

Legalizing Gender Inequality

Courts, Markets, and Unequal Pay for Women in America

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Law, Markets, and the Institutional Construction of Gender Inequality in Pay

The pay equity movement won its largest legal victory in 1983, when Judge Jack Tanner of the federal District Court of Western Washington found that the State of Washington had discriminated against workers in predominantly female jobs and awarded the plaintiffs a \$400 million judgment.¹ The *AFSCME* decision (so named because the American Federation of State, County, and Municipal Employees brought the lawsuit) catapulted the pay equity issue into instant prominence. In its immediate aftermath, the number of states conducting pay equity studies doubled to thirty-four, and the number of articles on pay equity in leading newspapers quadrupled (McCann 1994, 54–59). The victory was shortlived, however. In 1985, the Ninth Circuit Court of Appeals reversed the *AFSCME* decision. Then judge, now justice, Anthony Kennedy pronounced, “Neither law nor logic deems the free market a suspect enterprise. . . . Title VII does not obligate [the State of Washington] to eliminate an economic inequality it did not create” (*AFSCME*, 1407). According to Justice Kennedy, the plaintiffs not only lacked a legal basis for redress, but the very nature of their thinking – their logic – was wrong. The Ninth Circuit authoritatively denounced plaintiffs’ theory of gender-based wage inequality as inconsistent with a core institution of American society – the free market.

The reversal of the *AFSCME* decision had a devastating effect on the pay equity movement. Other courts followed the *AFSCME* precedent in rejecting similar claims. Reform activity in states and municipalities slowed to a trickle. Media coverage of pay equity matters fell by more than one-half (McCann 1994, 54–59). Some wage reforms were won through state legislation and collective bargaining, but even these garnered only mixed results. The conventional view among the press, policy makers, and academics was that comparable worth was essentially dead

1 *American Federation of State, County, & Municipal Employees v. Washington*, 578 F. Supp. 846 (D. Wash. 1983), rev’d, 770 F.2d 1401 (9th Cir. 1985) (hereinafter *AFSCME*).

on arrival, an unrealistic reform program that lacked broad-based political support and now had lost its tenuous foothold within federal antidiscrimination law. Reflecting on the aftermath of *AFSCME*, the director of the National Committee on Pay Equity summed up the common perception in the media: "I thought this issue died in 1985" (McCann 1994, 85).

Fourteen years later we are attempting to probe more deeply into the circumstances that surrounded the sudden death of pay equity as a law reform movement. Pay equity reform was derailed by the dominant discourse on the role of law in addressing between-job wage inequality.² Justice Kennedy's opinion can be taken as representative of that discourse. His views were echoed by a chorus of prominent judges, scholars, and policy makers who dismissed the claims of pay equity advocates as empirically unfounded and potentially dangerous to the American economy (see, e.g., Killingsworth 1985; Livernash 1980; O'Neill 1984; Fischel and Lazear 1986). Clarence Pendleton Jr., chairman of the Civil Rights Commission, may have coined the most colorful phrase when he referred to comparable worth "as the looniest idea since Looney Tunes" (Bureau of National Affairs 1981, 35-46).

The legal and ideological success of the dominant view revolves around the analysis of an empirical question: What is the source of wage differences between jobs held primarily by women and those held primarily by men within the same organization? The legal opinions and orthodox labor economics that make up the dominant discourse give two answers. First, differences in wages are produced outside the employing organization – that is, they are the product of "the market" rather than of decisions by the employer. Second, differentials are based on efficiency considerations – that is, the reasonable, noninvidious, economic motivations of employers. If one accepts the dominant interpretation of male-female wage differences, doing so mutes the entire policy debate on pay reform, for it follows that neither the courts nor legislatures should intervene in the pay policies of employers.

This book argues that the core empirical claims of the dominant discourse are largely untested, have far more limited application in the American economy than the discourse acknowledges, and, in several significant organizational contexts, are demonstrably wrong. We assert that a substantial portion of the pay differences between "male" and "female" jobs, especially in large organizations, cannot be attributed to the market and does not rest on efficiency principles. Rather the differ-

2 By "between-job" inequality we mean the differences in pay between different jobs, such as the truck drivers versus the secretaries of a firm. "Within-job" pay differences, by contrast, consist of pay differences among workers within one job category, such as the truck drivers employed by the same firm.

ences are the product of organizational processes for which employers could be held legally responsible and which could be the target of political action by groups of women within the workplace.

Our results also raise questions about the role of courts in offering authoritative interpretations of the reasons for gender inequality in organizations. As we confronted the empirical data in the pay discrimination cases, we were led to wonder why the courts so quickly and uncritically accepted the dominant conception of between-job gender inequality in the face of relatively weak evidence to support it. We have come to see the courts as important participants in the institutional construction of markets and the gender gap in pay. The courts adopted and reinforced the orthodox explanation of male-female earnings differentials. In doing so, they contributed to the construction of a false dichotomy between “markets” and gender equality. And they gave legal sanction to a persistent aspect of gender inequality in organizations. Without a sound basis in market necessity or efficiency principles, the courts legalized gender inequality in pay.

Our analysis does not, however, lead us to support comparable worth as the solution for gender inequality in pay. Our reasons are theoretical and practical. First, although many of the criticisms that comparable worth advocates mount about orthodox labor economic explanations of earnings differentials are valid and have been enormously important to the theoretical debate, we think they have failed to develop a persuasive theory of the wage gap. In short, they misanalyze the sources of male-female wage differences. Second, we see other avenues of change as more promising and politically feasible. The call for comparable worth as the touchstone of wage reform contributed to a false opposition between the market and the law against pay discrimination: It accepted the orthodox economic view that pay differentials originated in the “market,” but it also entailed the intractable position of rejecting markets as a valid basis for wage setting. Despite our disagreement with comparable worth, we suggest that the death of pay equity in the law was premature. Our findings imply the need to reopen the question of how antidiscrimination law should be applied to sex-based, between-job pay differences.

