeply implicated in the systematic process which prevents women from fully realizing their potential as individuals in a society which boasts of its upward mobility. These institutions contribute to the vast waste of human resources and must share responsibility for some of the results.

An obvious result of this cumulative process is that women frequently work at jobs unrelated to their training or for which they are overqualified, or they perform the duties of a higher position without the benefits of advanced rank and higher pay. An analysis of women graduates from the College of Letters and Science at the University of Wisconsin illustrates this point:

[I]n 1964, of 9 working female former economics majors, 1 reported herself a welfare aid worker, 2 were secretaries, 1 a traffic assistant, 1 a clerk, 1 a recreation aide, 1 a physical education teacher, while only 3 held positions vaguely related to their economics training. Of the 63 male economics graduates who began working that year, needless to say none were secretaries or clerical workers; most were company trainees. . . . Even in English, a 'woman's field', several reported themselves as secretaries while their male counterparts were doing considerably better in range of job area and remuneration. In mathematics that year, all male working graduates except 1

105. *Id.* at 255. "We found [at Cornell University] . . . that among nonacademic employees there are no high-level women in the administration. Typically the female applicant for a job (with or without B.A. or M.A.) is given a typing test; the male employee is given an aptitude test." Tobias letter, *supra* note 39.

Peace Corps volunteer were in jobs related to mathematics; of the 7 working female mathematics graduates 1 reported as a welfare aide and 1 as a waitress.¹⁰⁶

This analysis is consistent with the report of the Women's Bureau that in March, 1969,

a startling 7 percent of employed women who had completed 5 or more years of college were working as service workers (including private household), operatives, sales workers, or clerical workers. Nearly one-fifth [19%] of employed women with 4 years of college were working in these occupations, as were some two-thirds [69%] of those who had completed 1 to 3 years of college.¹⁰⁷

A more far-reaching result for which colleges and universities are directly responsible is the continued lack of "role models" to encourage younger women to raise their goals and expectations and the perpetuation of the stereo-type that women are not a good academic investment. As the report on women at Columbia University pointed out:

We are puzzled by the Graduate Faculties' commitment to train women, but not to hire them. We know from experience as students and teachers that it is vital for women students in graduate school to see women engaged in the academic profession as naturally as men are. . . . By the obvious scarcity of women training graduate students, the institution acclimatizes women students to their professional expectations: low rank, low pay, low status, a slower rate of promotion than their male colleagues, and a more difficult tenure hurdle.¹⁰⁸

Similarly, the report on women at Harvard University noted that the "scarcity of women scholars in the senior ranks at Harvard tends to discourage the professional aspirations of women students and junior faculty."¹⁰⁹ Thus, the self-fulfilling prophecy continues to operate. "Since women have a visibly lower chance of success than men," said Dr. Scott, "fewer women are inspired to try, lowering in turn the

106. Women's Research Group, *Women at Wisconsin, 1970*, reprinted in *1970 Hearings* 190, 192.

107. UNDERUTILIZATION, *supra* note 9, at 17.

108. Columbia Women's Liberation, Report from the Committee on Discrimination Against Women Faculty, Columbia University, reprinted in *1970 Hearings* 260, 263.

109. Women's Faculty Group, Preliminary Report on the Status of Women at Harvard, March 9, 1970, reprinted in *1970 Hearings* 183, 186. See also Kusnetz & Francis, *The Status of Women at Cornell, 1969*, reprinted in *1970 Hearings* 1070, 1081.

numbers of women available" for academic positions.¹¹⁰

REMEDIES AGAINST SEX DISCRIMINATION IN EDUCATION

Judicial Approaches

The enormous extent to which the federal government subsidizes sex discrimination in higher education can be measured by the 1969 National Science Foundation report that 2,174 colleges and universities received \$3,367 million from the federal government for the fiscal year 1968.¹¹¹ Citing these figures, Congresswoman Martha Griffiths charged that "it is a national calamity that agencies of the Federal Government are violating our national policy, as well as the President's Executive Orders, by providing billions of dollars of Federal contracts to universities and colleges which discriminate against women both as teachers and as students."¹¹²

