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PAY EQUITY: A CHILD OF THE 80s GROWS UP

ROBERT H. COHEN

INTRODUCTION

And the Lord spoke unto Moses, saying, Speak unto the children of Israel, and say unto them:

When a man shall clearly utter a vow of persons unto the LORD, according to thy valuation, then thy valuation shall be for the male from twenty years old even unto sixty years old, even thy valuation shall be fifty shekels of silver, after the shekel of the sanctuary. And if it be a female, then thy valuation shall be thirty shekels.¹

From biblical times, then, the undervaluation of women has existed, and it still exists today. Consider, for example, the case of Marilyn Jancey. She was a cafeteria worker for the Everett, Massachusetts School District for sixteen years, from 1973 until 1989.² After she and her thirty-four coworkers were denied a raise in 1987, they joined together and formed Local #26 of the Hotel and Restaurant Workers' Union.³

Upon recognition and a new collective bargaining agreement granting a pay raise, the School Board reduced the cafeteria workers' hours, effectively nullifying any benefit of the raise.⁴ A hearing before the Civil Service Commission forced a compromise, mandating that seniority determine the number of hours worked.⁵ Still dissatisfied with their overall pay, the union decided to evaluate the cafeteria workers' job description by comparing it to other restaurants in the area.⁶ Upon comparison, they found that Ms. Jancey and her coworkers were highly skilled; they were responsible for feeding six to seven thousand students a day; they were responsible for menu organizing; and they maintained all of the kitchen equipment.⁷ Furthermore, the union hired a job evaluation team, which found that the cafeteria workers' jobs were equivalent to those of the school custodians, but that the custodians made between \$10.76 and \$12.73 per hour while the former earned between \$6.44 and \$6.85 per hour.⁸

1. *Lev. 27: 1-4*; see also Michael Evan Gold, *A Dialogue on Comparable Worth 3* (1983) (drawing the analogy between the biblical quote and the current undervaluation of women in the workplace).

2. *Jancey v. Everett School Comm.*, 59 Fair Empl. Prac. Cas. (BNA) 1314, 1315-16 (Mass. Super. Ct. 1992).

3. *The Fair Pay Act of 1994: Joint Hearing with the Subcomm. on Select Education and Civil Rights on H.R. 4803* (1994) (statement of Marilyn Jancey Marblehead), available in LEXIS, Legis Library, Testimony File [hereinafter *Jancey Testimony*].

4. *Id.*

5. *Id.*

6. *Id.*

7. *Jancey v. Everett School Comm.*, 59 Fair Empl. Prac. Cas. (BNA) 1314, 1322-23 (Mass. Super. Ct. 1992).

8. *Id.* at 1322.

The predominately female cafeteria workers went to court, bringing a cause of action under the Massachusetts Equal Pay Act.⁹ Under the Massachusetts Act, an employer is barred from discriminating in the payment of wages for work that is "of like or comparable character."¹⁰ The judge decided in favor of the cafeteria workers¹¹ because their jobs were comparable to the custodians' and they uniformly were paid at a lower wage rate than were the custodians.¹² The total of the judgment awarded in early 1994, including damages, costs, and attorney's fees was \$1.1 million.¹³

Ms. Jancey's story is not unique. In 1992, American women earned only seventy-one percent of the wages earned by men.¹⁴ Pay differentials appeared across race as well as gender lines. For example, African American men earned seventy-two percent of the salary of white men, while African American women received only sixty-four percent of white men's salary.¹⁵ Hispanic men and women were also underpaid, the former earning sixty-five percent and the latter fifty-five percent of what white men earned.¹⁶

9. Mass. Ann. Laws ch. 149, § 105A (Law. Co-op 1994).

10. *Id.*

11. *Jancey*, 59 Fair Empl. Prac. Cas. at 1334-35.

12. *Id.* at 1335.

13. *Jancey Testimony*, *supra* note 3.

14. *The Fair Pay Act of 1994: Joint Hearing with the Subcomm. on Select Education and Civil Rights on H.R. 4803* (1994) (statement of John Sturdivant), available in LEXIS, Legis Library, Testimony File [hereinafter *Sturdivant Testimony*]. It is clear, furthermore, that the wage gap exists even after accounting for education, job experience, and "other measurable differences between men and women." Robert T. Michael, *Are Pay Equity Plans an Answer?*, St. Louis Post-Dispatch, Oct. 23, 1989, at 3B. *But cf.* Robert Rector, *The Pseudo-Science of Comparable Worth: Phrenology for Modern Times*, The Heritage Foundation Reports, Feb. 29, 1988, available in LEXIS, Nexis Library, Arcnws File (noting that secretaries earn almost the same wages as an auto mechanic and that telephone operators earn about the same as bus drivers and 10% more than garbage collectors). Rector also notes that secretaries make 92% of the median wage for professionals, and their pay is in the top half for skilled blue collar craft workers. *Id.*

15. *Sturdivant Testimony*, *supra* note 14.

16. *The Fair Pay Act of 1994: Joint Hearing with the Subcomm. on Select Education and Civil Rights on H.R. 4803* (1994) (statement of Michelle Leber), available in LEXIS, Legis Library, Testimony File [hereinafter *Leber Testimony*]. The astonishing numbers continue: individually, women lose over \$420,000 during their lifetime due to pay equity; on an annual basis, the collective loss due to wage discrimination against women is over \$100 billion; among college graduates, white men earned approximately \$9,000 more in 1992 than did men of color, and approximately \$13,000 more than their female colleagues. *Id.* Furthermore, in 1991, female nurses earned 10% less than male nurses, female managers earned 34% less than male managers, and female elementary school teachers earned 14% less than male elementary school teachers. *The Fair Pay Act of 1994: Joint Hearing with the Subcomm. on Select Education and Civil Rights on H.R. 4803* (1994) (statement of Judith L. Lichtman), available in LEXIS, Legis Library, Testimony File [hereinafter *Lichtman Testimony*]. Finally, "[i]t should be noted that all other industrial countries with the exception of Japan have a smaller wage gap between men and women than the United States." *Leber Testimony*, *supra*.

The gap between wages closed slightly during the third quarter of 1993, with white women full-time employees earning seventy-six percent of the wages earned by white men.¹⁷ Similarly, African American women earned sixty-seven cents, and Hispanic women sixty-four cents, for every dollar earned by a white man.¹⁸

One author provides a basis for these skewed figures:

A significant reason for the persistence of the gender wage gap is the prevalence of occupational segregation by sex and race. This segregation is both horizontal (the crowding of women into low-paying occupations such as clerical work, health care, and service work) and vertical (stratification of male-dominated occupations by gender, with women occupying the bottom rungs of the workforce hierarchy).¹⁹

But not everyone agrees that the wage disparities are due to any discrimination or intentional job segregation. Robert Rector, Policy Analyst at the Heritage Foundation, attacks the theory that women are barred from entering predominantly male jobs.²⁰ He notes that if this were true, there would be evidence that a large number of women were competing for a small number of jobs.²¹ But this is not the case.²² Furthermore, Rector refutes the idea that cultural bias induces employers to undervalue traditional female work.²³ This assertion, he says, is undermined by the fact that employers of traditional female jobs are not earning huge profits.²⁴ If they really were undervaluing work, "employers should be reaping a windfall bonus due to the unpaid productivity they gain from women's labor."²⁵ Instead, he attributes the wage gap to hard-to-measure factors, such as differences in

17. *Id.*

18. Marion Crain, *Confronting the Structural Character of Working Women's Economic Subordination: Collective Action vs. Individual Rights Strategies*, 3 Kan. J.L. & Pub. Pol'y, Spring 1994 at 26, 26 (citing Bureau of Labor Statistics, U.S. Dep't of Labor, *Usual Weekly Earnings of Wage and Salary Workers: Third Quarter 1993* (Oct. 28, 1993)). Furthermore, the wage disparity continued on strictly racial lines with black women earning 90% of black men's wages, while Hispanic women received 92% of Hispanic men's wages. *Id.* at 33 n.2.

19. *Id.* at 27. Furthermore, Crain reports that horizontal stratification affects roughly three-fifths of all working women who occupy jobs that are at least 75% female. *Id.* Female sex-segregated jobs include: secretaries (98% female); bookkeepers (91% female); nursing aides (88% female); cashiers (79% female); textile sewing machine operators (90% female); and waitpersons (80% female). *Id.* at 33 n.7. Women's median weekly earnings for the above occupations range from \$178 (waitresses) to \$299 (secretaries). *Id.* In contrast, male sex-segregated jobs—retail sales (85%), machinists (97%), protective services (89%), construction workers (99%), and janitors (78%)—have median weekly earnings ranging from \$275 to \$550. *Id.*

20. Rector, *supra* note 14.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

long-term work expectations, family commitments and interest in management positions bringing financial reward.²⁶

Starting in the late 1970s and increasing in the early 1980s, many feminists and economists felt that the best way to improve the pay disparity among workers was through comparable worth. The National Committee on Pay Equity defines comparable worth as "the effort to raise wages for female dominated jobs."²⁷ Specifically, comparable worth seeks to eliminate pay discrimination by using objective factors to evaluate all jobs, from nurses to truck drivers.²⁸

In *American Nurses' Association v. State of Illinois*,²⁹ Judge Posner provided comparable worth's historical and cognitive premises. He stated that the historical premise is that women were steered into certain low-paying jobs solely because they were women and that through comparable worth, those artificial barriers could be removed.³⁰ The cognitive premise, according to Posner, is that analytical techniques do exist for determining the worth of jobs involving different levels of skill, effort, risk, and responsibility so comparable worth can serve an important function in equalizing income.³¹

The debate over comparable worth has been fierce ever since its inception, and the debate probably will continue for as long as comparable worth is being considered. Those in favor of comparable worth argue that "[p]ay equity is a matter of fundamental fairness" and a "matter of economic necessity."³² Furthermore, because two out of three adults in this country living in poverty are women, comparable worth would be a primary factor in reducing the poverty rate.³³

26. *Id.*

27. Rita Mae Kelly & Jane Bayes, *Comparable Worth, Pay Equity, and Public Policy* 4 (1988) (citing National Committee on Pay Equity, *The Wage Gap: Myths and Facts* 1 n.d.); see also *American Nurses' Ass'n v. Illinois*, 783 F.2d 716, 719 (7th Cir. 1986) (Judge Posner, the formidable Law and Economics proponent, defines comparable worth as, "the movement to raise the ratio of wages in traditionally women's jobs to wages in traditionally men's jobs").

28. See Michael, *supra* note 14, at 3B.

29. 783 F.2d 716 (7th Cir. 1986).

30. *American Nurses'*, 783 F.2d at 719.

