Indiana Law Review

Volume 29 1996 Number 3

NOTES

THE FAIR PAY ACT OF 1994

THOMAS N. HUTCHINSON*

INTRODUCTION

On July 20, 1994, Representative Eleanor Holmes Norton[1] introduced the Fair Pay Act of 1994.[2] Norton's bill seeks pay equity for women and minorities by requiring employers to pay the "same wage to workers who hold jobs that are equivalent in some combination of skill, effort, responsibility, and working conditions."[3] Norton characterizes the proposed legislation as completing the unfinished task begun by the Equal Pay Act of 1963, which sought to bridge the gap between men's and women's wages.[4]

The task is indeed unfinished. In 1992, women earned only seventy-one cents for every dollar earned by men.[5] Although statistics show improvement since 1982, when the ratio was sixty-two cents for every dollar earned by men, Norton attributes half of the gains to an overall decrease in male wages.[6] She argues that

---

* J.D. Candidate, 1996, Indiana University School of Law—Indianapolis; B.A., 1993, DePauw University, Greencastle, Indiana. Special thanks to my wife, Heather, for her patience and understanding.

1. Representative Eleanor Holmes Norton (D-D.C.) is a lawyer and a tenured professor of law at the Georgetown University Law Center. She serves on the Board of Governors and was the chair of the Equal Employment Opportunity Commission from 1977-1981.

2. The bill in pertinent portion states:

> No employer having employees subject to any provisions of this section shall discriminate between its employees on the basis of sex, race, or national origin by paying wages to employees or groups of employees at a rate less than the rate at which the employer pays wages to employees or groups of employees of the opposite sex or different race or national origin for work in equivalent jobs, except where such payment is made pursuant to a seniority system, a merit system, or a system which measures earnings by quantity or quality of production.

H.R. 4803, 103d Cong., 2d Sess. § 3 (1994).

3. *The Fair Pay Act of 1994: Hearings on H.R. 4803 Before the Joint Subcomm. of House Educ. and Post Office and Civil Service Comm.*, 103d Cong., 2d Sess. (1994) [hereinafter *Hearings*] (statement of Michele Leber, Treasurer, National Committee on Pay Equity).

4. *See infra* Part I.A.

5. *Hearings, supra* note 3 (opening statement of Representative Eleanor Holmes Norton).

6. *Id.*

the continued gap between male and female wages illustrates the insufficiency of the Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964. More specifically, she notes that the Equal Pay Act applies only to "equal pay for equal work" and gender-based discrimination.[7] It does not extend protection to comparable jobs or to pay discrimination based on race or national origin.[8] Although Title VII of the Civil Rights Act of 1964 prohibits discrimination with respect to race, color, religion, sex, or national origin,[9] and has not specifically been limited to "equal pay for equal work,"[10] lower courts have refused to delve into a comparison of dissimilar jobs.[11]

Furthermore, in recent years the Equal Employment Opportunity Commission (EEOC) has pursued fewer and fewer claims.[12] As delegate at-large for Washington D.C., Norton seeks to remedy the ineffectiveness of current legislation and insufficient implementation through comparable worth legislation aimed at eliminating pay inequities between female-dominated and male-dominated occupations.

Part I of this Note surveys the history of equal pay legislation, including the Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964. Part II discusses why current remedies are unsuitable for wage disparity claims. Part III analyzes the "equal pay for comparable work" theory and the latest legislative attempt to codify and implement a comparable worth doctrine.

I. HISTORY OF PAY EQUITY LEGISLATION

The ideas proposed by the Fair Pay Act of 1994 are not new. The concept of equal pay for comparable jobs has been drifting through legislation for almost fifty

---

7. *Id.*

8. *Id.*

9. 42 U.S.C. § 2000e-2(a) (1994).

10. County of Washington v. Gunther, 452 U.S. 161 (1981). The Court provided protection based on a Washington State survey that indicated wage disparities between jobs the state had determined were of comparable value. Nevertheless, the Court specifically denied passing any judgment on the comparable worth doctrine stating, "Respondents' claim is not based on the controversial concept of 'comparable worth' . . . ." *Id.* at 166. Some scholars have noted the Court's distinction was likely based on the fact that the Court did not have to engage in a rating system of jobs. The State of Washington had already conducted a study and the Court only had to look at the uncontested evidence presented. Brendan Mangan, *Comparable Worth Claims Under Title VII: Does the Evidence Support an Inference of Discriminatory Intent?*, 61 WASH. L. REV. 781, 784 n.22 (1986).

11. *See infra* notes 64-67 and text accompanying notes 60-67.

12. *See Hearings*, *supra* note 3 (statement of Gene R. Voegtlin, Legislative Liaison, National Federation of Federal House Education/Select Education and Civil Rights Fair Pay Act). *See also Commission Attorneys Filed Fewer Cases; Brought in Less Money During Fiscal 1995*, Employment Discrimination Rep. (BNA) No. 14, at 426 (April 3, 1996) (noting a decline in 1995 compared with 1994 in all but disability suits).

years. Initially, wage disparity investigations were limited to equal work.[13] In 1867, Congress established the Joint Select Committee on Retrenchment to examine the existing appointment procedures and salaries in the federal civil service.[14] The Committee sent out thirty-seven interrogatories to government officers.[15] The responses to those interrogations confirmed the suspicion that women were paid less than men for equal work.[16] The proposed solution was either to hire more women or to eliminate differentials.[17]

In 1870, Congress enacted legislation that adopted the principle of equal pay for equal work in the federal civil service.[18] The legislation was not generally implemented until the Classification Act of 1923 when Congress established a uniform system of job grades and salaries.[19] Although the Classification Act was largely limited to the federal sector, Montana and Michigan had since adopted broad equal pay laws in 1919 for private employers. [20]

With the advent of World War II and the influx of women into the work force, problems of pay inequality came into sharper focus. Expanding beyond the equal pay for equal work concepts proposed thus far, the War Labor Board approved wage increments to correct gross inequalities in pay for comparable work. The Board stated there should be "'no discrimination between employees whose production [was] substantially the same on comparable jobs.'"[21] The Board issued General Order No. 16 on November 24, 1942 authorizing "increases which equalize the wage or salary rates to females with the rates paid to males for comparable quality and quantity of work on the same or similar operations . . . ."[22] The General Order was only an authorization, however, and did not compel employers to equalize pay.

Finally, in 1945, the War Labor Board introduced a comprehensive federal equal pay bill that mandated elimination of wage disparities.[23] Both the

---

13. Carin Ann Clauss, *Comparable Worth—The Theory, Its Legal Foundation, and the Feasibility of Implementation*, 20 U. MICH. J.L. REF. 7, 12-14 (1986).

14. *Id.* at 10-11.

15. *Id.* at 11.

16. *Id.* at 12.

17. *Id.* at 11-12.

18. *Id.* at 12.

19. *Id.*

20. *Id.* at 12-14.

21. Deborah L. Rhode, *Occupational Inequality*, 1988 DUKE L.J. 1207, 1227 (quoting War Labor Board).

22. PROGRAM APPRAISAL AND RESEARCH DIV., NATIONAL WAR LABOR BD., NATIONAL WAR LABOR BOARD POLICY ON EQUAL PAY FOR EQUAL WORK FOR WOMEN (1945) (Research and Statistics Report No. 32) (quoting General Order No. 16 as amended 1944), *reprinted in Equal Pay for Equal Work for Women: Hearings on S. 1178 Before a Subcomm. of the Senate Comm. on Education and Labor*, 79th Cong., 1st Sess. 33 (1945) [hereinafter *1945 Hearings on S. 1178*].

23. S. 1178, 79th Cong., 1st Sess. (1945), *reprinted in 1945 Hearings on S. 1178*, *supra* note 22, at 1.

government and public sectors widely supported the proposed legislation[24] and six states had similar bills.[25] Nevertheless, the directives lost force and the Senate failed to come to a vote.[26] The bill was reintroduced to no avail in every subsequent session for nineteen years.[27]

Although the bill's language initially applied to "work of comparable character on jobs the performance of which requires comparable skills,"[28] the comparable language was one of the biggest impediments to passage.[29] As a result, the language was changed to "equal work on jobs the performance of which requires equal skills."[30] The bill, then known as the Equal Pay Act, finally passed, was signed on June 10, 1963, and went into effect on June 1, 1964.[31]

A. Equal Pay Act of 1963

The Equal Pay Act of 1963 prohibits employers from paying lower wages to employees of one sex than to employees of the other sex for performing equal work, except where such payment is made pursuant to a seniority system, a merit system, a system that measures earnings by quantity or quality of production, or a differential based on any factor other than sex.[32]

---

24. Clauss, *supra* note 13, at 14.

25. *1945 Hearings on S. 1178, supra* note 22, at 9, 39-40. The six states were Illinois, Massachusetts, Michigan, Montana, New York and Washington. *Id.*

26. Clauss, *supra* note 13, at 14.

27. *Id.*

28. H.R. 8898, 87th Cong., 1st Sess. § 4 (1962), *reprinted in Equal Pay for Equal Work: Hearings on H.R. 8898 and H.R. 10226 Before the Select Subcomm. on Labor of the House Comm. on Education and Labor*, 87th Cong., 2d Sess. 6, 7 (1962) [hereinafter *Equal Pay for Equal Work Hearings*]; *see also* Clauss, *supra* note 13, at 14-15.