Since colleges and universities are specifically exempted from present federal legislation with respect to discrimination based on sex, women must pursue available remedies through constitutional litigation or through the policies of the executive branch of the federal government. State-supported institutions of higher education, of course, are agencies of the state, and discriminatory policies of these institutions constitute state action within the purview of the equal protection clause of the fourteenth amendment. In *Kirstein v. Rector and Visitors*,¹¹³ a lower federal court ruled that the exclusion of women applicants from the all-male campus of the University of Virginia was a denial of equal protection where the facilities available to women were not equal. The application of the fourteenth amendment to compel equalization of Negro teachers' salaries in state public school systems¹¹⁴ and to prohibit

110. 1970 Hearings 214.

111. NATIONAL SCIENCE FOUNDATION, FEDERAL SUPPORT TO UNIVERSITIES AND COLLEGES, FISCAL YEAR 1968 (Report No. NSF-69-12, Sept., (1969).

112. 1970 Hearings 738. See 5 U.S.C. § 7151 (1964) which declares: "It is the policy of the United States to insure equal employment opportunities for employees without discrimination because of race, color, religion, sex or national origin. The President shall use his existing authority to carry out this policy." Cf. *Williams v. McNair*, 316 F. Supp. 134 (D.S.C. 1970) (three-judge court), *aff'd*, 91 S. Ct. 976 (1971).

113. 309 F. Supp. 184 (E.D. Va. 1970). See also *White v. Crook*, 251 F. Supp. 401 (M.D. Ala. 1966) (holding invalid exclusion of women from state jury service); *United States ex rel. Robinson v. York*, 281 F. Supp. 8 (D. Conn. 1968); *Commonwealth v. Daniel*, 430 Pa. 642, 243 A.2d 400 (1968). The *Robinson* and *Daniel* decisions invalidated state statutes providing for more severe criminal penalties for women than for men convicted of certain offenses.

114. See, e.g., *Alston v. School Bd.*, 112 F.2d 992 (4th Cir. 1940); *Thomas v. Hibbits*, 46 F. Supp. 368 (M.D. Tenn. 1942); *McDaniel v. Board of Pub. Instruction*, 39 F. Supp. 638 (N.D. Fla. 1941); *Mills v. Board of Educ.*, 30 F. Supp. 245 (D. Md. 1939).

racially discriminatory practices within state universities¹¹⁵ may be extended to comparable issues of sex discrimination in appropriate cases.

The question arises whether discriminatory policies of *private* educational institutions receiving federal grants come within the scope of the due process clause of the fifth amendment. Here, too, by reference to precedents relating to racial discrimination, it is arguable that these institutions perform a public function and that the public character of the institution combined with direct involvement of the government through financial aid is sufficient to bring the fifth amendment into play.¹¹⁶ This theory warrants greater consideration by lawyers concerned with women's rights. It should be pointed out, however, that the infrequency of constitutional attacks upon sex-based discrimination in institutions of higher education may be partly explained by the traditional attitudes of judges in the federal courts. As Mary Eastwood points out,¹¹⁷ the Supreme Court and some of the lower federal courts have often applied different standards to sex discrimination and race discrimination.¹¹⁸

Executive Orders 11246 and 11375

A potentially powerful remedy is provided by Executive Order 11246,¹¹⁹ as amended by Executive Order 11375,¹²⁰ which became effective

115. See, e.g., *McLaurin v. Oklahoma State Regents*, 339 U.S. 737 (1950).

116. See, e.g., *Evans v. Newton*, 382 U.S. 286 (1966) (applying the "public function" theory to a racially segregated private park). See also *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961) (applying "state involvement" test); *Bolling v. Sharpe*, 347 U.S. 497 (1954) (applying the concept of equal protection through the fifth amendment to the federal government).