31. *Id.*

32. Alan Cranston, *The Proposed Equity Act of 1985*, 36 Lab. L.J. 131, 144 (1985).

33. *Id.*

The weight of the legal and political authority, however, has been against the implementation of comparable worth.³⁴ In *American Nurses*,³⁵ Judge Posner noted that

virtually the entire difference in the average hourly wage of men and women, including that due to the fact that men and women tend to be concentrated in different types of job [sic], can be explained by the fact that most women take considerable time out of the labor force in order to take care of their children. As a result they tend to invest less in their "human capital" (earning capacity); and since part of any wage is a return on human capital, they tend therefore to be found in jobs that pay less.³⁶

Therefore, according to this theory, because women are not permanently in the labor force, while men generally are, employers will not invest as much in women and, consequently, their wages will be lower.

Comparable worth, furthermore, is not a constitutional issue. If an employer intentionally underpays an employee because of her gender or race, she may seek redress under either the Equal Pay Act³⁷ or Title VII of the Civil Rights Act of 1964.³⁸ Additionally, employers acting under color of law who discriminate among employees may violate the employees' 14th Amendment equal protection rights.³⁹ Comparable worth, on the other hand, seeks to attack historical and institutional practices that undervalue jobs traditionally held by women and minorities. A lack of comparable worth does not necessarily reflect an intent by the employer to discriminate. Therefore, the presence of pay inequity on its own does not raise constitutional questions.⁴⁰

This Note assumes the validity of comparable worth and proceeds to analyze the best vehicle for its implementation, considering the in-

34. See Paul Weiler, *The Wages of Sex: The Uses and Limits of Comparable Worth*, 99 Harv. L. Rev. 1728, 1729 (1986) (stating that "[President Reagan] himself dismiss[es] the notion [of comparable worth] as a 'cockamamie idea' ") (quoting *U.S. Presses Brief in Job Value Case*, N.Y. Times, Aug. 17, 1985, at A7); see also Mark R. Killingsworth, *The Economics of Comparable Worth* 45 (1990) (stating that the "concentration of women in low-paid jobs is not necessarily evidence of employer discrimination; and equal pay for jobs of comparable worth is not necessarily an appropriate standard for evaluating pay differences among jobs").

35. 783 F.2d 716, 719 (7th Cir. 1986).

36. *Id.* Judge Posner went on to conclude that "the issue of comparable worth is not of the sort that judges are well equipped to resolve intelligently or that we should lightly assume has been given to us to resolve by Title VII or the Constitution." *Id.* at 720 (citations omitted); see also Rector, *supra* note 14 (stating that "America seldom has seen a policy proposal which, through apparently well intentioned, would be as destructive as comparable worth").

37. 29 U.S.C. § 206(d) (1988); see *infra* notes 44-71 and accompanying text.

38. 42 U.S.C. § 2000e-2 (1988); see *infra* notes 72-117 and accompanying text.

39. U.S. Const. amend. XIV, § 1; see also *American Nurses' Ass'n v. Illinois*, 783 F.2d 716, 722 (7th Cir. 1986) (stating that no violation of equal protection exists unless there is intentional discrimination).

40. Thus, as the intent of the employer is not at issue, this Note does not address any potential constitutional claims that employees may have.

terests of the individual workers.⁴¹ Employees get the most benefit from comparable worth when they introduce it, as they have the ability to work directly with management to ensure effective implementation. By joining labor organizations, workers—especially women—can improve their economic status by influencing management decisions.

Part I of this Note analyzes current federal legislation to see what, if any, causes of action plaintiffs can bring successfully under comparable worth. Part II looks at new legislation introduced into the House of Representatives during the summer of 1994 that attempted to federalize the concept of comparable worth. Finally, Part III suggests that comparable worth should be implemented, but not through federal legislation. As an alternative, this Note proposes that individual employees join together in unions and exert pressure over their employers to get comparable worth pay increases. Only through union involvement and collective bargaining can the goal of increasing women's and minorities' pay be met without government intervention and increased regulation of the job market.

I. CURRENT FEDERAL LEGISLATION

There are currently two federal acts that address equal pay for men and women: the Equal Pay Act of 1963⁴² and Title VII of the Civil Rights Act of 1964.⁴³ Both of these acts, while important in the fight against discrimination in the workplace, do not provide a cause of action for comparable worth.

A. *The Equal Pay Act*

The Equal Pay Act of 1963 ("EPA") provides that employers cannot discriminate between employees on the basis of sex by paying lower wages to women for performing the same work as men.⁴⁴ To

41. For an excellent look at both sides of the comparable worth debate, see Gold, *supra* note 1 (moderating a fictional debate between a proponent and an opponent of comparable worth); see also Kelly & Bayes, *supra* note 27 (editing a number of articles on different comparable worth programs throughout the country); Killingsworth, *supra* note 34 (providing a complex economic analysis); Judith Olans Brown, et al., *Equal Pay for Jobs of Comparable Worth: An Analysis of the Rhetoric*, 21 Harv. C.R.-C.L. L. Rev. 127 (1986) (analyzing the reasons for the failure of comparable worth under Title VII); Weiler, *supra* note 34, at 1793-1807 (analyzing the viability of federally-mandated comparable worth); Cranston, *supra* note 32 (examining the proposed Pay Equity Act of 1985); Janice R. Bellace, *Comparable Worth: Proving Sex-Based Wage Discrimination*, 69 Iowa L. Rev. 655 (1984) (calling for judicial activism with respect to Title VII).

42. 29 U.S.C. § 206(d) (1988).

43. 42 U.S.C. § 2000e-2 (1988).

44. 29 U.S.C. § 206(d) provides:

No employer . . . 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

establish a prima facie case under the EPA, the plaintiff must compare the jobs held by the female and male employees and show that the jobs are substantially similar.⁴⁵ The plaintiff, then, has the burden of proving "that an employer pays different wages to employees of opposite sexes 'for equal work on jobs the performance of which requires equal skill, effort, and responsibility.'"⁴⁶

Once a prima facie case is established, the burden shifts to the defendant to show by a preponderance of the evidence that any pay differential is justified by one of four statutory exceptions.⁴⁷ The EPA provides that a pay discrepancy is valid if it 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."⁴⁸ Basically, the defendant must show that sex played no role in the lower wage.⁴⁹

1. Limitations on Recovery

Courts have further refined their analysis of alleged discrimination under the EPA by providing that "[t]he jobs held by the employees of opposite sexes need not be identical; rather, they need only be substantially equal."⁵⁰ Furthermore, the plaintiff does not need to show discriminatory intent on the part of the defendant, but only that her pay was lower than a comparable male's pay.⁵¹

The courts have, despite their broad reading of the EPA requirements, also read the fourth statutory exception, any factor other than sex, very generally, thus reducing the effectiveness the Equal Pay Act. For example, in *Horner v. Mary Institute*,⁵² the court allowed a male gym teacher to be paid higher wages than a female gym teacher because he demanded a greater salary upon hiring than his female coun-

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

29 U.S.C. § 206(d)(1) (1988).

45. *Miranda v. B & B Cash Grocery Store, Inc.*, 975 F.2d 1518, 1526 (11th Cir. 1992).

46. *Mulhall v. Advance Sec., Inc.*, 19 F.3d 586, 590 (11th Cir. 1994) (quoting *Schwartz v. Florida Bd. of Regents*, 807 F.2d 901, 907 (11th Cir. 1987) (citation omitted)); see *Miranda*, 975 F.2d at 1532; see also *Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974) (noting that the plaintiff has the burden of proof).

47. *Mulhall*, 19 F.3d at 590.

48. 29 U.S.C. § 206(d) (1988).

49. *Mulhall*, 19 F.3d at 590.

50. *Miranda v. B & B Cash Grocery Store, Inc.*, 975 F.2d 1518, 1533 (11th Cir. 1992).

51. *Id.* at 1532.

52. 613 F.2d 706 (8th Cir. 1980).

terpart.⁵³ In reaching this conclusion, the court held that "an employer may consider the market place value of the skills of a particular individual when determining his or her salary."⁵⁴ Similarly, in *Hodgson v. Robert Hall Clothes, Inc.*,⁵⁵ a male salesperson was allowed a higher pay than a female salesperson because men's clothes were of higher quality and produced a greater profit margin.⁵⁶ Because Robert Hall's method of determining salary did not show the "clear pattern of discrimination" necessary to require correlating the wages of each worker with his or her performance, the court allowed the company's affirmative defense of "any factor other than sex."⁵⁷

In addition to the court-imposed limitations, two statutory limitations reduce the effectiveness of the EPA. First, there is "red circling."⁵⁸ "[T]he term 'red circle' describes 'certain unusual, higher than normal, wage rates which are maintained for many reasons.'"⁵⁹ An example of legitimate red circling is when an employer transfers an employee from a skilled job to a less demanding job during an economic downturn but continues to pay the employee the higher wage in the hope of keeping him/her until conditions improve.⁶⁰ When a claimant identifies a legitimately red circled employee as a comparator, the employer will have a valid affirmative defense.⁶¹ Although red circling is a reasonable limitation, it further reduces the EPA's ability to combat pay inequity because employers merely have to explain why the man is getting paid more than the women to be relieved of liability.

Second, the statute limits a plaintiff's chance of recovery by imposing a geographical limitation.⁶² That is, those employees against whom plaintiffs compare themselves must work in the same "establishment" as the claimants.⁶³ "Establishment" has been defined by

53. *Id.* at 714.

54. *Horner*, 613 F.2d at 714 (citations omitted).

55. 473 F.2d 589 (3d Cir. 1973).

56. *Id.* at 594-95.

57. *Id.* at 597.

58. See 29 C.F.R. § 1620.26 (1994).

59. *Gosa v. Bryce Hospital*, 780 F.2d 917, 918 (11th Cir. 1986) (quoting 29 C.F.R. § 1620.26 (1994)). It is clear that "Congress intended to include this practice as a factor other than sex that explains a wage differential and constitutes an affirmative defense." *Mulhall v. Advance Sec., Inc.*, 19 F.3d 586, 595 (11th Cir. 1994) (citing H.R. Rep. No. 309, 88th Cong., 1st Sess. 3 (1963), reprinted in 1963 U.S.C.C.A.N. 687, 687-89; see also *Maxwell v. City of Tucson*, 803 F.2d 444, 446 (9th Cir. 1986) (holding that the four statutory exceptions are affirmative defenses that the employer must prove).

60. H.R. Rep. No. 309, 88th Cong., 1st Sess. 3 (1963), reprinted in 1963 U.S.C.C.A.N. 687, 689.

61. *Mulhall*, 19 F.3d at 590.

62. 29 U.S.C. § 206(d) (1988).

