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## EVALUATING POLICY SOLUTIONS TO SEX-BASED PAY DISCRIMINATION: WOMEN WORKERS, LAWMAKERS, AND CULTURAL CHANGE

VICKY LOVELL, PH.D.\*

Equal pay continues to be a top concern of women workers—especially those with more years on the job, who are more likely to have experienced or witnessed inequitable compensation practices. Only forty-four percent of women feel their workplace offers equal pay for equal work.<sup>1</sup> More than forty years after Congress mandated equal pay for women, the problem persists, affecting women across the wage spectrum, from the kitchen to the corner office.<sup>2</sup>

One reason that wage discrimination has proved to be so intractable is that it is very difficult to eradicate through legislative action. Even though Congress has outlawed specific acts of discrimination and the Supreme Court has struck down acts that create inequitable outcomes,<sup>3</sup> the burden of enforcement still falls on individuals who may never have an opportunity to discover their co-workers' pay.<sup>4</sup> Private-sector employers tend to be extremely secretive about sensitive compensation information, so this step in itself creates an enormous barrier: a woman can be given unfairly low pay for decades without suspecting a hint of discrimination. A worker who does pursue a claim must find a legal advocate to help navigate a complex legal structure; it may take years to bring this process to a conclusion. In the end, the monetary judgment may be relatively small. Not only will the award be too insufficient to allow the abused worker

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1. AMERICAN FED'N OF LABOR AND CONG. OF INDUS. ORG., ASK A WORKING WOMAN SURVEY REPORT (2006), <http://www.aflcio.org/issues/politics/labor2006/upload/AWWsurvey.pdf>.

2. The Equal Pay Act of 1963 requires establishments to pay equal wages to employees performing "equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions." 29 U.S.C. § 206(d)(1) (2000).

3. William Gordon, *The Evolution of the Disparate Impact Theory of Title VII: A Hypothetical Case Study*, 44 HARV J. OF LEGIS. 529, 529–51 (2007).

4. Claims for employment discrimination based on sex under the Equal Pay Act of 1963 or Title VII of the Civil Rights Act of 1964 are filed by individuals or by the U.S. Equal Employment Opportunity Commission on behalf of the worker claiming to have been damaged. M. MARGARET CONWAY, DAVID W. AHERN, & GERTRUDE A. STEUERNAGEL, *WOMEN & PUBLIC POLICY: A REVOLUTION IN PROGRESS* 73–77 (2nd ed. 1999). An alternative approach would require employers to document that their practices meet these standards. *Id.*

to train for a new career—which may be necessary if the claimant is virtually blacklisted among employers—but it will also be too insignificant to serve as an effective deterrent to employers who choose to continue to discriminate.<sup>5</sup>

This article provides an overview of the issue of equal pay for women. It first presents evidence of the continued relevance of the issue for working women, using the state of Maryland as a case in point.<sup>6</sup> Second, key federal laws are reviewed, with important weaknesses highlighted.<sup>7</sup> Third, I address a United States Supreme Court decision that eviscerated one of the two main lines of recourse for harmed workers, and Congress's reversal of that decision.<sup>8</sup> Fourth, I summarize the legislation currently before Congress and the states that would strengthen women's options for pursuing pay discrimination claims.<sup>9</sup> I conclude with comments about challenging the existing cultural paradigm to effectuate the change in workplace treatment that women need.<sup>10</sup>

#### I. WOMEN'S PAY STILL LAGS MEN'S SIGNIFICANTLY, WHILE EVIDENCE OF DISCRIMINATION CONTINUES TO ACCUMULATE

The most widely cited measure for monitoring women's access to fair pay and equal employment opportunities is the gender wage ratio. The number is calculated by dividing the average annual earnings of women working full-time, year-round by the comparable figure for men.<sup>11</sup> It elides many factors that distinguish women's experiences of employment from men's—differences in educational preparation, years of work, responsibility of caring for children and families, average work hours, typical jobs—but it allows change, or the lack thereof, to be tracked over time.<sup>12</sup> This indicator stands at 76.9—an enormous improvement since 1960, when women earned

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5. For instance, the charging party received \$55,000 as compensation for several years of unlawfully low pay in *EEOC v. Kettering University, No. 02-73901 (E.D. Mich. April 21, 2003)*, available at <http://www.eeoc.gov/litigation/settlements/settlement04-03.html>.

6. See *infra* Part II.

7. See *infra* Part III.

8. See *infra* Part IV.

9. See *infra* Part V.

10. See *infra* Part VI.

11. INST. FOR WOMEN'S POLICY RESEARCH, *The Gender Wage Ratio: Women's and Men's Earnings* 1 (2008), IWPR No. C350, available at <http://www.iwpr.org/pdf/C350.pdf>.