117. Eastwood, *The Double Standard of Justice: Women's Rights Under the Constitution*, 5 VAL. U.L. REV. 281 (1971). See *Diaz v. Pan American World Airways, Inc.*, 3 F.E.P. Cas 337 (5th Cir. 1971) (reversing lower court holding that sex is a bona fide occupational qualification for position of flight attendant). The appellate court, construing § 703(e) of Title VII, emphasized that the words "in those certain cases" and "reasonably necessary to the operation of that business" were chosen by Congress to limit the scope of the section and implied that the absence of such a limitation might open an enormous gap in the law which might "largely emasculate the act." *Quaere*, would the absence of this language in the Administration Bill, if enacted, have any emasculating effect?

118. *Hoyt v. Florida*, 368 U.S. 57 (1961); *Goesaert v. Cleary*, 335 U.S. 464 (1948). See also Emerson, *In Support of the Equal Rights Amendment*, 6 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 225 (1971); Dorsen & Ross, *The Necessity of a Constitutional Amendment*, 6 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 216 (1971); Brown, Emerson, Falk & Freedman, *The Legal Basis of Equal Rights for Women*, 80 YALE L.J. — (1971).

119. 3 C.F.R. 339 (1965). Executive Order 11246 became effective October 24, 1965. Part I of the Order applies the policy of equal opportunity to federal government employment; Part II applies to employment by government contractors and subcontractors.

120. 3 C.F.R. 320 (1967). Executive Order 11375 amended Executive Order 11246 by substituting the word "religion" for "creed" and by adding "sex" as a prohibited basis of discrimination.

tive October 14, 1968. The Order prohibits discrimination in employment because of race, color, religion, sex or national origin by federal contractors and subcontractors and on federally assisted construction contracts. Contractors are required to take affirmative action to ensure equal employment opportunity which "shall include but not be limited to the following: employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship."¹²¹ Under regulations issued by the Department of Labor, federal contractors with a contract of \$50,000 or more and 50 or more employees must develop a written plan of affirmative action to prevent the prohibited discrimination.¹²² The Order is administered by the Office of Federal Contract Compliance (OFCC) in the Department of Labor, and the Secretary of Labor is empowered to cancel present contracts or declare the ineligibility for future contracts of contractors and subcontractors found guilty of discrimination. Sex Discrimination Guidelines were issued by OFCC on June 9, 1970.¹²³

While overall responsibility for the enforcement of Executive Order 11246 remains with the OFCC, each contracting agency is primarily responsible for obtaining compliance with OFCC regulations with respect to contracts entered into by such agency. In October, 1967, the Department of Health, Education and Welfare (HEW) was designated by OFCC as "Compliance Agency" for all universities and colleges holding federal contracts. A Contract Compliance Division was established in HEW'S Office of Civil Rights which began assigning field staff in July, 1968.¹²⁴

During 1969 only three individual complaints charging sex discrimination were received by HEW.¹²⁵ Since January 31, 1970, however, the Women's Equity Action League (WEAL) and the National Organization for Women (NOW) have taken the initiative in filing complaints on behalf of women as a class against approximately 350 colleges and universities and several professional organizations.¹²⁶ The complainants seek affirmative action programs to upgrade all women employees as well as women professors and administrative workers, to develop policies of vigorous recruitment of women for faculty positions, to

121. 3 C.F.R. 339, 340 (1965).

122. See 41 C.F.R. §§ 60-1.1 et seq. (1970).

123. 35 Fed. Reg. 8888 (1970).