We revisit the relationship between law, markets, and gender inequality in organizations through empirical case studies of four significant pay discrimination lawsuits that were litigated in the 1970s and 1980s. These case studies provide a unique vantage point on organizations as systems of gender inequality. They also reveal how litigation and legal judgments construct competing images of both gender relations in organizations and the role that antidiscrimination law should play in organizational practices.

Our argument thus touches on three significant concerns: theories of gender inequality in organizations; theories of law, markets, and gender inequality; and social policies on pay equity. In the remainder of this chapter we locate this project with respect to these theoretical and practical concerns, outline our methodological approach, and describe the organization of the book.

Gender Inequality in Organizations

This book is foremost an analysis of gender inequality. We seek to advance theories of inequality by explicitly examining the relationship between market and organizational processes and by explicating the mechanisms through which organizations reproduce gendered pay hierarchies.

The economic inequality of men and women is a fundamental aspect of the stratification systems of modern societies. In the United States gender-based pay inequality is intimately connected to the nature of gender relations. At least in part because women tend to make less than men, women are more likely to stay at home to care for children than are men, women are more likely to follow their spouses when they pursue career opportunities than the reverse (even though such moves may have a destructive effect on women's careers or wage-earning prospects), and, if unmarried, women are more likely than men to subsist at or below the poverty line. These tendencies are part of a broader culture of male dominance that tends to relegate women to "women's roles," both in the family and the workplace. It is sometimes difficult, therefore, to disentangle the causes and effects of gender-based wage inequality. Yet in any number of real-life contexts, the simple material reality that men earn more reinforces the unequal position of women in society.

It is not surprising then that the wage gap in pay between men and women has been a central, recurrent topic for empirical investigation and theorizing by economists and sociologists. The two disciplines offer divergent interpretations of the phenomenon. Most labor economists, while recognizing the possibility of sex discrimination in pay (see, e.g., Becker 1971), argue that whatever gender inequality exists reflects differences in choices men and women make about investment in human capital, occupational selection, and labor force participation, and the rational responses of employers to labor market conditions (see, e.g., Polachek 1975; Mincer and Ofek 1982; O'Neill 1985).

In the sociological literature, the role of markets is minimized on the basis of the view that large segments of the work force are employed in internal labor markets (Doeringer and Piore 1971; Althausen and

Kalleberg 1981) or bureaucratic personnel systems (Edwards 1979; Jacoby 1985), each of which institutionalizes nonmarket, organizational influences that hinder the market determination of wage rates. Indeed, a significant portion of organization-specific research in the field, that done on government agencies, is sometimes justified explicitly on the grounds that wages in this context (net of “background characteristics”) reflect only employer discretion and are unaffected by market forces (see, e.g., Taylor 1979; Grandjean 1981). The difficulty is that these studies assume away market influences on compensation rather than examine how organizational compensation systems interact with the labor market. Other sociologists theorize about the structural characteristics of labor markets that serve to disadvantage women. They posit that premarket socialization and discriminatory hiring practices limit women to stereotypically female jobs. As a result, female occupations tend to be “crowded” and to receive lower wages. Other scholars argue that labor markets are segmented between better-paying, stable jobs at the core and low-paying, unstable jobs in the periphery. Women and minorities, it is argued, are denied access to jobs in the core of the economy, and consequently suffer economically marginal employment (generally see Marini 1989; England 1992).

Thus there is a tendency for economists to reify the effects of markets on wages, while sociologists either ignore market forces or construct alternative aggregate models of tainted markets. Theories of inequality need to consider both organizational and market factors. In our view, the impasse between these contrasting viewpoints stems from the failure to develop and test theories of income determination in large organizations that address the relationship between organizational and market influences on compensation systems.

While much of our argument will be conducted in the negative by presenting evidence that counters market and efficiency-based explanations of female-male wage differentials, we seek to develop a new sociological framework for the analysis of gender inequality – what we call the organizational inequality model. We propose that much can be gained analytically by thinking of gender inequality in pay as an aspect of organizational systems of inequality. Our approach has its roots in a classic Weberian conception of organizations as systems of legitimate domination. In this conception organizations involve hierarchical relationships between leaders and staff that must be legitimated by appeals to shared values. Modern institutional theorists, from Selznick (1969) to Meyer (Meyer and Rowan 1977) to DiMaggio and Powell (1983), have elaborated on the basic theme that organizations cannot be understood solely as a set of exchange relationships or as a configuration of vested interests. Rather, they also are normative entities that give rise to shared

understandings and expectations about organizational practices. The crucial issue then becomes what (or whose) values become institutionalized as organizational practice, with what consequences for various members of the organization and for the survival of the organization as a whole.

What both the classic tradition and more recent institutional theory has slighted, however, is the role of gender in structuring these relationships, as well as the consequences of organizational practices for gender inequality. Steinberg (1992, 576) asserts the feminist view:

Masculine values are at the foundation of informal and formal organizational structures. Masculine styles of authority are legitimated by reliance on bureaucratic and hierarchical organizational forms. Images of masculinity and assumptions about the gendered division of labor organize institutional practices and expectations about work performance. . . . Regardless of their position in the organizational hierarchy, men have a vested interest in maintaining their gendered advantages. Men are not just passive recipients of organizational advantages but also actively recreate their dominance every day. They maintain organizational arrangements and institutional policies that appear to be gender neutral, but that, in fact, advantage men.