12. *Id.*

sixty-one cents for every dollar paid to men.<sup>13</sup> But the pace of change, once very dramatic, was lethargic in the 1990s and has slowed to a near standstill since 2001.<sup>14</sup>

Of course, the fact that women are not paid as much as men does not prove that women are treated unfairly. It could be that the types of differences in education and employment mentioned above produce two groups of workers with very dissimilar skills and abilities who do not provide the same value to employers. However, research that examines individuals' pay and accounts for measurable differences such as work hours and occupation finds that women and men with the same characteristics are not paid the same—women earn less.<sup>15</sup> That is, part of the observed aggregate difference between women's and men's pay is not caused by work-related factors that are expected to affect earnings. The unexplainable portion of the observed difference must arise either from differences between women and men that we cannot measure or from differences in the way they are treated, such as sex-based discrimination.

Since women are still our primary caregivers to children, women are inherently set up for disparate treatment at work.<sup>16</sup> Firms in the United States have done little to offer the support that parents need, such as easily accessible and affordable child care, flexible work hours, and paid parental leave.<sup>17</sup> Beyond that, employers may act on preconceptions about parents' (especially mothers') available time and commitment in assigning tasks, pay increases, learning opportunities, and promotions, or treat parents' needs for time off differently. This unequal treatment of workers who try to combine employment with family care can be interpreted as a form of sex-based discrimination.<sup>18</sup>

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13. *Id.* at 1.

14. *Id.*

15. See COUNCIL OF ECONOMIC ADVISERS, THE WHITE HOUSE (PRESIDENCY OF WILLIAM JEFFERSON CLINTON), EXPLAINING TRENDS IN THE GENDER WAGE GAP (Jun. 1998), available at <http://clinton4.nara.gov/WH/EOP/CEA/html/gendergap.html>.

16. In households with children under six, women average 1.2 hours of physical child care per weekday, while men average 0.4 hours. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, USDL 07-0930, AMERICAN TIME USE SURVEY—2006 RESULTS 4 (June 28, 2007), available at <http://www.bls.gov/news.release/pdf/atus.pdf>.

17. In the private sector, fifteen percent of workers receive employer assistance with the costs of child care (Table 23), five percent have a flexible workplace (Table 23), and eight percent have paid family leave (Table 19). BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, NATIONAL COMPENSATION SURVEY: EMPLOYEE BENEFITS IN PRIVATE INDUSTRY IN THE UNITED STATES, MARCH 2007, SUMMARY 07-05 (Aug. 2007), available at <http://www.bls.gov/ncs/ebs/sp/ebsm0006.pdf>.

18. For a thorough presentation of the theory of family responsibility discrimination see JOAN C. WILLIAMS & CYNTHIA THOMAS CALVERT, *Family Responsibilities Discrimination*:

Women may experience small disadvantages in the workplace from being caregivers at various points in their work life, such as seeking part-time or part-year jobs or otherwise scaling back work hours to pick up the kids before the child care center closes, or to provide primary child care if there are no affordable, quality local options. Over a career, the cumulative effects in limiting women's pay can be substantial.<sup>19</sup>

Feminists also point to the continuing disparity between the types of jobs typically held by women and those held by men as further evidence of discrimination. They ask whether it can be possible in 2009 that women are actually more likely to "choose" stereotypical female jobs, such as clerical work and primary-school teaching—isn't it more likely that social norms and unconscious biases steer women into certain kinds of work, while men are encouraged to pursue others?<sup>20</sup> And why do female-dominated occupations so consistently pay less than those associated with white men, even when the jobs require comparable skills and responsibilities?<sup>21</sup> Statistical analyses of workers' earnings strongly support the notion that women are still paid less than comparably skilled men.<sup>22</sup>

## II. THE CURRENT SITUATION AND A CASE STUDY OF THE STATE OF MARYLAND

In 2005, the legislature of the state of Maryland overrode a gubernatorial veto to create an equal pay commission.<sup>23</sup> The Commission was tasked with investigating sex- and race-based wage

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*What Everyone Needs to Know*, 91 WOMEN LAW. J.24 (2006), available at <http://www.epexperts.com/modules.php?op=modload&name=News&file=article&sid=2382>.

19. See Deborah L. Brake, *The Need to Restore Title VII's Protection from Pay Discrimination to Our Nation's Workers*, Testimony before the Committee on Education and Labor, U.S. House of Representatives (Jun. 12, 2007) (noting that discriminatory pay decisions "are not separate and distinct from the paychecks that follow them" but, rather, "expand exponentially over the course of an employee's career, even if subsequent raises are determined in a nondiscriminatory fashion"), available at <http://edworkforce.house.gov/testimony/061207DeborahBrakeTestimony.pdf>.

20. Ninety-seven percent of secretaries, eighty-nine percent of bookkeepers, and eighty-two percent of elementary and middle school teachers are women, but only twelve percent of architects and engineers are. U.S. DEP'T OF LABOR, U.S. BUREAU OF LABOR STATISTICS, REPORT 1000, HIGHLIGHTS OF WOMEN'S EARNINGS IN 2006, 9, 11, 12, Table 2 (Sept. 2007), <http://www.bls.gov/cps/cpswom2006.pdf>.