124. Muirhead statement, *supra* note 59, in 1970 *Hearings* 659.

125. *Id.*

126. Statement of Chairman, Action Committee on Federal Contract Compliance in Education, WEAL, April 16, 1971.

achieve salary equity between men and women in similar academic positions, to raise the number of women admitted to all levels of higher education and to eliminate sex-based discriminatory advertising. By May, 1971, compliance reviews were underway or had been initiated at an estimated 190 institutions of higher education, including Harvard, M.I.T., Brown, Tufts, University of Maryland, George Washington University, City University of New York (CUNY), the state university system of New York (SUNY), University of Pittsburgh, University of Michigan, University of Wisconsin, Yale University, University of Southern Illinois, Bryant College and Providence College in Rhode Island, several colleges in California, several institutions in Florida, Georgia and North Carolina and at least one in Arizona.¹²⁷

Although the threat of withdrawal or suspension of government funds can be an effective instrument against discrimination in higher education, experience under Executive Order 11246 has already revealed serious weaknesses of coverage and enforcement. The Order is directed to employment, and the question arises whether the requirement to ensure equal opportunity in "selection for training and apprenticeship" is broad enough to cover college admissions and other inequities experienced by women students. As suggested earlier, college training is analogous to apprenticeship training and should be considered an integral part of the employment process. This is particularly true of admissions to graduate and professional schools since such training is a prerequisite to academic employment. Graduate status is also required for appointment to teaching or research assistantships. The issue of graduate school admissions arose in compliance negotiations between HEW and the University of Michigan and has been referred to Secretary Elliot Richardson for interpretation. At this writing no official interpretation has been issued¹²⁸

Order No. 4: Goals and Timetables

A second disputed issue has arisen with respect to the general enforcement of the sex provisions of Order 11246. What has been

127. Fields, *Federal Probes Into Sex Discrimination Provoke Controversy on Campuses*, CHRONICLE OF HIGHER EDUCATION, March 22, 1971. Information obtained from Dr. Bernice Sandler and Dr. Ann Scott, Federal Compliance Coordinator for the National Organization for Women (NOW), April 30, 1971.

128. Telephone inquiry to Mr. Joseph Wiley, Chief of Contract Compliance Field Coordination, Office of Civil Rights, HEW, Washington, D.C., April 28, 1971. See also Zwerdling, *Sex Discrimination on Campus: The Womanpower Problem*, THE NEW REPUBLIC, March 20, 1971, at 11-13.

described as "the heart of OFCC's enforcement procedure"¹²⁹ is Order No. 4, which became effective January 30, 1970 and sets forth detailed requirements of the contents of affirmative action programs to be developed by federal contractors. Order No. 4 declares in part:

An acceptable affirmative action program must include an analysis of areas in which the contractor is deficient in the utilization of minority groups and, further, goals and timetables to which the contractor's good faith efforts must be directed to correct the deficiencies and, thus to increase materially the utilization of minorities at all levels and in all segments of his work force where deficiencies exist.¹³⁰

Order No. 4 specifically includes "sex," and the Rules and Regulations governing "Obligations of Contractors and Subcontractors" were amended on January 17, 1969, to provide: "The term 'minority group' as used herein shall include, where appropriate, female employees and prospective female employees."¹³¹

Since underutilization is one of the chief complaints of academic women, they argue that there is nothing in the Executive Order, the Rules and Regulations or in Order No. 4 which "indicates that women should have different or separate treatment or that priorities of enforcement should be established."¹³² Nevertheless, on July 25, 1970, at a meeting between Secretary of Labor James Hodgson and representatives of women's groups concerned with equal employment opportunity, the Secretary gave no "assurance . . . that goals and timetables would be applied against sex discrimination." He reportedly told the group that the "employment problems of women are different" and must be "handled on a different basis." He indicated that Order No. 4 was "designed for racial minorities" and that the Labor Department had "no intention of applying exactly the same approach to women in Order No. 4." On July 30, 1970, a group of angry women picketed in front of the Waldorf-Astoria Hotel in which 350 members of the National Association of Manufacturers met for a closed "video-teleconference" briefing being conducted by the OFCC and being telecast simultaneously from Washington to 14 cities. Women also demonstrated against the Department of Labor in each of the other 13 cities.¹³³

129. Scott, *Feminism vs. the Feds: Woman's Place in the Work Force*, 2 ISSUES IN INDUS. SOCIETY 39 (1971).

130. 35 Fed. Reg. 2586 (1970).