Contemporary scholarship on organizations and inequality has not made much progress on this theoretical front, despite an infusion of interest in gender inequality and some rethinking of organizational theory by feminist theorists. It has been more than fifteen years since Baron and Bielby (1980) called for "bringing the firm back in" to studies of gender inequality. Still, most research on male-female wage differentials is done in the aggregate, using cross-sectional samples of individuals, occupations, or subgroups within particular industries (see, e.g., Anderson and Tomaskovic-Devey 1995). Case studies in particular organizations provide insight into the local dynamics of gender inequality and demonstrate that there is considerable variability in the character of gender inequality in organizations, depending on historical and industrial contexts (see, e.g., Kanter 1977; Cohn 1985; Diprete 1989; Milkman 1987; Baron et al. 1991; Cockburn 1991). But they stop short of developing a general organizational approach to gender inequality. Organizational analyses of the diffusion of equal employment opportunity structures have not investigated the effects of structural changes on pay inequality within organizations (Edelman 1990, 1992), although such work has begun to examine how legal rights become transformed in the context of employing organizations

(Edelman, Erlanger, and Lande 1993; Edelman, Abraham, and Erlanger 1992).

One reason for the underdevelopment of organizational theories of gender inequality is that some feminist and critical theorists reject bureaucratic forms of organization as inherently antithetical to their visions of justice and individuality (Ferguson 1984; Frug 1984). In their view, women and minorities should not formulate strategies for succeeding within bureaucratic hierarchies but must instead seek to dismantle bureaucracies. While radical critiques of bureaucracies are valuable for unearthing various ways in which bureaucratic structures operate as gender and race hierarchies, they do not develop a theory that would explain variations in the quantity or character of inequality in bureaucratic organizations. We see such theory as important because bureaucratic organization dominates in society. Such organizations not only impose systems of inequality; they also can promote values of gender equality and fairness. As Selznick observes in response to contemporary critics of bureaucracy:

In our preoccupation with subtle forms of oppression and with high aspirations for fairness and well-being, we may forget that resistance to domination must begin with the obvious and the unsubtle. Arbitrary power is all too often blunt and crude; the pain it inflicts is readily apparent; there is no need for a guide to suffering, no need for consciousness-raising. Rather we require elementary constraints on the abuse of power. When these are discounted – as “mere structures” or as “liberal legalism” – people are left unprotected where protection is most urgent. This posture often signals a failure to appreciate the gains other generations have won and that are now taken for granted. (1992, 263–64)

Indeed, there are indications that women and minorities may find bureaucratic employment settings more congenial. Bridges and Villemez (1994) found that women and minorities were more likely to work in firms with developed personnel systems.

Perhaps the main reason why organization-level analyses have not played a more prominent role in the pay equity debate is that such analyses are inconsistent with how comparable worth advocates have theorized the problem of between-job, male-female wage differences. Advocates of comparable worth tacitly assume that employers follow similar cultural templates in devaluing work done primarily by women. Accordingly, they have concentrated their efforts on aggregate-level demonstrations of such effects (see England 1992). They have shown little interest in analyzing whether organizations vary in the nature of

between-job wage differences or whether such differentials are produced through different mechanisms in different organizations. They have been satisfied that such variation is probably not important, given that most job evaluation studies show about the same level of “underpayment” to female job categories.

In our view this has left a serious gap in our understanding of how gender inequality is produced at the organizational level. As we note later, the lack of an organizational theory of pay setting can frustrate attempts to make pay systems more fair. Ironically, this theoretical tack also may have made pay equity proposals vulnerable to market-based arguments. By attributing wage differentials primarily to society-wide forces that operate outside the employing organization, comparable worth advocates come perilously close to reaching the same conclusion as orthodox economists: employing organizations are not individually responsible for the wage gap that exists in their organizations. For the economists, the employers are price takers. Comparable worth advocates might agree, with the added stipulation that the employers’ pricing behavior is based on cultural bias against women.

We suggest that it is valuable to begin to theorize explicitly about how organizational characteristics influence patterns of gender inequality in organizations. Among the variables of interest are whether the organization is in the public or the private sector, the size and complexity of the work force, the degree to which the firm constitutes an internal labor market or otherwise has a large number of skilled jobs that are idiosyncratic to the firm’s operations, the role of unions in management-employee relations, the degree to which the firm has developed a bureaucratic personnel system that attempts to centralize and rationalize personnel decisions, the nature of the product and labor markets in which the organization is located, and the historical and social characteristics of the industry in which the organization is embedded.

The configuration of these variables and the nature of their effects on gender inequality in organizations is likely to vary by historical period. For the most part, our case studies concern large bureaucratic organizations in the early to mid-1970s. Although we are examining only a small number of organizations, we detect discernible period effects. Most obvious is the relatively recent application of antidiscrimination laws to these organizations in the early 1970s. The cases all represent new efforts to determine the reach of laws against pay discrimination. Another period effect is the historically specific shape of managerial ideologies as it affected pay systems. For example, the four organizations we studied redesigned their pay systems based on the advice of consultants. The pay consultants literally acted as agents for disseminating similar pay rationalization schemes among organizations in the same economic sector.