29. Clauss, *supra* note 13, at 14.

30. H.R. 3861, 88th Cong., 1st Sess. § 4 (1963), *reprinted in Equal Pay Act: Hearings on H.R. 3861 and Related Bills Before the Special Subcomm. on Labor of the House Comm. on Education and Labor*, 88th Cong., 1st Sess. §§ 2, 3 (1963) [hereinafter *1963 Hearings on H.R. 3861*]; *see also* 108 Cong. Rec. 14,771 (1962) (House discussion of proposed Equal Pay Act amendments); *see also* Clauss, *supra* note 13, at 14-15 & n.35.

31. Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (1964) (codified at 29 U.S.C. § 206(d) (1994)).

32. *Id.* The pertinent portion states:

> No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex.

To establish a prima facie case of discrimination under the Equal Pay Act, the employee must show that the employer pays workers of one sex more than workers of the opposite sex for jobs that are equal in content.[33] The employee must establish that skill, effort, and responsibility are all "equal" and performed under similar working conditions.[34] Although courts initially struggled with the term "equal work," wavering on whether work must be identical, judicial clarification came in 1974 with *Corning Glass Works v. Brennan*, in which the United States Supreme Court determined that jobs need only be "substantially equal."[35]

Still, the legislative history of the Equal Pay Act illustrates rejection of any comparable worth standard in the meaning of "substantially equal."[36] During the Equal Pay Act hearings, the Kennedy Administration strenuously urged adoption of the "comparable" language. Although the original bill contained the "comparable" language, Representative St. George offered an amendment limiting equal pay claims to jobs "the performance of which requires equal skills."[37] Representatives St. George and Landrum feared that employees of the Labor Department would harass businesses with various definitions of "comparable."[38] When the bill was reintroduced in 1963, it contained the St. George amendment. In addition, Representative Goodell clearly enunciated the rejection of the "comparability standards" when he stated:

---

29 U.S.C. § 206(d)(1) (1994).

33. Corning Glass Works v. Brennan, 417 U.S. 188, 195 (1974).

34. "Skill" is an objective standard of ability or dexterity, "effort" is the physical or mental exertion necessary to perform the two jobs, and "responsibility" is the degree of an employee's accountability. Mack A. Player, *Exorcising the Bugaboo of "Comparable Worth": Disparate Treatment Analysis of Compensation Differences Under Title VII*, 41 ALA. L. REV. 321, 331 & nn.35-37 (1990). "Working conditions" need only be similar; however, its definition falls somewhere in the spectrum between equality and comparability. *Id.* at 333.

35. *Corning Glass Works*, 417 U.S. at 188. The case concerned an employer who paid a higher base wage to male night shift inspectors than it paid to female day shift inspectors, where the higher wage was independent of a shift differential paid to all night workers. *Id.* at 190. The employer argued the shifts were not "equal work" in that the groups experienced dissimilar working conditions. *Id.* at 197. The Court found, however, that Congress intended the term "working conditions" to be defined as an industrial relations specialist's term of art, not in lay person's terms. *Id.* at 202. In the industrial relations context, "working conditions" applies to surroundings and hazards, not the overall desirability of a job. *Id.* Consequently, the shifts were defined as "equal" and the employer was required to compensate the shifts equally. *Id.* at 203.

The legislative history of the Equal Pay Act clearly illustrates the rejection of the comparability standards. The legislative history is less clear, however, on the narrowness of the term "equal," stating only that the jobs should be "virtually identical," "very much alike," "closely related." 109 CONG. REC. 9197 (1963).

36. *See generally* County of Washington v. Gunther, 452 U.S. 161, 184-88 (1981) (Rehnquist, J., dissenting).

37. 108 CONG. REC. 14,767 (1962).

38. *Id.* at 14,768-69.

> I think it is important we have a clear legislative history at this point. Last year when the House changed the word 'comparable' to 'equal' the clear intention was to narrow the whole concept. . . . We expect [the Equal Pay Act] to apply only to jobs that are substantially identical or equal.[39]

B. Title VII of the Civil Rights Act of 1964

Less than one month after the Equal Pay Act went into effect, Congress passed similar legislation with Title VII of the Civil Rights Act of 1964.[40] Title VII went beyond the scope of the Equal Pay Act and prohibited discriminatory employment practices against any individual because of race, religion, color, sex, or national origin.[41] The statute was aimed at "eliminating job segregation, as well as opening job opportunities for women."[42] Under Title VII, an employee can bring a cause of action based on disparate impact, where facially neutral employment practices have a discriminatory effect on a protected group,[43] or disparate treatment, where the employer is engaged in intentionally discriminatory employment practices.[44]

Disparate impact claims arise when an employer's facially neutral employment practices, which are not job related and consistent with business necessity, have a disproportionately adverse impact upon a group protected under Title VII.[45] The plaintiff need not prove intent under a disparate impact claim.[46] The employee establishes a prima facie case of discrimination by showing that a facially neutral employment practice has an uneven—disparate—impact on the employee or the employee's class. Once the employee has met the burden of production, the employer then has the burden of justifying its employment practice by proving job relatedness and business necessity.[47]

Disparate treatment claims, however, require the employee to prove an intent to discriminate.[48] In a disparate treatment claim, the employees must show that they: belong to a protected class, are qualified for the position, were rejected for

---

39. 109 CONG. REC. 9197 (1963).

40. 42 U.S.C. §§ 2000e-1 to -17 (1994).

41. *Id.* § 2000e-2(a).

42. Nichole Jenkins, Note, *Labor Law—Comparable Worth Statistics and Studies Alone are Insufficient to Establish Sex-Based Wage Discrimination Under Title VII of the Civil Rights Act of 1964:* AFSCME v. Washington, 29 HOW. L.J. 669, 672 (1986).

43. Griggs v. Duke Power Co., 401 U.S. 424, 430 (1971).

44. McDonnell Douglas v. Green, 411 U.S. 792, 802 (1973).

45. 42 U.S.C. § 2000e-2(k)(2) (1994); *Griggs*, 401 U.S. at 432; *see also* Dothard v. Rawlinson, 433 U.S. 321, 328-29 (1977) (noting height and weight requirement disproportionately excluded women).

46. Jenkins, *supra* note 42, at 673.

47. 42 U.S.C. § 2000e-2(k)(2) (1994); *Griggs*, 401 U.S. at 432; *see also* Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).

48. Spaulding v. University of Wash., 740 F.2d 686, 705 (9th Cir. 1984), *cert. denied*, 469 U.S. 1036 (1984).

the position, and the employer continued to search for an employee with the same qualifications.[49] Once the employee meets this burden of production, a presumption of discrimination is established.[50] The burden of production then shifts to the employer to rebut the presumption of discrimination by articulating some legitimate nondiscriminatory reason for its action.[51]

Once the employer articulates some legitimate nondiscriminatory reason, the employee then has the opportunity to prove that the proffered reason is mere pretext.[52] Pretext may be established by showing that the employment practice, although outwardly legitimate, was applied unevenly[53] or by showing that the employer was more likely motivated by discrimination.[54] Once the employee proves pretext, the employee then must proceed to prove his case by a preponderance of the evidence.[55] During the shifting of the burden of production, the employee always retains the ultimate burden of persuasion.[56]

For the first decade following the enactment of the two statutes, most gender-based discrimination claims were brought under the Equal Pay Act.[57] This was true for two primary reasons. First, an Equal Pay Act action had several procedural advantages over a Title VII action. Title VII actions require deferral to the state unemployment agency, prior notice to the EEOC, and the receipt of a right to sue letter.[58] Second, the EEOC initially took the position that it would not accept any Title VII claims unless they met the "equal pay for equal work" standards of the Equal Pay Act.[59]

Beginning in the 1970s, however, women began to file actions under Title VII.[60] Employers initially defended these claims under the Bennett Amendment.[61]

---

49. McDonnell Douglas v. Green, 411 U.S. 792, 802 (1973). These are not strict qualifications, as the requirements will necessarily vary depending on the particular situation. Loyd v. Phillips Bros., Inc., 25 F.3d 518, 523 (7th Cir. 1994).

50. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253-56 (1981).

51. *McDonnell Douglas*, 411 U.S. at 802; *Burdine*, 450 U.S. at 254.

52. *Burdine*, 450 U.S. at 256.

53. *McDonnell Douglas*, 411 U.S. at 804.

54. Mangan, *supra* note 10, at 786 n.33. The employee could, for example, produce evidence of derogatory or sexist remarks by supervisors.

55. *Burdine*, 450 U.S. at 253.

56. St. Mary's Honor Ctr. v. Hicks, 113 S. Ct. 2742, 2747-48 (1993).

57. Clauss, *supra* note 13, at 16.

58. *Id.*

59. *Id. See also* EEOC Guidelines on Discrimination Because of Sex, 30 Fed. Reg. 14,926, 14,928 (1965).

60. Clauss, *supra* note 13, at 16.

61. The Bennett Amendment states in pertinent part:

> It shall not be an unlawful employment practice under [Title VII] for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such is authorized by the provisions of [the Equal Pay Act].

42 U.S.C. § 2000e-2(h) (1994).

Although the Bennett Amendment had been added to Title VII in the last hours of its debate to overcome any confusion or conflict arising because of the two similar statutes,[62] employers interpreted the Bennett Amendment as limiting Title VII claims to those claims that met the "equal work" standard of the Equal Pay Act.[63] Lower courts were in conflict as to the interpretation of the statute. Some courts allowed the defense, limiting Title VII claims to the "equal work" terms of the Equal Pay Act, while other courts construed the Bennett Amendment as merely adopting the four affirmative defenses—seniority system, merit system, quantity or quality of production, and factor other than sex—found in the Equal Pay Act.[64]

In 1981, the United States Supreme Court resolved the Bennett Amendment conflict in *County of Washington v. Gunther*.[65] The Court stated that the purpose of the Bennett Amendment was to incorporate the four affirmative defenses of Title VII, not to limit it to "equal work" claims.[66] Although many hoped *Gunther* would open the door to pay equity claims, the Court's narrow holding was based upon a mass of statistical data the state had gathered through its own studies. Unfortunately for advocates of comparable worth, lower courts have largely refused to wander off the "equal work" path absent the strong statistical proof provided in *Gunther*.[67]

II. A Square Peg and a Round Hole

With the failure of *Gunther* to open the doors to comparable worth claims, advocates of comparable worth have focused on enacting some form of pay equity legislation. As noted in Part I, comparable worth is not a new concept. Legislators have considered the idea of equal pay for jobs of comparable worth since the investigations of the War Labor Board in the 1940s.[68] Consequently, "comparable worth" has become a term encompassing numerous definitions.[69]

---

62. County of Washington v. Gunther, 452 U.S. 161, 170 (1981).

63. Clauss, *supra* note 13, at 16.

64. *Compare* Lemons v. City of Denver, 620 F.2d 228 (10th Cir. 1980), *cert. denied*, 449 U.S. 888 (1980); Keyes v. Lenoir Rhyne College, 552 F.2d 579, 580 (4th Cir. 1977), *cert. denied*, 434 U.S. 904 (1977); Orr v. Frank R. MacNeill & Son, Inc., 511 F.2d 166, 171 (5th Cir. 1975), *cert. denied*, 423 U.S. 865 (1975); Ammons v. Zia Co., 448 F.2d 117 (10th Cir. 1971) (requiring Title VII claims to meet "equal requirement of Equal Pay Act) *with* International Union of Elec., Radio & Mach. Workers v. Westinghouse Elec. Corp., 631 F.2d 1094 (3d Cir. 1980), *cert. denied*, 452 U.S. 967 (1981); Gunther v. County of Washington, 602 F.2d 882, 888-91 (9th Cir. 1979) (not limiting Title VII claims to "equal work" situations), *aff'd on rehearing*, 623 F.2d 1303 (9th Cir. 1979), *aff'd*, 452 U.S. 161 (1981).

65. 452 U.S. 161 (1981).

66. *Id.* at 170.

67. *See* Loyd v. Phillips Bros., 25 F.3d 518, 525 (7th Cir. 1994); International Union, U.A.W. v. Michigan, 886 F.2d 766, 768-69 (6th Cir. 1989); American Nurses Ass'n v. Illinois, 783 F.2d 716 (9th Cir. 1986); AFSCME v. Washington, 770 F.2d 1401 (9th Cir. 1985).

68. *See supra* notes 21-31 and accompanying text.

69. *See infra* Part III.C.

Comparable worth as used in this Note, and as apparently used in the Fair Pay Act, describes a class of wage discrimination claims based on a single employer's use of different criteria in establishing the wage rates for male-dominated and female-dominated jobs.[70] Pay equity studies show that when two job classifications have the same value according to the employer's job evaluation system, but one job is held primarily by men and the other by women, the job held by men usually pays more.[71]

Norton, like many proponents of comparable worth legislation, argues that both the Equal Pay Act and Title VII are unsuitable to cure the problems of pay equity.[72] Although a Title VII disparate treatment claim could theoretically remedy wage disparities in comparable occupations, cases since *Gunther* indicate that such claims are unlikely to succeed.[73] Both the Equal Pay Act and Title VII are designed to cure discrimination by eliminating discriminatory barriers to a free market. For example, by bringing a Title VII cause of action, an employee can overcome seemingly neutral employment practices that have an adverse impact on a protected group. In an ideally free market, once these barriers are overcome, women then have the opportunity to enter traditionally male-dominated occupations.[74] Once in those jobs, and doing equal work with men, women can defeat additional discrimination using the "equal pay for equal work" standards of the Equal Pay Act. Nevertheless, the Equal Pay Act and Title VII do not remedy the problems of wage disparities between male-dominated and female-dominated occupations because there may be no occupation for comparison.

A. Equal Pay Act Unsuitable

The Equal Pay Act is unsuitable to remedy wage disparities in female-

---

70. Clauss, *supra* note 13, at 9.

71. Barbara J. Nelson, *Comparable Worth: A Brief Review of History, Practice, and Theory*, 69 MINN. L. REV. 1199, 1200 (1985) (book review); *see, e.g.*, WOMEN, WORK, AND WAGES: EQUAL PAY FOR JOBS OF EQUAL VALUE (D. Treiman & H. Hartmann eds., 1981).

72. *See Hearings, supra* note 3 (statement of Representative Eleanor Holmes Norton); *see also Hearings, supra* note 3 (statement of John Sturdivant, National President, American Federation of Government Employees House Education/Select Education and Civil Rights Fair Pay Act); Mangan, *supra* note 10, at 801-02. *But cf.* Robert J. Arnold & Donna M. Ballman, AFSCME v. Washington: *The Death of Comparable Worth?*, 40 U. MIAMI L. REV. 1039, 1074 (1986). *See also* George Rutherglen, *The Theory of Comparable Worth As a Remedy for Discrimination*, 82 GEO. L.J. 135, 145-46 (1993).

73. *See supra* note 64.

74. Of course, this is a highly generalized statement that fails to consider other hurdles women encounter. For example, barriers that block women from upper management—a problem known as the "glass ceiling"—is still a hotly debated and controversial issue. A study released in March of 1995 reported that 97% of the senior managers in Fortune 1000 industrial and Fortune 500 companies are male. Pamela M. Prah, *Glass Ceiling: Commission's Recommendations Elicit Mixed Marks from Employers, Advocates*, BNA EMPLOYMENT POLICY & LAW DAILY, Dec. 15, 1995.

dominated occupations because of its specific requirement of "equal pay for equal work." As mentioned above, the Equal Pay Act failed to pass for nineteen years, in part because it originally used comparable language. Although the specific definition of "equal" was uncertain for a number of years, the concern was construing the term too strictly. In *Corning Glass v. Brennan*, "equal" was defined as "substantially equal."[75] This definition would not apply to comparable worth cases.

No matter how broadly the Equal Pay Act is construed, it is unlikely that a court would permit a comparison of dissimilar jobs.[76] In a comparable worth claim there is no male counterpart; there is no control group with which to compare. The Equal Pay Act necessitates a group the complaining party can use as a basis of the prevailing wage.[77]

B. Title VII Unsuitable

Title VII is the usual means of pursuing a comparable worth remedy. Although its relaxed comparison standards and implied intent requirements make it initially attractive, its structural limitations and judicial interpretations make it an unsuitable remedy for persons employed in an undervalued female-dominated occupation. For example, assume high school cafeteria employees are predominately women and high school custodians are predominantly men. The females in the cafeteria make $6.00 an hour, while the male custodians make $12.00 an hour. The hiring criteria for each occupation is applied evenly to all applicants and the promotional criteria is applied evenly to all employees in that occupation. All of the cafeteria workers earn basically the same wage, as do all of the custodians. The problem is the wage depression across each occupation. Comparable worth advocates would argue that wages of cafeteria employees are suppressed because that occupation is dominated by women.[78] Even though the work is comparable when looking at skill, effort, responsibility, and working conditions, the custodians are paid more because that occupation is dominated by males.