131. 41 C.F.R. § 60-1.3(2) (1970).

132. Scott, *supra* note 129.

133. *Id.*

On July 31, 1970, Secretary Hodgeson issued a statement declaring that while the Guidelines on Sex Discrimination and Order No. 4 are both directed to the same result and both require affirmative action on the part of Government contractors to attain that result,

[t]he primary procedural distinction between the two is the requirement set forth in Order No. 4 that Government contractors analyze their work force and their potential work force recruitment area and where deficiencies in the utilization of minorities exist, that goals and timetables be set to which the contractors' efforts shall be directed to eliminate these deficiencies.

. . . It is clear that utilization of the concept of goals and timetables as an anti-sex discrimination tool is appropriate. It is equally clear that the exact goals and timetables development procedure set forth in Order No. 4 is not sufficient to meet the more difficult and elusive problems of sex discrimination.

. . . [A]ccordingly, different criteria must be employed in examining work force patterns to reveal the deficiencies in employment of women than are used in revealing racial deficiencies. Such criteria may well include the availability of qualified women in the employer's own force and the interest level expressed in respective occupations, as evidenced by applications for employment in those occupations. . . . The Department plans to engage in an immediate series of consultations with interested parties. Representatives of women's groups, employers, and unions as well as acknowledged authorities on human resources will be invited to participate. . . . The information thus obtained [from the consultative groups] will be utilized by the Department in expanding and further defining its approach toward employing affirmative action to achieve an equal employment opportunity for women among Government contractors and by applying the concept of goals and timetables.¹⁸⁴

The "immediate" consultations did not materialize. An advisory group of representatives from women's organizations, labor, management and authorities on human resources has been named and will meet in four separate committees beginning in early May, 1971, to consider the

134. 1970 *Hearings* 695. Read into the record by Mrs. Elizabeth Duncan Koontz, Director of the Women's Bureau, Department of Labor.

question of determining availability of women under Order No. 4. The groups may then meet together to formulate a report and recommendations to the Department of Labor.¹³⁵ Meanwhile, the important issue of goals and timetables as applied to sex discrimination remains unclarified.

Limited Resources of Office of Civil Rights, HEW

A serious overall problem is the meagre extent to which an agency with limited staff and resources can enforce compliance in an area of widespread and long entrenched patterns of sex discrimination, of resistance to change, and in the face of competing claims of other disadvantaged minorities covered by the Executive Order. As Daniel Zwerdling pointed out in an article reviewing HEW's compliance efforts at the University of Michigan,

HEW has the zeal but not the money or staff to make its order stick. . . . HEW has only 27 people to investigate contract compliance at thousands of universities and hospitals under its jurisdiction around the country. They have to worry not only about sex, but race, national origin . . . and religion as well. HEW devoted an extraordinary amount of time to the first phase of negotiations with Michigan, but can't possibly follow up on the University's progress. Complaints against 200 [now approximately 350] more colleges are sitting in its files. "Our investigations now are hit and miss," says James Hodge-don, HEW's Chicago regional director.¹³⁶

HEW does not deny this estimate of the situation. Although seeking an expansion of its staff, the Office of Civil Rights presently has only two to three investigators in each of its ten regional offices which must cover the entire United States. It must deal with the recalcitrance and evasions of educational institutions which, while they seek government funds, have traditionally resisted any type of governmental regulation. Zwerdling reported that Harvard University refused to cooperate with HEW investigators until government funds were held up and that while HEW has blocked contracts to four universities so far, only two—Michigan and Pittsburgh—have presented remedial programs.¹³⁷ In these circumstances, the inability of HEW to exercise continuous supervision over contract compliance in thousands of colleges and universities makes the potential

135. Information obtained from Dr. Ann Scott, *supra* note 129.

136. Zwerdling, *supra* note 128.

137. Some institutions are voluntarily developing affirmative action plans without governmental intervention. Ohio State University and the University of Southern California are two examples. Scott, *supra* note 129.

relief granted under Executive Order 11246 a slender reed upon which to rely.

