AUTHENTICATED
U.S. GOVERNMENT
INFORMATION
GPO

S. HRG. 110–64

CLOSING THE GAP: EQUAL PAY FOR WOMEN WORKERS

HEARING

OF THE

COMMITTEE ON HEALTH, EDUCATION, LABOR, AND PENSIONS

UNITED STATES SENATE

ONE HUNDRED TENTH CONGRESS

FIRST SESSION

ON

EXAMINING CLOSING THE GAP RELATING TO EQUAL PAY FOR WOMEN WORKERS

APRIL 12, 2007

Printed for the use of the Committee on Health, Education, Labor, and Pensions

Available via the World Wide Web: http://www.gpoaccess.gov/congress/senate

U.S. GOVERNMENT PRINTING OFFICE

34–993 PDF WASHINGTON : 2009

For sale by the Superintendent of Documents, U.S. Government Printing Office
Internet: bookstore.gpo.gov Phone: toll free (866) 512–1800; DC area (202) 512–1800
Fax: (202) 512–2250 Mail: Stop SSOP, Washington, DC 20402–0001

VerDate Nov 24 2008 13:34 Mar 18, 2009 Jkt 035165 PO 00000 Frm 00001 Fmt 5011 Sfmt 5011 S:\DOCS\34993.TXT DENISE

COMMITTEE ON HEALTH, EDUCATION, LABOR, AND PENSIONS

EDWARD M. KENNEDY, Massachusetts, *Chairman*

CHRISTOPHER J. DODD, Connecticut
TOM HARKIN, Iowa
BARBARA A. MIKULSKI, Maryland
JEFF BINGAMAN, New Mexico
PATTY MURRAY, Washington
JACK REED, Rhode Island
HILLARY RODHAM CLINTON, New York
BARACK OBAMA, Illinois
BERNARD SANDERS (I) Vermont
SHERROD BROWN, Ohio

MICHAEL B. ENZI, Wyoming,
JUDD GREGG, New Hampshire
LAMAR ALEXANDER, Tennessee
RICHARD BURR, North Carolina
JOHNNY ISAKSON, Georgia
LISA MURKOWSKI, Alaska
ORRIN G. HATCH, Utah
PAT ROBERTS, Kansas
WAYNE ALLARD, Colorado
TOM COBURN, M.D., Oklahoma

J. MICHAEL MYERS, *Staff Director and Chief Counsel*
KATHERINE BRUNETT MCGUIRE, *Minority Staff Director*

VerDate Nov 24 2008 13:34 Mar 18, 2009 Jkt 035165 PO 00000 Frm 00002 Fmt 0486 Sfmt 0486 S:\DOCS\34993.TXT DENISE

C O N T E N T S

STATEMENTS

THURSDAY, APRIL 12, 2007

	Page
Harkin, Hon. Tom, a U.S. Senator from the State of Iowa, opening statement	1
Enzi, Hon. Michael B., a U.S. Senator from the State of Wyoming, opening statement	3
Prepared statement	5
Clinton, Hon. Hillary Rodham, a U.S. Senator from the State of New York, statement	9
Reed, Hon. Jack, a U.S. Senator from the State of Rhode Island, statement	10
Murray, Hon. Patty, a U.S. Senator from the State of Washington, statement	11
Prepared statement	11
Brown, Barbara, Attorney, Paul Hastings, Washington, DC.	13
Prepared statement	15
Samuels, Jocelyn, Vice President for Education and Employment, National Women's Law Center, Washington, DC.	19
Prepared statement	21
Murphy, Evelyn, Founder and President of the WAGE Project, Incorporated, Boston, Massachusetts	28
Prepared statement	30
Cohen, Philip, Associate Professor and Director of Graduate Studies, Department of Sociology, University of North Carolina, Chapel Hill, North Carolina	36
Prepared statement	38

ADDITIONAL MATERIAL

Statements, articles, publications, letters, etc.:	
Kennedy, Hon. Edward M., a U.S. Senator from the State of Massachusetts, prepared statement	53
Brown, Hon. Sherrod, a U.S. Senator from the State of Ohio, prepared statement	54
Response to Questions of Senator Kennedy by:	
Barbara Brown	55
Jocelyn Samuels	55
Evelyn Murphy	57
Philip Cohen	57
Response to Questions of Senator Enzi by Jocelyn Samuels	57
Response to Questions of Senator Harkin by Evelyn F. Murphy	59
Response to Questions of Senator Reed by Philip Cohen	61
Response to Questions of Senator Clinton by:	
Barbara Brown	61
Evelyn Murphy and Jocelyn Samuels	62
Evelyn Murphy	63
Philip Cohen	66

VerDate Nov 24 2008 13:34 Mar 18, 2009 Jkt 035165 PO 00000 Frm 00003 Fmt 0486 Sfmt 0486 S:\DOCS\34993.TXT DENISE

CLOSING THE GAP: EQUAL PAY FOR WOMEN WORKERS

THURSDAY, APRIL 12, 2007

U.S. SENATE,
COMMITTEE ON HEALTH, EDUCATION, LABOR, AND PENSIONS,
Washington, DC.

The committee met, pursuant to notice, at 2 p.m., in Room SD–628, Dirksen Senate Office Building, Hon. Tom Harkin, presiding.

Present: Senators Harkin, Murray, Reed, Clinton, and Enzi.

OPENING STATEMENT OF SENATOR HARKIN

Senator HARKIN [presiding]. The Senate Health, Education, Labor, and Pensions Committee will come to order. At today's hearing, we'll focus on three things—the enforcement of two current laws, the Equal Pay Act of 1963, the Fair Pay Act and also the Paycheck Protection Act.

I'm proud to be a part of this important hearing on the wage gap between men and women. It's unbelievable to me that more than 40 years after the passing of the Equal Pay Act and the Civil Rights Act, women are still making only 77 cents for every dollar that a man makes. I guess we're supposed to be comforted by the fact that the wage gap is shrinking but according to the Economic Policy Institute, this isn't because women are making more, it's because men are making less.

This is an interesting chart here. What it shows is earnings of men, earnings of women. We won't get into ratio but it shows them coming together about 2024, not because women are going to make more but because both are making less and that says something about what our economy is scheduled to do in the next few years, if we keep on the same course that we're on. Not very heartening.

The Iowa Workforce Development Agency in my own State has been looking at data for all of the jobs in my State. It found that across all industries, women are only making 61.8 percent of what men make—61.8 percent. There are various reasons given why women make less than men, such as women seeking self-selecting lower paid jobs, having less education, taking time off to have babies, et cetera, et cetera. However, I believe that women are making less because we are not properly enforcing current law and because we do not value jobs we traditionally view as women's jobs as we value those we think of as men's jobs.

Why, I ask, is a housekeeper worth less than a janitor? Why is a parking meter reader worth less than an electrical meter reader? Why is a social worker worth less than a probation officer? Without

VerDate Nov 24 2008 13:34 Mar 18, 2009 Jkt 035165 PO 00000 Frm 00005 Fmt 6633 Sfmt 6633 S:\DOCS\34993.TXT DENISE

question, we need to do a better job of enforcing the law that requires equal pay for equal work and we need to stiffen the penalties for violations. That's why I support Senator Clinton's Paycheck Fairness Act, which would help give women the tools they need to identify and confront discrimination head on.

But we also need to be doing more to make sure women are not steered into lower paying job categories and that's why yesterday, I re-introduced the Fair Pay Act. My bill amends the Fair Labor Standards Act of 1938 to prohibit discrimination in the payment of wages on the basis of sex, race or national origin. Most importantly, it requires each individual employer to provide equal pay for jobs that are comparable in skill, effort, responsibility, and working conditions.

This is the tenth or eleventh year in a row I've introduced this. So we're just not going to give up.

It's strictly about equality and parity. Today, millions of female-dominated jobs, for example, as I said, social workers, teachers, child care workers, Head Start workers, nurses—are equivalent in skills, effort, responsibility and working conditions to similar jobs dominated by men but these jobs pay significantly less.

Even for highly educated women, according to the American Association of University of Women, a typical college-educated woman earns $46,000 a year while her male classmates end up making an average of $62,000 a year, a difference of $16,000 a year, which would come in pretty handy.

If you want to read about women living with this kind of wage discrimination, Evelyn Murphy has a collection of personal stories on her WAGE Project Web site. One such story really outlines the long-term problem of gender discrimination. A 53-year-old woman wrote,

> I started working at a Circuit Bell Telephone Company in 1970, right out of high school. I was making $79 a week. At the time, it wasn't bad money but the guys outside were making $150 a week and getting time and a half for working overtime.

And again, these women, we know will retire with less money eligible for their retirement, eventhough they live longer so they need more retirement money. And let's face it, a lot of times women confront separated marriages, divorces in their fifties and they've been working at a low paying job and they are left with even lower paying Social Security benefits and things like that, because of this.

Well, my bill would also prohibit companies from reducing other employees' wages to achieve pay equity and it also requires public disclosure of employer job categories and their pay scales. Moreover, it would allow payment of differential wages under a seniority system, merit system or a system that measures earnings by quantity or quality of production.

Well, some say we don't need more laws—that market forces will take care of it. But our experience shows that there are just some things that market doesn't take care of. That's why we passed the Equal Pay Act. That's why we passed the Civil Rights Act and the Family Medical Leave Act. That's why we passed the Americans with Disabilities Act. The market just doesn't answer some of those problems.

This is a vital hearing, one that will keep us focused on trying to close this gap and to make sure that women are not discriminated against in the workplace. It's unfair, it's demoralizing. Women shouldn't have to battle and battle and battle day after day just to win equal pay. So we need inclusive national laws to make equal pay for equal work a basic standard and a legal right in the American workplace.

I might just add parenthetically, in Iowa under a Republican governor and a Republican legislature, years ago, we passed a pay equity bill for those who are working in the public sector. The sky didn't fall. The earth didn't come to an end. And quite frankly, women started making more in the public sector. Minnesota has the best one, by the way. Minnesota covers municipal workers. In Iowa, we just cover the public workers but it has worked well in the State of Iowa and I think if it works there, I don't know why it couldn't work everywhere else.

So with that, I welcome our guests. I will yield to Senator Enzi for an opening statement and I'll yield to Senator Clinton for an opening statement.

OPENING STATEMENT OF SENATOR ENZI

Senator ENZI. Thank you, Mr. Chairman. I do want to thank Chairman Kennedy for scheduling today's hearing on this very important topic of wage equity. I also want to thank my colleague, Senator Harkin, for chairing today's hearing. I'm sorry that I won't be able to be here for all of it. I've looked at the testimony and I will be looking at answers to the questions that you have and I'll also be sending a few questions.

Since the passage of the Equal Pay Act and the discrimination provisions of title VII, we have witnessed enormous progress in ensuring both the quality of opportunity and equity of compensation. However, some maintain these efforts are not sufficient and must be augmented, pointing to what some could call a wage gap that continues to exist in terms of compensation levels between men and women.

Many labor specialists note that pay differentials are a function of labor market economics and they reflect the choices that individual workers and groups of workers tend to make and the underlying skill sets of the workers.

I believe the proper way to address this situation is to improve skills, training and education. That's why I continue to urge the Democratic leadership to take up and pass the Workforce Investment Act, to re-authorize the Federal Government Job Skills and Training Program. It passed the Senate twice unanimously and it's been sitting around for 4 years, waiting for a Conference Committee.

In an economy where skills are critical to success, everyone should have access to education and training throughout their lives and the Workforce Investment Act is one way for people to gain the necessary knowledge and skills they need. This bill passed the Senate last year, however the Democratic leadership has yet to even address the critical bill in the 110th Congress.

Now, we need to look no further than my home State of Wyoming to find a perfect example of what is happening and what can hap-

pen to improve the job skills and training for women. Some of you may know that our State is called the Equality State. It was the first territory and the first State to extend the right to vote to women. Wyoming was the home to our Nation's first woman judge, the first woman governor, the Nation's first woman elected to statewide office. In 1920, the town of Jackson, Wyoming elected the Nation's first all-women town government.

Now, despite Wyoming's long history of gender equality, it's pay gap is among the highest of all of the States and that's not because Wyoming employers are notoriously discriminatory or grossly undervalue their female workers. Rather, Wyoming demonstrates that market choices, education, training and opportunity all play a role in the establishment of wages and wage differentials.