21. See PAULA ENGLAND, COMPARABLE WORTH: THEORIES AND EVIDENCE (1992).

22. See COUNCIL OF ECONOMIC ADVISERS, *supra* note 15.

23. DIV. OF LABOR AND INDUS., MARYLAND DEP'T OF LABOR, LICENSING & REGULATION, *Report of the Equal Pay Commission* (Sept. 28, 2006), available at <http://www.dlir.state.md.us/labor/equalpay/reportequalpay.doc>.

differences, studying the impact of those differences on individuals and on the state economy, and recommending remedial action. The Institute for Women's Policy Research (IWPR) was invited to provide data and policy analysis for the Commission on a pro bono basis.<sup>24</sup> IWPR's full report to the Commission was incorporated into the Commission's report to the state legislature in September 2006; key findings are summarized in this section. These findings are likely to be substantially similar to studies that might be undertaken in other states or in the United States as a whole—while the prominence of particular industries varies somewhat among these jurisdictions, the social and economic contexts that determine employment outcomes for different demographic groups form a relatively uniform substrate across them all.

In Maryland, men's hourly wages and total annual earnings<sup>25</sup> are higher than women's at the aggregate level, when comparing women with men among full-time, full-year workers, in the public or private sector, within specific occupations, and by racial/ethnic group or level of educational achievement.<sup>26</sup> Annual earnings of women in Maryland who work full-time for the entire year are \$40,220, while men earn an average of \$48,859 (in 2005 dollars), for a gender earnings ratio of eighty-two percent.<sup>27</sup> Women and men in this full-time, full-year worker group work the same number of weeks per year (an average of 51.9), and their average weekly work hours are similar: 42.3 for women and 44.9 for men (a difference of only 2.6 hours).<sup>28</sup>

Looking at all workers, the incidence of reduced-hours schedules is significantly higher among women than men (see Figure 1). One-third of women workers work less than full-time and full-year (thirty-five percent), but only one-fifth of men do so (twenty-two

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24. IWPR analyzed data for Maryland residents from the 2002, 2003, and 2004 American Community Survey. The study's dataset included 25,172 wage and salary workers from ages sixteen to sixty-four. Details of the analysis can be found in VICKY LOVELL & OLGA V. SOROKINA, INST. FOR WOMEN'S POLICY RESEARCH, REPORT TO THE MARYLAND EQUAL PAY COMMISSION (2006), available at [http://www.iwpr.org/pdf/MD\\_payequity\\_report.pdf](http://www.iwpr.org/pdf/MD_payequity_report.pdf).

25. *Id.* at 3, Table 1. The most commonly used indicator of women's pay relative to men's is the annual earnings ratio for full-time, full-year workers. This measure compares individuals with similar commitment to employment and excludes those on part-time or part-year schedules. Hourly wage data also help to understand where total earnings differences arise—that is, in the level of pay or in total work hours. *Id.*

26. The only exceptions are for hourly wages of: (1) African Americans (women and men have essentially the same wages, although men earn more over the course of a year) (*Id.* at 4, Table 3), (2) both hourly wages and total earnings of Hispanics (which are similar for women and men) (*Id.*) and (3) Laborers (a job category in which women's hourly wages match men's, although men's total earnings exceed women's) (*Id.* at 13, Table 10).

27. LOVELL & SOROKINA, *supra* note 24.

28. *Id.*

percent).<sup>29</sup> Many workers on part-time schedules would prefer full-time work, but cannot find it; others choose part-time work because it makes it easier to arrange care for their children or to fit in their own schooling, or because they are semi-retired.<sup>30</sup>

Figure 1. Distribution of Women and Men by Work Hours, Maryland Wage and Salary Workers, 2003

<u>Work schedule</u>	<u>Women</u>	<u>Men</u>
Full-time year-round	65%	78%
Part-time year-round	9%	3%
Full- or part-time, part-year	25%	19%
	100%	100%

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Note: Columns may not sum to totals due to rounding.

Source: Institute for Women's Policy Research analysis of the 2002, 2003, and 2004 American Community Survey (Lovell and Sorokina 2006).

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Both women and men earn more in the public sector than in the private sector in Maryland, by substantial margins. The earnings advantage in the public sector is greater for workers of color than for whites.<sup>31</sup> Among full-time full-year African-American workers, women employed by the government average forty-three percent higher earnings than those in private-sector employment; for white women, public-sector pay is thirty-four percent higher than that in the private sector.<sup>32</sup> Workers in the government sector are older and better educated than their private-sector counterparts, and the mix of industries and occupations is very different in the two areas of employment. Different hiring and wage-setting practices and the substantially higher unionization rate in the public sector likely contribute to better employment outcomes for workers of color in the

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29. *Id.*

30. VICKY LOVELL, INST. FOR WOMEN'S POLICY RESEARCH, WOMEN AND UNEMPLOYMENT INSURANCE: OUTDATED RULES DENY BENEFITS THAT WORKERS NEED AND HAVE EARNED (Jan. 2008) available at [http://www.iwpr.org/pdf/A132\\_WomenandUI.pdf](http://www.iwpr.org/pdf/A132_WomenandUI.pdf).