Proposed Legislation

It seems clear that congressional action with adequate funding is necessary if women are to achieve full equality of opportunity in higher education. Several legislative proposals toward this objective introduced in the 91st Congress were not acted upon. The most comprehensive proposed legislation now pending before Congress is H.R. 916, the Mikva Bill, introduced in the House on January 22, 1971. Hearings on the bill were held before Special Subcommittee No. 4 of the House Judiciary Committee in March and April, 1971.¹³⁸

Among other things, the Mikva Bill would provide for:

(1) amendment of Titles IV and IX of the Civil Rights Act of 1964¹³⁹ to authorize the Attorney General to institute suits or to intervene in actions brought to eliminate sex discrimination in public facilities and in education;

(2) amendment of Title VI of the 1964 Act to prohibit sex discrimination in federally assisted programs;

(3) amendment of Title VII of the Act to extend coverage to state and local governments and to educational institutions, and to empower the Equal Employment Opportunity Commission to issue enforceable orders;

(4) amendment of the Fair Labor Standards Act to apply the equal pay provisions¹⁴⁰ to executive, administrative and professional employees;

(5) requirement that the Commissioner of Education make a national survey of public and private schools and colleges at all levels of education (including technical and vocational as well as academic institutions) to determine the extent of denial of equal educational opportunity by reason of sex and to report the results of the survey with recommendations for legislation to Congress within eighteen months of the date of enactment.

The Nixon Administration has introduced legislation (H.R. 5191; S. 1123) to amend and extend the Higher Education Act of 1965.¹⁴¹ Section 1001(a) of the bill provides:

138. On April 29, 1971, Special Subcommittee No. 4 approved the proposed Equal Rights Amendment (H.J. Res. 208) but temporarily postponed consideration of Representative Abner J. Mikva's bill. N.Y. Times, April 30, 1971, at 6, col. 4.

139. 42 U.S.C. §§ 2000a et seq. (1964).

140. 29 U.S.C. § 206(d) (1964).

141. 42 U.S. §§ 2751 et seq. (Supp. 1V, 1968).

No person in the United States shall, on the ground of sex, be discriminated against by a recipient of Federal financial assistance for any education program or activity. The preceding sentence shall not, however, preclude differential treatment based upon sex where sex is a bona fide ground for such differential treatment.

Critics of the bill point out that the loosely worded exception can virtually nullify the objective of the bill. Section 1001(b) prohibits discrimination in employment on grounds of sex by recipients of federal financial assistance for any educational program or activity.¹⁴² Federal agencies empowered to extend federal financial assistance to educational programs or activities are directed to administer the provisions of section 1000 by issuance of rules, regulations or orders which shall not become effective unless and until approved by the President.¹⁴³

The Administration bill does not extend the coverage of Title VII to educational institutions but provides for the administration of the equal employment opportunity provision by federal contract granting agencies. The language of the BFOQ exception differs from that of Title VII covering the same subject matter. The variance of language and the multiplicity of agencies involved in the administration of the equal employment opportunity provision may cause confusion and lack of uniformity in the interpretation and application of the provision.¹⁴⁴

142. Section 1001(b) provides:

No recipient of federal financial assistance for an education program or activity shall, because of an individual's sex—(1) discharge that individual, fail or refuse to hire (except in instances where sex is a bona fide occupational qualification) that individual, or otherwise discriminate against him or her with respect to compensation, terms, conditions or privileges of employment; or (2) limit, segregate, or classify employees in any way which would deprive or tend to deprive that individual of employment opportunities or otherwise adversely affect his or her status as an employee.

Compare the language of the BFOQ exception above with that of section 703(e) of Title VII of the Civil Rights Act of 1964 which permits a BFOQ 'in those certain instances where . . . sex . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise. 42 U.S.C. § 2000e-2(e) (1964).