63. *Mulhall*, 19 F.3d at 590 (citing *Brennan v. Goose Creek Consol. Indep. Sch. Dist.*, 519 F.2d 53, 57 (5th Cir. 1975)). In *Goose Creek*, however, the court recognized that there are instances where an "establishment" can include more than one physical plant, placing the emphasis on central control. *Id.* at 56-58; see also *Marshall v. Dallas Indep. Sch. Dist.*, 605 F.2d 191, 194 (5th Cir. 1979) (holding that all schools in a school

the Secretary of Labor as a "distinct physical place of business rather than . . . an entire business or 'enterprise' which may include several separate places of business."⁶⁴ If the court strictly interprets establishment, the plaintiff will have a more difficult time proving wage discrimination under the Equal Pay Act because women may be separated physically from their higher-paid male counterparts.⁶⁵

2. Role of Comparable Worth

Because courts have been so restrictive in their application of the EPA,⁶⁶ "comparable worth" claims under the Act will often fail. Under current interpretation, plaintiffs must show that their jobs are exactly, or almost exactly, the same as jobs performed by men.⁶⁷ Comparable worth, however, is intended to raise the wages of women performing jobs that are not identical to those of men, but that are similar in skills, effort, responsibility, and working conditions.⁶⁸ Thus, the EPA generally does not provide a cause of action for comparable worth.⁶⁹ As a result, a bill was introduced in the House of Representatives last summer that suggested amendments to the EPA providing equal pay for similar jobs.⁷⁰ That new bill, The Fair Pay Act of 1994, would provide for comparable worth throughout the country.⁷¹ While potentially beneficial, the best route for the implementation of comparable worth is not through federal intervention, but through collective bargaining on an employer-by-employer basis.

district were a single establishment); *Brownlee v. Gay & Taylor, Inc.*, 642 F. Supp. 347, 352 (D. Kan. 1985) (stating that pay comparisons should be made at different geographical locations providing there is central control of salary administration and job assignments).

64. *Mulhall v. Advance Sec., Inc.*, 19 F.3d 586, 591 (11th Cir. 1994) (quoting 29 C.F.R. § 1620.9(a) (1993)).

65. *Goose Creek*, 519 F.2d at 57-58.

66. See *Horner v. Mary Inst.*, 613 F.2d 706, 714 (8th Cir. 1980); *Hodgson v. Robert Hall Clothes*, 473 F.2d 589, 595 (3d Cir. 1973).

67. *Lichtman Testimony*, *supra* note 16.

68. *Kelly & Bayes*, *supra* note 27, at 4.

69. *But cf. Shultz v. Wheaton Glass Co.*, 421 F.2d 259, 265 (3d Cir. 1970) (concluding that although Congress chose to require equal pay for "equal" rather than "comparable" work, Congress in prescribing 'equal' work did not require that the jobs be identical, but only that they be substantially equal); *Wirtz v. Rainbo Baking Co.*, 303 F. Supp. 1049, 1052 (E.D. Ky. 1967) (stating that equal work does not mean identical work and that different tasks that are only incidental and occasional would not justify a wage differential). These cases, however, indicate a high water mark in the court's thinking and do not provide for comparable worth under the Equal Pay Act.

70. See H.R. Rep. No. 4803, 103d Cong., 2d Sess. (1994), available in LEXIS, Legis Library, BTX103 File.

71. *Id.*

B. Title VII of the Civil Rights Act of 1964

To combat discrimination against women and racial minorities in the workplace,⁷² Congress enacted Title VII of the Civil Rights Act of 1964.⁷³ Title VII provides that employers may not discriminate in employment practices on the basis of race, color, religion, sex, or national origin,⁷⁴ and thus, like the EPA, prohibits employers from engaging in sex-based wage discrimination.

Discrimination under Title VII comes in two forms: disparate treatment and disparate impact. Courts have delineated the elements of a prima facie case for both forms of discrimination, and it is necessary to analyze these elements to show what a successful plaintiff claiming pay discrimination must prove.

1. Disparate Treatment

An employer engages in disparate treatment discrimination when it "overtly accords different treatment in some employment practice to individuals based solely on their race, sex, religion, or national origin."⁷⁵ In *McDonnell Douglas Corp. v. Green*,⁷⁶ the Supreme Court laid out the shifting burdens of proof that must be met to prove that an employer intentionally discriminated against its employees. First, the plaintiff has the burden of proving a prima facie case of discrimination by a preponderance of the evidence.⁷⁷ This is accomplished by showing that: (i) the plaintiff is in one of the protected classes (race, sex, religion, or national origin); and (ii) the plaintiff is not treated as well as a similarly situated employee not a member of the protected class.⁷⁸ If the employer succeeds, a presumption of discrimination is

72. See *Miranda v. B & B Cash Grocery Store, Inc.*, 975 F.2d 1518, 1526 (11th Cir. 1992).

73. 42 U.S.C. § 2000e-2 (1988).

74. Title VII states, in relevant part:

(a) Employer practices [:] It shall be an unlawful employment practice for an employer- (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Id.

75. Bellace, *supra* note 41, at 680.

76. 411 U.S. 792 (1973).

77. *McDonnell Douglas Corp.*, 411 U.S. at 802.

78. See *id.* In *McDonnell Douglas*, a case where an African-American man was not hired although qualified, the Court's four-part test to establish prima facie evidence of discrimination necessitated the plaintiff showing

(i) that he belongs to racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position

created.⁷⁹ The burden of production then shifts to the defendant to "articulate some legitimate, nondiscriminatory reason" for the alleged discrimination.⁸⁰ It is important to note that "the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff."⁸¹ The defendant employer, moreover, is not required to prove that it followed the best employment procedures, but merely that its reasons for abiding by the challenged procedure were not discriminatory.⁸² Although an employer must provide a legitimate, nondiscriminatory reason for following the specific employment practice, it does not have to prove the absence of a discriminatory motive.⁸³

If the defendant produces such a reason, the burden shifts back to the plaintiff, who must "prove that the legitimate reason offered was a mere pretext for an illegal motive."⁸⁴ Recently, in *St. Mary's Honor Center v. Hicks*,⁸⁵ the Court explained this burden switching by stressing that after the employer provides its legitimate, nondiscriminatory reason, the presumption created by the plaintiff's prima facie case drops out and the plaintiff must prove pretext.⁸⁶ In *St. Mary's*, the Court reversed a court of appeals decision holding that once the plaintiff proved that all of the employer's proffered reasons for its actions were pretextual, the plaintiff was entitled to judgment as a matter of law.⁸⁷ Thus, even though the district court found that all of *St. Mary's* reasons were pretextual, the Court remanded the case so that the trier of fact could "decide the ultimate question: whether plaintiff has proven 'that the defendant intentionally discriminated against

remained open and the employer continued to seek applicants from persons of complainant's qualifications.

Id. *McDonnell Douglas* also noted that "[t]he facts necessarily will vary in Title VII cases, and the specification above of the prima facie proof required from respondent is not necessarily applicable in every respect to differing factual situations." *Id.* at 802 n.13.

79. See *St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742, 2747 (1993).

80. *McDonnell Douglas Corp.*, 411 U.S. at 802.

81. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

82. *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577-78 (1978).

83. *Board of Trustees of Keene State College v. Sweeney*, 439 U.S. 24, 25 (1978); see also *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977) (stating that although proof of discriminatory motive is critical, "it can in some situations be inferred from the mere fact of differences in treatment").

84. *Miranda v. B & B Cash Grocery Store, Inc.*, 975 F.2d 1518, 1528 (11th Cir. 1992). When plaintiff makes out her prima facie case, this "creates a presumption that the employer unlawfully discriminated against the employee," *Burdine*, 450 U.S. at 254, "a presumption that can be rebutted, and hence its mandatory force obliterated, by the production of admissible evidence setting forth a legitimate, nondiscriminatory reason for the adverse employment action." *Loyd v. Phillips Bros.*, 25 F.3d 518, 522 (7th Cir. 1994); see *St. Mary's Honor Ctr. v. Hicks*, 113 S. Ct. 2742, 2747-50 (1993).

85. 113 S. Ct. 2742 (1993).

86. *St. Mary's Honor Ctr.*, 113 S. Ct. at 2749.

87. *Id.* at 2748.

[him]' because of his race."⁸⁸ Thus, even an adjudged lie by the employer will not necessitate a verdict for the plaintiff; she still must prove intentional discrimination.

2. Disparate Impact

Disparate impact claims are those involving "employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity."⁸⁹ In 1989, the Supreme Court in *Wards Cove Packing Co. v. Atonio*⁹⁰ stated that a prima facie case of disparate impact discrimination was made out by plaintiffs identifying a specific or particular employment practice that "creates the disparate impact under attack."⁹¹ Once this has been shown, the plaintiffs must provide statistical evidence "of a kind and degree sufficient to show that the practice in question has caused the exclusion of applicants for jobs or promotions because of their membership in a protected group."⁹²

After the plaintiff has established this prima facie case, the case shifts to the business justification phase.⁹³ There are two components to this phase: the consideration of justifications the employer offers and "the availability of alternative practices to achieve the same business ends, with less racial impact."⁹⁴ With regard to justification, the employer need only show that the employment practice served the legitimate goals of the employer,⁹⁵ not that it is "essential" or "indispensable" to her business.⁹⁶ The Court in *Wards Cove* also noted that

88. *Id.* at 2749 (quoting *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981)).

89. *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 336 n.15 (1977).

90. 490 U.S. 642 (1989).

91. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 657 (1989). Furthermore, "[r]acial imbalance in one segment of an employer's workforce does not, without more, establish a prima facie case of disparate impact with respect to the selection of workers for the employer's other positions." *Id.* at 653. Rather, the plaintiff must pinpoint a specific employment practice. See *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977, 994 (1988).

92. *Watson*, 487 U.S. at 994.

93. *Wards Cove*, 490 U.S. at 658.

94. *Id.*

95. *Id.* at 659.

96. *Id.* The "business necessity defense" was first established by the Supreme Court in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). The Court in *Duke Power* noted: "The Act proscribes not only overt discrimination but also practices that are fair in form, but discriminatory in operation. The touchstone is business necessity. If an employment practice which operates to exclude Negroes cannot be shown to be related to job performance, the practice is prohibited." *Id.* at 431. The business necessity defense, however, never implied that the practice was absolutely necessary to the survival of the business. The employer, rather, had to show that the challenged employment practice was job related and that the business' legitimate goals were signifi-

the employer's burden is merely production of evidence, while the burden of persuasion remains with the disparate impact plaintiffs.⁹⁷

Furthermore, if the employer successfully shows justification, plaintiffs may still prevail by providing an alternative practice that would serve the same goal, but without the similarly undesirable racial effect.⁹⁸ If the plaintiff produces such an alternative and the employer refuses to utilize it, "such a refusal would belie a claim by [the employer] that their incumbent practices are being employed for non-discriminatory reasons."⁹⁹ Thus, the plaintiff has a difficult burden as the employer need not show necessity, but merely reasonable justification.¹⁰⁰

In 1991, however, Congress amended Title VII, alleviating the burden on plaintiffs attempting to show disparate impact discrimination.¹⁰¹ The new section states:

An unlawful employment practice based on disparate impact is established under this subchapter only if—

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity.¹⁰²

Thus, Congress codified what the Court had set out in *Wards Cove*.