31. LOVELL & SOROKINA, *supra* note 24, at 5, 6 (2006).

32. *Id.*

government sector.<sup>33</sup> Women's pay is also a bit higher relative to men's in the public sector for both these groups. The gender earnings ratio is sixty-three percent for African-Americans in the private sector and sixty-nine percent in the public sector.<sup>34</sup> Among non-Hispanic whites, the gender earnings ratio is seventy-four percent in the private sector and seventy-six percent in the public sector.<sup>35</sup> Affirmative action, Executive Orders, relative ease of oversight of employment practices, and unionization have made the public sector more hospitable to women and workers of color for several decades. But the gender earnings gap in Maryland's public sector remains at about the level of the national indicator for all full-time full-year workers (seventy-seven percent).<sup>36</sup>

The gender wage ratio is much lower among workers with less educational attainment than it is among those with more years of schooling. Women without a high school degree earn just two-thirds as much as men with the same level of education.<sup>37</sup> These low-wage workers are strongly segregated by sex among different jobs, but even when employed in the same occupation, men typically out-earn women cashiers, nursing aides, pre-school teachers, and security guards.<sup>38</sup> Women with a high-school degree do better, earning seventy-nine percent as much as the average high-school-educated man; taking some college courses raises the gender earnings ratio even more, to eighty-three percent.<sup>39</sup> But women with college degrees fare less well, earning only seventy-three percent as much as similarly educated men (seventy-one percent among those with advanced college studies).<sup>40</sup> This disparity not only reflects the same occupational segregation, discrimination, and family caregiver effects that pervade the labor market, but is also an artifact of the glass ceiling and of women's continuing inability to break into the very highest paying occupations.

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33. Nationally, 35.9 percent of public-sector workers are unionized, while only 7.5 percent of private-sector workers are similarly unionized. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, UNION MEMBERS IN 2007, (Apr. 1, 2008), *available at* <http://www.bls.gov/news.release/union2.nr0.htm>).

34. LOVELL & SOROKINA, *supra* note 24, at 6.

35. *Id.*

36. LOVELL & SOROKINA, *supra* note 24, at 1.

37. *Id.*

38. Vicky Lovell, Heidi Hartmann, and Misha Werschkul, *More Than Raising the Floor: The Persistence of Gender Inequities in the Low-Wage Labor Market*, in THE SEX OF CLASS: WOMEN TRANSFORMING AMERICAN LABOR 35-57 (Dorothy Sue Cobble, Ed., Cornell University Press, 2007).

39. LOVELL & SOROKINA, *supra* note 24, at 6.

40. *Id.*

Some of the disparity between women's and men's earnings can be explained by sex-linked differences in workers' human capital—the skills and experience that make workers valuable to employers. Because cultural norms about educational attainment, employment, and family care work continue to diverge for women and men, there are many significant differences between the women and men who enter the workforce, and the jobs they end up taking. Using a statistical technique to sort out the impact of those factors on earnings, IWPR's report found that only seventy-nine percent of the difference in women's and men's earnings could be traced back to specific, measurable worker and job characteristics.<sup>41</sup> That is, one-fifth of the earnings difference (twenty-one percent) is not explainable with this dataset. This portion may reflect discrimination,<sup>42</sup> or it may be connected with differences between female and male workers that were not captured in the available data.

The “unexplained” earnings difference is not the only gap that puts women at a disadvantage in the labor market. Caring for family members such as small children, elderly parents and ill or disabled spouses can make it very hard to be successful in jobs that do not offer any flexibility about work schedules or demand excessive work hours, and women continue to carry out the lion's share of this type of work in the United States.<sup>43</sup> Girls and boys may be steered into different lines of education and career preparation, either explicitly or through the subtle messages about sex roles that permeate society. The cumulative effect of lifestyle and employment “choices” can have a huge impact on individuals' work outcomes and on aggregate differences in women's and men's experiences.<sup>44</sup> Thus, even the “explained” portion of the gender earnings difference may be created by implicit or explicit discrimination.

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41. *Id.* at 17.