143. Section 1002(a) provides:

Each Federal department or agency which is empowered to extend Federal financial assistance to any education program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of Section 1001 with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President.

144. See notes 142-43 *supra*. Note also that the Administration Revenue Sharing

An alternative to the Administration bill is the proposed Higher Education Act of 1971 (H.R. 7248) introduced by Congresswoman Edith Green. The bill would amend Title VI of the Civil Rights Act of 1964 to prohibit sex discrimination against any person under any educational program or activity receiving federal financial assistance. The bill, however, exempts from coverage any "educational institution in existence on the date of enactment of this subsection at which on that date substantially all the students are of the same sex." This exception is so broad that conceivably it could be interpreted to exempt from coverage law schools, medical schools and other professional schools which presently have only a few women students enrolled. The word "substantially" should be omitted. The bill also provides a 5-year exemption for schools now in the process of changing from one-sex to coeducational institutions, and certain religious institutions are exempted.

The Green bill would also amend section 701(b) of Title VII of the Civil Rights Act to cover teachers in public and private institutions; it would amend the Civil Rights Act of 1957¹⁴⁵ to extend the jurisdiction of the United States Commission on Civil Rights to sex discrimination, and would amend the Fair Labor Standards Act to apply the equal pay provisions to executive, administrative and professional employees.

Meanwhile, the modest gains which women have made during the period of rapid expansion of higher education are seriously threatened. The predicted number of teaching positions in the 1970's will be fewer than the Ph.D.'s available.¹⁴⁶ Moreover, most colleges and universities are in financial difficulties, and many of these institutions are beginning to reduce their professorial and administrative staffs. In view of women's marginal position in academic institutions, they are highly vulnerable to retrenchment policies. In addition, an unprecedented number of trained women will be seeking employment during the 1970's. The prospects look bleak unless women press vigorously for effective legislation to protect their foothold in higher education and reinforce their legitimate claims through organized protest.¹⁴⁷

As this entire discussion has intimated, the present unrest among women, particularly in the academic world, has a valid basis and shows

Bills (H.R. 6181; S. 1234) provide that revenues shared under the proposed act shall be considered federal financial assistance within the meaning of Title VI of the 1964 Civil Rights Act (42 U.S.C. § 2000d) which, as presently enacted, does not include a prohibition against sex discrimination.

145. 42 U.S.C. §§ 1975 et seq. (1964).

146. See Rossi, *Discrimination and Demography Restrict Opportunities for Academic Women*, COLLEGE & UNIVERSITY BUSINESS, Feb., 1970, reprinted in *1970 Hearings* 923.

147. *Id.*

no signs of abatement. Failure to deal with this national problem can have serious consequences, for as Dr. Rossi has warned:

Should these protections against discrimination on the basis of sex not be enacted, we can predict increased militancy by American women. Such militancy among women, as among blacks, will not be evidence of psychological instability but a response to the frustration of rising expectations. Militant women in the 1970s may be spurned and spat upon as the suffragists were during the decade before the vote was won for women in 1920. But it must be recognized that such militant women will win legal, economic, and political rights for the daughters of today's traditionalist Aunt Bettys, just as our grandmothers won the vote that women exercise today.¹⁴⁸

It is in the best interests of the Nation to heed this warning.

148. Rossi, *Job Discrimination—And What Women Can Do About It*, ATLANTIC MONTHLY, March, 1970, reprinted in 1970 *Hearings* 927, 930. This militant mood is not unique. The following comment is typical:

More and more of us are refusing to be insulted by arthritic attitudes about women, whether they come from government, management, or union. If the price of being a lady is to earn 73 cents an hour less as a selector-packer than as a forklift truck operator, then we are going to take the 73 cents and the forklift. If having our cigarettes lighted and our doors opened means we earn half as much as the man who does these things for us, then we will open our own doors and carry our own matches, and lady be damned. If the government will not help us, then we will picket, sue, confront, lobby, and demonstrate until it does its job.

Scott, *supra* note 129.