Still, a disparate impact claim is an unsuitable cause of action because the job classifications affected are not the sort of specific, clearly delineated employment practices applied at a single point in the job delegation process to which disparate

---

75. Corning Glass Works v. Brennan, 417 U.S. 188, 203 n.24 (1974).

76. Arnold & Ballman, *supra* note 72, at 1048.

77. Clauss, *supra* note 13, at 16.

78. This example is taken from *Jancey v. Everett Sch. Comm.*, as described by Marilyn Jancey in her testimony in support of the Fair Pay Act. *Hearings, supra* note 3 (statement of Marilyn Jancey, before the House Subcommittee on Select Education and Civil Rights concerning the Fair Pay Act). Massachusetts already has legislation outlawing pay discrimination in equivalent jobs. The cafeteria workers prevailed and were awarded a $1.1 million judgment, including damages, costs, and attorney fees. The school has appealed. Jancey v. Everett Sch. Comm., No. 89-3807, 59 Fair Empl. Prac. Cas. (BNA) 1314 (Mass. Super., Aug. 13, 1992).

impact analysis is aimed.[79] Disparate impact analysis is confined to the particular standards an employer uses in determining hiring criteria and advancement standards.[80] When those criteria or standards have a disparate impact on a protected group, the employee has a colorable claim.[81] Comparable worth doctrine, however, is not concerned with the hiring or promotional criteria, but with occupations dominated by one gender or race.[82] Employees in these occupations are not complaining of disparate employment practices within their occupation. Standards within their narrowly defined occupation are often applied equally to all members. Comparable worth is concerned with pay inequities between comparable occupations; occupations that "may be dissimilar, but whose requirements are equivalent, when viewed as a composite of skills, effort, responsibility, and working conditions."[83]

Disparate treatment initially seems a more viable option for comparable worth claims. Plaintiffs which have brought claims based on wage disparities complaints have traditionally attempted to do so using disparate treatment. Nevertheless, a disparate treatment claim gives the employer the opportunity to proffer a nondiscriminatory reason for its actions. The proffered reason is often to point to prevailing market rates, and market rates usually satisfy the rational relationship requirement.[84] Market rates reflect factors that define the value of different jobs, including the availability of workers in a particular occupation and their ability to bargain collectively for higher wages.[85] Consequently, if women are to use a disparate treatment action, they must present substantial proof that the market justification is mere pretext and then prove their case by a preponderance of the evidence. This has proven to be an especially difficult burden when the jobs are dissimilar but comparable in value.

C. Judicial Concurrence

In a small number of cases sufficient proof is available. In *Gunther v. Washington,*[86] the Court held that "claims for sex-based wage discrimination can also be brought under Title VII even though no member of the opposite sex holds an equal but higher paying job, provided that the challenged wage rate is not exempted under the Equal Pay Act's affirmative defenses . . . ."[87] The respondents in *Gunther* were female prison guards who patrolled the female section of the

---

79. Spaulding v. University of Wash., 740 F.2d 686, 708 (9th Cir. 1984), *cert. denied*, 469 U.S. 1036 (1984).

80. Griggs v. Duke Power Co., 401 U.S. 424, 429-30 (1971).

81. *Id.* at 429.

82. Laura B. Pincus, *Free Market Approach to Comparable Worth*, 43 LAB. L.J. 715 (1992).

83. H.R. 4803, 103d Cong., 2d Sess. § 3(b)(4)(B) (1994).

84. AFSCME v. Washington, 770 F.2d 1401, 1407 (9th Cir. 1985); Arnold & Ballman, *supra* note 72, at 1066-67.

85. Mangan, *supra* note 10, at 790.

86. 452 U.S. 161 (1981).

87. *Id.* at 168.

prison.[88] They claimed they were paid less than the male prison guards who patrolled the male section.[89] The female guards argued that the pay inequities were due to unintentional discrimination, submitting evidence that the prison had failed to adhere to its own study showing wage disparities.[90]

Although the female guards achieved pay equity in *Gunther*, the Court significantly limited its holding, stating that "Respondent's claim is not based upon the controversial concept of 'comparable worth' . . . ."[91] The Court based its decision on intentional discrimination, evidenced by the prison's self-initiated pay equity studies.[92] The Court noted it did not have to conduct its own subjective assessment of job criteria. The prison had already conducted such an evaluation and the Court merely had to look at the results.[93] With pay equity studies then being conducted by local governments in a number of different states, comparable worth advocates hoped that the resulting statistics might serve as a basis of proving discriminatory intent.

Nevertheless, four years later, in *AFSCME v. Washington*,[94] the Ninth Circuit overturned a decision requiring the State of Washington to act on its survey findings of wage disparities. In 1974, the State of Washington had conducted an initial, internal survey which indicated that wage disparities between female-dominated and male-dominated occupations were not attributable to job worth.[95] The state then commissioned an independent consulting firm to further assess the amount of wage disparities.[96] Two simultaneous surveys were conducted and both confirmed a gender-based wage disparity.[97] The state conducted similar surveys with similar findings again in 1976 and 1980.[98]

In 1980, AFSCME brought an action seeking immediate implementation of a comparable worth scheme.[99] AFSCME argued that the state's job classification system had a disparate impact on females.[100] In addition, AFSCME argued disparate treatment, in that the state's failure to act on the 1974, 1976, and 1980 surveys evidenced a discriminatory motive and reflected a historical pattern of gender-based wage disparity.[101] Although the district court agreed with AFSCME's reasoning, granting declaratory and injunctive relief, the court of appeals overturned its ruling on both disparate impact and disparate treatment

---

88. *Id.* at 164.
89. *Id.* at 164-65.
90. *Id.* at 165.
91. *Id.* at 166.
92. *Id.* at 180.
93. *Id.* at 180-81.
94. 770 F.2d 1401 (9th Cir. 1985).
95. Mangan, *supra* note 10, at 786-87.
96. *Id.* at 786.
97. Arnold & Ballman, *supra* note 72, at 1040.
98. Jenkins, *supra* note 42, at 679.
99. *Id.*
100. *Id.*
101. *Id.*

grounds.[102] A finding of disparate impact was deemed inappropriate because the state utilized market rates as its hiring criteria and market rates bore a rational relationship to the value of the work. A disparate treatment finding was deemed inappropriate because of market justifications and the subsequent inability of AFSCME to prove intentional discrimination by a preponderance of the evidence.[103]

With the Equal Pay Act and Title VII arguably unsuitable for comparable worth claims, and the judiciary's reluctance to recognize pay equity studies as a basis for discriminatory intent, many comparable worth advocates have switched their efforts towards enacting comparable worth legislation. Norton's proposed Fair Pay Act eliminates many of the traditional concerns about comparable worth. First, the Fair Pay Act applies only to single employers and does not mandate a national comparative system.[104] Second, it does not permit employers to lower the salaries of one occupation to equal the salaries of another.[105] Third, it allows the employer to continue to vary wages under the four affirmative defenses of the Equal Pay Act and Title VII.[106] Finally, it emphasizes the need for employer, employee, and public education on the issues of comparable worth.[107] In these four regards, the Fair Pay Act seems a viable solution to the unquestionable wage disparity between male-dominated and female-dominated occupations. Nevertheless, with little national discussion of comparable worth in the last seven years, and little understanding of how a comparable worth system could effectively operate, misinformation will likely prevent passage of the Fair Pay Act or similar comparable worth legislation.

III. THE TRADITIONAL ARGUMENTS AGAINST COMPARABLE WORTH

The traditional arguments against comparable worth can be divided into roughly four categories. First, some opponents refuse to recognize the problem addressed by comparable worth. They either believe that existing legislation will remedy inequities or deny the existence of gender-based wage disparities.[108] Second, opponents who do recognize wage disparities often blame the marketplace or women themselves.[109] Third, opponents often doubt the viability of a job

---

102. *Id.* at 680.