Today, Wyoming is undergoing a period of unprecedented growth, particularly in such sectors of the economy as energy, natural resources and construction. We face significant labor shortages in these industries. Just last week, the press articles highlighted the fact that Wyoming's unemployment rate is 2.3 percent, which is very close to the record set in the late 1970s. In addition, there are thousands of energy-related industry jobs that are unfilled and waiting for workers of either gender.

By simple operation of the law of supply and demand, the wage rates for positions in these sectors in Wyoming's economy are at a very high absolute as well as comparative level. The other reality is that many of these jobs, from heavy equipment operators to carpenters and from welders to coal miners, are not positions to which women traditionally gravitate.

In Wyoming, market forces have greatly increased the labor rates for traditionally male jobs, which largely explains the magnitude of the wage gap in my own State. Closing the wage gap requires an increase in training and educational opportunities for women.

Now, the role of education and training is evident in the results of one such program. Climb Wyoming is a not-for-profit program funded through a mix of private and public funds. Its mission is to move low-income single mothers to higher paying careers through training and placement assistance.

The program has enjoyed considerable success with program graduates earning double and even triple their previous program income levels. In many instances, these gains have been achieved by encouraging program participants to consider non-traditional work in the energy, natural resources and construction industries and providing participants with the necessary skills, training and placement assistance to make the transition into such non-traditional work.

Over the past 2 years, Climb Wyoming has training and placed 135 single mothers in such non-traditional careers as short haul truck driving, welding and construction trades. The Casper Star Tribune, which is our statewide newspaper, just last week carried an article on the front, which is titled, "Train Moms, Earn More." It's a tremendous article. It goes on for several pages but it does point out some of the tremendous changes the program has made in women's lives. One woman, one of her difficulties is that she lives 40 miles from the job so it's an 80-mile round trip. It doesn't sound like a lot out here but nobody does that in Wyoming.

Senator HARKIN. It takes about 5 minutes driving in Washington.

Senator ENZI. Yes, much less. But she wanted to make sure that her kids got to go to the Moorcroft School District so that required her living in the adjacent town. There is the experience of Valerie Gibbons, from my home town of Gillette. It's a typical one.

In 2004, Valerie, a single mother with two children is simply unable to make ends meet in a series of low-skill, low-wage jobs. She entered the training program, was encouraged to consider a non-traditional career and given the training and counseling that eventually led her to obtaining a commercial driver's license. She now works as a short-haul truck driver for a construction company in Gillette and has more than doubled her previous program earnings in much less time.

Now, the program has provided a host of similar success stories. Heidi Shaffer, a single mother from Casper who could barely make ends meet by working 55 to 80 hours a week in a low-paying retail position. She trained for a non-traditional position and now works as a welder at more than twice her previous earnings. The success of Misty, a single mom with two children and a program graduate from Cheyenne—before entering the program, she worked in a fast food restaurant and earned $6 an hour. She enrolled in the program and studied integrated systems technology and is now working on wind energy generation and earning three times her pre-program income.

These are all real women that have, with encouragement and training and education, managed to eliminate the wage gap in their working careers. Just as we should be wary of government intervention to set wage rates that are the function of individual choice, we must be aggressive in pursing initiatives that eradicate wage disparity through training and education.

We can learn a great deal from the success of Climb Wyoming's efforts to help women climb the ladder to higher paying jobs through education and training. In addition, we must take up and pass the Workforce Investment Act reauthorization. Our Democratic leadership has failed to address the bill this Congress, even though it passed the last two Congresses unanimously. This critical bill is essential to getting the necessary Federal resources to States for jobs and skills and education training. Both Climb Wyoming and the Workforce Investment Act are real pathways to closing the wage gap.

Thank you, Mr. Chairman.

[The prepared statement of Senator Enzi follows:]

PREPARED STATEMENT OF SENATOR ENZI

Good morning. I want to thank Chairman Kennedy for scheduling today's hearing on the very important topic of wage equity. I also want to thank my colleague, Senator Harkin for his willingness to Chair the hearing today.

The notion that any individual should be denied employment opportunities, or compensated at lower levels because of their gender is simply intolerable, and is not acceptable to any fair-minded or reasonable person. Indeed, the sex discrimination provisions of

Title VII and the Equal Pay Act were specifically designed to eliminate those twin evils.

Since the passage of these laws we have witnessed enormous progress in ensuring both equality of opportunity and equity in compensation. However, some maintain that these efforts are not sufficient and must be augmented, pointing to the so-called wage gap that continues to exist in terms of compensation levels between men and women. Those who would go beyond the vigorous enforcement of gender discrimination laws and the efficient operation of open markets often make highly selective use of statistical data reported by the Department of Labor's Bureau of Labor Statistics to support their position. An op-ed in last week's Washington Post referred to such statistics as misused sound bites that tell us little about gender discrimination in the workplace since they ignore the interplay of such factors as occupation, experience, seniority, education and hours worked in making gross compensation comparisons. For example, in managerial and professional positions women are much less likely to be employed in the highest paying fields in the labor market such as engineering, and computer or mathematics-related occupations. As a group, women are also much more likely to work part-time than their male counterparts. Part-time workers account for up to 25 percent of all female wage and salary workers, while, by way of contrast just 11 percent of all male wage and salary workers were part-timers. This has been a relatively constant ratio over the years. Women workers are also far more likely than men to enter and leave the workforce for family or lifestyle reasons. Surveys also strongly suggest that women workers tend to place a much higher value than their male counterparts on job flexibility and benefits than on pure earnings and are thus more likely to gravitate to positions where market-based trade offs are often made between the former and the latter. Thus, while DOL's latest Report on Women's Earnings finds that overall median female earnings have continued their steady rise since 1979 and now stand at 81 percent of male earnings; it also notes that caution should be exercised in the use of such comparisons since they are determined "on a broad level and do not control for many factors that can be significant in explaining earnings differences."

I do not need DOL's cautionary warning about the potentially misleading nature of these kinds of comparative statistics since that is readily apparent to me as I look at similar statistics for my home State of Wyoming. Wyoming, as some of you may know is nicknamed "The Equality State." It was the first territory and the first State to extend the right to vote to women. Wyoming was home to our Nation's first woman judge, the Nation's first woman governor, and the Nation's first woman elected to statewide office. In 1920 the town of Jackson, Wyoming elected the nation's first all-woman town government. The historical roots of gender equality run strong and deep in Wyoming.

So, how can it be, that similar wage comparisons in my home State of Wyoming show that the wage gap between the earnings of men and women is greater than the national average, indeed in some recent years the greatest in all of the States? Does this suggest, as some would argue, that employers in Wyoming value

women employees less; or that Wyoming has somehow transformed itself into the "inequality state?"

That is categorically not the case. Such a view is not only contrary to my State's history, it is contrary to my everyday experience. What for me the Wyoming experience demonstrates is that there is something overly simplistic and fundamentally unsound in the type of "comparative" statistics that are so often cited. While such statistical sound bites certainly make for great political rhetoric; they rarely serve as the basis for sound public policy.

Those who have studied this issue note that there are a large number of factors, none of which involve employer discrimination, that contribute to the wage gap. Many of these factors boil down to matters of choice—choice of career, choice of academic pursuit, choice of hours and work location, as well as the choice to remain in the labor force or to leave it temporarily or permanently. On a macro-economic basis all of these choices contribute significantly to the existence of a gender-related gap.

Legislation aimed at undoing the cumulative and macro-economic effect of these individual choices, all in the name of some goal of statistical purity, is neither warranted nor wise. This is particularly true where doing so would place enormous burdens and liabilities on even our smallest employers to correct statistical "imbalances" which they did not cause, and are not the result of their discrimination. There is a fundamental difference between leveling the playing field, and guaranteeing the score of the game. And, there is a fundamental difference between correlation and causation. If we are going to make sound policy and if we are going to make a real difference we need to keep these distinctions clearly in mind.

In properly understanding the wage gap, we must understand the role of choice, but we must also understand that choice is not the only factor at play. There are other factors which affect both individual and macro-economic compensation levels, and those merit a closer look, since they are areas in which governmental action may be warranted, and useful.

I believe that the proper way to address this situation is to improve skills training and education. This is why I continue to urge the Democratic leadership to take up and pass the Workforce Investment Act to reauthorize the Federal Government's job skills and training programs. In an economy where skills are critical to success, everyone should have access to education and training throughout their lives and the Workforce Investment Act is one way for people to gain the necessary knowledge and skills they need. This bill passed the Senate last year however Democratic leadership has yet to even address this critical bill in the 110th Congress.

In this regard, I am once again drawn to the example of my own State. Wyoming, today, finds itself in a period of unprecedented growth, particularly in such sectors of the economy as energy, natural resources, and construction. We face significant labor shortages in these industries. By simple operation of the law of supply and demand, the wage rates for positions in these sectors of Wyoming's economy are at very high absolute, as well as comparative, levels. The other reality is that many of these jobs, from heavy

equipment operator to carpenter, and from welder to coal miner, are not positions to which women traditionally gravitate. The fact that in Wyoming market forces have greatly increased the labor rates for traditionally "male jobs" largely explains the magnitude of the wage gap in my own State. However, to some extent it begs the more fundamental question as to why these labor shortages are not filled in proportional numbers by both male and female job applicants. A major factor in this phenomenon is, of course, the matter of choice. However, choice alone is not the complete story. Education, training and opportunity play a vital role as well.

The role of these factors in shrinking the wage gap is evident in the results of just one training program in my home State. "Climb Wyoming" is a not-for-profit program funded through a mix of private and public funds. Its mission is to move low income single mothers to higher paying careers through training and placement assistance. The program has enjoyed considerable success with program graduates earning double and even triple their pre-program income levels. In many instances these gains have been achieved by encouraging program participants to consider "non-traditional" work in the energy, natural resources and construction industries; and providing participants with the necessary skills training and placement assistance to make the transition into such "non-traditional" work. Over the past 2 years, Climb Wyoming has trained and placed 135 single mothers in such non-traditional careers as short-haul truck driving, welding and construction trades.

The experience of Valarie Giddens, from my home town of Gillette is a typical one. In 2004, Valarie, a single mother with two children, was simply unable to make ends meet in a series of low skill, low wage jobs. She entered the training program, was encouraged to consider a non-traditional career, and given the training and counseling that eventually led to her obtaining a commercial drivers' license. She now works as a short-haul truck driver for a construction company in Gillette, and has more than doubled her pre-program earnings. Valarie's success has certainly helped to narrow the wage gap. However, the cold statistical effect is not what is most important. In a recent news interview she noted that securing a higher-paying and secure job that she was a different person. "It changed my life so dramatically. I had my self esteem back," she said. Those are the results that are important.

Valarie Giddens is not alone. The program boasts a host of similar success stories. There's Heidi Schaffer, a single mother from Casper, who could barely make ends meet by working 55–80 hours a week in a low-paying retail position. Like Valarie, she was convinced to look at non-traditional work, went through a training and apprentice program and now works as a welder at more than twice her prior earnings. There's also Misty, a single mother with two children and a program graduate from Cheyenne. Before she entered the program Misty was working in a fast food restaurant and earning about $6.00 per hour. She completed a program in integrated systems technology where she studied and trained in electrical, plumbing and HVAC work. Today she is employed at a wind energy generation farm and is earning nearly three times what she earned before entering the training program.

These are all real women that have, with encouragement, training and education, managed to eliminate the wage gap in their own working careers. Just as we should be wary of government intervention to manipulate wage rates that are the function of individual choice; we must be aggressive in pursuing initiatives that eradicate wage disparity through training and education.

We can learn a great deal from the success of Climb Wyoming's efforts to help women climb the ladder to higher paying jobs through education and training. In addition, we must take up and pass the Workforce Investment Act reauthorization. Our democratic leadership has failed to address the bill this Congress even though the bill passed the Senate last Congress. This critical bill is essential to getting the necessary Federal resources to States for job skills and education training.

Both Climb Wyoming and the Workforce Investment Act are the real pathways to closing the wage gap.

Senator HARKIN. Thank you very much, Senator Enzi.

Senator Clinton.