The role of consultants raises another potentially important variable: the effect of organizational field on pay-setting practices. The neo-institutionalist school of organization theory (see Meyer and Rowan 1977; DiMaggio and Powell 1983) asserts that the structures and practices of organizations, including those relating to equal opportunity, are significantly influenced by what similar organizations do (Edelman 1990). This, too, is apparent in our cases.

In asserting the importance of organizations in generating gender inequality, we do not mean to deny the significance of forces external to organizations. Indeed, one task of an organizational theory of gender inequality is to map variation in how organizations incorporate or mediate the nature of gender relations in the broader society. Some organizations have crudely exploited categories of workers – minorities, immigrants, children, and women – through their monopsonistic position in the labor market (see, e.g., Thomas 1985; Milkman 1987). Cohn's (1985) insightful comparison of the British Railways and the British Postal Service in the nineteenth century illustrates how one organization pursued an overt strategy of “feminizing” its work force as a means of reducing labor costs, while another did not, in a period when women were at least informally (and sometimes formally) barred from certain kinds of work.

In contemporary American society, these processes typically occur in more subtle ways, as organizations recruit from gender-stratified occupational labor markets, as organizations construct firm-specific models of skill and capability that build on and transform gender stereotypes, as groups of management or groups of workers compete for resources within organizations by deploying “gendered” strategies (e.g., hard bargaining) or invoking “gendered” values (e.g., the family wage, “aggressiveness”).

Some of these practices may be intentional. But many aspects of gender hierarchy in organizations are the “naturalized” products of gender relations from an earlier period in the organization (Bourdieu 1977). The gendered character of these practices is rendered invisible to the current incumbents of organizational positions. They often did not invent them. They merely are working within a set of taken-for-granted understandings that do not explicitly concern gender. Only in certain moments will the “hidden” dimension of gender emerge. In our case studies those moments included a time when a frustrated employee claimed a promotion was based on politics, not merit, when an outside consultant analyzed pay and promotion data by gender and found unexplained gender differentials, and when a woman unwittingly learned over a drink with a male co-worker that he mysteriously made more than she did even though they were doing the same job.

The gender ideologies of organizations are likely to be continuous with gender ideologies in the organization's environment. This is true in part because organizations are populated by professionals and other experts who were trained outside the organization. Personnel officers in large organizations, for example, will be imbued with the personnel philosophy of their organization. But their practices also are likely to reflect prior experience and training in other organizations, such as the military. Thus theoretical and practical understanding of gender inequality will depend on the interaction between organizations and environments on employment issues.

While there is a need for sociologists to begin to develop a systematic theory of gender inequality in organizations, this book proceeds inductively. We selected our case studies to tap aspects of organizational and market differences that we think are salient determinants of between-job gender inequality. But these four cases are only a beginning. We cannot claim to have captured the kinds of variations in organizational characteristics that would form the basis for a comprehensive theory. Instead, we have gone into as much depth as possible in a small number of cases. This approach allows us to discover and evaluate mechanisms that contribute to or alleviate gender-based pay inequality in these organizations.

The four case studies illuminate how organizational processes interact with and mediate market forces in the generation of gender-based wage inequality. There is a sharp contrast between public sector and private sector organizations in how this mediation takes place. In public sector organizations, in which the wage structure is more rigidly determined by job, we find explicit interest group behavior with respect to the pay levels for particular jobs. Female-dominated jobs tend to be less well represented in these political processes. The politics of pay are more muted in private sector firms, in part because there is less information available about who gets what, in part because norms of equity and employee participation are less salient than in the public sector, and in part because pay levels are less rigidly set by job. Nonetheless, organizational politics of a different kind play a pivotal role in structuring pay levels and producing and reproducing patterns of gender inequality in pay.

The *Sears* case represents an instance in which the tension between different parts of the organization (the "field" and the "parent"), along with the organizational imperative of rapid growth and deployment during an earlier era, produced a highly decentralized pay system. By entrusting almost total wage-setting discretion to subunit managers, this system fostered a pattern of discriminatory pay premiums to male workers. In the *Coastal Bank* case (a pseudonym), we find patterns of

gender inequality produced in an organization that consists of a large, nonprofessional sector at the bottom, a modest-sized professional strata in the middle, and a small group of all male manager/owners at the top. In the nonprofessional sector, gender inequality in wages is largely the product of job (much like in the public sector organizations we studied). Moreover, female jobs tend to be disadvantaged in part because the organizations tend to play tough with market rates for female jobs (i.e., they pay further below the market than they do for less numerous, mostly male-occupied jobs). At the middle professional level, pay is much less structured by type of job and far more determined by rank within the professional corps. While top management may be committed to lowering labor costs in this stratum, department heads compete to gain higher incomes for their professional subordinates. In practice, these appeals favor male officers proportionally more than female officers. Moreover, the clublike character of top management encourages a definition of “performance” and “potential” that matches the status-class attributes of existing management: white, male, Gentile, and upper class.

The case studies support the need for organizational theories of gender-based wage inequalities. All four organizations studied employed sophisticated efforts to evaluate jobs and survey market rates. All invoked at least the idiom of market wage rates in justifying their pay structures. Yet each organization produced a pattern of gender inequality that was significantly independent of market forces and efficiency considerations. Our results suggest the value of mapping variations in gender and racial inequality across different market and organizational contexts.

In this book we have not ventured into the study of racial inequality in organizational pay systems. The organizational approach to inequality we advance here may well be usefully applied to race-based pay discrimination, as well as to the particular difficulties produced at the intersection of race and gender. We would not presume, however, that race and gender work the same way in occupational systems, labor markets, or organizational pay systems. Just as we have attempted to theorize about gender differences in pay at the level of organizations, additional research is necessary to theorize about racial (and race by gender) differences in pay in organizations. We settled on a singular focus on gender in part to make this a manageable project. The legal and empirical literature on gender inequality alone is complex and difficult to marshal. It is also the case that legal and policy debates in the wage discrimination field have, since the early 1970s, focused primarily on gender discrimination.