42. Matched-pair research studies that send female and male applicants with identical fictive skills in response to job advertisements, and analysis of the impact of blind auditions on women musicians' success in entering orchestras, document active discrimination in hiring. David Neumark, *Sex Discrimination in Restaurant Hiring: An Audit Study*, 111(3) Q. J. Econ. 915-941 (1996); Claudia Goldin and Cecilia Rouse, *Orchestrating Impartiality: The Impact of Blind Auditions on the Sex Composition of Orchestras*, 90(4) Amer. Econ. Rev. 715-41 (2000). Successful litigation of equal pay or equal employment claims also documents discrimination. See, e.g., U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM'N., EQUAL EMPLOYMENT OPPORTUNITY DATA POSTED PURSUANT TO THE NO FEAR ACT, Dec. 31, 2009, <http://www.eeoc.gov/eeoc/statistics/nofear/upload/nofear.pdf>.

43. BUREAU OF LABOR STATISTICS, *supra* note 16.

44. Stephen J. Rose and Heidi I. Hartmann, *Still a Man's Labor Market: The Long-Term Earnings Gap* (Washington, DC: Institute for Women's Policy Research) (2004).

The Maryland Equal Pay Commission's report concluded with several recommendations for bringing women and racial and ethnic minority workers closer to parity with men and whites. If implemented, these suggestions would strengthen and clarify institutional responsibility for administering and enforcing the state's equal pay laws, provide resources to collect data and study relevant aspects of the issue, encourage the development of family-friendly policies that might help counter women's work caring for their families, and point to best practices for fair treatment of employees.

### III. FEDERAL ANTI-DISCRIMINATION LAW

The U.S. Congress established fundamental rights against sex-based pay discrimination in two statutes: the Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964. The Equal Pay Act made it illegal to pay workers less than workers of the opposite sex for jobs requiring "equal skill, effort, and responsibility, and which are performed under similar working conditions."<sup>45</sup> The employment discrimination provisions of the Civil Rights Act create a larger set of protected classes, covering not only sex but also race, ethnicity, religion, and national origin.<sup>46</sup> That Act also forbids discrimination across the entire spectrum of employment practices, from hiring to pay and terms of employment.<sup>47</sup> Both laws are enforced by the U.S. Equal Employment Opportunity Commission (EEOC).<sup>48</sup>

The U.S. Supreme Court plays a very important role in interpreting Congress' desire to eliminate discriminatory treatment of workers. Supreme Court decisions have helped to change cultural expectations about women's employment as they address real situations faced by millions of women in the workplace. In 1971, the Court validated guidelines issued by the EEOC holding that policies and practices that appear to be neutral but that disproportionately and negatively affect a class of workers protected by the Civil Rights Act do in fact violate that Act (the disparate impact doctrine).<sup>49</sup> The Court decreed in 1973 that employers could not refuse to hire qualified

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45. The Equal Pay Act, 29 U.S.C. § 206(d)(1) (1963).

46. Title VI of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000d-1 to 2000d-7. Many states have laws that enhance these rights. See, e.g., Deborah Thompson Eisenberg, *Opening the Doors to the Local Courthouse: Maryland's New Private Right of Action for Employment Discrimination*, 9 U. Md. L.J. RACE, RELIGION, GENDER & CLASS 7 (2009).

47. 42 U.S.C. § 2000e-2.

48. M. MARGARET CONWAY, DAVID W. AHERN, AND GERTRUDE A. STEUERNAGEL, *WOMEN & PUBLIC POLICY: A REVOLUTION IN PROGRESS* 62-64 (CQ Press, 2004).

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

women for physically demanding jobs that have traditionally been held exclusively by men, such as fire-fighting.<sup>50</sup> The Court has also validated the EEOC's view that sexual harassment is a form of employment discrimination, prohibiting acts that create a "hostile work environment."<sup>51</sup> But the Supreme Court has also issued rulings that have constricted workers' ability to prove an employment discrimination claim,<sup>52</sup> leaving it to Congress to emphasize its original intent via the passage of new legislation such as the Civil Rights Act of 1991.<sup>53</sup>

Neither Congress nor the Supreme Court has supported the concept of comparable worth, however. This standard—that women should not be paid less than men working in comparable jobs—was the goal of advocates for women's employment equality from the end of World War II to 1963 and was seen as the best approach for overcoming occupational segregation by sex and the devaluation of work performed primarily by women.<sup>54</sup> The criterion articulated in the Equal Pay Act severely restricts the potential benefit of anti-discrimination policy, because women and men rarely hold the same job within a single workplace, and there is usually no "equal job" held by men to compare with a woman's pay.<sup>55</sup>

#### IV. THE U.S. SUPREME COURT V. WOMEN: THE LEDBETTER DECISION

In 2007, the U.S. Supreme Court gutted Title VII's pay discrimination standard.<sup>56</sup> A superficially simple redefinition of what constitutes discrimination made it much more difficult for an aggrieved worker to substantiate a claim for wage discrimination under Title VII of the Civil Rights Act of 1964.<sup>57</sup> In response, Congress passed the Lilly Ledbetter Act in January 2009. While workers' rights were restored, the Court's decision highlights women's

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50. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

51. *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 63, 65–66 (1986).

52. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 655 (1989). *See also* CONWAY ET AL., *supra* note 48, at 70.

53. Pub. L. No. 102-166, 105 Stat. 1071.

54. KIM M. BLANKENSHIP, *Bringing Gender and Race In: U.S. Employment Discrimination Policy*, GENDER & SOCIETY 7(2), 204-226 (1993).

55. Peter Avery, *The Diluted Equal Pay Act: Was it Broken? How Can it Be Fixed?*, 56 RUTGERS L. REV. 849, 858–59 (2004).

56. Linda Greenhouse, *Justices Limit Discrimination Suits Over Pay*, N.Y. TIMES, May 29, 2007.

57. *Ledbetter v. Goodyear Tire & Rubber Co. Inc.*, 127 S.Ct. 2162, 2178–79 (2007) (Ginsburg, J., dissenting).

vulnerability to the erosion of their legal protections against discrimination.

### *A. The Ledbetter Decision*

Lilly Ledbetter was a supervisor for the Goodyear Tire & Rubber Company for twenty years, usually serving as the only woman area manager at the company.<sup>58</sup> When informed by an anonymous letter that she was being paid less than comparably situated men, she immediately filed a discrimination claim with the Equal Employment Opportunity Commission.<sup>59</sup> Presenting convincing documentation of discriminatory treatment enacted over many years, Ledbetter was awarded nearly \$4 million in back pay and punitive damages by a jury in the Northern District of Alabama.<sup>60</sup> But the 11th Circuit Court of Appeals unanimously overturned that judgment, ruling that (1) Title VII required discrimination claims to be filed within 180 days of a discriminatory act, and (2) historical discrimination reflected in a current paycheck does not constitute discrimination, unless pay in that specific check was the result of a new discriminatory action (e.g., an unfairly low raise).<sup>61</sup> In other words, an employee must file a claim within six months of an individual action disallowed by the Civil Rights Act;<sup>62</sup> she could not argue that subsequent pay was discriminatory, even if each successive paycheck was predicated on the discriminatory foundation of the initial illegal pay decision.

In other words, the Court allowed employers to escape liability for unfair disparities that accumulate incrementally and without the employee's knowledge, even if earlier overt discrimination is incorporated into subsequent pay practices for years.

Justice Ruth Bader Ginsburg entered a scathing dissenting opinion in the case, which was joined by Justices Stevens, Souter, and Breyer.<sup>63</sup> Her analysis recognizes the way wage discrimination typically unfolds in the workplace: slowly, over time, with many individual decisions accumulating eventually into substantial

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58. *Id.* at 2178 (Ginsburg, J., dissenting).

59. *Id.* at 2165. Ledbetter filed claims under both the Equal Pay Act and Title VII of the Civil Rights Act of 1964. Her Equal Pay Act claim was dismissed by the District Court. *Id.*

60. *Ledbetter v. Goodyear Tire and Rubber Co., Inc.*, 2003 WL 25507253 (N.D.Ala. Sep 24, 2003) (NO. 99-C-3137-E).

61. *Ledbetter v. Goodyear Tire and Rubber Co., Inc.*, 421 F.3d 1169, 1178, 1189-90 (11th Cir. 2005).

62. An employee must file "within 300 days if first filing with a local or state enforcement agency." *Ledbetter*, 127 S.Ct. at 2163, n.1 (Ginsburg, J., dissenting).

63. *Id.* at 2178 (Ginsburg, J., dissenting).

differences.<sup>64</sup> She noted that pay discrimination is categorically different from employment acts such as unlawful terminations that are discrete actions:

Pay disparities often occur . . . in small increments; cause to suspect that discrimination is at work develops only over time . . . Small initial discrepancies may not be seen as meet for a federal case . . . It is only when the disparity becomes apparent and sizable . . . that an employee in Ledbetter's situation is likely to comprehend her plight and, therefore, to complain. Her initial readiness to give her employer the benefit of the doubt should not preclude her from later challenging the then current and continuing payment of a wage depressed on account of her sex.<sup>65</sup>

Ginsburg cites precedent from the U.S. Supreme Court, the U.S. Courts of Appeals, and the EEOC that interprets Title VII as identifying past discrimination in each subsequent pay action.<sup>66</sup>

To the contrary, the Court held that the only pay decisions that were relevant to Ledbetter's wage discrimination charge were those made during the 180 days before she first contacted the EEOC, and that she had not proven discrimination in any pay decisions taken during that period.<sup>67</sup> From this perspective, Ledbetter would have had to somehow become aware of the discriminatory treatments each time one occurred and pursued her rights within 180 days. As Justice Ginsburg points out, "comparative pay information . . . is often hidden from the employee's view" by employers' secrecy about their wage-setting practices, so it is usually impossible to seek redress immediately.<sup>68</sup> But under the new decision, six months after behaving illegally, her employer was shielded from liability, even though each future paycheck might be based on, and reify, the original discrimination—or, to use Justice Ginsburg's term, be "infected" by the discriminatory action.<sup>69</sup>

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64. *See id.* at 2178–79.