Also, the amended statute mirrors the Court's language in *Wards Cove* that if the plaintiff produces an alternative employment practice and the employer refuses to adopt it, disparate impact discrimination will be established.¹⁰³ Finally, and most significantly, the amended Act reverses *Wards Cove* by changing the employer's burden to production and persuasion.¹⁰⁴ The 1991 amendments, then, are helpful to plaintiffs attempting to show disparate impact discrimination, but as we will see, comparable worth is still not a cause of action under Title VII.

Thus, disparate treatment discrimination occurs where the employer intentionally pays female employees less than male employees in similar jobs whereas disparate impact discrimination involves a neu-

cantly served by the practice. See *New York City Transit Auth. v. Beazer*, 440 U.S. 568, 587 n.31 (1979).

97. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 659 (1989).

98. *Id.* at 660.

99. *Id.* at 661.

100. See Michael J. Zimmer et. al., *Cases and Materials on Employment Discrimination* 361 (3d ed. 1994).

101. See 42 U.S.C. § 2000e-2(k)(1)(A)-(C) (Supp. V 1993).

102. 42 U.S.C. § 2000e-2(k)(1)(A)(i) (Supp. V 1993).

103. See 42 U.S.C. § 2000e-2(k)(1)(A)(ii), (C) (Supp V 1993).

104. 42 U.S.C. § 2000e(m) (Supp. V 1993) ("The term 'demonstrates' means meets the burdens of production and persuasion.").

tral employment policy that compensates female employees less than male employees.

3. Effects of Title VII on the Effort to Implement Comparable Worth

The role of comparable worth in claims arising under Title VII is defined by The Bennett Amendment, contained in the Civil Rights Act of 1964.¹⁰⁵ This amendment states that Title VII is not violated when an employer "differentiates upon the basis of sex in determining the amount of the wages or compensation paid . . . if such differentiation is authorized by the provisions of [the Equal Pay Act]."¹⁰⁶ That is, no discrimination exists if the employer can show one of the four affirmative defenses stated in the EPA.

In *County of Washington v. Gunther*,¹⁰⁷ however, the Supreme Court held that the Bennett Amendment¹⁰⁸ was implemented to incorporate the affirmative defenses of the EPA into Title VII.¹⁰⁹ That is, "claims for sex-based wage discrimination can 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 based on seniority, merit, quantity or quality of production, or 'any other factor other than sex.'"¹¹⁰ The *Gunther* Court held that the Bennett Amendment should be construed as incorporating into Title VII only the four affirmative defenses of the Equal Pay Act and not the latter Act's requirement of equal work.¹¹¹ Thus, Title VII is broader than the EPA, as equal work is not required.

After *Gunther*, however, the level of proof required to prevail on a wage discrimination claim is quite specific, as "comparable worth" is

105. 42 U.S.C. § 2000e-2(h) (1988).

106. 42 U.S.C. § 2000e-2(h) (1976).

107. 452 U.S. 161 (1981).

108. 42 U.S.C. § 2000e-2(h) (1988).

109. *County of Washington v. Gunther*, 452 U.S. 161, 168 (1981).

110. *Id.*

111. *See id.* (stating that the Bennett Amendment "was designed merely to incorporate the four affirmative defenses of the Equal Pay Act into Title VII for sex-based wage discrimination claims"). In *Gunther*, the county employed "matrons" to guard female prisoners and it employed deputy sheriffs (later "correction officers") to guard male prisoners. While the deputy sheriffs spent nearly all of their time on guard duty, because there were few female prisoners, matrons spent a great deal of time doing clerical work. When the complaint was filed in February of 1973, the monthly salary range for the matrons' job was \$525 to \$668; for the deputy sheriff recruit it was \$701 to \$812; and for the deputy sheriff it was \$736 to \$940. Bellace, *supra* note 41, at 668 (citation omitted). Although the Court found that the matrons had been discriminated against, the ruling has been limited to the facts of the case where the employer's actions were intentional and it undertook a job-evaluation survey that indicated that the female jobs should be compensated more highly. *Id.* at 668-69.

not a theory of liability under Title VII.¹¹² The plaintiff must show an intent to discriminate, and the intent must encompass an actual desire to pay women less than men because they are women.¹¹³ This burden on the plaintiff to show intent to discriminate is illustrated in *AFSCME v. Washington*.¹¹⁴ In *AFSCME*, the State of Washington had commissioned a study that determined that female-dominated jobs were paid an average of twenty percent less than male-dominated jobs, even though the jobs were deemed to be of comparable worth.¹¹⁵ The court, in rejecting "comparable worth" theories of liability under Title VII, noted that

[t]he State of Washington's initial reliance on a free market system in which employees in male-dominated jobs are compensated at a higher rate than employees in dissimilar female-dominated jobs is not in and of itself a violation of Title VII, notwithstanding that the Willis study deemed the positions of comparable worth. Absent a showing of discriminatory motive, which has not been made here, the law does not permit the federal courts to interfere in the market-based system for the compensation of Washington's employees.¹¹⁶

Thus, Title VII does not include a cause of action for a comparable worth theory of pay discrimination unless the plaintiff can prove that the employer intentionally pays women less than their male counterparts. Once again, because the goal of comparable worth is to increase the compensation of employees in occupations that have traditionally been underpaid, the intent of the employer is irrelevant. Some have called for a different interpretation of Title VII that would include comparable worth as a cause of action.¹¹⁷ It is evident, how-

112. *Loyd v. Phillips Bros.*, 25 F.3d 518, 525 (7th Cir. 1994) (citing *EEOC v. Madison Community Unit Sch. Dist. No. 12*, 818 F.2d 577, 587 (7th Cir. 1987)); see *American Nurses' Ass'n v. Illinois*, 783 F.2d 716, 720 (7th Cir. 1986).

113. See *Madison Community Unit Sch. Dist.*, 818 F.2d at 588.

114. 770 F.2d 1401 (9th Cir. 1985).

115. 115. *AFSCME v. State of Washington*, 770 F.2d 1401, 1403 (9th Cir. 1985).

116. *Id.* at 1408; see *Crain*, *supra* note 18, at 28 (explaining that "comparable worth strategies, which have transformative potential because they raise the question of the intrinsic worth of work traditionally done by women, have met with a lukewarm reception in the courts, in part because of their perceived efficacy in accomplishing a transformation of the gendered wage labor market"); see also *Christensen v. Iowa*, 563 F.2d 353, 355-56 (8th Cir. 1977) (denying clerical workers' Title VII claim predicated on disparate wages paid to predominantly female clerical workers and predominantly male physical plant workers because Title VII guarantees only equality of opportunity); *Lemons v. City of Denver*, 17 Fair Empl. Prac. Cas. (BNA) 906, 909 (D. Colo. 1978) (proclaiming that comparable worth claims have the potential to disrupt the free market system in the United States), *aff'd*, 620 F.2d 228, *cert. denied*, 449 U.S. 888 (1980). See generally Linda M. Blum, *Between Feminism and Labor: The Significance of the Comparable Worth Movement 183-202* (1991) (examining the radical possibilities of comparable worth).

117. See generally *Lichtman Testimony*, *supra* note 16 (noting how limited enforcement of the equal pay laws hinders women and minorities in their fight for pay equity).

ever, that the government does not intent to extend Title VII this broadly, and individual workers who feel strongly enough about comparable worth must take it upon themselves to fight for equal pay.

II. FAIR PAY ACT OF 1994

As the previous section illustrates, the current legislation does not adequately protect against sex-based wage discrimination because it does not provide a cause of action for comparable worth either through the Equal Pay Act or Title VII of the Civil Rights Act of 1964. As such, a new Act was introduced for debate in the House of Representatives in the summer of 1994. This new act was intended to address pay discrimination, and more importantly, to provide for equal pay for comparable, though not necessarily equal, work.¹¹⁸

A. *The Act*

In July of 1994, Representative Eleanor Holmes Norton of the District of Columbia introduced the Fair Pay Act of 1994 ("FPA") in front of the House Committee on Education and Labor.¹¹⁹ The Act would amend the Equal Pay Act¹²⁰ by adding:

No employer . . . 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.¹²¹

The FPA defines "equivalent jobs" as "jobs that may be dissimilar, but whose requirements are equivalent, when viewed as a composite of skills, effort, responsibility, and working conditions."¹²² Thus, the FPA would explicitly provide a cause of action for comparable worth. The FPA also would allow, for the first time, class actions in equal pay matters¹²³ and would require employers to keep records of its wage policies and make those records available for public inspection.¹²⁴

118. *The Fair Pay Act of 1994: Joint Hearing with the Subcommittee on Select Education and Civil Rights on H.R. 4803* (1994) (opening statement of Eleanor Holmes Norton, Chairwoman, Subcommittee on Compensation and Employee Benefits), available in LEXIS, Legis Library, Testimony File.

119. *Id.*

120. 29 U.S.C. § 206(d) (1988).

121. H.R. 4803, 103d Cong., 2d Sess. § 3(G)(1)(a) (1994), available in LEXIS, Legis Library, BTX103 File.

122. *Id.* at § 3(G)(4)(b).

123. "Any such action may be maintained as a class action as provided by the Federal Rules of Civil Procedure." *Id.* at § 5(1)(f).

124. The public disclosure provision provides:

Every employer . . . shall preserve records which document and support the method, system, calculations, and other bases used by the employer in establishing, adjusting, and determining the wages paid to the employees of the employer. Every employer . . . shall preserve such records for such periods

Currently, the FPA's status is still pending with thirty-six cosponsors; the last action was taken on October 3, 1994 when another sponsor signed on to the bill.¹²⁵ To date, it has not been introduced to committee, debated, or brought up for a vote.¹²⁶ With the recent changes in both the House and the Senate, it is unlikely that the FPA will ever be passed.¹²⁷ Nonetheless, it is important to determine the validity and desirability of the FPA, as the push for federal comparable worth legislation is by no means dead. Moreover, as long as women and minorities are being under-paid, it is probable that individual legislators will continue to introduce bills similar to the Fair Pay Act of 1994.