STATEMENT OF SENATOR CLINTON

Senator CLINTON. Thank you very much, Senator Harkin and thank you for your dedication to this issue over so many years. I do agree with Senator Enzi that I hope we can take up the Workforce Investment Act under a Democratic majority. We weren't successful the last two Congresses but now that we have a majority, I think we'll be able to pass it and I'm particularly pleased because one of the provisions that is in it goes right along with what Senator Enzi has talked about, an amendment that I suggested to do more to encourage women to seek out non-traditional employment in areas that historically were not very friendly to women.

I think that is an important piece of the puzzle but I don't think that obviates the need for us to enforce equal pay. I believe that we have a real opportunity here with the legislation that I've reintroduced, the Paycheck Fairness Act with Senator Harkin's legislation, to really highlight the impact on families from the continuing discrimination in the workplace.

You know, a 2003 Government Accountability Office report found that women's work patterns partially explained the differences between men's and women's earnings but that even accounting for all other variables that are often used to justify the pay gap, such as time out of the workforce to care for children or part-time work, women still earn significantly less than men. The report also concluded that 20 percent of the wage gap could not be explained by factors other than discrimination.

Now, conventional wisdom often associates the pay wage gap with low paying jobs but this inequity is not limited to people who are in low-paying jobs. Just recently, Wimbledon finally came around to paying the men and women champions the same amount of money and we've had a series of studies done at some of our finest universities, like MIT, finding that when you held constant for time in the workforce, task on job, commitment to a career and these are some of the brightest men and women in the world who are physicists and mathematicians and chemists and everything else, there were still discriminatory effects that to their credit,

some of the institutions have been willing to face and begin to try to address.

So the Paycheck Fairness Act does three things. First, it does create strong penalties to punish those who violate the Equal Pay Act and it makes it illegal for employers to punish women who ask around about salaries. One of the things that I've tried to do is to put on my Web site a guide to helping women negotiate because a lot of women are somewhat shy or reserved about negotiating over salaries and they feel that they're just unequipped to go in and ask for higher pay or to raise the fact that somebody they know, they're working with, doing a similar job or a comparable job or the same job, is getting paid more. And very often, employers punish employees for finding out or trying to figure out what the salaries are.

Second, the Federal Government should be a model employer in enforcing Federal employment laws and will, under the Paycheck Fairness Act, be asked to use every weapon in our arsenal to ensure that women get paid the same amount as men for doing the same job. That includes re-instating the collection of gender-based data in the current employment statistics survey, something that was discontinued under the Bush administration. So we actually have up-to-date numbers showing how this issue is impacting our female employees across the country.

Tax dollars should be used to bridge the equal pay gap, not make it wider and finally, I do want to provide ways to help women strengthen their negotiation skills, to help them stop discrimination before it starts or certainly to prevent it from continuing and as Senator Harkin showed us on that graph, we have a lot of work to do to get back an economy that produces good wages for everybody, with rising incomes.

This is a part of that puzzle because we certainly should not allow discrimination against women who are not only supporting themselves but very often, contributing to the family support or being the sole support of a family. But it is in the interests of all of us, men and women and mothers and fathers and daughters and sons to really set the goal of finally achieving equal wages for equal work.

So I want to thank Senator Harkin for his dedication to this issue and look forward to working with him to finally achieve the goal that we both share.

Senator HARKIN. Thank you very much, Senator Clinton.

Senator Reed.

STATEMENT OF SENATOR REED

Senator REED. Very briefly, Mr. Chairman. I think this is an incredibly important topic, the gap between the wages and income of women and men is something that we have to explore, especially in the context of stagnant income for working Americans, both male and female. So this is a very appropriate topic and at a very critical moment. Thank you, Mr. Chairman.

Senator HARKIN. Thanks, Senator Reed.

Senator Murray.

STATEMENT OF SENATOR MURRAY

Senator MURRAY. Thank you, Mr. Chairman. I'll submit my statement for the record because I know you want to get to your witnesses. I really appreciate you having this hearing.

This work is really important. It affects not just women but their families. It's an issue of fairness. No one should have to face discrimination in the workplace. For women, the lifetime earnings that it impacts also impacts their families. This issue is critical and I'm proud to be a cosponsor of both pieces of legislation and look forward to what our witnesses have to say. I think that for both men and women, this is important.

Women's financial contributions to their families make a difference. We know that—studies have shown that poverty rates for single mothers could be cut in half if we have fair wage laws and I hope that we can move legislation in this Congress to again focus on that.

For all of the men in my family, they know that without a women's income, their family would have had much tougher choices to make. This is about fairness and pay equity. It's about disparity, it's about our sons and our daughters and it's a critical hearing and I really appreciate it. Thank you.

[The prepared statement of Senator Murray follows:]

PREPARED STATEMENT OF SENATOR MURRAY

Thank you, Mr. Chairman, for calling this hearing to examine the persistent barriers to equal pay for women in the workforce. I want to thank our witnesses for being here today and for their contribution to our discussion.

For me, this is a question of fundamental fairness. No one should have to face pay discrimination in the workplace. It's unfair and unacceptable.

I think it's important to recognize that the wage gap doesn't just hurt women. It hurts their children and their spouses too, so everyone has a stake in ending this discrimination. In a national study, the Institute for Women's Policy Research and the AFL–CIO found that, collectively, America's working families are losing $200 billion in income each year as a result of the on-going gender wage gap. And their study accounted for differences in other factors like age, education, and hours worked.

That amounts to an average annual loss of $4,000 for each working woman's family. Imagine what parents and spouses could do with this lost income and the dramatic effect that equal pay would have on individual families.

It's not just women who would benefit from equal pay. According to the same study, equal pay would equate to a reduction in poverty rates for women and their families. Poverty rates for single mothers would be cut in half. Imagine that—we could lift half of working single mothers out of poverty by ending gender wage discrimination. The poverty rates of married working women would fall by more than 60 percent. It's clear to me and to America's working families that this issue should be important to all of us, whether we are male or female.

Throughout history, women have played a vital role in our economic prosperity although they haven't always received equal reward for their work. Since the passage of the Equal Pay Act of 1963, women have made great strides in narrowing the wage gap. In 1963, a woman working full-time, year-round, earned just 58.9 percent as much as her male counterpart. Unfortunately, that number has only increased to 77 percent as of 2005.

Clearly, barriers to equal pay still persist in today's labor market. It's time to confront these barriers and find out what we can do to make equal pay a reality for working women and their families.

I'm proud to co-sponsor the *Paycheck Fairness Act* and the *Fair Pay Act*—two important pieces of legislation that will help eliminate some of these barriers. I'm especially pleased that these bills enhance enforcement and encourage businesses to be forward-thinking in this area.

The Paycheck Fairness Act prohibits employer retaliation against employees who freely share salary information with one another. It allows women who have experienced discrimination to recover more than just back pay for lost wages. It calls for the government to enhance outreach and training efforts with employers and calls for more data about wage disparities. It also supports women as they individually confront these barriers by establishing a negotiation skills training program.

Equally important, the Fair Pay Act addresses ethnic and racial discrimination encountered by women of color. It requires businesses to provide equal pay for jobs of comparable value and allows workers discriminated against because of gender, race, or national origin to file a complaint.

Finally, these bills recognize exemplary employers who are making positive strides in equal pay by establishing a national award program.

Unfair discrimination in the workplace should not be tolerated in any form. As a mother and a grandmother, I want my children to live in a country where my daughter can earn just as much as my son. It's time to address this issue and finally close the wage gap for working women and their families.

Senator HARKIN. Thank you, Senator Murray. Before I recognize our witnesses, I just want to make it very clear for the record that it was due to the input and the demands of Senator Clinton that we're having this hearing. It was Senator Clinton who really led the charge on making sure we pulled this hearing together and that we highlighted this issue at this time.

If I'm not mistaken, I think April 24—is that not right?

Senator CLINTON. The Equal Pay Day.

Senator HARKIN. The Equal Pay Day. It takes women—how do I say it? It takes them that much longer to earn what men earn up to April 24 than what men would make for the remainder of the year. Anyway, the math alludes me. But anyway, I think we know what we're talking about.

[Laughter.]

But I want to thank Senator Clinton for her great leadership on this issue and for bringing us together today and insisting that we have this hearing.

All of your statements will be made a part of the record in their entirety. I think you were informed by our staff—I'd like to ask if you could each go for 5 minutes. We'll have a clock here. If you run a minute over or so, I'm not going to get too disturbed about that. If you run 5 minutes over, we might start getting anxious. But if you could, just give us the basic premise of your testimony and then we can open it up for discussion and questions.

What I'll do is I'll just go from one end down to the other and I'll recognize first of all, Barbara Brown and let me make sure I get my proper papers out here. An attorney with Paul Hastings in Washington, DC., Ms. Brown, welcome to the committee and please proceed as you wish for 5 minutes or so and then we'll go on.

STATEMENT OF BARBARA BROWN, ATTORNEY, PAUL HASTINGS, WASHINGTON, DC.

Ms. BROWN. Thank you, Senator and good afternoon to all of you who are here. Thank you very much for inviting me to speak. I am an employment lawyer and a Partner and Office Chair at Paul Hastings here in Washington as well as the Vice Chair of the American Bar Association Labor and Employment Law Section of 21,000 members.

I'm involved in discrimination and employment law issues all the time and I'm very opposed, vehemently opposed to pay discrimination and gender bias of all sorts. But I believe that there are already tools in place to handle it.

We have Title VII of the Civil Rights Act as amended in 1991 to provide an attack both on intentional discrimination, where it may be found with compensatory and punitive damages and with a disparate impact theory where there is a neutral practice that has a disproportionate impact on a protected class. We have the Equal Pay Act of 1963 for individuals who believe that a co-worker or perhaps a predecessor in the same job is being paid—was paid or is being paid more based on gender.

Businesses know these rules. The courts enforce these rules. I am heartened and I am frequently called upon by my clients as you all have mentioned, to review their pay practices and to be sure that they are consistent with the law both because the Office of Federal Contract Compliance Programs is working to enforce compensation nondiscrimination principles because of private litigation and because they are in a battle for the best talent and they know that they need to remain competitive in order to get it.

Second of all, compensation is very complex, much more so than most other personnel decisionmaking. We see multiple regressions in statistical studies, well accepted as the proper methodology in this area by the courts and what they show is that you can't look only at broad generalizations or broad factors.

You've got to look at particular workforces—what skills, what experiences, what willingness to travel, to relocate, to work late—make a difference among all the employees. Men, as compared to one another as well as men and women and employers need both the flexibility and the nimbleness to be able to pay what it takes to succeed in the market. It's important not to overly constrain that requirement with recordkeeping and burden.

Third of all, I think that what we're after here is equality of opportunity, not dictating results based on hypothetical or abstract notions of what ought to be paid the same. The market has been remarkably successful, whether you're talking about IT or heavy construction or financial analysts or whatever it may be, in driving talent where the opportunity and in adjusting pay appropriately and what we need to do is make sure and I believe employers are making every effort but laws are available if they're not, that women have every opportunity to get the skills they want, make the choices they want, work as hard as they want, work where and how they want.

General observations about this particular law and why I think it is unwise—very briefly, four points. First, the law has always said that employees need to be similarly situated in order to be fairly compared for purposes of pay. This law will eliminate two key concepts. One, the notion that employees must be in the same establishment to be working at equal work and that seems to me, fundamental. If you're talking—whether it's Wyoming, Iowa or New York City, you've got to look at that market, not only that geographic market but that employment market in terms of what skills are in demand there and what drives pay in that place. To take that requirement out would be wrong-headed.

Second, the defense, the broad catchall defense in the Equal Pay Act of any other factor other than sex being available to justify differences is critical. Because of the numerous factors that make a difference in pay and the very difficult if not impossible burden employers would face in contemporaneously keeping records of how one team performed against another team or how a supervisor's skills in the profession that he or she is supervising make that person a more valuable manager than someone else would be virtually impossible. So to impose all the requirements that are in this bill would essentially force employers to do nothing but cave in rather than defend perfectly legitimate distinctions.

Third of all, procedurally in two respects, the bill goes awry in my view. It imposes unlimited punitive and compensatory damages on pay differences with no requirement that there be any discriminatory intent. Title VII draws a clear requirement of willful or reckless disregard for federally protected rights. This has no such requirement. The Supreme Court has repeatedly said as recently as last term, you must—if you're going to have punitive damages, have reprehensibility and there must be proportionality to the reprehensibility of the conduct. This bill has none of that constitutional protection in it.