65. *Id.*

66. *Id.* at 2178–2185.

67. *Id.* at 2174.

68. *Id.* at 2179.

69. *Id.*

### *B. The Lilly Ledbetter Act*

The Lilly Ledbetter Fair Pay Act of 2007 was introduced in the House of Representatives less than a month after the Supreme Court announced its decision in the *Ledbetter* case (June 22, 2007, and May 29, 2007, respectively).<sup>70</sup> It defined discrimination as occurring “each time wages, benefits, or other compensation is paid, resulting in whole or in part from such a [prior discriminatory] decision or other practice.”<sup>71</sup> The bill passed the House by a vote of 225 to 199 on July 31, 2007.<sup>72</sup> Then-President George W. Bush vowed to veto the bill should it appear on his desk.<sup>73</sup>

Congressional efforts to restore women’s employment rights gained strength when Barack Obama was elected president. The Lilly Ledbetter Fair Pay Act of 2009 was introduced on January 8, 2009, and became the first piece of legislation signed into law by the new president on January 29, 2009.<sup>74</sup>

Although Congress was able to respond to the Ledbetter decision fairly quickly, the Court’s ability to revolutionize the legal context for fighting employment discrimination in one fell swoop shows how vulnerable women are to the whims of Congress and the judicial system. Without substantive, lasting cultural change in attitudes toward women, women will continue to face sex-based employment discrimination but will never have a reliable system for overcoming unfair practices.

## V. CONGRESSIONAL AND STATE PROPOSALS TO STRENGTHEN ANTI-DISCRIMINATION LAW

Concerned federal and state policy makers are trying to strengthen the standards and enforcement techniques related to women’s equal employment rights. Two bills have been introduced in

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70. Ledbetter Fair Pay Act, H.R. 2831, 110th Cong. (2007); *Ledbetter v. Goodyear Tire & Rubber Co.*, 127 S. Ct. 2162 (2007).

71. H.R. 2831, § 3.

72. Final result for Roll Call 768, available at <http://clerk.house.gov/evs/2007/roll768.xml> (last visited April 9, 2008).

73. OFFICE OF MGMT & BUDGET, EXECUTIVE OFFICE OF THE PRESIDENT, STATEMENT OF ADMINISTRATION POLICY, H.R. 2831—LILLY LEDBETTER FAIR PAY ACT OF 2007 (JULY 27, 2007), available at, <http://www.whitehouse.gov/omb/legislative/sap/110-1/hr2831sap-r.pdf> (last visited April 9, 2008).

74. S. 181, 111<sup>th</sup> Cong. (2009); Pub. L. No. 111-2.

each of the last several sessions of Congress: The Paycheck Fairness Act<sup>75</sup> and the Fair Pay Act.<sup>76</sup>

### *A. The Paycheck Fairness Act*

The Paycheck Fairness Act offers a set of policy enhancements and programs to the Equal Pay Act of 1963. It allows for compensatory and punitive damages, recovery of fees and class action suits; clarifies criteria that may legally inform wage decisions; and forbids retaliation against employees who share wage information. It directs the Secretary of Labor to support training for girls and women in negotiation over compensation offers; conduct research and collect data; provide technical assistance to states, employers, labor organizations, and professional associations; convene a national summit to discuss pay equity; and create the “Secretary of Labor’s National Award for Pay Equity in the Workplace” to recognize model employers.

This comprehensive package of laws and programs aims to both provide women with stronger, more effective remedies when they suffer discrimination and transform corporate culture to institutionalize fair employment practices so that discrimination—even unconscious discrimination based on stereotypes about women’s and men’s abilities—becomes less common. The bill was introduced in both the Senate and the House of Representatives on March 6, 2007.<sup>77</sup> A hearing was held by the Subcommittee on Workforce Protections of the House Committee on Education and Labor on July 11, 2007.<sup>78</sup>

### *B. The Fair Pay Act*

The Fair Pay Act directly attacks one of the fundamental sources of women’s lower pay: Occupational segregation by sex that steers women and men into different jobs and then allows “women’s work” to be paid less.<sup>79</sup> It replaces the Equal Pay Act’s requirement of equal pay for workers in the same job with a broader standard of equal pay in equivalent jobs—“jobs that may be dissimilar, but whose

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75. The Paycheck Fairness Act, H.R. 1338, 110th Cong. (2007).

76. Fair Pay Act, H.R. 2019, 110th Cong. (2007).

77. The Paycheck Fairness Act, H.R. 1338, S. 766, 110th Cong. (2007).

78. *Hearing before the Subcomm. on Workforce Protections of the H. Comm. on Education and Labor*, 110th Cong. (2007).