B. *Response to the Act*

Immediately upon the introduction of the Bill, there was a great deal of support for the Act from the unions,¹²⁸ the media,¹²⁹ and the Institute for Women's Policy Research ("IWPR").¹³⁰ Specifically, the IWPR testified before Congress about its recently completed study of pay equity programs in twenty state governments. According to the IWPR, that study shows that the Fair Pay Act can¹³¹ and should be

of time and shall make such reports therefrom to the [EEOC] as shall be prescribed by the [EEOC] by regulation or order as necessary or appropriate for the enforcement of the provisions of Section 6(g) or any regulations promulgated thereunder . . . Every employer . . . shall file annually with the [EEOC] a report . . . containing information in such detail as may be necessary accurately to disclose the wage or salary rates paid to each classification, position, job title, or other wage or salary group of employees employed by the employer, as well as the sex, race, and national origin of employees at each wage or salary level in each classification, position, job title, or other wage or salary group.

Id. at § 6(C)(2)(a), (b).

125. 140 Cong. Rec. H10533 (daily ed. October 3, 1994).

126. 1994 Bill Tracking H.R. 4803; 103 Bill Tracking H.R. 4803, 103rd Cong., 2d Sess. (1994), available in LEXIS, Legis Library, Bill Tracking File.

127. See *World Politics and Current Affairs; AMERICAN SURVEY*, The Economist, Nov. 12, 1994, at 29; Melissa Healy, *Gingrich Lays Out Rigid GOP Agenda; Congress: As Next House Speaker, Republican Lawmaker Says He Will 'Cooperate' With Clinton. But He Vows No Compromise On His 10-Point Plan*, L.A. Times, Nov. 12, 1994, at A1.

128. See *The Fair Pay Act of 1994: Joint Hearing with the Subcomm. on Select Education and Civil Rights on H.R. 4803* (1994) (statement of Robert M. Tobias), available in LEXIS, Legis Library, Testimony [hereinafter *Tobias Testimony*]; *Sturdivant Testimony*, *supra* note 14.

129. See Martha Burk, *After 30 Years, Let's Enforce Pay Equality*, USA Today, July 21, 1994, (Editorial), at 8A; Judy Mann, *Doing What's Fair on Payday*, The Wash. Post, July 15, 1994, at E3.

130. See *The Fair Pay Act of 1994: Joint Hearing with the Subcomm. on Select Education and Civil Rights on H.R. 4803* (1994) (statement of Heidi I. Hartmann), available in LEXIS, Legis Library, Testimony File [hereinafter *Hartmann Testimony*].

131. "Can" meaning, it would be practical to do so: "it will be possible for firms to meet the requirements of the proposed legislation and that implementing comparable worth will help to close the pay gap between women and men." *Id.*

implemented.¹³² The IWPR's study drew five conclusions.¹³³ First, because the states were able to determine the content of their jobs in a systematic way, they demonstrated that it is possible to compare jobs within a single company.¹³⁴ Second, because nearly all the states found a pay gap between comparable female- and male-dominated jobs, there is a problem that needs to be addressed.¹³⁵ Third, these states were able to make adjustments to the pay of employees in underpaid female-dominated job classes that substantially closed the pay gap: making pay adjustments raises the wages of many women and substantially closes the wage gap between men and women.¹³⁶ Fourth, states that targeted specific underpaid female-dominated jobs spent a relatively small portion of their wage bill on pay equity adjustments, usually one percent or less. The proposed legislation would affect only jobs that are found to be underpaid and would not ordinarily require companies to redesign their entire personnel structures, so reform would tend to be moderate and inexpensive.¹³⁷ And finally, these remedies did not have the unfortunate side effects that many economists predicted,¹³⁸ such as causing unemployment or affecting the pay and employment practices of other employees. Therefore, companies would not have to fear that adjusting the wages of female-dominated jobs found to be underpaid would significantly harm them or their communities.¹³⁹

Some have enthusiastically endorsed specific portions of the Act, such as the public disclosure requirement¹⁴⁰ and the class action provision.¹⁴¹ An editorial in the *USA Today* noted:

Right now, the workplace double standard forces employees to submit to the most intrusive preemployment screenings—drug tests, interviews with neighbors, school transcripts, traffic-ticket records and credit reports. But job seekers or those who fear discrimination can't get the simplest data from employers, such as aggregate earnings information for women and men, or what proportion of each job category is female.¹⁴²

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

137. *Id.*

138. See Steven E. Rhoads, *Incomparable Worth: Pay Equity Meets the Market* 34-35 (1993) (noting that those employers covered by comparable worth legislation would be able to hire fewer employees, increasing the supply and further decreasing wages in the sector not covered by comparable worth).

139. *Hartmann Testimony*, *supra* note 130.

140. Burk, *supra* note 129, at 8A; Mann, *supra* note 129, at E3.

141. *The Fair Pay Act of 1994: Joint Hearing with the Subcommittee on Select Education and Civil Rights on H.R. 4803* (1994) (statement of Gene R. Voegtlin), available in LEXIS, Legis Library, Testimony File [hereinafter *Voegtlin Testimony*].

142. Burk, *supra* note 129, at 8A; see also Mann, *supra* note 129, at E3 (stating that "[i]t is a disclosure that would go a long way to replacing the culture of secrecy that

Likewise, during his testimony before the House Subcommittee, Gene R. Voegtlin, a leader in the National Federation of Federal Employees, noted how the class action provision of the FPA would be a "serious deterrent to employers who would otherwise engage in discriminatory pay practices."¹⁴³ Thus, the FPA might have been a major asset in the struggle to equalize pay for all workers.

Others, however, will no doubt disagree with the FPA. For example, Rector noted in 1989 that if the federal government got involved in comparable worth legislation, "[t]o prevent over or undergrading the government would have to monitor, regulate, and ultimately control all aspects of personnel administration within the private sector, including job description, classification, and promotion."¹⁴⁴ This would entail the "largest regulatory expansion in the history of the American economy."¹⁴⁵ In addition, opponents of government intervention cite to a lack of objective means for evaluating jobs and the possibility of creating disincentives for hiring female workers as reasons why comparable worth is not a matter for the federal government.¹⁴⁶ Part III of this Note analyzes the reasons not to implement comparable worth by means of the Fair Pay Act of 1994 or any other federal legislation.¹⁴⁷

has allowed employers to discriminate against employees who have no way of knowing what their colleagues are being paid").

143. *Voegtlin Testimony*, *supra* note 141.

144. Rector, *supra* note 14.

145. *Id.*

146. *Id.*

147. Some have even argued that the federal government would be a perfect place to begin a series of pilot programs on pay equity while consideration of this legislation is underway. *Tobias Testimony*, *supra* note 128; *see also* Weiler, *supra* note 34, at 1805 (stating that "[i]f the federal government, in particular, were to undertake a comprehensive reevaluation of its own pay structure and do it properly . . . this undertaking would serve as a valuable demonstration project from which others could learn"); *Sturdivant Testimony*, *supra* note 14 ("The federal government is the largest employer in the nation, and consequently has an obligation to eliminate all vestiges of discrimination against women and minorities").

Mr. Tobias, during his testimony, noted that women have been promoted less often than men over the course of their government careers, even as they receive equal performance appraisals and express just as much commitment to their jobs and career advancement. *Tobias Testimony*, *supra* note 128. Mr. Tobias used the fact that the federal classification system was implemented over 70 years ago, reflecting much of the bias concerning female and minority job roles that "permeated" society 70 years ago, to show that "[i]n the federal government women become stuck in undervalued and undercompensated occupations." *Id.* Interestingly, the current federal job classification system was put in place three years before women were given the right to vote in 1920. *Id.* Thus, it is evident that the federal government, as the nation's largest employer, owes a duty to its citizens to reevaluate its own pay structure and take positive steps to increase pay equity, hopefully leading the way for the rest of the country.

III. COMPARABLE WORTH SHOULD BE IMPLEMENTED ON AN INDIVIDUAL BASIS THROUGH THE EMPLOYEES' BARGAINING REPRESENTATIVES

The best reason for not passing the Fair Pay Act is that the National Labor Relations Act ("NLRA") already provides employees with enough protection, allowing them to receive comparable worth pay adjustments. The NLRA is not the same as the proposed FPA; it is better. Instead of having federal judges determine proper pay scales for individual employees, the NLRA allows these employees to determine for themselves, along with their employers, what the pay should be. The NLRA, then, provides the mechanism whereby employees can get comparable worth pay increases.

A. *Duty to Bargain under the National Labor Relations Act*

This section analyzes what an employer's duty to bargain about comparable worth entails and what effect that has on employees seeking comparable worth pay increases.

1. The Act

Section 8(a)(5) of the National Labor Relations Act¹⁴⁸ compels employers to bargain collectively with employees through their elected union representatives.¹⁴⁹ The duty to bargain is limited by section 8(d) of the Act passed in the Taft-Hartley Amendments in 1947,¹⁵⁰ which provides that the duty to bargain applies solely to "wages, hours, and other terms and conditions of employment."¹⁵¹

148. 29 U.S.C. §§ 151-69 (1988).

149. 29 U.S.C. § 158(a)(5) (1988); see also Michael C. Harper, *Leveling the Road from Borg-Warner to First National Maintenance: The Scope of Mandatory Bargaining*, 68 Va. L. Rev. 1447, 1462 (1982) (stating that "the primary policy of the Labor Act [is] to facilitate employees engaging in certain legitimate concerted efforts, such as collective bargaining, [and to extract] from their employers more compensation for their work"); Note, *Subjects of Bargaining Under the NLRA and the Limits of Liberal Political Imagination*, 97 Harv. L. Rev. 475, 477 (1983) [hereinafter *Subjects of Bargaining*] ("Th[e] state-imposed duty constitutes a central component of the NLRA's attempt to institutionalize industrial conflict and promote employee participation in workplace governance.");

150. 29 U.S.C. § 158(d) (1988).

151. *Id.*; see Exxon Research & Eng'g Co., 1994 NLRB Lexis 256, at *16. The case that first applied this principle is NLRB v. Wooster Division of Borg-Warner Corp., 356 U.S. 342 (1958). In that case, the Court noted that the Act treats as mandatory bargaining subjects any feature of the employer-employee relationship that affects "wages, hours, and other terms and conditions of employment." *Id.* at 349 (quoting 29 U.S.C. § 158(d)).

For a criticism of the Court's handling of § 8(d), see Archibald Cox, *Labor Decisions of the Supreme Court at the October Term, 1957*, 44 Va. L. Rev. 1057, 1074-86 (1958). The Article proclaims that "it is both unsound and inconsistent with the basic philosophy of collective bargaining to license the NLRB and courts to determine the scope of effective contract negotiations." *Id.* at 1083. Professor Cox concluded with the hope that the Court will broaden its view of "terms and conditions of employ-

Because comparable worth involves wages, any plan that seeks to utilize it is a mandatory subject of bargaining and employers must bargain with the union regarding its possible implementation until impasse.¹⁵² The Fair Pay Act, therefore, is not only unnecessary, but as the following discussion indicates, it is detrimental.