Last, it flips class action law under the Equal Pay Act on its head. Equal pay, by definition, is a highly individualistic inquiry into whether two particular individuals are doing the same work, equal work. Class actions are by definition, looking at common policies or practices. Title VII far more suited in those instances where there are such differences.

Last but not least, I think that the provisions that would create retaliation causes of action would just do nothing more than invite employees to have a conversation and then when they saw some sort of adverse personnel action happening, claim that they were protected. The courts are drowning in retaliation cases. They are

ruling on the legitimate ones. I don't think we ought to be adding another vague and over-broad category.

All that said, I'm as firmly committed to eradicating discrimination where it is. I think that many in the cases that I'm involved in, many of the differences that initially look suspicious or worrisome turn out to be perfectly legitimate when a close look is given. I think this bill is the wrong way to go about solving our problems, to the extent they remain. Thank you very much.

[The prepared statement of Ms. Brown follows:]

PREPARED STATEMENT OF BARBARA BERISH BROWN

I am here today to testify about S. 766, the Paycheck Fairness Act. I am a practitioner in the area of employment law, handling issues and matters across the broad span of employment discrimination and personnel practices. I have counseled and defended employers with respect to such issues for the past 27+ years. Among the issues that I have handled and considered is compensation discrimination and class actions. I am Vice-Chair of the 21,000 member Labor & Employment Law Section of the American Bar Association and a Fellow of the American College of Labor and Employment Lawyers. I am co-author of **Equal Employment Law Update (BNA 7th ed. Fall 1999) and The Legal Guide to Human Resources** (Thomson/West Supp. 2006). I speak and write frequently on employment law topics. I am chair of the Washington, DC. office of Paul, Hastings, Janofsky & Walker LLP.[1] Paul Hastings has over 1,100 attorneys internationally and over 130 attorneys in our Washington office.

I am firmly and unequivocally committed to the eradication of compensation discrimination against women. S. 766 is not the way to do it. I believe that effective legal tools are in place to accomplish that goal and that S. 766 will impose substantial, costly burdens on employers that are unnecessary, unrealistic and indefensible. The provisions of Title VII of the Civil Rights Act of 1964, as amended, and of the Equal Pay Act of 1963 cover the area of compensation discrimination. I see no reason to change the underlying substantive law concerning compensation, as S. 766 would do in various mischievous ways. Nor do I see a need to loosen the procedural rules that govern class action lawsuits concerning alleged gender bias in compensation. That also would lead to undesirable results.

All that the proposed changes will do is encourage more employment-related litigation, which is already drowning the Federal court docket, and make it much more difficult, if not impossible, for employers, particularly small businesses, to prove the legitimate non-discriminatory reasons that explain differences between the salaries of male and female employees.

If the goal of this committee is to increase the compensation of women, then the committee's focus is better spent on creating opportunities for women to choose whatever jobs they want, including those that the market rewards with high levels of pay. The amount an employee earns depends a lot on the choices that employee makes (or is able to make) about her career paths: the amount and type of education received, training undertaken, hours worked, family obligations, prior experience, personal goals, ability to relocate, frequency and duration of time out of the labor force, willingness to commute, and similar factors. All of these choices greatly influence employee compensation. Many of these factors are outside the control of employers. But many are not outside the scope of meaningful government programs that serve to promote access to jobs that pay more. That expertise is within the ambit of Congress and the Executive Branch, not the judiciary.

Education and training are of primary importance. Women need to be provided with opportunities and incentives for education and training that will lead to jobs that pay more. The market is the best way to set pay that we have. We should not manipulate the market by setting salaries for IT or mining jobs, as S. 766 seeks to do, but we should examine the market for trends on the best paying jobs and focus government education and training programs on those areas.

Several broad observations underlie my views:

1. *Current Law Is Reliable And Effectively Remedies Discriminatory Practices.*—The law on compensation discrimination under the Equal Pay Act and Title VII is fairly well settled. That reliability plays a positive role in attaining compliance with those established principles by the employer community. Employers take compensation discrimination very seriously. They are keenly aware that the failure to take

[1] The views expressed in this paper are my own.

steps to eliminate unexplained compensation differences may lead to litigation that will result in tarnished public image, loss of valuable employees, costly legal fees, and judicial intervention in their business practices, all of which subtract from the bottom line. Even without the threat of litigation, employers are witnessing major changes and shifts in our tight (and increasingly mobile) labor market. In order for businesses to survive, employers across all industries are committing vast resources to recruitment and diversity initiatives to attract, retain and train minority and female talent. Without a doubt, competitive compensation is central to achieving these labor goals. But, as explained below, the setting of compensation is complex and requires consideration of numerous factors.

2. *S. 766 Ignores The Complex Realities Of Compensation Determinations.*—My experience has taught me that compensation is a very complex area as compared to most other types of personnel decisions. Many different factors play a part in determining salary level. Investigating to find out what skills and experiences are most highly valued by a particular employer and then looking at how those factors can he isolated and quantified is not easy. For example, in a newspaper setting, the number of bylines or front page articles may well be a proxy for the most highly performing employee, and correlating such information to the pay of a group of reporters may well explain the higher salaries of some of them. Or, in a company where certain kinds of professional skills are most highly valued, managers who came from the ranks of those professionals will typically be paid more highly than other managers, who may have come to that position from administrative jobs.

Regression analysis is the tool that allows an employer to find out what explains differences in pay. This is the method of analyzing pay of a group of employees that has been approved by the courts as the best method of ascertaining whether differences are explained by job-related factors or remain unexplained, perhaps attributable to a protected characteristic. When we do such an analysis, we typically find that most, if not all, of the difference is explained by a myriad of non-discriminatory factors including:

- length of experience in the workforce altogether;
- length of service with the current employer;
- length of time in job;
- length of time in the job type (e.g. certain kinds of professional experience);
- whether there were significant breaks in service;
- prior job-related experience;
- skills; and
- education.

These factors explain the differences in pay among employees without regard to gender, and they often explain the differences in pay between men and women, on average, as well.

One thing that is very clear is that simplistic comparisons between pay for incumbents of different jobs, with different levels of seniority and different skills, without taking those factors into account, is comparing apples and oranges. To say by fiat that men and women have equal amounts of all those qualities, and therefore that their pay should be equal, is to ignore reality. Indeed, through our own personal experiences as employees in the labor market, common sense tells us that these factors cannot be separated from the way we are compensated. S. 766 brushes aside their importance eventhough they form the fundamental core to compensation determinations.

3. *S. 766 Leaves Employers Legally Defenseless, Imposes Uncertain Punitive Damages, and Creates Unmanageable Class Actions.*—An agenda of equalizing the pay of men and women, without regard for their job content, the market for their type of work and, the choices they made in the past concerning the salary they would work for, their education, and the fields they chose to work in, is something far different from working to eliminate discrimination.

With these thoughts in mind, I have grave concerns about the provisions of S. 766, the Paycheck Fairness Act. My concerns must be viewed in light of the fact that there is no requirement to find intentional discrimination before liability is imposed under the Equal Pay Act. Therefore, if the defenses to a *prima facie* case are eliminated or weakened, the act would hold the current employer liable for differences that grew up in the far distant past, perhaps because of the acts of prior employers or because of the choices made by the employee with respect to her preferred job, salary, training and education. These are circumstances outside the current employer's control, and it is illogical and unfair to impose liability on it. Some of these factors may be legitimate bases for pay differences, as different fields, with their different amounts of supply and demand, opportunities for public versus private employment, and terms and condition of work, are properly compensated differently.

Overall, the bill is aimed at destroying the requirement, which is the cornerstone of current compensation discrimination law, that two employees must be *similarly situated* but paid differently before there is liability. Under the Equal Pay Act, the men and women being compared have to be performing jobs with equal or substantially equal content in the same establishment. S. 766 removes these requirements. First, it eliminates the "establishment" requirement—that the employees being compared work in the same establishment or geographic market. Therefore, employees in different locations, with different markets and different cost-of-living, will be able to cite a comparator in another location to prove their case. An employee working for Company X in Topeka, Kansas, will be able to cite a comparator in Company X's New York City location to prove her case of compensation discrimination. On these basic facts, it is indisputable that economic and labor circumstances are vastly different in Topeka than they are in New York City and the alarm bell should signal loudly that such a comparator provides dubious probative value as to whether the employee suffers from compensation discrimination. S. 766 will drive employers to pay the same amounts across geographic markets even if the salary scale for different jobs is quite different, because a woman in the lower-paid market will otherwise have a viable case. Of course, it may be possible for the employer to make out a defense to such a charge at great expense and burden, but we have to consider the incentives that legislation of this sort creates to change compensation systems in order to avoid a deluge of litigation.

The scope of the fourth defense to a *prima facie* case, "any other factor other than sex," is dramatically reduced in S. 766. Because pay is so complex and depends so much on what an employer needs to pay at a particular point in time in order to meet business exigencies, the fourth affirmative defense has been (properly) broad and open-ended. Consider a reduction in force, where some managers are demoted to a professional job but are held at their managerial salaries for some period of time. Justifying this kind of factor would be very difficult if not impossible under S. 766, yet it makes eminent good sense and serves an equitable purpose. This kind of personnel decision would make the employer vulnerable to being ordered to raise the salaries of all the women in the professional job to the level of the former managers.

The hoops that are created for the fourth defense by S. 766 make it virtually impossible for an employer to prove the legitimacy of its compensation decisions. By requiring that the employer prove that any such factor is objective, job-related, and was "actually applied and used reasonably" in light of the justification for its use, the bill essentially eliminates the defense. The bar has been raised so high that employers will be doing nothing but keeping records and doing studies to justify each compensation decision, or they will give in and abandon perfectly legitimate pay practices. The changes in this defense will essentially eliminate the market as a defense to pay differentials unless detailed contemporaneous data is collected to show how the external market influences require a particular job or group of jobs to be paid more than other jobs, if those latter jobs are held predominantly by women.

No one who has tried to recruit information technology employees can reasonably quarrel with the fact that the market for people with their skills and experience is far different than that for financial analysts, who may have had as much education and experience as the IT folks. Yet, merely if the IT employees are more heavily male than the analysts, a presumptive violation of the law will occur. S. 766 will therefore tend to result in the same pay for employees in widely varying jobs. Many compensation systems are driven by a relationship to the market price for benchmark jobs, and depriving employers of the ability to defend the salaries of individual employees by referring to the market for that position will require wholesale revamping of those compensation systems. The market has worked very well to motivate people to acquire the skills and take the jobs for which there is a need; this bill will interfere with those incentives and produce inefficiency and waste. The net bottom line effect of the elimination of the establishment basis for comparison and the narrowing of the fourth defense is to require that the pay for more and more jobs and employees be equalized, no matter how even-handed the employer has been treating the employees.

S. 766 permits the award of unlimited compensatory and punitive damages. Moreover, it does so without articulating any heightened standard of liability for the award of punitive damages. This destroys the compromises that resulted in the Civil Rights Act of 1991 and makes no sense in light of the standards typically required to be met before punitive damages can be justified. Under title VII, there has to be a finding of malice or reckless disregard for the federally protected rights of the aggrieved individual before punitive damages can be imposed. That makes sense because these damages are intended to punish a state of mind that resulted in the

discriminatory act.[2] To permit punitive damages in the absence of any finding of intentional discrimination at all, never mind the absence of malice, would be to misuse that type of damages just to provide unlimited awards against employers. Under current law, good faith provides a defense to the imposition of liquidated damages, and that is appropriate. Moreover, unlimited compensatory damages for pay violations seems very out of place.