103. *See also* Plemer v. Parsons-Gilbane, 713 F.2d 1127, 1134 (5th Cir. 1983); American Fed'n of State, County, & Mun. Employees v. County of Nassau, 609 F. Supp. 695, 708 (E.D.N.Y. 1985) (citing Spaulding v. University of Wash., 740 F.2d 686, 708 (9th Cir. 1984), *cert. denied*, 469 U.S. 1036 (1984)); Power v. Barry County, 539 F. Supp. 721, 726 (W.D. Mich. 1982); Connecticut State Employee's Ass'n v. Connecticut, 31 Fair Empl. Prac. Cas. (BNA) 191, 192-93 (D. Conn. 1983).

104. *See generally* H.R. 4803, 103rd Cong., 2d Sess. (1994).

105. H.R. 4803, 103d Cong., 2d Sess. § 3 (1994).

106. *Id.*

107. *Id.* §§ 6-7.

108. *See infra* Part III.A.

109. *See infra* Part III.B.

classification system. They argue any job classifications would be too subjective and important variables would go unrecognized.[110] Finally, opponents feel that comparable worth legislation would prove too costly, with benefits being outweighed by increases in spending, increases in unemployment among women, and depressed wages among male blue-collar workers.[111]

A. "No Problem Exists"

It is somewhat surprising that scholars still deny the existence of wage disparities.[112] Wage disparities have existed for almost two thousand years.[113] Although the Equal Pay Act has cured the most obvious wage gaps, and Title VII has opened many doors, women are still crowded into a small number of job categories that have no male counterparts.

Statistics show that about three-fifths of female workers are employed in jobs which are at least seventy-five percent female.[114] In the late 1980s, females were only half as likely to be partners in law firms, had only eight percent of state and federal judgeships, and occupied only two percent of corporate executive positions in Fortune 500 companies.[115] According to Norton and other proponents testifying in support of the Fair Pay Act, in 1992 women earned only seventy-one cents for each dollar earned by men, a mere twelve cent gain in thirty years.[116]

Today, female college graduates earn twenty-nine percent less than male college graduates, and only $1,950 a year more than high school educated white

---

110. *See infra* Part III.C.

111. *See infra* Part III.D.

112. *See generally* Daniel R. Fischel & Edward P. Lazear, *Comparable Worth and Discrimination in the Labor Market*, 53 U. CHI. L. REV. 891 (1986); Nicholas J. Mathys & Laura B. Pincus, *Is Pay Equity Equitable? A Perspective that Looks Beyond Pay*, 44 LAB. L. J. 351 (1993); Pincus, *supra* note 82.

113. *Leviticus* states, "When a man shall make a special vow of persons to the Lord at your valuation, Then your valuation of a male from twenty years old up to sixty years old shall be fifty shekels of silver . . . . And if the person is a female, your valuation shall be thirty shekels." *Leviticus* 27:2-4 (Amplified).

114. Rhode, *supra* note 21, at 1209.

115. *Id.* at 1210.

116. *Hearings, supra* note 3 (statement of Michele Leber, Treasurer, National Committee on Pay Equity) (quoting U.S. BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS, SERIES P60-184, MONEY INCOME OF HOUSEHOLDS, FAMILIES, AND PERSONS IN THE UNITED STATES: 1992 (1993)). In addition, for every dollar earned by white men, black men earned seventy-two cents, black women sixty-four cents, Hispanic men sixty-five cents, and Hispanic women fifty-five cents. These figures vary slightly from study to study. For example, figures provided by the Federal Office of Personnel Management showed women in the professional classification category earning eighty percent of male earnings and women in the administrative classification category earning eighty-four percent. *Hearings, supra* note 3 (statement of John Sturdivant, National President, American Federation of Government Employees before the House Subcommittee on Select Education and Civil Rights concerning the Fair Pay Act).

males.[117] Moreover, additional job experience pays at a rate of $1.20 per hour for white males, while only paying thirty-five cents for black women, thirty cents for white women, and twenty-five cents for Hispanic women.[118] Furthermore, these statistics may underestimate overall gender disparities, because less than half of the women work full-time for a full year and a disproportionate number lack employment-related benefits such as health coverage and pensions.[119] According to advocates of the Fair Pay Act, women individually lose over $420,000 during a lifetime due to pay inequity[120] and women as a group lose over $100 billion annually.[121] At current rates, under current legislation, proponents of comparable worth predict it will take between seventy-five and 100 years to achieve a balanced workplace.[122]

B. "It's the Market"

The market excuse can be subdivided into two categories. First, both opponents and courts argue that wage disparities are the result of the free market, not latent or patent discrimination.[123] These opponents of comparable worth argue that the free market accurately reflects the worth of an individual occupation. They contend comparable worth legislation would superficially alter the supply and demand curve.[124] Without voluntary, free exchange by independent employers there could only be dictated trade.[125] In addition, these opponents note that comparability of jobs and wages fails to take intrinsic, nonmonetary benefits into consideration, such as the working conditions of a particular occupation.

Norton argues that the consideration of nonmonetary benefits only widens the wage disparity gap, because women often do not receive comparable health coverage and pension benefits, whereas opponents of comparable worth focus more on the lay person's definition of "working conditions." Working conditions under a comparable worth analysis, however, are defined, as in Title VII,

---

117. *Hearings, supra* note 3 (statement of Michele Leber, Treasurer, National Committee on Pay Equity) (quoting U.S. CENSUS BUREAU, CURRENT POPULATION REPORTS, SERIES P60-184, MONEY INCOME OF HOUSEHOLDS, FAMILIES, AND PERSONS IN THE UNITED STATES: 1992 (1993)).

118. *Id.* (quoting INSTITUTE FOR WOMEN'S POLICY RESEARCH, INCREASING WORKING MOTHER'S EARNINGS: THE IMPORTANCE OF RACE, FAMILY, AND JOB CHARACTERISTICS (1991)).

119. Rhode, *supra* note 21, at 1209.

120. *Hearings, supra* note 3 (statement of Michele Leber, Treasurer, National Committee on Pay Equity) (quoting WOMEN'S VOICES POLICY GUIDE: A JOINT PROJECT BY THE MS. FOUNDATION FOR WOMEN AND THE CENTER FOR POLICY ALTERNATIVES (1992)).

121. *Id.* (quoting the National Committee on Pay Equity's calculation of the total wage gap, based on 1992 U.S. Census Bureau Data).

122. 2 UNITED STATES COMM'N ON CIVIL RIGHTS, COMPARABLE WORTH: ISSUE FOR THE 80'S, at 109 (1984) (statement of Joy Ann Grune).

123. *See, e.g.*, Linda Chavez, *Fair Pay or Foul Play?*, USA TODAY, Aug. 3, 1994, at A9; Pincus, *supra* note 82, at 717-18.

124. Chavez, *supra* note 123, at A9; Pincus, *supra* note 82, at 717-18.

125. Chavez, *supra* note 123, at A9; Pincus, *supra* note 82, at 717-18.

according to industrial relations standards, in terms of safety and hazards.[126] Some opponents of comparable worth argue that a lay person's definition of working conditions—including friendships and sociability, schedule flexibility, job status, and emotional significance—are ignored by a comparable worth analysis.[127]

Second, some opponents of comparable worth argue that the problem is not the ineffectiveness of current legislation, but the failure of women to take advantage of such legislation by making less of an investment in their careers and focusing instead on their families.[128] They point to figures which show that women earn more than men when they dedicate themselves to a full-time position.[129] This argument, however, merely describes the job market and does not attempt to explain the underlying reasons for the failure of women to enter male-dominated occupations or work full-time, choosing instead to focus more on family and child rearing. Although an in-depth analysis of all the socioeconomic and psychological reasons for the failure of women to enter male-dominated occupations is beyond the scope of this Note, two general categories illustrate this point.

First, women are barraged with definite cultural expectations throughout their lives. Although these expectations have changed over the past forty years, preconceived notions about "women's work" persist. The absence of female role models may also aggravate the problem.[130] Women remain largely outside the network of support, guidance, and information exchange.[131] Families encourage job choices that will not conflict with domestic duties, require geographic mobility, or entail greater prestige or income for wives than for husbands.[132] This is especially true among minority groups, the groups already most disadvantaged by existing occupational structures.[133] Low expectations become self-fulfilling prophecies. In light of the wage disparities, and the difficulty women have

---

126. *See* Corning Glass Works v. Brennan, 417 U.S. 188, 202 (1974).

127. Mathys & Pincus, *supra* note 112, at 353. This argument relates to the second market excuse category, that women freely choose to remain in female-dominated job classifications.

128. *Id.* at 354-56.

129. For example, statistics from the U.S. Department of Labor, Women's Bureau, show full-time working women making more than men in certain occupations:

Full-time Working Women Earnings in Selected Occupations as a Percentage of Men's Earnings

Occupation	1983	1993
Registered nurse	99.5	101.5
Cashiers	84.3	87.7
Guards, except public service	91.2	95.9
Mechanics/repairers	89.4	106.7

Chavez, *supra* note 123, at A9.