2. Advantages of Obtaining Comparable Worth through Collective Bargaining

As courts constrict comparable worth theories as a cause of action under Title VII,¹⁵³ women must focus on organizational strategies and collective action. One author notes: "Women must look . . . to unions, whose role in the market is clear and whose competence in this area is undenied."¹⁵⁴ As we have seen in Part I of this Note, federal acts can be of limited use because judges limit their application; therefore, women and minorities are better off turning to unions who have long gained benefits for their members.

One problem with federally mandated comparable worth is that not all employees want it more than other benefits. Even if women or racial minorities feel that they are being underpaid as compared to white men, they may believe that other benefits are more important, like health care or a pension plan. Traditional collective bargaining involves a give-and-take process. When employees feel strongly about

ment" to include any bargaining proposal "not inconsistent with a federal statute or declared public policy." *Id.* at 1086; see also *Subjects of Bargaining, supra* note 149, at 477 (stating that § 8 circumscribes the subjects of legally-mandated negotiation, thus limiting employee participation in industrial decision-making).

152. See *School District Must Bargain Pay Equity, At Least Partially, Iowa PERB Holds*, 23 Gov't Empl. Rel. Rep. (BNA) 635 (stating that "[a] wage formula, a definition of comparable worth, and formation of a committee to study pay equity are mandatory subjects for bargaining"). It is also important to note that the NLRA provides an affirmative duty for an employer to comply with a union's request for information that will "assist the union in fulfilling its responsibilities as the employees' statutory representative," and a component of the employer's duty to bargain in good faith. *Southern Ohio Oil Coal Co.*, 1994 NLRB Lexis 19, at *32-33 (citing *Detroit Edison v. NLRB*, 440 U.S. 301, 303 (1979)); *NLRB v. Acme Indus. Co.*, 385 U.S. 432, 435-36 (1967). Thus, when a union comes to the bargaining table with pay equity in mind, the employer must, even without the Fair Pay Act, open up her books and show her pay scales and relevant statistical data. *Pfizer, Inc.*, 268 NLRB 916, 918 (1984) (noting how the information simply needs to have some bearing on the issue for the which the information is requested and be of "probable or potential relevance to the union's dut[y]" (quoting *Conrock Co.*, 263 NLRB 1293, 1294 (1982) (footnote omitted in original)).

153. See *supra* part I.B.

154. Nancy Gertner, *Thoughts on Comparable Worth Litigation and Organizational Strategies*, 20 U. Mich. J.L. Ref. 163, 182 (1986). For a detailed look at why collective action strategies under the labor laws are superior to individual rights strategies, see Crain, *supra* note 18, at 31-33.

one benefit, they may be willing to give up another to ensure that they receive that more-desired benefit.¹⁵⁵

By passing the FPA, the government would require employees to take comparable worth in lieu of something that they may want more.¹⁵⁶ When an employer sits down with a union to bargain, it has a limited amount of money to give to its workers. If the government forces the workers to take comparable worth pay adjustments, the pool of funds would necessarily be decreased, and other benefits would have to be foregone. Where comparable worth is unregulated, however, as it is now, if the workers want it, they can go to their union¹⁵⁷ and bargain with their employer to implement a comparable worth program.¹⁵⁸

As one author notes, "[w]hat collective bargaining adds is both meaningful participation by women in the process and the necessary motivation to the employer to get it underway."¹⁵⁹ Furthermore, another author indicates that gender-conscious union activity could radically improve women's economic status.¹⁶⁰ This latter author cites to

155. This statement, of course, assumes that workers will want different benefits. For example, health care benefits have been important at the collective bargaining table in recent years. Alan Finder, *Health Care Costs Are the New Crux of Contract Talks*, N.Y. Times, Oct. 27, 1991, at A1; Peter J. Levin, *'Baby-Bell' Strike Raises Health Insurance Issues*, St. Petersburg Times, Sept. 17, 1989, at 2.

156. This argument, then, does not address the issue of whether there is something inherently valuable to equal pay, as in an elevated status for women and minorities. This Note is not analyzing the sociological effects of lower pay or the potential benefit to women as a group by the passage of the FPA. It is limited to looking at the increase to wages and other side effects that directly relate to comparable worth pay increases.

157. Or, if they are not unionized, they can join a labor organization.

158. See Gertner, *supra* note 154, at 177;

In the arenas where collective bargaining takes place, the focus can be on bargaining directly or indirectly for comparable worth. Obviously, the parties can adopt the practice of setting wages according to comparable worth principles. Alternatively, they can bargain for a single, rational wage evaluation plan. . . . [T]he absence of such a plan makes a crucial difference in litigation—posing remedy problems in some cases, undermining the proof in others.

Id.

159. Weiler, *supra* note 34, at 1799. Professor Weiler also noted that [r]ather than call upon the law to *regulate* the market from the outside, one could try to *reconstruct* the operation of the market so that women would be better able to address the problem from the inside Through union representation, the employees in traditionally female jobs could obtain expert technical assistance in identifying the actual degree of underpayment of their work in their own particular workplace and then in bringing group pressure to bear on their employer to do something about it.

Id. at 1798; see also Janet A. Flammang, *The Implementation of Comparable Worth in San Jose*, in *Comparable Worth, Pay Equity, and Public Policy* 159, 186 (Rita Mae Kelly & Jane Bayes eds., 1988) ("Comparable worth is well suited to the collective-bargaining context, where it can be custom tailored to local needs and client groups can make substantive contributions at both the policy-making and implementation stages.").

160. Crain, *supra* note 18, at 30.

a report by the AFL-CIO Public Employee Department on workers earning poverty level wages. The report concludes that union membership does more to increase the incomes of women than does job training, an additional year of education, or work experience.¹⁶¹

3. Potential Drawbacks

Two potential drawbacks to the implementation of comparable worth through collective bargaining are the low number of women in unions and the problems that implementation may cause for unions with a diverse membership. Historically, the organized labor movement has not been kind to women.¹⁶² As of 1984, women made up only 33.7% of all union members,¹⁶³ with most of this unionization occurring in the public sector.¹⁶⁴ Forty-five percent of all female unionists belong to only twenty-six national unions.¹⁶⁵ Almost sixty percent of all national unions have less than twenty percent female memberships, and seventy percent of all national unions have less than thirty percent female memberships.¹⁶⁶ Thus, with no pressure from within, unions will not take comparable worth seriously. Even if

161. *Id.* (citing *Union Membership Most Effective Factor in Raising Wages of Poor Report Says*, 4 Lab. Rel. Wk. (BNA) 407 (Apr. 25, 1990) (citation omitted)). In 1989, union women's median earnings were \$417 per week, compared with \$312 per week for nonunion women. *Id.* Thus, women stand to gain a great deal by joining unions, beyond obtaining comparable worth pay adjustments.

162. Blum, *supra* note 116, at 6. This attitude toward women has resulted in "the exclusion of women from male unions and male occupations, and a lack of support for organizing those employed in female occupations. Such tactics have reinforced the sex segregation of the workforce and the marginalization of women workers." *Id.*; see also Crain, *supra* note 18, at 30;

Historically, unions and women have been uneasy partners. Unions have a well-documented history of sex discrimination and are characterized by an overwhelmingly male culture. The image of the cigar-chomping, Mafia-connected union business agent remains synonymous with the word 'union' in most people's minds. Unions have been notoriously ineffective in organizing women, and women are underrepresented in union staff and leadership positions

Id.

163. Blum, *supra* note 116, at 10 n.7; see also Weiler, *supra* note 34, at 1799 (noting that a fundamental flaw with relying on collective bargaining to implement comparable worth is the fact that women are so poorly represented). In the private sector, only 10% of all female workers are in a union, making them half as likely as men to be part of a labor organization. *Id.*

164. Blum, *supra* note 116, at 10. Within public sector unions, women make up nearly 50%, as the demand for female labor grew dramatically with the growth of state employment between 1950 and 1970. *Id.* This, in turn, has led to increased attempts to implement comparable worth in the public sector. Kelly & Bayes, *supra* note 27, at 8 ("[W]omen have been unionized at a relatively rapid rate in the public sector, leading to substantial bargaining power for comparable worth").

165. Gold, *supra* note 1, at 92 (citing U.S. Bureau of Labor Statistics, Directory of National Unions, 62-63, tbl. 11).

166. *Id.*

it is, pay equity gains will be only minimal, as roughly twelve percent of women are organized.¹⁶⁷

Comparable worth may also cause problems within the union and within the context of collective bargaining. First, many employers bargain with several different unions; if one union pushes for comparable worth, the others will want to get involved to keep their workers satisfied, and the result will be very complex bargaining.¹⁶⁸ As the complexity of bargaining increases, the cost to all parties involved also increases, especially to the employer. This further reduces the amount of money available to the workers. Likewise, employers may potentially use comparable worth to break-up unions' solidarity.¹⁶⁹ For example, if an employer has X amount of money to give wage increases, it could play the membership of the union against itself. There may be a split among union members regarding whether to use the additional funds to increase women's salaries so that they are comparable to equivalent jobs held by men, or to give across-the-board wage increases that result in the same wage ratios between men and women.¹⁷⁰

4. Improvements in Labor Unions' Commitment to Comparable Worth

The treatment of women by unions is improving, however, as the percentages of women in unions increase. Statistics indicate that women are now joining unions in ever-increasing numbers. For example, the growth in female white-collar union membership represents the largest growth in the last fifteen years.¹⁷¹ Most of this growth has taken place in public sector unions where women make up nearly half the membership.¹⁷²

Additionally, the American Federation of Labor and Congress of Industrial Organization ("AFL-CIO") has endorsed comparable worth.¹⁷³ In 1979, the AFL-CIO urged its affiliates "to adopt the concept of equal pay for equal work of comparable value in organizing and in negotiating collective bargaining agreements."¹⁷⁴

167. *Id.*

168. *Id.* at 91.

169. *Id.*

170. *Id.*

171. Blum, *supra* note 116, at 10 (citation omitted).

172. *Id.* (citation omitted).

173. *Id.* at 7.