79. PAULA ENGLAND, MICHELLE BUDIG, AND NANCY FOLBRE, *Wages of Virtue: The Relative Pay of Care Work*, 49 *SOCIAL PROBLEMS* 455, 467 (2002).

requirements are equivalent, when viewed as a composite of skills, effort, responsibility, and working conditions.”<sup>80</sup> It also prohibits retaliation against workers raising or exploring fair pay claims.<sup>81</sup> Like the Paycheck Fairness Act, it provides for additional recordkeeping, research, and technical assistance (from the EEOC in this instance).<sup>82</sup> If adopted, this proposal could radically restructure pay scales, neutralizing the bias that holds down pay for child-care providers, for instance, just because they are usually women and do the kind of work that women have performed for their families without pay for millennia. This bill was introduced in the Senate April 11, 2007 and in the House April 24, 2007.<sup>83</sup>

### *C. State Legislative Efforts*

A number of states have also attempted to enact wage discrimination laws that go beyond current federal standards by strengthening remedies or mandating equal pay in equivalent jobs. For example, in January 2008, a bill was introduced in the Colorado state legislature to give workers an essential tool for discovering unfair pay practices: the ability to discuss their wages without fear of retaliation.<sup>84</sup>

## VI. TAKING FAIR PAY SERIOUSLY: NON-LEGISLATIVE SOLUTIONS

A clear, comprehensive foundation of strongly enforced anti-discrimination laws is essential to the fair treatment of women in the workplace. It is not enough, however. Assigning the entire burden of policing employer behavior to individual workers is inefficient and not nearly effective enough in eradicating explicit and covert bias. Monetary remedies are too small to induce every illegally treated worker to pursue a claim or to prevent employers from continuing unfair practices. And as the *Ledbetter* decision makes all too obvious, laws can be changed or interpreted in ways that are detrimental to women.

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80. Fair Pay Act, H.R. 2019, 110th Cong. (2007). State-level comparable worth policies in the 1980s did effectively shrink the gender wage gap. Heidi I. Hartmann & Stephanie Aaronson, *Pay Equity and Women's Wage Increases: Success in the States, a Model for the Nation*, 1 DUKE J. GENDER L. & POL'Y 69 (1994).

81. Fair Pay Act, H.R. 2019, 110th Cong. § 4 (2007).

82. H.R. 2019 at § 6–7.

83. Fair Pay Act, H.R. 2019, S. 1087, 110th Cong. (2007).

84. Wage Transparency Act, SB. 08-122, 66th General Assemb. (Co. 2008).

Another important approach is to increase women's collective power to negotiate with their employers. Union membership in the United States is very low—only 13.3 percent have union representation—but a slight increase from 2006 to 2007 was fueled by women, 12.4 percent of whom are now unionized.<sup>85</sup> Strengthening the relative bargaining power of women workers creates a context for raising equal pay issues and negotiating location-specific solutions. Legislative proposals such as the Employee Free Choice Act could make it easier for workers to join together in unions and to achieve a first contract.<sup>86</sup>

Women really need significant cultural change—whether it is new norms about women to replace old ideas about what women can and want to do; an explicit commitment by all employers to consciously strive for fair employment practices; or a sea change in men's participation in the socially essential work of care-giving. In the absence of an employer-driven movement to ensure equal employment opportunities for all workers, the federal government surely has a responsibility to play an active role in providing research, outreach, technical assistance, information about model programs, and incentives. Working with unions and diverse groups of employers and workers, the Secretary of Labor could initiate such a program—a sort of “Keep America Beautiful” campaign for the workplace—to establish this as a policy goal of the highest priority and create lasting change.

Getting men to examine their personal commitment to employment equity and to sharing equally in the physical work of sustaining our families may be the biggest hurdle to pay equity for women. Surely the United States has enough creative talent to figure out how to fully support women in the part of family care that only they can do—giving birth and breastfeeding—while incorporating men much more completely into parenting, caring for the ill and disabled, and helping older citizens. In this scenario, with families making choices about education and employment that reflect the interests of their members—not just tradition and stereotyping—more households would have a man at home full-time and his partner in the workforce full-time. More husbands and wives would take turns concentrating on

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85. BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, UNION MEMBERS IN 2007 (Jan. 2008), <http://www.bls.gov/news.release/union2.t01.htm>.

86. Employee Free Choice Act, H.R. 800, S. 1041, 110th Cong. (2007). The bill was introduced in the House February 5, 2007, and passed by a vote of 241 to 185 less than a month later, on March 1, 2007. See Final Vote Results for Roll Call 118, <http://clerk.house.gov/evs/2007/roll118.xml> for House voting record.

employment. Fewer individuals would be deprived of the joys of caring for a family, or the satisfaction of building a career, because more would have a chance at both situations. Gradually, old ideas about who is better at what kind of activity would fade, as women and men would intermingle in more contexts, developing their abilities and providing role models and mentors across occupations. Not even the U.S. Supreme Court could neutralize that kind of cultural revolution.