The class action rules under the Equal Pay Act are also changed by this legislation. At present, employees can file an "opt-out" class action under title VII. However, they will have to be able to show some intentional discrimination in order to proceed with a jury trial and seek compensatory and punitive damages. This generally requires showing some central policy or practice that affects the whole class and that is imbued with intentional bias against women. (A disparate impact challenge to a specific identified compensation policy may be permissible, but such a case would be tried to the court without the availability of compensatory or punitive damages.) The area of pay is rife with individualized decisionmaking, and it is typically not amenable to class treatment. This is particularly true when a plaintiff in an EPA case has to show that a man is doing equal work in order to recover. That is a highly individualized and fact-specific finding. It only makes sense in such a situation for individuals who truly believe that they are being illegally underpaid as compared to a male co-worker to join the suit. Making such suits opt-out cases with unlimited punitive and compensatory damages for all class members will force employers to settle rather than litigate, even when the company has meritorious defenses, because every female employee would purportedly be a member of such a class. In light of recent decisions questioning the viability of class actions seeking individualized punitive and compensatory damages in situations where there is a need to litigate each individual's situation separately, it makes no sense to write another law providing for just such unwieldy and unmanageable cases. That is not good law nor good policy.

S. 766 directs the Department of Labor to issue guidelines to enable employers to ascertain which jobs are "equivalent" for purposes of the equal pay law. This means that the Department is being asked to group jobs which are not of similar content, but which require similar education or skill, in order to require that they be paid the same. The explicit goal of this section is to require the payment of equal amounts to jobs held "predominantly by men and those held predominantly by women" despite the different job content, market, and other dimensions of those jobs. This is nothing more than the discredited "comparable worth" theory in new clothing. It authorizes grouping jobs based not on their constituting equal work or not on differences in pay being driven by a protected characteristic-like gender, but based on a study of equivalency which is driven by the goal of making all "male-dominated" and all "female-dominated" jobs pay the same. This is misguided and should not be countenanced.

The bill also instructs the Department of Labor to reject the use of multiple regression analysis and instead to utilize more simplistic comparisons to draw a conclusion that discrimination is at work. This is utterly backwards and rejects well-established precedent and basic statistical principles. The Office of Federal Contract Compliance Programs issued compensation guidelines in early 2006, and Federal contractors have been following those guidelines as they monitor their compensation. This guidance was issued only after years of consideration of the most effective and accurate way of assessing pay differences in order to determine whether women are underpaid as compared to similarly situated men. I do not agree with all of the elements of the compensation guidance, but in its adherence to multiple regression analysis as the proper way to study pay differences, as compared to merely comparing the median pay of men and women in a salary level or grade. The bill would represent a major step backwards in terms of securing widespread consensus on the best way to analyze pay and take remedial steps if warranted.

For all these reasons, I am opposed to this legislation. I believe in the eradication of discrimination. I believe that our current laws work to meet that end. Furthermore, the better course would be to encourage employers to audit their pay systems,

---

[2] In failing to provide any heightened standard of liability for the award of punitive damages, S. 766 sets itself on a collision course with Supreme Court precedent and predictably invites years of wasteful constitutional challenge. In one of the leading cases on punitive damages, Justice Stevens stated that "[p]erhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct . . . punitive damages my not be 'grossly out of proportion to the severity of the offense.'" *BMW* v. *Gore*, 517 U.S. 559, 575–76 (1996). Writing for the majority, he made clear that in the award of punitive damages "aggravating factors associated with particularly reprehensible conduct" must be present. *Id.* S. 766 is devoid of any guidance on the standard of liability for punitive damages, leaving it vulnerable to being overturned after years of litigation and uncertainty for employers.

through the use of regression analysis, to make training available so the women can enter any job and field of endeavor they wish to pursue, to root out true discrimination, and to provide them with some incentive for doing so. Enforcement dollars and effort should go into attacking discrimination and not into DOL's creation of a template for what employers should pay to their employees based on a formula intended to guarantee equal pay for male and female employees despite valid and objective differences in the markets, skills, and other factors that explain pay levels.

Senator HARKIN. Thank you very much, Ms. Brown. Now we turn to Jocelyn Samuels, Vice President for Education and Employment, National Women's Law Center, Washington, DC.

Ms. Samuels.

STATEMENT OF JOCELYN SAMUELS, VICE PRESIDENT FOR EDUCATION AND EMPLOYMENT, NATIONAL WOMEN'S LAW CENTER, WASHINGTON, DC.

Ms. SAMUELS. Thank you so much, Senator Harkin and members of the committee for chairing this hearing today and being here and for all of your leadership on this issue. I'm delighted to be here to testify in support of both the Paycheck Fairness Act and the Fair Pay Act because I think they address very important issues and real problems with the current law.

I want to make a few basic points about the operation of the law but first note that not only do I agree with the comments that each of you have made about the wage gap in some significant measure, reflects continuing discrimination against women but also note that even those factors that are sometimes cited as non-discriminatory rationales, themselves can embody barriers and discrimination that women have faced in the past.

So, for example, the length of time that a woman has worked in a particular industry may not, in fact, be a product simply of her choice but a barrier that she has faced in entering that industry. Similarly, women who take time off for childcare needs because their family decides that as the lower income earner of the family, she can more easily give up her job to the demands of childcare, are women who face barriers in the workforce that are not non-discriminatory.

To excuse the wage gap on the basis of these kinds of decision, I think, misconceives the nature of the decisions that women are sometimes forced to make in the workplace.

I'd also like to say in response to Senator Enzi that we firmly support getting women into non-traditional jobs and industries and areas from which they've traditionally been excluded but I think what is critical here is to ensure that women are paid fairly and equitably, no matter the job they do, whether they are childcare workers or house cleaners or engineers or CEOs. And contrary to Ms. Brown's impressions, I firmly disagree.

The focus of my testimony today is that far from being reliable and effective, current law is simply inadequate to address the wage disparities that women face today and I say that's so for four reasons.

First, courts have applied the law in ways that make it exceptionally difficult for plaintiffs to prove that they have been subject to wage discrimination, even in circumstances where disparities are clearly based on facts. Initially, a plaintiff has to show that she has been paid less than a specific comparator of the opposite sex

who holds a job that requires equal skill, effort, responsibility and it is performed in the same establishment. That is, to say a distinct physical place of business, separate and apart from other locations of the company that may be just a few miles down the road. Even the jobs compared need not be identical, moreover, courts have allowed purely minor differences in job functions to defeat a plaintiff's showing.

In addition, the factor other than sex defense that Ms. Brown mentioned has been construed by some courts in ways that open the door to perpetuation of the very types of sex discrimination that the Equal Pay Act was intended to prohibit.

Although the Supreme Court long ago, more than 30 years ago, rejected the argument that market forces—that is, the perception that men will only work for more or command greater bargaining power could be a defense to pay violations. Courts have authorized, excuse me, employers to pay male employees more than similarly situated female employees based simply on the higher prior salaries that those male employees have earned. As one court has said, moreover, an employer can permissibly continue to pay a transferred or a reassigned employee his or her previous higher wage, even though the current work may not justify that higher wage.

The problem with these cases is their failure to recognize that the prior salary earned by a male comparator may itself be the product of sex discrimination or may simply reflect the residual effects of the traditionally enhanced value that is attached to work performed by men.

Some courts have applied a similarly blinkered approach to evaluating the legitimacy of an employer's claim that a male is being paid more based on his prior experience or education, accepting that argument without examining whether those qualifications are, in fact, related to the job under consideration. Several courts have accepted the notion that any factor that is not explicitly based on sex is a permissible defense under the law, no matter how tenuous its relation to an employer's legitimate business purposes.

Because these basis for decisionmaking can so easily mask criteria that are, in fact, at bottom, grounded on sex, these cases undermine the spirit of the EPA and the court's failure to engage in the kind of searching analysis that I think Congress intended when it passed the EPA now more than 40 years ago, further circumvents the burden that Congress intended those employers to bear.

Second, the Equal Pay Act procedures and remedies, I think, offer insufficient protection for women who are the victims of wage discrimination. Unlike those who challenge wage discrimination based on race and ethnicity, who are already authorized to recover unlimited compensatory and punitive damages for the injuries that they have suffered, women under the EPA receive only back pay and in a limited number of cases, liquidated damages. Those recoveries tend to be insubstantial and insufficient to compensate women for the discrimination they have suffered. They are also insufficient to operate an effective deterrent for employers because the recovery simply isn't enough of a penalty to encourage them to take the kinds of steps we'd like to see to root out continuing and systemic wage discrimination.

In addition, procedures for enforcing the Equal Pay Act hamstring plaintiffs who are attempting to prove systemic wage discrimination. Unlike other civil rights claims where plaintiffs are authorized to bring class actions and have people opt out, under the Equal Pay Act, plaintiffs have the burden of searching out plaintiffs who will opt in, which is a substantial burden that decreases participation.

Third, nothing in the Equal Pay Act addresses disparities that are premised on occupational wage segregation. Many occupations today are segregated based on gender and reflect artificially suppressed wages.

Finally, there is insufficient information available to people and the government collects no such information today to enable the government or individuals to know what employers are paying to others in the workforce.

The Paycheck Fairness Act and the Fair Pay Act would address these problems in targeted and appropriate and critical ways and I think it is extremely important for Congress to act expeditiously to pass both of them. Thank you so much.

[The prepared statement of Ms. Samuels follows:]

PREPARED STATEMENT OF JOCELYN SAMUELS

Chairman Kennedy, Ranking Member Enzi and members of the committee, thank you for this opportunity to testify on behalf of the National Women's Law Center on "Closing the Gap: Equal Pay for Women Workers." More than 40 years after enactment of the Equal Pay Act of 1963, equal pay for women is not yet a reality in our country. While progress toward that goal has been made, women working full-time year-round still earn only about 77 cents for every dollar earned by men—and women of color fare significantly worse. There is not a single State in which women have gained economic equality with men, and gender-based wage gaps persist across every educational level.

The evidence shows that these gaps cannot be dismissed simply as the result of women's choices or qualifications. Indeed, substantial evidence demonstrates that discrimination and barriers that women face in the workforce must shoulder blame for the wage disparities women endure.

Because these gaps are neither fixed nor immutable, there is much that Congress can do to realize the promise of the Equal Pay Act. In particular, Congress should expeditiously enact the Paycheck Fairness Act introduced by Senator Clinton and Representative DeLauro, and the Fair Pay Act, introduced by Senator Harkin and Representative Holmes Norton. These bills strengthen current laws against wage discrimination and require the government to step up to its responsibility to prevent and address pay disparities. Enactment of these bills is critical to ensure that women have the tools necessary to achieve the pay equity that has too long been denied them.

THE WAGE GAP REFLECTS SEX DISCRIMINATION

The wage gap cannot be dismissed as the result of "women's choices" in career and family matters. In fact, recent authoritative studies show that even when all relevant career and family attributes are taken into account—attributes that themselves could reflect underlying discrimination—these factors explain at best a minor portion of the gap in men's and women's earnings.

• A 2003 study by U.S. Government Accountability Office (then the General Accounting Office) found that, even when all the key factors that influence earnings are controlled for—demographic factors such as marital status, race, number and age of children, and income, as well as work patterns such as years of work, hours worked, and job tenure—women still earned, on average, only 80 percent of what men earned in 2000.[1] That is, there remains a 20 percent pay gap between women and men that cannot be explained or justified.