174. Gold, *supra* note 1, at 87-88 (footnote omitted) (citing Bureau of National Affairs, *The Comparable Worth Issue*, BNA Special Report (Washington, D.C.: Bureau of National Affairs 1981, p.132)). Furthermore, other unions have joined the fight: The International Union of Electrical Workers has filed several lawsuits, including *Gunther*. See *City of Washington v. Gunther*, 452 U.S. 161 (1981). The Communication Workers of America put comparable worth on the table with the Bell System, and the United Electrical Workers, as early as 1970 in a contract with General

Finally, the use of comparable worth could give this country's labor movement a much-needed boost. By enticing more women to join unions, a greater potential than just increased membership can be realized by this "feminization" of the movement. There is a possible "revitalization of the movement as women's concerns and greater family orientation may provide a catalyst for humanizing the workplace and the internal structure of unions [Perhaps] the full inclusion of women can initiate a new 'social unionism,' reminiscent of the militancy surrounding the great CIO industry organizing drives of the 1930s."¹⁷⁵

B. *Implications*

This section analyzes and contrasts two comparable worth programs—a collective bargaining scenario and a mandated legislative program. It will be evident that the former program has been more successful, thus supporting the conclusion that the best route to implementing pay equity is through individual bargaining, not government intervention.

1. Case Study I: San Jose

The city of San Jose's implementation of comparable worth for municipal employees exemplifies the benefits of comparable worth realized through union-management bargaining.

a. *Background*

San Jose, located in Northern California, in the heart of the Silicon Valley, had a booming economy in the late 1970s and early 1980s.¹⁷⁶ Furthermore, when the new City Council took office in January of 1981, seven of its eleven members were women, including a female mayor, Janet Gray Hayes.¹⁷⁷ In fact, the Mayor called San Jose the "feminist capital of the world."¹⁷⁸

The union representing about half of the city's four thousand workers, Local 101 of the American Federation of State, County, and Municipal Employees ("AFSCME"), drew many of its leaders from predominantly female jobs, including the city librarians, clerical workers, and recreation specialists, "who had long been concerned with women's issues, including comparable worth."¹⁷⁹ Both the union and the city enjoyed a climate of good-faith treatment and cooperation.¹⁸⁰

Electric, sacrificed money from a general pay increase to give an extra boost to women's jobs at the lower end of the scale. Gold, *supra* note 1, at 87-88.

175. Blum, *supra* note 116, at 11 (citation omitted).

176. Flammang, *supra* note 159, at 168.

177. *Id.* at 168-70.

178. Killingsworth, *supra* note 34, at 184.

179. *Id.*

180. Flammang, *supra* note 159, at 168-70.

Nevertheless, when collective bargaining began in 1978, the city government "had no desire to explore the . . . comparable worth concept."¹⁸¹

b. *The Agreement*

In December of 1980, the city released the results of a study conducted by the Hay Associates showing that the wages in female-dominated jobs¹⁸² were less than those paid in male-dominated jobs of equal "points."¹⁸³ Points were assigned to jobs according to four criteria: knowledge, problem-solving, accountability, and working conditions.¹⁸⁴

In the winter of 1981, AFSCME and the City Council began to negotiate a new collective bargaining agreement.¹⁸⁵ The union bargained for a ten percent cost-of-living increase and \$3.2 million in comparable worth adjustments over four years; the city countered with a six percent cost-of-living increase and \$1.3 million in comparable worth adjustments over two years.¹⁸⁶

After reaching an impasse early in the summer of 1981, the union voted to strike, initiating "the first comparable worth strike in the nation and a rare disturbance in the city's normally tranquil labor relations."¹⁸⁷ The strike lasted nine days and resulted in the City Council voting to pay roughly \$1.45 million over two years in comparable worth pay adjustments.¹⁸⁸

c. *The Results*

Public policy analysts indicate four scenarios in which the successful implementation of the city counsel's decision is unlikely.¹⁸⁹ First, the analysts explain the Resistance to Innovation scenario.¹⁹⁰ Under this scenario, pressure from interest groups—business, elected officials, and personnel administrators—stalls attempts to implement a policy as controversial and innovative as comparable worth.¹⁹¹ Second, the analysts set forth the The Grandstanding Without Follow-through Sce-

181. Killingsworth, *supra* note 34, at 184 (citation omitted).

182. Those jobs that were greater than 70% female were considered female-dominated. Flammang, *supra* note 159, at 160.

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.*

187. Flammang, *supra* note 159, at 160.

188. *Id.* Furthermore, as a result of the collective bargaining agreement, \$116,000 was spent on comparable worth in 1983, another \$171,000 in 1984, and \$341,000 in 1985. Blum, *supra* note 116, at 89-90.

189. Flammang, *supra* note 159, at 161-65.

190. *Id.* at 161-62.

191. *Id.* Negative press came from a wide variety of sources, such as an editorial in the Wall Street Journal, an article in Fortune Magazine, the EEOC Advisory Council, Detroit Mayor Coleman Young, and San Jose Council Member Claude Fletcher. *Id.*

nario.¹⁹² In this case, elected officials get political mileage from merely studying comparable worth but have little incentive to actually implement it.¹⁹³ Third, analysts propose The Court-Mandated Implementation Scenario.¹⁹⁴ Under this scenario, “[i]t [is] plausible to assume that AFSCME would have to engage in a protracted court battle with San Jose to implement the findings of the Hay study.”¹⁹⁵ Finally, the Fiscal Constraint Scenario disfavors implementation of comparable worth because of the economic policy during the Reagan years and the overall cut-back in government, as evidenced by California’s Proposition 13.¹⁹⁶ Basically, this scenario suggests that the government would be unwilling or unable to conduct a drastic, costly social experiment at this time.¹⁹⁷

Despite the analysts’ bleak propositions,¹⁹⁸ San Jose’s comparable worth program has been a success in large part because of the collective bargaining setting in which it was implicated. Specifically:

[T]he collective-bargaining setting meant that the union had procedural access, both legally and informally, to the decision-making process. It had detailed knowledge of what the council intended, and it had the necessary time, energy, information, financial incentive, and experience. Procedural channels increase the likelihood of an implementation in the direction of the watchdog scrutinizing it.¹⁹⁹

d. *The Implications*

The success of San Jose’s movement is significant in three very important respects. First, because women were disappointed with the results of Affirmative Action, which was mandated through legislation, they realized that “the only effective way to gain comparable worth was through union action.”²⁰⁰ Second, the San Jose case shows how effective a union can be when it takes at least partial control of

192. *Id.* at 162-63.

193. *Id.*

194. Flammang, *supra* note 159, at 160.

195. *Id.* at 164.

196. *Id.* at 164-65.

197. *Id.*

198. *See, e.g.,* Killingsworth, *supra* note 34, at 212 (“[E]stimates indicate that San Jose’s comparable worth pay adjustments may have raised wages by between 5.7 percent and 5.8 percent in female jobs, and had negligible effects on pay in male jobs. As a result, the six years of comparable worth wage adjustments in San Jose had a negligible effect on employment in male jobs, and may have reduced employment in female jobs by between 6.55 percent to 6.67 percent—roughly the equivalent of somewhat less than a year of lost employment growth.”).

199. Flammang, *supra* note 159, at 173. *But cf.* Gold, *supra* note 1, at 90 (“[T]he labor movement is [not] as firmly committed to comparable worth as [some may think]. It is no coincidence that the mayor and a majority of the city council of San Jose were women. The politicians wanted comparable worth . . . as much as the union.”).

200. Blum, *supra* note 116, at 90.

the "technically mystified job evaluation process" away from management's so-called experts.²⁰¹ Finally, on a national level, the union's "tough politics" showed just how effective comparable worth could be and just what could be gained through the unity of an aggressive labor and feminist campaign.²⁰²

San Jose is an example of how a local union can obtain comparable worth pay increases for its workers. Through collective bargaining, women and minorities can get deserved pay equity wage increases without having to rely on questionable federal legislation and a district court judge's interpretation of "equal jobs." Through the combination of a re-vitalized labor movement and the aggressive activity of the feminist and minority coalitions, comparable worth could be implemented without federal legislation such as the Fair Pay Act of 1994.

2. Case Study II: Iowa

In contrast to San Jose, Iowa has tried to implement legislation to combat wage discrimination. Unlike San Jose, however, Iowa was not successful.

a. *The Legislation*

In 1983, the Iowa General Assembly passed H.F. 313²⁰³ which provided "that a state department, board, commission, or agency shall not discriminate in compensation for work of comparable worth between jobs held predominantly by women and jobs held predominantly by men."²⁰⁴ The statute defined comparable worth as "the value of work as measured by the composite of the skill, effort, responsibility, and working conditions normally required in the performance of work."²⁰⁵

b. *The Agreement*

On March 29, 1985, some 9500 Iowa state employees received their first pay raise as a result of the new legislation.²⁰⁶ The pay raise was in

201. *Id.* at 91.

202. *Id.* The phenomenon of striking over comparable worth has spread from northern California to the rest of the country. At two venerable Ivy League institutions, Yale and Columbia, secretaries have struck over a number of things, including comparable worth. For more information, see William Serrin, *Columbia Faces Threat of Strike Over Union Vote*, N.Y. Times, Dec. 31, 1984, at A28; William Serrin, *Yale Strike is Watched by Unions Across the U.S.*, N.Y. Times, Oct. 11, 1984, at B4; see also Wayne King, *When Drivers Earn Far More Than Secretaries*, N.Y. Times, Oct. 17, 1989, at B1 (examining the plight of secretaries at Hofstra University on Long Island).

203. Hugh Winebrenner, *The Implementation of Comparable Worth in Iowa, in Comparable Worth, Pay Equity, and Public Policy 213, 213* (Rita Mae Kelly & Jane Bayes eds., 1988).

204. *Id.*

205. *Id.* (citation omitted).

206. *BNA Survey Finds 23 States Are Taking Comparable Worth Actions*, 69 Daily Lab. Rep. (BNA) C-1 (April 10, 1985).

response to a \$150,000 study conducted by Arthur Young and Company of 758 job classifications covering 18,000 state employees.²⁰⁷

The study found that 10,700 employees should get pay raises and 7300 should get pay cuts. Nevertheless, budget constraints and the political problem surrounding pay cuts forced the state and the union, American Federation of State, County, and Municipal Employees ("AFSCME"), to negotiate a deal whereby some employees deserving equity pay raises did not receive them.²⁰⁸ Some 1800 nonunion employees received their pay raise while another 2000 saw their wages frozen.²⁰⁹ Thus, where the government mandated comparable worth to employees, only some of whom were covered by a collective bargaining agreement, the full benefit of the program was not realized.

c. *The Problem*

From the beginning, Iowa's comparable worth program has met difficulties in implementation, as well as objections from the parties involved, including the unions.²¹⁰ There are many different reasons why Iowa has not been as successful with its comparable worth program as San Jose.