Law, Markets, and Gender Inequality in Pay

In both method and substance, this is a study in the sociology of law. Not only do we rely on law cases as windows through which we view organizational dynamics, but we see each case as representing a legal challenge to gender inequality in an organization. The resolution of these cases thus has implications for larger theoretical issues concerning law and inequality. Is the law an instrument for change, a hollow symbol of justice presiding over a manifestly unfair system of wage inequality, or part of an ideological apparatus that denies and legitimates aspects of gender inequality that are pervasive in organizational life?

One of the central tensions within the American legal system in the modern era has been the question of what role the law should play in redressing patterns of social inequality. In the area of sex-based pay discrimination, the most intense debate has concerned the question of whether employers can be liable for discrimination in how they pay men and women who hold different jobs in the same organization. The passage of the Equal Pay Act of 1963 established the principle that employers could not pay men and women different wages for the same job. (The act allowed exceptions for piece-rate systems, seniority-based pay differences, and for reasons other than sex.) The Civil Rights Act of 1964, as amended in 1972, set in place a broader antidiscrimination rule that prohibited employers from discriminating against women and minorities in any aspect of employment, including pay. Title VII's ban on wage discrimination did not contain an "equal work" requirement. But until 1981, when the Supreme Court decided the *Gunther* case,³ it was not clear whether an amendment to Title VII that sought to reconcile it with the Equal Pay Act imported the equal work requirement into Title VII as well. *Gunther* ruled that Title VII could apply to between-job pay differences. It thus opened the door for comparable worth lawsuits in which plaintiffs used job evaluation results as a means of attempting to demonstrate sex-based pay discrimination.

In its pure form, a comparable worth lawsuit argues that employers are required to pay equal wages for jobs of the same evaluated worth (typically as measured in terms of skill, effort, responsibility, and working conditions). *AFSCME* sounded the deathknell for "pure" comparable worth theories. In its aftermath, plaintiffs moved away from sole reliance on job evaluation results in cases alleging between-job pay discrimination and sought rather to bring in other evidence of disparate treatment and intentional discrimination. Their efforts failed every time,

3 *County of Washington v. Gunther*, 452 U.S. 161 (1981).

as courts insisted on characterizing the plaintiffs' claims as "comparable worth claims" and cited the same market explanation given for between-job wage differences invoked in *AFSCME*.

The rise and fall of comparable worth as a legal theory of discrimination must be understood in the context of the broader set of cases alleging sex-based pay discrimination in the post-*Gunther* era. As a predicate to the in-depth analyses of the four cases, we reviewed and classified all reported opinions in such cases for the period 1982–96. This analysis reveals that, although the courts never overruled *Gunther*, after the defeats in *AFSCME* and similar cases plaintiffs largely abandoned efforts at more ambitious, between-job claims of discrimination. Scrutiny of the opinions issued in the cases involving between-job claims indicates that, with the exception of a few cases in which there is something approaching an empirical analysis of market issues, the courts rejected the plaintiffs' claims based on a conviction that the employers' pay policies were reasonable and nondiscriminatory given labor market conditions. The courts adopted what we call the free market paradigm of the relationship between labor markets and employing organizations.

Our project has two kinds of legal implications. The first pertains to the internal logic of antidiscrimination law. By reanalyzing the market explanation for between-job wage differences in these cases, we are questioning the empirical underpinnings of the leading precedents in the case law. To the extent our interpretations take hold, future commentators and courts may reconsider the authority of these cases and adopt a more critical stance toward market and efficiency explanations offered by employers.

Our results thus may reopen doctrinal debates about the appropriate standards to apply in determining sex-based pay discrimination. In recent years the courts increasingly have moved away from notions of liability based on disparate impact in favor of tests based on intentionality and specific institutional culpability.⁴ The courts have explicitly rejected disparate impact approaches to allegations of systemic discrimination in pay.⁵ This judicial stance is fully compatible with the dominant conception of between-job gender inequality, for the dominant conception locates the source of wage disparities outside the employing organization.

But what if empirical research challenged the validity of the dominant conception? In our view, the question of the source of gender disparities in organizations is an empirical issue to be determined on a case-by-case basis. The organizational inequality framework we propose argues that

4 See, e.g., *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989); partially overridden by the Civil Rights Act of 1991.

5 See *Spaulding v. University of Washington*, 740 F.2d 686 (1984).

there often is a link between organizational pay practices and gender-based pay differences. Our framework blurs the comfortable distinction between forces internal and external to the employing organization by focusing on specific mechanisms within organizations that generate between-job pay inequality. Given that employers typically are aware of such practices, are in a position to study their consequences for gender inequality, and have the power to alter the practices, our framework may lead to a reconsideration of the responsibility of employing organizations for gender-based pay differences.

The second set of legal implications relates to social theories about law and gender inequality in American society. The empirical record generated by the case studies, including court documents, transcripts, interviews with participants, organizational documents, work force statistics, and local labor market data, allows us to evaluate the official descriptions of gender inequality in the defendant organizations offered by the judicial opinions in these cases. Our examination of these data suggests that in at least three of the four cases the courts played a profoundly conservative role. The judges deployed the authority of law to legitimate institutionalized forms of gender inequality in the workplace. The decisions were not merely institutionally cautious, in the sense that the courts declined to enter a judgment that would have required a complicated, judicially taxing remedy, as in litigation concerning prisons, schools, and other institutions. Rather, the opinions offered a sweeping, some might say “sociological,” interpretation of the organizational and market context presented in the case before them.