• One extensive study that examined occupational segregation and the pay gap between women and men found that, after controlling for occupational segregation by industry, occupation, place of work, and the jobs held within that place of work

(as well as for education, age, and other demographic characteristics), about one-half of the wage gap is due solely to the individual's sex.[2]

Studies like these are borne out by case after case, in the courts and in the news, of suits brought by women charging their employers with wage discrimination. The evidence shows that sex discrimination in the workplace is still all too prevalent. Recent examples of pay discrimination cases include:

• In the largest employment discrimination suit ever filed, female employees have sued Wal-Mart for paying women less than men for similar work and using an old boys' network for promotions that prevented women's career advancement. One woman alleged that when she complained of the pay disparity, her manager said that women would never make as much as men because "God made Adam first." Another woman alleged that when she applied for a raise, her manager said, "Men are here to make a career, and women aren't. Retail is for housewives who just need to earn extra money."[3] The Ninth Circuit recently reaffirmed the case as a class action on behalf of more than 1.5 million women who are current and former employees of Wal-Mart.[4]

• In February 2007, a Federal judge approved a $2.6 million settlement against Woodward Governor Company for gender discrimination with respect to pay, promotions and training. The EEOC sued the global engine systems and parts company on behalf of female employees working at two of the company's plants. Pursuant to the terms of the agreement, an outside individual will oversee the company's implementation and compliance, including the development of written job descriptions for the positions at issue as well as performance appraisals and a compensation review process.[5]

• In 2004, on the eve of trial, investment house Morgan Stanley agreed to settle a sex discrimination class action filed by the Equal Employment Opportunity Commission alleging that the investment firm paid women in mid- and upper-level jobs less than men, passed women over for promotions, and committed other discriminatory acts. Although it denied the allegations, Morgan Stanley did agree to pay $54 million to the plaintiffs and to take numerous other actions to prevent discrimination in the future.[6]

• In 2004, Wachovia Corporation admitted no wrongdoing but agreed to pay $5.5 million to settle allegations by the U.S. Office of Federal Contract Compliance Programs that it engaged in compensation discrimination against more than 2,000 current and former female employees over 6 years.[7]

Clearly, sex discrimination plays a major role in producing and sustaining the wage gap for women. It is thus hardly surprising that public opinion surveys consistently show that ensuring equal pay is among women's top work-related priorities. For instance, 9 in 10 women responding to the "Ask a Working Women Survey" conducted by the AFL–CIO in 2004 rated "stronger equal pay laws" as a "very important" or "somewhat important" legislative priority for them.[8] Similarly, a January 2007 national survey of 1,000 unmarried adult women by Women's Voices Women Vote found that 73 percent of respondents said that support for pay equity legislation would make them "much more likely" to support a congressional candidate.[9]

CURRENT LAW IS INADEQUATE TO ADDRESS THE WAGE GAP

In 1963, President Kennedy signed the Equal Pay Act into law, making it illegal for employers to pay unequal wages to men and women who perform substantially equal work. At its core, the Equal Pay Act bars employers from paying wages to an employee at an establishment

> at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions . . . [10]

Under the EPA, a plaintiff must establish a *prima facie* case by showing that "(1) the employer pays different wages to employees of the opposite sex; (2) the employees perform equal work on jobs requiring equal skill, effort and responsibility; and (3) the jobs are performed under similar working conditions."[11] If the plaintiff succeeds in demonstrating each of these requirements, the defendant employer may avoid liability by proving that the wage disparity is justified by one of four affirmative defenses—that is, that it has set the challenged wages pursuant to "(1) a seniority system; (2) a merit system; (3) a system which measures earnings by quantity or quality of production; or (4) a differential based on any other factor other than sex."[12]

Congress intended the Equal Pay Act to serve sweeping remedial purposes. As the Supreme Court has recognized, the act was designed:

> to remedy what was perceived to be a serious and endemic problem of employment discrimination in private industry—the fact that the wage structure of "many segments of American industry has been based on an ancient but outmoded belief that a man, because of his role in society, should be paid more than a woman even though his duties are the same.[13]

Unfortunately, and for several reasons, the Equal Pay Act has failed to meet Congress' remedial goals. First, the substantive standards of the law—both with regard to a plaintiff's *prima facie* case and with regard to an employer's affirmative defenses—have been applied by courts in ways that make it difficult to demonstrate a violation of the law, even in cases where wage disparities are based on sex. Second, the remedies and procedures available to plaintiffs under the Equal Pay Act are insufficient to ensure the effective protection of this critical anti-discrimination law. Moreover, the law is simply inadequate to respond to wage disparities produced by the significant occupational sex segregation that still exists in numerous industries today. Finally, both because employers often fail to disclose—and because the government refuses to collect—information on pay disparities, it is exceedingly difficult for individuals or enforcement agencies to take effective enforcement action against discriminating businesses.

Plaintiffs Must Meet a High Burden to Make Out a Prima Facie Case

The plaintiff's *prima facie* burden is a demanding one. For example, plaintiffs must demonstrate that the pay disparity exists between employees of the same "establishment"—that is, "a distinct physical place of business rather than . . . an entire business or 'enterprise' which may include several separate places of business."[14] Indeed, courts "presume that multiple offices are not a 'single establishment' unless unusual circumstances are demonstrated."[15]

In addition, as one court recently noted, the plaintiff's showing under the Equal Pay Act:

> is harder to make than the *prima facie* showing [in other cases] . . . because it requires the plaintiff to identify specific employees of the opposite sex holding positions requiring equal skill, effort and responsibility under similar working positions [sic] who were more generously compensated.[16]

Although the jobs for which wages are compared need not be identical, moreover, they must be substantially equal—a comparison which typically can be satisfied only after courts have performed what one commentator has called a "very exacting inquiry."[17] Notwithstanding the remedial purposes of the law, courts have narrowly defined what they will consider to be "equal" work. In *Angelo* v. *Bacharach Instrument Company*,[18] for example, female "bench assemblers" in light assembly alleged they were paid less than their male counterparts who were classified as "heavy assemblers."[19] Both the women and men, as well as an industrial engineering expert, testified that the men's and women's jobs at the plant were substantially the same with respect to skill, effort, and responsibility.[20] Despite this testimony, the court held that the positions were "comparable," but not equal.[21] As one commentator has stated, therefore,

> "despite the admonition contained in the Federal regulations that "insubstantial differences" should not prevent a finding of equal work, the courts have not "reach[ed] beyond comparisons of virtually identical jobs, which in a workforce substantially segregated by gender, provides women with a very limited substantive right indeed."[22]

For all of these reasons, plaintiffs must meet a particularly heavy burden to proceed with an Equal Pay Act claim. But even plaintiffs who successfully make out a *prima facie* case of unequal pay for equal work face challenges from courts that have construed an employer's affirmative defenses in ways that defeat the basic purposes of the law.

Interpretation of the "Factor Other Than Sex" Defense Has Created Loopholes in the Law

The Equal Pay Act provides four affirmative defenses through which an employer may justify a wage disparity between substantially equal jobs. As a commentator has noted, the first three of these defenses—that a pay disparity is based on a seniority system, a merit system, or a system that bases wages on the quantity or quality of production—are relatively straightforward ones applied with reasonable consistency by the courts.[23] Court interpretations of the last of these affirmative defenses, however—the defense that a pay differential between equal jobs is based on

a "factor other than sex"—have in some instances opened the door to a perpetuation of the very sex discrimination the Equal Pay Act was designed to outlaw.

In 1974, the Supreme Court rejected the argument that "market forces"—that is, the value assigned by the market to men's and women's work, or the greater bargaining power that men have historically commanded—can constitute a "factor other than sex," since sex is precisely what those forces have been based upon.[24] Despite this unequivocal holding, however, courts in the Seventh Circuit recited a "market forces" defense recently as last year.[25]

At the same time, moreover, some courts have accepted as "factors other than sex" arguments that seriously undermine the principles of the Equal Pay Act. Some courts have, for example, authorized employers to pay male employees more than similarly situated female employees based on the higher prior salaries enjoyed by those male workers. In a case decided just last month, for example, one Federal district court accepted the argument that higher pay for the male comparator was necessary to "lure him away from his prior employer." According to the court, "salary matching and experience-based compensation are reasonable, gender-neutral business tactics, and therefore qualify as 'a factor other than sex.'"[26] Similarly, another district court stated that:

> [O]ffering a higher starting salary in order to induce a candidate to accept the employer's offer over competing offers has been recognized as a valid factor other than sex justifying a wage disparity.[27]

Indeed, that court has also stated that:

> "[i]t is widely recognized that an employer may continue to pay a transferred or reassigned employee his or her previous higher wage without violating the EPA, *even though the current work may not justify the higher wage*" (emphasis added).[28]

The problem with these cases is their failure to recognize that the prior salary earned by a male comparator may itself be the product of sex discrimination or may simply reflect the residual effects of the traditionally enhanced value attached to work performed by men. Some courts have applied a similarly blinkered approach to evaluating the legitimacy of an employer's claim that a man's greater experience or education justifies a higher salary. In *Boriss* v. *Addison Farmers Insurance Company*,[29] for example, the court accepted the male comparators' purportedly superior qualifications as a factor other than sex justifying their higher salaries without any examination of whether those qualifications were in fact necessary for the job. According to the court, it "need not explore this issue [of whether a college degree was a prerequisite for the position] as the Seventh Circuit has ruled that a 'factor other than sex' need not be related to the 'requirements of a particular position in question,' nor that it be a 'business-related reason.'"[30] In fact, at least two circuits have accepted the argument that "any" factor other than sex should be interpreted literally and that employers need not show that those factors are in any way related to a legitimate business purpose.[31]

Cases such as these undermine both the spirit and analytical approach of the Equal Pay Act. What was intended to be an affirmative defense for an employer—a defense that demands that the employer carry the burden of proving that its failure to pay equal wages for equal work is based on a legitimate reason—has instead been converted by these courts into a requirement merely that an employer articulate some ostensibly nondiscriminatory basis for its decisionmaking. Because these bases can so easily mask criteria that are at bottom based on sex, the courts' failure to engage in searching analysis circumvents the burden Congress intended employers to bear.

The Equal Pay Act's Procedures and Remedies Offer Insufficient Protection for Women Subjected to Wage Discrimination

Unlike those who challenge wage disparities based on race or ethnicity, who are entitled to receive full compensatory and punitive damages, successful plaintiffs who challenge sex-based wage discrimination under the Equal Pay Act may receive only back pay and, in limited cases, an equal amount as liquidated damages. Even where liquidated damages are available, moreover—in cases in which the employer acted intentionally and not in good faith—the amounts available to compensate plaintiffs tend to be insubstantial.

These limitations on remedies not only deprive women subjected to wage discrimination of full relief—they also substantially limit the deterrent effect of the Equal Pay Act. Employers can refrain from addressing, or even examining, pay disparities in their workforces without fear of substantial penalties for this failure. The class action currently pending against Wal-Mart illustrates precisely this problem. In that case, Wal-Mart refrained from any examination of the pay of its male and female

employees, even though a discrete inquiry into the pay for male and female occupants of a mid-level management job revealed disparities that the company elected not to evaluate further. While such conduct would certainly be taken into account in assessing the availability of punitive damages under statutes that permitted such relief, it is largely irrelevant in calculating remedies under the Equal Pay Act.

Procedures for enforcing the Equal Pay Act also hamstring plaintiffs attempting to prove systemic wage discrimination through the use of class actions. Class actions are important because they ensure that relief will be provided to all who are injured by the unlawful practice. But the Equal Pay Act, which was enacted prior to adoption of the current Federal rule governing class actions,[32] requires that all plaintiffs opt in to a suit. Unlike in other civil rights claims, in which class members are automatically considered part of the class until they choose to opt out, Equal Pay Act plaintiffs are subjected to a substantial burden that can dramatically reduce participation in wage discrimination cases.

Current Law Does Not Address Wage Disparities Premised on Occupational Sex Segregation

Far too many occupations in the United States remain dominated by one gender. Ninety-five percent of child care workers are female, while 95 percent of mechanical engineers are male. Similarly, while 99 percent of dental hygienists are women, 99 percent of roofers are men. In female-dominated fields, moreover, wages have traditionally been depressed and continue to reflect the artificially suppressed pay scales that were historically applied to so-called "women's work." Maids and house cleaners, for example, 87 percent of whom are female, make about $3,000 less each year than janitors and building cleaners, who are 72 percent male.[33]

Current law simply does not provide the tools to address this continuing devaluation of traditionally female fields. Courts have refused to interpret the Equal Pay Act and Title VII of the Civil Rights Act of 1964 to address this chronic problem.[34] But it is this occupational sex-segregation—and the wage disparities associated with it—that is partially responsible for the wage gap women face today.

Current Sources of Information on Wage Disparities are Inadequate to Identify, Target or Remedy Problems

Individuals are significantly handicapped in their ability to enforce their rights under the Equal Pay Act by the inaccessibility of information about the wages paid to their co-workers. Far from making such information readily available, in fact, numerous employers penalize employees who attempt to discuss their salaries or otherwise glean information about their colleagues' pay.

Relevant Federal enforcement agencies have not only failed to fill this gap, but have, in the case of the Department of Labor, affirmatively undermined the government's ability to identify and remedy systemic wage discrimination. In September of last year, the Department's Office of Federal Contract Compliance Programs (OFCCP) published a final rule that guts the Equal Opportunity Survey, a critical enforcement tool developed over the course of two decades and three administrations to better allow OFCCP to identify and investigate Federal contractors most likely to be engaging in pay discrimination.[35] Without the Equal Opportunity Survey—the only enforcement tool for the collection of wage data by sex—the Federal Government now requires no submission of pay information. This refusal to collect relevant data deprives the government of any means to systematically monitor pay disparities or efficiently enforce the anti-discrimination laws.