130. Thomas Huang, *Getting His Housekeeping In Order*, THE DALLAS MORNING NEWS, Oct. 12, 1994, at C1.

131. Rhode, *supra* note 21, at 1221.

132. *Id.* at 1214.

133. *Id.*

entering the male-dominated job market, economically it often makes more sense for the couple to invest in the husband's career.[134]

Second, women are still subjected to intentional discrimination. As evidenced in clinical and longitudinal studies, this intentional discrimination results from outdated statistical information about female job performance and unconscious stereotypes.[135] For example, if an employer believes female workers have a higher turnover rate than males, and it is difficult to screen for true job commitment in advance, it makes sense for the employer to channel women toward low-status, low-paid positions where they are easily replaced. Although recent data suggest men and women holding comparable jobs do not have different turnover rates, the residual effects of statistical discrimination persist.[136]

Opponents of comparable worth argue that even if these reasons are probable or supported by statistical data, comparable worth legislation seems an ill-suited remedy. Rather than prevent or discourage segregation into male-dominated and female-dominated occupations, opponents argue comparable worth aggravates segregation by providing equal pay.[137] While comparable worth is admittedly limited to pay discrimination, it is also concerned with sex discrimination in general. By increasing the pay of female-dominated occupations, comparable worth legislation discourages women from entering male-dominated occupations and results in increased segregation. Women must enter male-dominated occupations to become role models for future generations and to erode stereotypes.

Indeed, the increase of women in law, medical, and business school indicates cultural expectations are having less effect on occupational choices.[138] For example, in 1964 forty-two percent of degrees earned by women were in education.[139] In 1981, that figure declined to eighteen percent.[140] In 1964, women received only five percent of the law, medical and business degrees conferred.[141] In 1984, thirty percent of law degrees, twenty-five percent of medical degrees, and twenty-five percent of business degrees were earned by women.[142] Although the transformation will take time, opponents insist traditional methods will inevitably lead to more women in upper management, where they will be able to effect

---

134. *Id.* at 1216.

135. *See, e.g.*, Caribbean Marine Serv. Co. v. Baldridge, 844 F.2d 668, 671, 675 (9th Cir. 1988) (fishing boat owners stated that if women were on board it would hurt morale, distract the crew, and reduce the catch); *see also* J. LYLE & J. ROSS, WOMEN IN INDUSTRY 8, 9-10 (1973). Note also that fear of sexual harassment may discourage women from entering male-dominated occupations. Rhode, *supra* note 21, at 1221.

136. Rhode, *supra* note 21, at 1219.

137. *Id.*, at 1232.

138. *See generally* Mathys & Pincus, *supra* note 112, at 355.

139. *Id.*

140. *Id.*

141. *Id.*

142. *Id.* The 1993 statistics for Indiana University School of Law—Indianapolis further illustrate this point, with females comprising 40% of the school's enrollment. INDIANA UNIVERSITY SCHOOL OF LAW-INDIANAPOLIS BULLETIN 1994-1996 (1994).

policy, act as role models, and establish a female network for future generations.

C. "Who Determines Worth?"

Opponents argue that it is impossible to assign a value to a particular occupation.[143] They point to the numerous examples of wage gaps in male-dominated occupations that also seem unfair, like wage disparities between professional baseball players and college professors or between presidents of large corporations and the President of the United States. Even jobs that require equal levels of education and skill, and have similar working conditions, often vary widely in pay. Engineers and architects, for example, have similar training, skills, and working conditions, yet engineers usually earn more than architects.[144]

Opponents of comparable worth use such examples to illustrate wage disparity as an inevitable part of the free market.[145] Comparable worth, as discussed in this Note and as proposed by the Fair Pay Act, however, is concerned only with wage disparities of a single, specific employer.[146] Engineers would not be compared to architects. Moreover, engineers working for Company A would not be compared to engineers working for Company B. Company A would only have to pay its engineers as much as other Company A employees doing equivalent work, the performance of which requires equal skill, effort, and responsibility, and which is performed under similar working conditions.[147]

Employers are free to establish any evaluation criteria, so long as they apply these criteria equally to both male-dominated and female-dominated occupations.[148] The employer can pay everyone the same, pay different rates for work of lesser value, pay more for managerial skills, pay more for creative skills, or emphasize responsibility over skill.

The Fair Pay Act's use of employer-designated evaluation criteria is not the only possibility under a comparable worth system. Other systems involve the government or government-appointed committees in establishing evaluation

---

143. Mathys & Pincus, *supra* note 112, at 352-54 (stating that pay is only one motivation for people to accept a position or desire a particular career, with other motivations including fringe benefits, job security, social satisfaction, and recognition by one's supervisor); Fischel & Lazear, *supra* note 112, at 893-94 (value of a job can be determined only by reference to the wage that prevails in the market as a result of supply and demand); Rhode, *supra* note 21, at 1231 (an evaluation system that considers only job content might make it difficult for employers to attract and retain workers in areas of tight labor supply and distort signals to potential employees about labor needs).

144. Clauss, *supra* note 13, at 20.

145. *See supra* note 143.

146. H.R. 4803, 103d Cong., 2d Sess. § 3 (1994).

147. *Id.*

148. An employer may still be subject to liability under a disparate impact Title VII claim if the employment criteria has an adverse impact on a protected group. McDonnell Douglas v. Green, 411 U.S. 792, 802 (1973).

criteria.[149] The former is known as "policy capturing" and the latter "a priori."

"A priori" evaluation systems utilize governmental standards or standards imposed by government-appointed committees, instead of using the employer's own evaluation criteria.[150] These evaluation procedures are not likely to recognize the specialization inherent in many occupations. "A priori" systems are likely to overlook the relative size of an employer, particular business nuances, and local economic considerations. Furthermore, "a priori" evaluation systems would likely be deemed too intrusive into the workings of private employers.

"Policy capturing" systems would likely be used under the Fair Pay Act.[151] "Policy capturing" systems permit the employer to establish its own evaluation criteria or utilize a system already in place.[152] This reduces the cost to employers of implementing and learning a new job evaluation system and minimizes disruption of same-sex job rankings.[153] After the employer determines its evaluation system, a regression analysis is used to detect and eliminate biases.[154] Only factors that are also used in male-dominated occupations or mixed

---

149. Fischel & Lazear, *supra* note 112, at 896 (comparing mediocre bankers with brilliant artists); Mathys & Pincus, *supra* note 112, at 356 (comparing engineers with nurses); Chavez, *supra* note 123, at A9 (comparing brain surgeons and professional baseball players); Rhode, *supra* note 21, at 1229-30 (citing job comparisons using an intrinsic, "a priori" evaluation system).

150. Rhode, *supra* note 21, at 1229-30.

151. H.R. 4803, 103d Cong., 2d Sess. § 3 (1994).

152. Studies show that approximately two-thirds of all employers have already established some formal evaluation procedure. Rhode, *supra* note 21, at 1228.

153. Clauss, *supra* note 13, at 11-12.

154. In order to establish an evaluation procedure, the employer must set up an evaluation system. The evaluation system will rank groups of jobs on the basis of a common set of job factors. Clauss, *supra* note 13, at 49 (quoting REPORT OF WISCONSIN'S TASK FORCE ON COMPARABLE WORTH 34, 196 (Jan. 1986)). Thus, the employer must first determine which factors it will use. *Id.* The factors will vary depending on the nature of the work and the person doing the evaluation, but will typically include some variant of skill, effort, responsibility, and working conditions. *Id.* Once the factors are determined, they are divided into levels. *Id.* Each level has an increased degree of worth, and often includes language identifying the requisite mastery for a particular level. *Id.* For example, a Wisconsin pay equity study used knowledge as one of its requirements, with the requisite level one mastery defined as "[l]anguage skills sufficient to follow oral instructions and [s]kills necessary to perform simple manual tasks . . . ." *Id.* Next, weights are assigned to each factor, because some factors will be valued more than others. *Id.* at 50. Finally, the employers analyze the jobs in relation to the factors and weights, and decide which factor level accurately describes each job. *Id.* at 50-51. This process is often done by either a job evaluator, personnel director, or job evaluation committee, using interviews, position descriptions, and on-site inspections. *Id.* at 51.

The regression analysis is then performed by plotting the wage rates for male-dominated and female-dominated jobs at each point level. The employer then draws a line of best fit for male-dominated and integrated jobs and a line of best fit for female-dominated jobs. If the lines overlap, there is no evidence of sex bias. If they do not overlap, however, there is substantial evidence of gender-based wage disparity. *Id.*

occupations are then used to compare the female-dominated occupations.