In three of the four cases the opinions ratified the status quo as just. If similar logic and proof had been used to reach the opposite result in these cases, the opinions would have been pilloried in the press and in legal commentary as instances of inappropriate judicial activism. The one case that ended as a legal victory for the plaintiffs was decided on quite narrow grounds of intentional discrimination in the initial placement, promotion, and pay of women and minorities as a group. Neither the plaintiffs’ theory nor the remedy adopted attacked some basic aspects of gender inequality in the defendant’s pay system.

We see the courts in these cases acting as conservators of institutionalized patterns of gender inequality. This is a different, although not entirely an inconsistent, conclusion from that proposed by Michael McCann (1994) in his pathbreaking study of the pay equity movement. McCann judged pay equity litigation a key element in raising the rights consciousness of female workers and an inspiring source of rights discourse. While the activists McCann spoke to may have taken inspiration from a legal rights framework, they represent but the vanguard of a reform movement that has gained limited victories in relatively

isolated contexts. In our view, the legal discourse that has had a broader effect, in policy and in society's perception of gender inequality, has been voiced by judges denying the responsibility of employers for pay differences between male and female workers. By attributing the gender gap in pay to a faceless monolith, the market, for which no identifiable group of individuals is responsible, this discourse located the problem beyond the reach of collective action by workers within the workplace. Rather than empowering female workers, the discourse tended to silence them.

Why did the courts assume such a posture? Several models of judicial decision making might be invoked to explain this pattern. We conclude that the most persuasive account rests on an ideological explanation. The courts saw the evidence presented in these cases through the lens of the dominant discourse on between-job gender inequality. The certainty of this vision is revealed in the texts of these opinions, such as that quoted from Justice Kennedy. With few exceptions, the courts do not merely say that the plaintiffs failed to carry their burden of proof. Instead, the opinions offer sweeping pronouncements that market forces and efficiency considerations explain the wage differences at issue, despite often powerful evidence to the contrary. This is an instance of what Kim Scheppelle (1987) refers to as perceptual fault lines. The courts in these cases would acknowledge the antidiscrimination principle articulated by *Gunther* but were largely unwilling to question the dominant explanation of "the facts" before them.

We do not mean to attribute some kind of universal intention to the courts. The conclusions they reached were not predetermined. A small number of judges ruled in favor of plaintiffs in between-job cases. Others described the kinds of evidence they were looking for in the plaintiffs' case, which they did not find. In a few early cases the plaintiffs invited the courts to assume that market forces were at work by asserting (1) "the market discriminates" and (2) the employer had discriminated by "following the market." Yet most of the opinions cannot be explained away on tactical grounds. Most of the opinions reflected an unquestioning assumption that market forces produced the gender inequality plaintiffs complained about.

Our analysis thus calls for both a rethinking of the law against sex-based pay discrimination and a reconsideration of the role of law in maintaining gender inequality. Our results suggest the need to expand the legal responsibility of employers for between-job wage differences. Under the current regime, the courts have functioned to deny and legitimate existing patterns of gender inequality in organizations, even though these patterns do not appear justified by market or efficiency factors.

Social Policy and Pay Equity

Finally, our investigation is relevant to policy debates about antidiscrimination policy. How our society confronts between-job gender inequality depends on theoretical understandings of the relationship between law, labor markets, and employing organizations. The emphasis in this work is on these underlying theoretical constructs and the evidence that supports one theoretical perspective over another. Yet our conceptual framework and our findings have implications for what concrete steps might be taken through the courts, regulation, and political organization to address this problem.

The debates about existing laws against sex discrimination in pay is a subset of a broader issue in social policy: How should this society regulate the pay practices of employers for predominantly male and predominantly female jobs? According to free market theorists, pay practices should be left to the discretion of employers. It usually is irrational for employers to discriminate on the basis of sex; the market will cure itself by driving less efficient, discriminating employers from the market. Besides, any attempt at regulation would entail costs that would outweigh potential benefits, even for the intended beneficiaries of such regulation (see Epstein 1992). Advocates of comparable worth, in contrast, argue that market prices and employer practices are so thoroughly infused with sexism that the only cure for gender inequality is to abandon market systems in favor of job evaluation. When properly cleansed of sexism and racism, job evaluation will reward workers fairly based on their evaluated worth to the firm.

We enter this broad debate with what we take to be a set of relevant empirical findings. First, the free market theorists exaggerate the degree to which market forces determine wage levels within large organizations. Second, we find that organizational politics significantly shape the outcomes of pay systems, whether based on market principles or principles of comparable worth. These findings suggest the need to move the policy debate about pay equity beyond the simple juxtaposition of market and nonmarket systems. This society cannot rely on labor markets to cure the problem of between-job sex discrimination in pay. Yet, for a number of political and practical reasons, including difficulties of implementation, comparable worth also does not appear to be the solution.

Just as the organizational inequality model identifies organizational processes that generate gender inequality, it implies a set of procedural reforms that can alleviate institutional tendencies toward sex discrimination in pay. It may seem ironic, given our questioning of the link between markets and organizational pay systems, but we think there may

be much to be gained by harnessing the transformative energies of markets. Gender hierarchies in organizations often have functioned to distort and deflect the progressive effects of market change on male-female wage differences. If organizations more consistently and fairly incorporated market principles in their wage determination systems, we expect it would have progressive gender consequences. It also is useful for policy to encourage the sometimes powerful tendencies within organizations to develop pay practices that are more rational and just. While antidiscrimination law is not the only, or necessarily the preferred, instrument for change, it can play an important role in stimulating significant organizational change. We expand on these ideas in the conclusion of the book, based on what we have learned from the case studies.