The Paycheck Fairness Act and Fair Pay Act Would Remedy the Deficiencies of Current Law

The Paycheck Fairness Act and the Fair Pay Act would respond, in appropriate and targeted ways, to precisely the problems discussed previously in this testimony that have undermined the effectiveness of current law. Among other provisions, the Paycheck Fairness Act would:

• *Improve Equal Pay Act Remedies.*—The act toughens the remedy provisions of the Equal Pay Act by allowing prevailing plaintiffs to recover compensatory and punitive damages. The change will put gender-based wage discrimination on an equal footing with wage discrimination based on race or ethnicity, for which full compensatory and punitive damages are already available. As a result, it will eliminate the unacceptable situation of an employer defending a denial of equal pay to a woman of color as based on her gender rather than her race.

• *Facilitate Class Action Equal Pay Act Claims.*—The act allows an Equal Pay Act lawsuit to proceed as a class action in conformity with the Federal Rules of Civil Procedure. This would conform Equal Pay Act procedures to those available for other civil rights claims.

• *Improve Collection of Pay Information by the EEOC.*—The act requires the EEOC to survey pay data already available and issue regulations within 18 months that require employers to submit any needed pay data identified by the race, sex, and national origin of employees. These data will enhance the EEOC's ability to detect violations of law and improve its enforcement of the laws against pay discrimination.

• *Prohibit Employer Retaliation.*The act prohibits employers from punishing employees for sharing salary information with their co-workers. This change will greatly enhance employees' ability to learn about wage disparities and to evaluate whether they are experiencing wage discrimination.

• *Close the "Factor Other Than Sex" Loophole in the Equal Pay Act.*—The act would tighten the "factor other than sex" affirmative defense so that it can excuse a pay differential for men and women only where the employer can show that the differential is truly caused by something other than sex and is related to job performance—such as differences in education, training, or experience.

• *Eliminate the "Establishment" Requirement.*—The act clarifies that a comparison need not be between employees in the same physical place of business.

• *Reinstate Pay Equity Programs and Enforcement at the Department of Labor.*—The act reinstates the collection of gender-based data in the Current Employment Statistics survey. It sets standards for conducting systematic wage discrimination analyses by the Office for Federal Contract Compliance Programs.[36] The act also directs implementation of the Equal Opportunity Survey.

The Fair Pay Act would extend the reach of the equal pay laws in the following ways:

• *Providing Equal Pay for Equivalent Jobs.*—The act would equalize wage disparities between jobs that are segregated on the basis of sex, race, or national origin, but require equivalent skills, effort, responsibility, and working conditions.

• *Protecting Victims of Wage Discrimination.*—Similar to the Paycheck Fairness Act, the Fair Pay Act provides punitive and compensatory damages to victims of wage discrimination. It also prohibits retaliation against individuals who exercise their rights under the law.

• *Requiring Employer Record Keeping.*—The act requires all employers to keep records of the methods they use to set employee wages. Employers must also provide yearly reports to the EEOC that describe their workforce by position and salary as well as gender, race, and ethnicity.

CONCLUSION

In less than 2 weeks, the Nation will mark Equal Pay Day—the annual shameful reminder that women must wait nearly 4 months into the year to earn as much as men earned the previous year. This wage gap is real and cannot be dismissed as the result of women's choices in career and family matters. Even when women make the same career choices as men and work the same hours, they still earn less.

The consequences of this wage discrimination are profound and far-reaching. Pay disparities cost women and their families thousands of dollars each year while they are working and thousands in retirement income when they leave the workforce. It is long-past time for Congress to act to ensure that the promise of equal pay becomes a reality.

REFERENCES

1. U.S. General Accounting Office, Women's Earnings: Work Patterns Partially Explain Difference between Men's and Women's Earnings 2, GAO–04–35 (Oct. 2003), *available at http://www.gao.gov/cgi-bin/getrpt?GAO–04–35* (last visited Feb. 26, 2007).

2. *See* Kimberly Bayard, Judith Hellerstein, et al., *New Evidence on Sex Segregation and Sex Differences in Wages from Matched Employee-Employer Data,* 21 J. Labor Economics 887, 904 (2003).

3. Bob Egelko, *Sex Discrimination Cited at Wal-Mart: Women Accuse Wal-Mart, Lawyers Seek OK for Class-Action Suit*, San Francisco Chronicle, Apr. 29, 2003, at B1, *available at sfgate.com/cgi-bin/article.cgi?file=/chronicle/archive/2003/04/29/BU303648.DTL* (last visited Feb. 26, 2007).

4. *Dukes* v. *Wal-Mart, Inc.*, 474 F.3d 1214 (9th Cir. 2007), *available at http://www.ca9.uscourts.gov/ca9/newopinions.nsf/D12BAFD84138E886882572790082A486/$file/0416688.pdf?openelement* (last visited Feb. 26, 2007).

5. The court consolidated the EEOC's case with a class action by employees alleging race discrimination against African-Americans, Hispanics, and Asians with regards to pay, promotions, and training. The terms of the settlement provide that

$2.4 million will go to plaintiffs with race-based claims. Press Release, Judge Approves $5 Million Settlement of Job Bias Lawsuits Against Woodward Governor (Feb. 20, 2007), *available at http://www.eeoc.gov/press/2–20–07.html* (last visited Mar. 27, 2007).

6. Press Release, EEOC and Morgan Stanley Announce Settlement of Sex Discrimination Lawsuit (July 12, 2004), available at *http://www.eeoc.gov/press/7–12–04.html* (last visited Feb. 25, 2007).

7. *See* Office of Federal Contract Compliance Programs, *U.S. Dep't of Labor* v. *Wachovia Corp.*, Case No. 2001–OFC–0004 (U.S. Dep't of Labor Office of Admin. Law Judges, Sept. 21, 2004), *available at http://www.oalj.dol.gov/DMSSEARCH/CASEDETAILS.CFM?CaseId=205183*) (last visited Feb. 26, 2007); *Wachovia to Pay $5.5M in Discrimination Case*, Tampa Bay Business Journal, Sept. 24, 2004, *available at http://tampabay.bizjournals.com/tampabay/stories/2004/09/20/daily37.html* (last visited Feb. 26, 2007).

8. AFL–CIO, Ask a Working Woman Survey Report, 9 (2004) *available at http://www.aflcio.org/issues/jobseconomy/women/speakout/upload/aawwreport.pdf* (last visited Feb. 23, 2007).

9. Memorandum from Greenberg Quinlan Rosner Research to Women's Voices Women Vote, 13 (Feb. 12, 2007) (on file with the National Women's Law Center).

10. 29 U.S.C. § 206(d).

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

12. 29 U.S.C. § 206(d)(1).

13. Corning Glass Works, 417 U.S. at 195.

14. *Ingram* v. *Brink's, Inc.*, 414 F.3d 222, 232 (1st Cir. 2005) (citing 29 CFR § 1620.9).

15. *Meeks* v. *Computer Ass'n Int'l*, 15 F.3d 1013, 1017 (11th Cir. 1994) (citing 29 CFR § 1620.9(a)).

16. Ingram, 414 F.3d at 232 (citations omitted).

17. Peter Avery, Note, *The Diluted Equal Pay Act: How Was It Broken? How Can It be Fixed?*, 56 RUTGERS L. REV. 849, 858 (Spring 2004).

18. 555 F.2d 1164 (3d Cir. 1977).

19. *Id.* at 1166.

20. *Id.* at 1167–1170.

21. *Id.* at 1176.

22. Elizabeth J. Wyman, *The Unenforced Promise of Equal Pay Acts: A National Problem and Possible Solution from Maine*, 55 ME. L. REV. 23, 34 (2003) (quoting Jennifer M. Quinn, *Visibility and Value: The Role of Job Evaluation in Assuring Equal Pay for Women*, 25 LAW & POL'Y INT'L BUS. 1403, 1439 (1994)).

23. Avery, *supra* note 17, at 868.

24. Corning Glass Works, 417 U.S. at 205 (noting that the company's decision to pay women less for the same work men performed "took advantage" of the market and was illegal under the EPA). *See also Siler-Khodr* v. *Univ. of Texas Health Science Ctr., San Antonio*, 261 F.3d 542, 549 (5th Cir. 2001) (noting that "This court has previously stated that the University's market forces argument is not tenable and simply perpetuates the discrimination that Congress wanted to alleviate when it enacted the EPA.") (citations omitted).

25. *Merillat* v. *Metal Spinners, Inc.*, 470 F.3d 685, 697, n6 (7th Cir. 2006) (noting that the court has "held that an employer may take into account market forces when determining the salary of an employee," although cautioning in a footnote against employers taking advantage of market forces to justify discrimination).

26. *Drury* v. *Waterfront Media, Inc.*, No. 05 Civ. 10646, 2007 WL 737486, at *9 (S.D.N.Y. Mar. 8, 2007).

27. *Glunt* v. *GES Exposition Services, Inc.*, 123 F. Supp. 2d 847, 859 (D. Md. 2000) (citing *Mazzella* v. *RCA Global Comm, Inc.*, 814 F.2d 653 (2d. Cir. 1987)); *Walter* v. *KFGO Radio*, 518 F. Supp. 1309 (D.N.D. 1981)).

28. Glunt, 123 F. Supp. 2d at 859. *But see Lenihan* v. *The Boeing Co.*, 994 F. Supp. 776, 798 (S. D. Tex. 1998) ("prior salary, standing alone, cannot justify a disparity in pay"); Equal Employment Opportunity Commission, Compliance Manual Section 10: Compensation Discrimination, at 10–IV(F)(2)(g) (2000), available at *http://www.eeoc.gov/policy/docs/compensation.html#10-IV%20COMPENSATION%20DISCRIMINATION* (last visited April 10, 2007).

29. No. 91 C 3144, 1993 WL 284331 (N.D. Ill. July 26, 1993).

30. *Id.* at *9 (quoting *Fallon* v. *State of IL*, 882 F.2d 1206, 1211 (7th Cir. 1989) (citing *Covington* v. *SIU*, 816 F.2D 317, 321–22 (7th Cir. 1987)).

31. *See Wernsing* v. *Dep't of Human Servs.*, 427 F.3d 466, 470 (7th Cir. 2005) ("The disagreement between this circuit (plus the eighth) and those that required an 'acceptable business reason' is established, and we are not even slightly tempted to change sides.").

32. FED. R. CIV. P. 23.
33. Bureau of Labor Statistics, 2006: Median Weekly Earnings of Full-Time Wage and Salary Workers by Detailed Occupation and Sex, *available at http://www.bls.gov/cps/cpsaat39.pdf* (last visited April 10, 2007).
34. *See, e.g., AFSCME* v. *Washington*, 770 F.2d 1401 (9th Cir. 1985).
35. The act refers to a regulation the Office of Federal Contract Compliance Programs (OFCCP) rescinded on September 8, 2006. *See* DOL, Affirmative Action and Nondiscrimination Obligations of Contractors and Subcontractors; Equal Opportunity Survey, 41 CFR § 60.2.
36. The Paycheck Fairness Act would overturn the DOL's 2006 decision to narrow the scope of its investigations into systematic wage discrimination. *See* DOL, Interpreting Nondiscrimination Requirements of Executive Order 11246 with Respect to Systemic Compensation Discrimination, 71 Fed. Reg. 35,124 (June 16, 2006).

Senator HARKIN. Ms. Samuels, thank you very much and now we'll turn to Evelyn Murphy, Founder and President of the WAGE Project, Incorporated, Boston, Massachusetts.

Welcome back to the committee, Ms. Murphy.

STATEMENT OF EVELYN MURPHY, FOUNDER AND PRESIDENT OF THE WAGE PROJECT, INCORPORATED, BOSTON, MASSACHUSETTS

Ms. MURPHY. Thank you, Senator Harkin and Senator Clinton. I commend both of you for wonderful leadership on this. It is a great day and a signal right now of importance that we look once again at pay equity in our laws.