Still, "policy capturing" is not without problems of its own. By permitting the employer to determine its own evaluation criteria, bias already existent in the company is given governmental approval and seemingly scientific validity.[155] Relevant job factors could be omitted, some jobs could be inaccurately described, and jobs could be assigned to the wrong factor level.[156]

D. "Too Costly"

Assuming that the problem is real and the Fair Pay Act could be effectively implemented, many employers are concerned with the costs of establishing and maintaining an evaluation system and the costs of an increased payroll.[157] Aside from the numerous record keeping and reporting costs, employers will have to raise the pay of female-dominated occupations to comply.[158] Opponents of comparable worth estimate a five percent increase in an employer's total payroll.[159] Proponents argue that those cost estimates are likely exaggerated, but assuming that they are accurate, the costs are justified.[160] Potential benefits outweigh costs and employers can implement programs gradually and spread costs over time.[161]

IV. COMPARABLE WORTH APPLIED

The term "comparable worth" has developed more into a concept than a specific legal program. Since its original inception, it has been altered into a variety of theories and approaches, all of which are based upon disputed data and arguably speculative results. Like its predecessors, the Equal Pay Act and Title VII, its likely impact on the national economy and wage disparities is unknown. Nevertheless, like many controversial legislative proposals, comparable worth legislation has had trial runs in various states, municipalities, and other countries.

---

155. Rhode, *supra* note 21, at 1239-40. For example, this difficulty was ironically highlighted by Robert M. Tobias, President of the National Treasury Employees Union, when he testified in support of the Fair Pay Act. Mr. Tobias called the federal job classification system fundamentally flawed because it reflects historical biases in its weights and classification standards. *Hearings, supra* note 3 (statement of Robert M. Tobias, President, National Treasury Employees Union).

156. Clauss, *supra* note 13, at 179; *see also* Mark Seidenfeld, *Some Jurisprudential Perspectives on Employment Sex Discrimination Law and Comparable Worth*, 21 RUTGERS L.J. 269, 319-21 (1990). The Fair Pay Act reduces this risk by requiring the employer to submit an annual report of its pay determinations, which will then be available to its employees and the public at large. H.R. 4803, 103d Cong., 2d Sess. (1994).

157. Rhode, *supra* note 21, at 1232.

158. Pincus, *supra* note 82, at 715.

159. Kathleen Weaver, *Comparable Worth in the United States and the Canadian Province of Ontario*, 14 B.C. INT'L & COMP. L. REV. 137, 138 (1991).

160. *Id.*

161. Rhode, *supra* note 21, at 1234 (noting similar unwarranted fears over minimum wage and child labor laws); Clauss, *supra* note 13, at 91.

These entities act as laboratories, experimenting with different mixtures of the comparable worth theory in different environments. When the broad ideology of comparable worth is attached to a concrete plan or piece of legislation, only then is it possible to examine its potential benefits and shortcomings.

A. San Jose, California

San Jose, California was one of the first cities in the United States to implement a comparable worth system. In 1980, the city conducted a wage evaluation of nonmanagement jobs.[162] The study indicated the existence of wage disparities. In July 1981, in reaction to the survey results, AFSCME Local 101 went on strike to force the city to implement a comparable worth system for the 4000 workers employed by the city.[163] After two weeks, the city agreed to a settlement of $1.45 million to be allocated over two years for comparable worth adjustments.[164] Wages were adjusted for the fifty-eight percent of female dominated job titles that deviated most from the evaluation.[165] About 809 workers, or twenty percent of the city's employees, were affected.[166] Adjustments came again in 1981, 1982, 1983, and 1984, although not all jobs were adjusted every year.[167]

The results were impressive. Over a period of six years, the average weekly wage for targeted jobs rose by 74%, compared to 50% for nontargeted jobs.[168] These increases were not due to other economic factors, such as a general overall increase in clerical workers.[169] The annual Area Wage Survey indicated that the wages in government positions rose faster than wages in similar positions in San

---

162. Shulamit Kahn, *Economic Implications of Public-Sector Comparable Worth: The Case of San Jose, California*, 31 INDUSTRIAL RELATIONS 270, 274 (1992).

163. *Id.*

164. Andrea Giampetro-Meyer, *Resurrecting Comparable Worth as a Remedy for Gender-Based Wage Discrimination*, 23 SW. U. L. REV. 225, 234 (1994).

165. Kahn, *supra* note 162, at 274.

166. *Id.*

167. *Id.*

168.

Average Weekly Wages in San Jose City Government

	July 1980	July 1986	Percentage change
Targeted Jobs:	$268.3	$466.6	73.9%
Nontargeted jobs:			
Total	422.8	636.0	50.4
AFSCME	340.7	526.6	54.6
Police/Fire	462.0	684.4	48.1
Other Union	353.7	548.7	55.1
Management	631.4	920.6	45.8

Id. at 275 (citing the City of San Jose Personnel Department Statistics).

169. *Id.* at 277.

Jose's private sector.[170] In addition, San Jose experienced faster growth than neighboring governments that had not implemented a comparable worth plan.[171] Finally, although wages in San Jose's targeted jobs were originally lower than those in neighboring cities, by 1986 the salaries met and exceeded neighboring cities.[172] Contrary to the fears of some economists, government employment grew 15.5% in San Jose from 1980 to 1984, over 10% faster than city governments in twelve of California's largest cities.[173]

Nevertheless, the San Jose experience may be atypical. The city had a strong commitment to comparable worth and to hiring and retaining female employees. This enthusiasm seems less likely if comparable worth is imposed by national legislation. In addition, like most state programs,[174] San Jose's comparable worth plan applied only to governmental employees.

B. Minnesota

The State of Minnesota has enacted the most wide-spread government employer comparable worth policy in the United States.[175] In 1982, Minnesota enacted the State Employees Pay Equity Law.[176] The Minnesota law allowed for adjustments over five years and relied on collective bargaining to make salary adjustments.[177] No jobs received salary decreases and increases were made only where evaluations indicated wage disparities.[178] Nevertheless, although state employees received pay increases, the legislation created shortages in some occupations and state salaries still lagged far behind comparable jobs in the private sector.[179]

C. Ontario, Canada

Canada has also been a pioneer in comparable worth legislation. In 1977, Canada passed the Canadian Human Rights Act.[180] Although the Human Rights Act only applied to eleven percent of the population, it required Canadian provinces to enact their own legislation.[181] In 1990, Ontario passed the Ontario

---

170. *Id.*

171. *Id.* at 276-77.

172. *Id.*

173. *Id.* at 277.

174. *See infra* Part IV.B. (Minnesota system); *see also* Giampetro-Meyer, *supra* note 164, at 234 (Washington system).

175. Giampetro-Meyer, *supra* note 164, at 235.

176. MINN. STAT. ANN. § 43A.01(3) (West 1988).

177. Giampetro-Meyer, *supra* note 164, at 235.

178. *Id.*

179. Chavez, *supra* note 123, at A9.

180. Canadian Human Rights Act, R.S.C., ch. 33, § 11 (1985) (Can.); Weaver, *supra* note 159, at 147.

181. Weaver, *supra* note 159, at 147.

Pay Equity Act ("Ontario Act"). [182] The Ontario Act was the most progressive legislation in Canada. Like the proposed Fair Pay Act, it applies a proactive comparable worth plan to both private and public employers.[183]

In several important aspects, however, the Ontario Act is distinct from the Fair Pay Act. First, unlike the Fair Pay Act, the Ontario Act provides a narrow exception that permits an employer to increase wages when there is a shortage of a particular skill in the market.[184] Second, unlike the Fair Pay Act, the Ontario Act permits employers to stagnate or "red-circle" employee wages that the employer then considers overvalued.[185] This helps the employer reduce the overall implementation costs of comparable worth.[186] The Fair Pay Act prevents reducing wages and has no exceptions for overvalued occupations.[187] Third, the Ontario Act is being implemented gradually over a six year period.[188] In contrast, the Fair Pay Act seemingly would require immediate implementation. Public sector employers are required to make the first adjustments, followed next by large private firms, and then by small private firms.[189] Finally, the Ontario Act has penalty caps whereas the Fair Pay Act has none.[190] An employer's maximum liability under the Ontario Act is $2,000 for individual claims and $25,000 for all other claims.[191] The caps are indicative of Ontario's cooperative approach to implementing a comparable worth system. The penalty caps motivate employers to educate themselves, but do not punish employers who are still attempting to correct disparities that have existed in their companies for decades.

In other aspects, the Ontario Act parallels the Fair Pay Act. First, like the Fair Pay Act, the Ontario Act allows for narrow exceptions based on seniority and

---

182. *Id.* at 149.