First, the General Assembly involved itself far too long with the implementation process. This delay led to a confrontation with the Executive Branch over who would actually be in charge of making sure Iowa's employees received the pay equity they deserved.²¹¹ Specifically, the steering committee appointed by the Governor to facilitate the introduction of comparable worth believed that the governor was engaging in the "grandstanding without follow-through scenario,"²¹² forcing them to remain involved too long. As one author notes, "the steering committee had neither the time nor the expertise to implement comparable worth and demonstrated that policy implementation is better left to professionals."²¹³ In contrast, when comparable worth is implemented through collective bargaining, all parties are familiar with the circumstances and have the time and the desire to see that the best possible program is instituted.

Second, Iowa's program was fragmented from the beginning. Each individual state department, board, commission, and agency was

207. *Id.* at C-2. The report concluded that jobs held predominantly by women were paid 30 to 32% less than jobs held predominantly by men "entailing the same responsibility, effort, and working conditions—the basic comparable worth values." *Id.*

208. *Id.*

209. *Id.*

210. See Winebrenner, *supra* note 203, at 221 ("The implementation of comparable worth in Iowa has been a nightmare."). *But cf.* Michael, *supra* note 14, at 3B (noting that Iowa's comparable worth plan cut the state's gender wage gap in half, to three percent).

211. Winebrenner, *supra* note 203, at 213.

212. *Id.* at 222; see *supra* notes 193-94 and accompanying text.

213. Winebrenner, *supra* note 203, at 222.

forced to comply, but the pay study conducted by the Steering Committee involved only 20,000 merit system jobs; about 13,000 employees of the regents, judicial, legislative, and executive exempt systems were excluded.²¹⁴ This limited sample detracts from the study because accuracy in statistical surveys increases as the numbers increase. In a collective bargaining situation, it is highly likely that all workers will be included in the survey, thereby assuring the most accurate wage survey possible.

Furthermore, because each department used a different job evaluation methodology and study, similar jobs in different departments could be assigned unequal pay.²¹⁵ For example, a guard in the courthouse could receive different pay than a guard in the library. A major component of employee satisfaction is not only the level of pay received, but the perceived fairness her pay brings in comparison to similarly situated coworkers. In a collective bargaining scenario, the union will be concerned that its workers not only receive the highest pay possible, but also that workers performing the same jobs are paid the same wage rate.

Third, a whole variety of problems commonly known as "pay compaction" occurred.²¹⁶ Pay compaction " 'result[s] when current salary distances between levels of job classes in the same job classification series are insufficient to reflect recognized differences in responsibility, skill (knowledge and ability), and effort, or when statutorily mandated or otherwise fixed salary ceilings arbitrarily and artificially limit salary levels.' "²¹⁷ One example of pay compaction problems is the "reduction of existing supervisory-subordinate pay differentials."²¹⁸ Likewise, a different problem, that of inversion of classes within a series, occurred. This involves the lower-ranked employee, through comparable worth, earning more than the higher-ranked employee.²¹⁹

214. *Id.* at 217.

215. *Id.* Like the problem in Iowa, Richard Burr, research analyst at the Center for the Study of American Business, Washington University, noted the arbitrariness of comparable worth programs throughout the country. Richard E. Burr, *Rank Injustice: The Arbitrary Record of Comparable Worth*, The Heritage Found. Pol'y Rev., 1986 Fall, available in LEXIS, Nexis Library, Arcnws File. An example of this arbitrariness occurs between Iowa and Minnesota, where a photographer in Minnesota is worth 25% more than one in Iowa while a Minnesota librarian is worth 30% more than a Vermont librarian, who in turn is worth 20% more than a fellow librarian in Iowa. *Id.* Thus, as Burr notes, the entire validity of comparable worth programs is questionable due to the inconsistency of programs from state to state. *Id.*

216. Winebrenner, *supra* note 203, at 217-18.

217. *Id.* (citation omitted).

218. *Id.* at 218.

219. *Id.* An example of this occurred when a conservation aide, a summer employee who picks up debris and pulls weeds, earned \$4.40 per hour before the study and a conservation worker, a full-time employee whose duties include collecting brood fish and eggs for propagation and planting wildlife habitats, earned \$5.88 per hour. After the study and implementation of comparable worth, the aide earned \$6.10 while the worker remained the same. *Id.*

For obvious reasons, this could cause major problems for employees, and collective bargaining would avoid inversion altogether as unions are constantly comparing figures to ensure that pay increases as responsibility increases.

Finally, Iowa's comparable worth program was muddled because the state had collective bargaining agreements that needed to be renegotiated with approximately seventy percent of the merit system employees.²²⁰ The city and the union (AFSCME) agreed to implementation, but watered it down greatly by rejecting downgrades and employee appeals.²²¹ Thus, by not involving the union from the outset, Iowa ran into problems when AFSCME tried to prevent any reduction in the pay of its male members. Because comparable worth will be achieved only if the desire exists, forcing the issue can cause resentment and opposition.

Moreover, the use of legislation risks commissioning inaccurate studies. Although this was not a problem in Iowa, "[m]any pressing employee concerns are considered to be beyond the reach of sensible legal intervention, including the obvious issue of what wages and benefits should be paid for the host of different jobs in our vast and decentralized economy."²²² Moreover, legislatures have avoided commissioning studies to analyze pay equity.²²³

Iowa is an example of legislature-mandated comparable worth. Although some states and cities have fared better,²²⁴ Iowa shows how things can go wrong when the parties involved do not make the decisions regarding the implementation of comparable worth.

C. Best Alternative

Throughout the 1980s, no labor policy issue was more hotly contested than comparable worth. Those in favor saw a great opportunity to increase the pay of women employed in jobs that had been assigned

220. *Id.* at 219. State Comptroller William Krahl said, in 1984, that Iowa's new comparable worth law is incompatible with collective bargaining. *Comparable Worth in Rough Waters*, UPI, Dec. 30, 1984, available in LEXIS, Nexis Library, UPI File.

221. Winebrenner, *supra* note 203, at 219. Apparently, the union did not want to upset its male members and the governor wanted to protect the state treasury. This "caused both parties to lose sight of the goal of comparable worth—pay equity for all employees." *Id.* Furthermore, other unions were dissatisfied with the outcome of the agreement between AFSCME and the state. Specifically, representatives of the 600-member Iowa United Professionals (IUP) were upset, claiming the agreement did not treat them fairly, and, more importantly, denies IUP the right to bargain for its own members. Scott Sonner, *Avenson and Branstad Spar Over Equity Bill*, UPI, Mar. 14, 1985, available in LEXIS, Nexis Library, UPI File.

222. Paul C. Weiler, *Governing the Workplace: The Future of Labor and Employment Law* 154 (1990).

223. *Id.*

224. See generally Sara M. Evans & Barbara J. Nelson, *Comparable Worth for Public Employees: Implementing a New Wage Policy in Minnesota*, in *Comparable Worth, Pay Equity, and Public Policy* 191-212 (Rita Mae Kelly & Jane Bays eds., 1988) (examining the implementation of comparable worth in the state of Minnesota).

historically to them, such as secretaries or nurses.²²⁵ Those opposed to comparable worth viewed it as an infringement on a free market economy with the potential to wreak havoc on the employment of women by increasing their cost to employers, thus effectively providing a dissincentive to hire them.²²⁶

Congress has alleviated some of the problems regarding the plight of women and minorities in the workplace by passing the Equal Pay Act of 1963²²⁷ and Title VII of the Civil Rights Act of 1964.²²⁸ These acts, however, do not go far enough. The EPA does not provide a cause of action for comparable worth pay disparities as plaintiffs must show that their jobs are identical to a comparator's job.²²⁹ As comparable worth aims to raise the pay level for jobs of *similar* skill, effort, responsibility, and working conditions, the EPA is contrary to the heart of comparable worth. Furthermore, Title VII does not allow a plaintiff to bring an action in federal court for comparable worth, as she must show an intent to discriminate encompassing an actual desire to pay women less than men, which is not a requirement in the typical comparable worth scheme.²³⁰

While the FPA would resolve some of the flaws in the EPA and Title VII, it is unlikely that it would better protect individuals against pay discrimination. Although comparable worth is no doubt an important and necessary tool to bring women and minorities' pay up to the level it should be, federal legislation is not the proper method to obtain this level.

Under the National Labor Relations Act,²³¹ employers have a duty to bargain with their employees over wages, hours, and working conditions.²³² As a component of wages, employers are compelled to bargain over comparable worth. Thus, employees who desire comparable worth can exert economic pressure and, perhaps, give up another benefit to get it.

The city of San Jose provides an excellent example to unions throughout the country regarding securing comparable worth pay increases. The union must be united, the employer must be fairly receptive, and there must be enough money in the coffers to cover the added increase in labor costs. If the government were to mandate employers to implement comparable worth, the favorable factors may not exist and the situation could become complicated, as was the case in Iowa.

225. See Rhoads, *supra* note 138, at 7-9.

226. *Id.* at 9-16.

227. 29 U.S.C. § 206(d) (1988).

228. 42 U.S.C. § 2000e-2 (1988).

229. See *supra* notes 44-71 and accompanying text.

230. See *supra* notes 72-117 and accompanying text.

231. 29 U.S.C. §§ 151-69 (1988).

232. 29 U.S.C. § 158(d) (1988).

Thus, employees should go to their unions (or join unions if they are not already organized) and put pressure on employers to finally end the discrimination that deprives women and minorities of equal pay. Only then, after every employee receives the pay that he or she deserves, can the United States truly be a country that allows an individual to succeed by hard work and an incentive to get ahead.

CONCLUSION

Recall the case of Marilyn Jancey, the cafeteria worker who was denied equal pay. Some may say that she was fortunate, because the state she lives in, Massachusetts, has an Equal Pay Act prohibiting employers from discriminatorily paying female workers less than male workers for jobs of comparable worth.²³³ Proponents of comparable worth legislation would, then, favor the passage of the Fair Pay Act of 1994, sponsored by Representative Eleanor Holmes-Norton of the District of Columbia.

The proposed federal legislation, however, is not the best way to bring about pay increases for women and minorities. The federal government already has passed numerous laws that go a long way to equalizing the workplace: the National Labor Relations Act, The Equal Pay Act, and the Civil Rights Act of 1964. What we have in place is the framework for achieving comparable worth without further government intervention. Instead of waiting for help from the government, it is imperative that individual workers take it upon themselves to get what they deserve by exerting economic pressure on their employers to get comparable worth pay increases. Thus, the best way to ensure equal pay for women is through collective bargaining. The National Labor Relations Act already provides the mechanism whereby employees can bargain to increase pay equity in the workplace.

233. See Massachusetts Equal Pay Act, Mass. Ann. Laws ch. 149, § 105A (Law. Co-op 1994).

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SYMPOSIUM ON ARBITRATION
IN THE SECURITIES INDUSTRY

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Chairman
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