Some analysts may argue that gender-based wage inequality is no longer a pressing problem that requires renewed attention by policy makers. They can cite trends over the past decade that reveal a shrinking gender gap in pay, in which women earned about 60 percent of men in 1974 but 76 percent by 1994 (see Chapter 3). We would counter that a substantial portion of the economic "progress" of women in the past decade has resulted from the stagnation and decline in the earnings of male workers (see Chapter 3). Moreover, there is no guarantee that without an active antidiscrimination policy sex-based discrimination and inequality will not increase. In this period of increasing hostility to affirmative action, both by the courts and politicians, there is some evidence that women workers are more pessimistic about equal opportunity in the workplace than they have been since the 1970s (*New York Times*, Sept. 12, 1995, p. C2, cols. 1-3; Rhode 1997). Indeed 1997 saw the first widening in the gender gap in many years, although female earnings rebounded in 1998 (*Chicago Sun Times*, June 10, 1998, p. 1). We should not assume that gender-based wage inequality is a problem that will go away by itself.

Methods

Our empirical analysis is based on in-depth examinations of four legal decisions that dealt with claims of gender discrimination in pay. The use of law cases as empirical case studies is relatively novel in the sociology of law, although more common among legal historians and other observers (see, e.g., McEvoy 1995; Noonan 1976; Mnookin 1985; Kluger 1976; Stewart 1983). Our approach is somewhat distinctive. Typically when sociolegal scholars are researching a case, they are primarily interested in the law. We are at least equally interested in aspects of the employing organizations that are the defendants in these lawsuits.

We exploit litigation to gain data on the origins, functioning, and gender effects of organizational pay systems that otherwise are very difficult to obtain. Of course, we also enjoy a unique opportunity to study law in action. The case studies reveal the conditions that gave rise to the lawsuit, the kinds of organizational data that found their way into the legal record, and, to some extent, the consequences the legal results have for the organization.

Case study approaches have gained popularity in sociology, as historical sociologists, feminists, and other critical theorists have called for analyses that explicitly recognize the historical contingency of social action and that give agency to the human actors involved (see, e.g., Sewell 1992; Abbott 1992; Burawoy 1991). Steinberg (1992, 580) explicitly extols case studies of organizations as a superior method for feminist research compared with surveys and other “mainstream” methods. (See Reinhartz 1992 for a more catholic perspective on the use of various methods to pursue feminist research.) Sociolegal scholarship also has seen increasing emphasis on critical narratives that attempt to analyze the legal consciousness of nonelite segments of society (see, e.g., Silbey and Ewick 1995; Merry 1990). McCann (1994), for example, pursues an “interpretive” approach in his interviews with pay equity activists, meaning that he allowed his informants to tell their own stories of how they came to perceive injustice and the steps that led them to get involved. His effort is part of a larger movement within law and society research that seeks to “decenter” official law by shifting attention from formal legal institutions to the effects of law and legal values in everyday life (Sarat and Kearns 1993; Trubek 1984). Many scholars working in this new vein frame their research in terms of domination and resistance (Scott 1985, 1990) and thus see their intellectual enterprise as raising counterhegemonic interpretations of law in social context. (For an excellent review, see Hirsch and Lazarus-Black 1994.)

Our approach embraces many aspects of this critical turn. Context is crucial to our analysis. The framework we propose posits that the specific configuration of politics and gender within an organization is an important source of gender inequality. The search for intraorganizational mechanisms of inequality requires an examination of local conditions. Moreover, our framework leads to explanations of inequality that run counter to the dominant interpretations offered within organizations and within legal opinions in most pay cases. In that sense, our project has a counterhegemonic message.

Yet in many ways our research involves conventional social-scientific methods. First, although we insist on the need to move below the level of aggregate data on gender inequality, we still seek to build a more general theory about inequality in organizations that maps variations in

gender inequality by market and organization contexts. Second, our analysis is based on “mainstream” methods of qualitative and quantitative research, including focused interviewing and regression analyses of work force and labor market data. Third, our case studies probe into the specific dynamics of organizational pay systems but hardly could be characterized as involving thick descriptions of organizational life. In the case studies we are primarily engaged in elite, intellectual debates about the determinants of sex-based pay differences. The data made available to us from the cases are the by-product of what the legal and personnel professionals in these matters deemed relevant to the question of discrimination. We have analyzed that material to address an ongoing debate within law and social science about the roots of gender inequality.

Whatever epistemology one subscribes to, our project faces difficult problems of proof. One could crudely characterize what we do in the case studies as relitigating lawsuits outside the presence of a judge, without giving the defense the opportunity to interrogate our sources, present alternative explanations, put their own experts on the stand. How can we claim to offer an empirical account that is more valid than that accepted by a court under the glare of scrutiny from opposing counsel and a public record? To that specific charge we plead *nolo contendere*. There is no guarantee that our results would prevail if these cases were to be litigated again. But that also is not the standard by which we have analyzed these data or by which we choose to have our work evaluated. We have approached these cases with the canons of social scientific proof in mind. The validity of our results ultimately rests on the ability of others to replicate our findings or to offer more compelling interpretations for what we present (for a general discussion, see King, Keohane, and Verba 1994, 7–9). Our results may not convince a given judge in a given case. We will settle for trying to persuade an intellectual community that we have added new insights into an old problem.