183. *Id.*

184. *Id.*

185. *Id.* at 152.

186. *Id.*

187. The Ontario Act uses four steps. First, employers must determine the number of plans for their organizations. This is determined by looking at the number of employees and grouping them according to geographic location, taking into account bargaining and non bargaining units. *Id.* at 150. Second, the employer must determine which occupations are male-dominated and female-dominated, and which occupations are comparable when considering duties, responsibilities, requisite qualifications, compensation schedules, salaries, grades or ranges of salary rates, and employment recruitment methods. *Id.* Third, the employer must apply a method of comparison. *Id.* The method is left to the discretion of the employer, so long as it is appropriate. *Id.* at 151. The Ontario Act, like the Fair Pay Act, forbids decreases in male salaries. *Id.* at 151-52. The Ontario Act allows for gradual periodic adjustments and has five exceptions to the pay equity requirement: formal seniority system, temporary employment training assignment available to both males and females, merit system, decrease for overvalued occupations, and skill shortages resulting in a temporary increase in compensation. *Id.* at 152.

188. *Id.* at 149.

189. *Id.*

190. *Id.* at 153.

191. *Id.*

merit.[192] Second, the Ontario Act, like the Fair Pay Act, allocates funds for educating employers about the goals and theories of comparable worth.[193] In addition to investigating claims, the Ontario Pay Equity Office develops educational materials, seminars, and workshops.[194] Third, the Ontario Act, like the Fair Pay Act, permits individual employees or groups of employees to file a complaint.[195] Currently, under Title VII, employees must file complaints with the Equal Employment Opportunity Commission.[196] The Commission's failure to pursue claims in the past four years makes this an attractive procedural advantage and is one of the strongest attributes of both the Ontario Act and the Fair Pay Act.

The Ontario Act is the first wide-scale implementation of a public and private comparable worth system that is similar to the proposed Fair Pay Act. The Ontario Act should serve as a model for similar legislation in the United States. In addition, over 700 American businesses have offices in Canada that will be exposed to the Ontario Act, providing a unique opportunity to introduce American businesses to the benefits and detriments of comparable worth on a reduced scale.[197]

V. REACTION OF THE POPULAR MEDIA

Because passage of the Fair Pay Act will inevitably require at least some

---

192. *Id.* at 150.

193. Section seven of the Fair Pay Act states:

> The Equal Employment Opportunity Commission shall undertake studies to provide information and technical assistance to employers, labor organizations, and the general public concerning effective means available to implement the provisions of section 6(g) prohibiting wage discrimination between employees performing work in equivalent jobs on the basis of sex, race, or national origin. Such studies, information, and technical assistance shall be based upon and include reference to the declared policy of such section to eliminate such discrimination. In order to achieve the purposes of such section, the Equal Employment Opportunity Commission shall further carry on a continuing program of research, education, and technical assistance including—
>
> (A) undertaking and promoting research . . . ;
>
> (B) publishing and otherwise making available to employers, labor organizations, professional associations, educational institutions, the various media of communication, and the general public findings of studies and other materials for promoting compliance with section 6(g);
>
> (C) sponsoring and assisting State and community informational and educational programs; and
>
> (D) providing technical assistance . . . .

H.R. 4803, 103d Cong., 2d Sess. §7 (1994).

194. Weaver, *supra* note 159, at 153.

195. *Id.* at 153; R.S.C. ch. 34, § 22 (1987); *Cf.* H.R. 4803, 103d Cong., 2d Sess. § 5 (1994).

196. 42 U.S.C. § 2000e-5 (1994).

197. *Hearings, supra* note 3 (statement of Michele Leber, Treasurer, National Committee on Pay Equity).

broad-based public support, it is worthwhile to summarize at least the initial, cursory reaction in the popular media. Unfortunately, the bill was largely overwhelmed in the 103d Congress and was never subjected to serious public debate. Most of the information that was published appears to have been disseminated by proponents, perhaps anticipating an uphill battle.

A columnist for *USA Today* cited recent polls showing that the number one issue for American women is pay equity, not wife beating or abortion coverage in health care plans.[198] Citing Norton's inequity statistics, the article highlighted the inability of job seekers to obtain even the simplest data from employers, while employers utilize intrusive investigative measures like interviewing an applicant's neighbors, drug screening, and credit reports when considering applicants.[199]

A columnist for the *Washington Post* cited a 1991 study, conducted by Democratic pollster Celinda Lake, that found seventy-seven percent of registered voters supported a law requiring the same pay for men and women in jobs requiring similar skills and responsibilities.[200] Furthermore, the article cited a study by Deborah Figart, a professor of economics at Eastern Michigan University, and June Lapidus, an instructor at Roosevelt University in Chicago, which illustrated that pay equity, not welfare reform, will improve the lot of the working poor.[201] Otherwise, the study noted that former female welfare recipients entering the job market will merely join the sixty-two percent of working poor women holding underpaid female-dominated jobs, the very jobs targeted by the Fair Pay Act.[202] The study also indicated that if a comparable worth system was implemented, poverty among women in clerical or clerical-support jobs, for example, would decrease by seventy-four percent.[203]

Other columnists reminded the public of similar legislation that failed in the Reagan years, which was then dubbed "the looniest idea since Looney Toons."[204] Unfortunately, these articles typically involved misinformation about the specifics of the Fair Pay Act, like criticizing the bill for attempting to assess the intrinsic value of jobs and trying to compare jobs between different employers.[205] The Fair Pay Act does neither.[206] If proponents want eventual passage, they must disseminate accurate information about the bill and squelch any confusion about

---

198. Martha Burk, *After 30 Years, Let's Enforce Pay Equity*, USA TODAY, July 21, 1994, at A8.

199. *Id.*

200. Judy Mann, *Doing What's Fair on Payday*, WASHINGTON POST, July 15, 1994, at E3.

201. *Id.*

202. *Id.*

203. *Id.*

204. Francine G. Hermelin, *Legislating Fair Pay; Proposed Fair Pay Act; 16th Annual Salary Survey: 1995*, 20 WORKING WOMAN 34, 34 (1995).

205. *See, e.g.*, Keith Epstein, *Working Women Building Support for Fair-Pay Law: U.S. Chamber of Commerce Vows Stiff Fight*, PLAIN DEALER, June 5, 1994, at A1 (comparing librarians to engineers and pilots to typists); Chavez, *supra* note 123, at A9 (using an "a priori" system and comparing brain surgeons to major-league baseball players).

206. *See generally* H.R. 4803, 103d Cong., 2d Sess. (1994).

the bill's particulars, especially its evaluation procedures.

CONCLUSION

The Fair Pay Act did not pass in the 103d Congress. Issues like national health care and the crime bill took precedent and the bill never even got out of committee. This term its success looks even more bleak. All but one of the former co-sponsors were democrats, most of whom are now out of office.[207] What looked like an uphill battle in the 103d Congress may prove an impossible battle in the new Congress.

Fairness is a lofty and admirable goal. Perhaps with time, some of the American businesses in Ontario will become supporters of pay equity legislation in the United States. Moreover, with national attention now focusing on the welfare system, the government will likely look for innovative solutions to resolve the nation's ills. Self-sufficiency can hardly suffice if the jobs unemployed women obtain still keep them below the poverty line. If the pay equity laws in Canada prove inexpensive or even profitable, perhaps passage of the Fair Pay Act will allow welfare-dependent women to enter the job market and earn enough to support themselves and their families. Comparable worth must be re-examined with an eye toward the future and the Fair Pay Act should serve as the catalyst for such an examination.

---

207. The bill's original co-sponsors in the House included: Brown D-FL, Collins D-MI, Dellums D-CA, Gonzalez D-TX, Green D-TX, Hinchey D-NY, Johnson, E.B. D-TX, Kennelly D-CT, Maloney D-NY, Margolies-Mezvinsky D-PA, Martinez D-CA, McCloskey D-IN, McKinney D-GA, Mineta D-CA, Nadler D-NY, Owens D-NY, Roybal-Allard D-CA, Schroeder D-CO, Serrano D-NY, Tucker III D-CA, and Velazquez D-NY.

In addition, Edwards D-CA, Filner D-CA, Frank D-MA, Hastings D-FL, Lowey D-NY, Mink D-HI, Unsoeld D-WA, and Watt D-NC, were added on July 28, 1994. Andrews D-NJ, Gilman R-NY, and Pastor D-AZ, were added on August 10, 1994.

The bill was reintroduced in the 104th Congress, received support from 28 additional co-sponsors in the House as H.R. 1507, and was introduced in the Senate by Tom Harkin, D-IA, as S. 1650 with eight co-sponsors as of April 15, 1996.