By far the largest problem with our research design from the standpoint of conventional methods is the difficulty of making generalizations to a large and complex universe of organizations from a set of four cases. When the cases become available because of litigation over claims of sex discrimination, there is a considerable risk of selection bias as well. How do we know that the conditions that led these organizations to be sued do not make them highly idiosyncratic among the population of organizations?

In the chapter on methods (Chapter 4) we pursue these questions at length. Suffice it to say here that our selection of cases was driven in part by necessity and in part by theoretical interests. We were limited to litigated cases that did not contain protective orders concerning organiza-

tional data. Because of our theoretical interest in markets, we thought it essential to include both public and private sector cases. For a variety of reasons, public sector organizations can be expected to operate their pay systems differently than private firms. Profit pressures, for one, do not play the same role in public sector organizations as in private firms. Thus we might expect private firms to follow the market more closely in setting wages than would public sector organizations. In the process of screening potential cases against private employers, we discovered that comparable worth litigation – that is, broad-based allegations of discrimination in paying different male and female jobs – has been limited to the public sector. We decided to press on with two private sector cases, even though they contained different sorts of pay discrimination claims than the public sector cases. The data in these cases still allowed us to investigate market, efficiency, and organizational inequality models. More important, they allowed us to test our theoretical framework in the private sector.

Despite some obvious limitations, we think these four cases carry substantial weight in theoretical debates about gender inequality. First, they represent fundamentally important variations in organizational and market contexts. In addition to the public-private variable just mentioned, they also vary by size: Two are very large organizations, two are more modest in size. Taken as individual entities the four organizations comprise an interesting collection of organizational types: a large state employment system, a small state university, a Fortune 500 retailing giant, and a money center bank. Not surprisingly, each organization's pay system contains some unique elements. What is more striking theoretically, however, is that all four also exhibit significant commonalities in how they determine the pay of workers and the mechanisms that produce male-female pay differences.

Second, there is little to suggest that these organizations are atypical among similar sorts of organizations in this time period on issues of gender discrimination. What may be most unusual about these organizations is the nature of the pay claims raised and the fact that they actually came to trial. Government reports suggest that a very large proportion of large organizations have been sued for sex discrimination in some aspect of their employment practices (Dunworth and Rogers 1996). Mere status as a defendant to a discrimination lawsuit does not render these organizations unusual. Also, we know from Bumiller's work (1988) building on the findings of the Civil Litigation Research Project that, of all perceived injuries, employment discrimination has the lowest odds of leading to the filing of a formal complaint. Just because other organizations were not sued for pay discrimination does not mean that women within those organizations did not experience wage injustice. Moreover,

the defendants in these cases defended their pay practices on the grounds that other employers did the same thing. While our results contradict the notion that they were just following the market in setting wages, our reading of these and other pay cases, as well as reports of pay consultants that compare these organizations with others in their industry, lead us to conclude that these are not especially deviant organizations.

Finally, the fact that the plaintiffs lost three of the four cases suggests that these are not “easy” cases from which to argue for an organizational inequality approach.

Plan of the Book

The remainder of the book has three parts: theory and method (Chapters 2–4); the case studies (Chapters 5–8); and the conclusion (Chapter 9). In Chapter 2 we analyze legal theories of sex-based pay discrimination. After briefly sketching the development of the statutory and case law leading up to the *Gunther* opinion, we examine all reported cases involving claims of sex discrimination in pay in the post-*Gunther* period. This analysis reveals that only a handful of between-job cases were adjudicated after *Gunther*. After the defeats in *AFSCME* and other cases, plaintiffs largely abandoned such theories. In the recent era, plaintiffs have limited their claims to more conventional Equal Pay Act issues. We then review the opinions in the cases involving between-job claims. These cases did not overturn *Gunther*, but were resolved based on the factual question of whether market or efficiency considerations explained the wage differences complained of. Our reading of these cases suggests that the courts, with a few exceptions, were heavily influenced by the dominant conception of between-job, male-female pay differences. We close the chapter by presenting three paradigms of sex-discrimination law that link empirical conceptions of employing organizations and labor markets to different regimes of antidiscrimination law: the free market paradigm, the comparable worth paradigm, and the organizational inequality paradigm.

Chapter 3 develops an organizational theory of gender inequality in pay. After summarizing historical and comparative data on the gender gap in pay, we examine the connection between the wage gap and sex segregation by job. We conclude that a substantial portion of the male-female wage gap is attributable to between-job pay differences – the focus of the pay equity movement and our empirical analyses in this book. After reviewing the literature in economics and sociology on male-female wage inequality, we present the organizational inequality model that informs our approach.

Chapter 4 discusses the research design of the study, including the unusual issues raised by using materials generated from litigation to perform empirical analyses of inequality in organizations. After we assess the problem of selection bias, we describe how the cases were selected and summarize the similarities and differences among them. We conclude the chapter with a comment on the intellectual approach we take in this book, what we call critical empiricism, and locate our approach within sociolegal studies.

Part II of the book consists of four case studies. Each case study analyzes an organization as a system of gender inequality. Each chapter describes the litigation that framed the issue of sex discrimination in the case. Using different kinds of data, in each organizational study, we examine the relative explanatory power of market, administered efficiency, and organizational inequality models of gender inequality. In Part III of the book, we synthesize the findings from the case studies and discuss the implications of our results for theories of gender inequality, for the sociology of law, and for policy debates on pay equity.