I am a Ph.D. economist, switching gears from the lawyers here. Let me tell you briefly that the comments that I want to make today are basically a synthesism of years of being interested in the pay gap. When I started, it was 59 cents on the dollar and we have gone up to 77 cents on the dollar. It's not where it should be but between that and my years of public office, both appointed and elected office, as the former Lieutenant Governor of Massachusetts and Secretary of Environmental and Economic Affairs and then in the private sector. So what I want to do today is bring these things, all three parts of my experience together.

I wrote a book called, Getting Even: Why Women Don't Get Paid Like Men and What To Do About It and this is basically a case—I spent 8 years researching it and the longer I researched, the more upset I got. I believe very strongly that the 23 cents of the gender wage gap today is about discrimination in the workplace. What you will see in this book are cases—all kinds of companies, all kinds of public offices, non-profits as well who had to pay up for some kind of discriminatory behavior, either because they settled out of court cases or judges and juries ordered them so this is not he said, she said. These are charges that went far down the litigation process.

What you find here is that companies, in many ways, from hiring, barriers on hiring to slower promotions to pay equity that is equal pay for equal work, which is not honored, companies that penalize pregnant women, sexual harassment, which is wage discrimination. Women who lose money when you're harassed and can't perform your work and have to change shifts to escape a harasser and also the every day discrimination, the kind of—the biases and stereotypes that still kick in at every workplace today—all these things accumulate and they accumulate in a way that when

you say there's 23 cents of a gender wage gap, it doesn't mean anything until you personalize it.

Once you personalize it and you realize that it means that for a young woman who graduated from high school last summer loses about $700,000 over her working career compared to the young man next to her getting his high school diploma and if she graduated from college, it's a 1.2 million difference between the young man getting his degree and hers. And if she gets a law degree or a medical degree or a MBA, it's a $2 million difference over her lifetime. That's a huge amount of money.

Women don't see that because it comes in the little niches through paychecks from the very beginning. A couple thousand dollars difference when she starts out with a guy next to her with the same job qualifications, the slowness in the promotion, the missed promotion because she's pregnant and the boss thinks that she might go part-time, inappropriately thinks that. All these things add up. And they add up over a period of time, eventually to $700,000 to a $1.2 million to $2 million.

What excites me about these bills is that it brings back the attention to the workplace and it tells me that we can finally look at—we've gone as far as we can go, looking at women's characteristics. We've been at this for a while now. When I started it was 59 cents on the dollar, it was well, you need to be better educated. We've got to work longer, we've got to work harder. Well, we all know that we now support our families. We are major contributors. We've been working long and hard. We are essentially—if all those merit arguments were true, we should be at zero rather than at a 23-cent difference. So we've gone as far as we can go looking at women's characteristics and now we have to look at the workplace characteristics and that's what these bills do, is looking at the policies and the practices and the cultures of workplaces, which I find important and compelling in these bills.

So here's my plea, which is that you act on this promptly. I will give you from the WAGE Project survey that's up on our Web site right now, just some highlights. We'll give a full report on Equal Pay Day.

But Senator Clinton, when you talk about making it illegal to retaliate, when employers can't retaliate, the quotes I have from this survey right now are very powerful. These are real working women who describe instances in which they can't speak up. They know they are being paid unfairly. They have the facts behind them. This is not just hearsay. They have data and yet they're afraid—they've been told—one woman who says—one example in the testimony, a woman says, "I am supervising 47 employees and I'm earning $22,500 and the guy next to me is a supervisor of 17 employees and he's making $28,000." How does she know? Because she just calculated the promotions that everybody is going to get. So these are real facts.

Now she can't and she was told that she better not mention that, lest she be fired. Now, it may be that there are other extenuating circumstances. But if you're too afraid to raise this issue and start discussing it in the workplace, what has happened, because you're going to lose your job, it has closed women down. Women can't talk about this.

So, in this survey, what I keep finding is women saying, "Well, I need my job. My husband is sick. We need our paycheck." And retaliations are a very serious problem in the workplace today. So the extent to which this law deals with that, it is terrific.

What it also does in terms of the salaries—the Secretary's guidelines on wage structures, pay structures allows women who believe they may be paid unfairly to have some external data to look at. I would love to have all employers adopting those guidelines. I think that's the real strength and the meat and it's the strength of what Senator Harkin's bill does.

But short of that, just having those guidelines out there so women will have an external authority to back to their bosses, opens up a dialogue. Here's my hope on this. If you will pass this bill and act on it now, what it does, is it tells both employee—women, working women that we are getting serious about making sure that we set the conditions so that they have a fair chance to accomplish fair pay, equitable pay for themselves. This is not about giving them—establishing fair pay. It is setting conditions in the workplace that allow them to make their case.

Three specific points on the bill—your points about negotiation—clearly, negotiation, training for that is very important. I would hope that the bill has very sharp language that focuses on the training because it could be all over the place on financial planning, whatever, but focuses on women's paychecks and the effects on women's paychecks and in fact, has to, in the report, evaluate those training programs so that we get quickly to what works and what doesn't work in training and negotiations, which will help women's paychecks.

Second, I would hope that in the Secretary's guidelines that we could stiffen some language so that employers feel they have to adopt these guidelines and not just look at them. The more incentive they have for adopting, the better. I would hope that if we have a prestigious national award that the applicants for that award can only apply if they document that they have had absolute changes. It's not good enough just to do some appropriate things around pay equity. You have to document that you have, that there were some changes towards pay equity.

Finally, I'd say this, in terms of the pay data that is collected, please make it accessible to a larger community. This needs to be out so the debate on what is happening in the workplace is debated and seen from many professionals' eyes and those who also offer service and support for working women. Thank you.

[The prepared statement of Ms. Murphy follows:]

PREPARED STATEMENT OF EVELYN F. MURPHY

Senator Clinton, Senator Harkin, members of the committee, thank you for the opportunity to testify today on S. 766, the Paycheck Fairness Act.

By way of introduction, I am Evelyn Murphy, a Ph.D. economist, author of *Getting Even: Why Women Don't Get Paid Like Men and What To Do About It* and President of The WAGE Project, a national nonprofit organization dedicated to eliminating the gender wage gap. I am also a Resident Scholar at the Women's Studies Research Center at Brandeis University, Vice Chair of the Board of SBLI USA Mutual Life Insurance Company, a Director of Citizens Energy Corporation, a Director of The Commonwealth Institute, and a Trustee of Regis College. Earlier in my career I served as Lt. Governor of Massachusetts, Secretary of Environmental Affairs and Secretary of Economic Affairs. After public office, I became Executive Vice President

of Blue Cross and Blue Shield of Massachusetts and a corporate director of several publicly traded financial institutions.

I outline this to explain that my remarks today combine three parts of my career. First, as an economist, I have had an interest in the gender wage gap for almost four decades. Over decades, as I watched more and more women graduating from college and entering careers, I just assumed that we would catch up with men's wages in a fairly short period of time. So, I was startled in the mid-1990s when I realized that we were nowhere near parity. I have been examining the wage gap ever since. More about that in a moment. As a former public official, I know what government can and cannot do. Government cannot regulate this Nation into pay equity. We will simply never appropriate sufficient funds to supervise the pay practices of every employer. Finally, from my experience in business I know that the President, the CEOs, the boss—whatever that top person is called—has the responsibility and authority, but not yet sufficient accountability, to insure pay equity for all of his or her employees.

With these perspectives, let me turn to my analysis of today's gender wage gap by highlighting material from my book.

The essence of *Getting Even*—the product of 8 years of research in which I accumulated evidence of gender wage discrimination never before assembled—is that practically all 23 cents of the gender wage gap is caused by inequitable treatment of working women simply because we are women. That's unfair. It is also illegal: it *is* discrimination.

Inequitable treatment takes money out of a woman's paycheck, which accumulates into serious financial losses over the 35 years that she typically works. Over the course of their working lives, a young woman graduating from high school this spring will make $700,000 less than the young man standing in line alongside her receiving his high school diploma. A young woman graduating from college this spring will lose $1.2 million compared to the man getting the same degree at the same time. A woman earning an MBA, law degree or medical degree will make $2 million less.

Because we have heard the gender wage gap ratio bandied about for decades, it has lost meaning. It has become simply a number. But once a woman personalizes this ratio by calculating what she is losing over her lifetime, I can tell you that every woman I talk to daily about this subject starts listening with laser beam intensity about why she is losing so much money. Through grassroots organizing that The WAGE Project is doing to establish WAGE Clubs—groups of women who gather to discuss their pay and treatment at work—large numbers of women are figuring out their own personal wage gap and are intent on stemming their financial losses.

Women do not realize the enormous price that they pay for gender wage discrimination because they do not see big bites taken out of their paychecks at any one time. Rather, little nicks in a woman's paycheck—a promotion delayed because she is pregnant and her boss guesses (wrongly) that she intends to shift to part-time work, a sales call she misses because her boss assumes she has gone home to cook dinner for her family, a request she makes for reassignment to escape a sexual harasser, leaving the bonus she earned behind—all add up, over time, to become $700,000, $1.2 million, $2 million.

In *Getting Even* you will read about employers of all kinds—businesses, corporations, government offices, nonprofit institutions, in localities throughout America, who had to pay women employees or former employees to settle claims of gender discrimination or judges and juries ordered them to pay up. The behavior of these employers vividly illustrate the commonplace forms of today's wage discrimination: barriers to hiring and promoting qualified women; arbitrary financial penalties imposed on pregnant women; sexual harassment by bosses and co-workers; failure to pay women and men the same amount of money for doing the same jobs. You will read about everyday discrimination, that is, the biases and stereotypes which influence manager's decisions about women. Acts of everyday discrimination may seem slight to a woman at the time, aggravating but certainly not worth legal action, yet these biases, too, cut into women's paychecks over time.

While all these pay-nicking activities occur daily in workplaces—sometimes intentional, other times simply unreflected biases—in recent years, public discourse has tried to explain away the gender wage gap as mothers opting out to raise families, women choosing low-paying professions, women preferring flex-time and part-time work. I would be glad to refute each of these as causes of the gender wage gap in our discussion. These so-called "causes" simply cannot withstand close scrutiny and commonsense as causes of the wage gap. Please do not misinterpret this point. We need pay equity AND better working conditions for working mothers. These are not tradeoffs.

The gender wage gap—the fact that women earn 77 cents for every dollar that men earn—has been stuck for 14 years. Think about that. Women have been graduating from college at the same rate as men or higher for a quarter century. More and more women are the sole financial providers for themselves and their families. Women work as hard as men; women are as committed to their jobs as men. Women need their paychecks just as much as men. So if all the reasons about merit which I heard when I started work (when women earned only 59 cents for a man's dollar!) were right, the gap today should be, in essence, zero!

Since the gap has not closed even a penny in more than a decade with women essentially equal to men by traditional measures of merit, then we have to conclude that we are looking in the wrong places to explain the gender wage gap. The gap is now not about *women's* characteristics, it's about *workplace* characteristics—the policies and practices of employers and the cultures that employers sanction.

What gives me great hope today is the fact that the Paycheck Fairness Act points public attention and policy to the right place: the American workplace. This bill, with its emphasis on altering workplace pay practices, creates the appropriate conditions for American women to achieve gender pay equity once and for all. Working women are not looking to have pay equity handed to them. Women can and will take responsibility for ensuring they're paid and treated fairly. But employers must also take responsibility to ensure that their pay policies and practices are fair and equitable. S. 766 helps women and employers achieve this common goal.

So, in my time today, I would call your attention to two matters: first, the need for prompt passage of S. 766; and second, consideration of specific language in the current bill.

1. THE NEED FOR PROMPT PASSAGE OF THE PAYCHECK FAIRNESS ACT

First and foremost, I urge you to act promptly on this bill because working women need help—no special treatment, no special breaks—simply the kind of help that this bill offers them. Let me explain.

Several months ago, The WAGE Project initiated a modest survey of working women. We secured their participation through collaborations with national women's organizations, specifically, the National Committee on Pay Equity, The Business and Professional Women, The Young Women's Christian Association, the American Association of University Women, and the National Organization for Women. Using these networks almost 800 working women have filled out this survey. They work in every State in the Nation. They work in large corporations and small businesses, in manufacturing and financial service outfits, in nonprofit health care agencies and hospitals, social service organizations, colleges and universities and in municipal, State and Federal agencies. They take home small paychecks as waitresses, modest paychecks as office managers and technicians, and relatively large salaries as senior executives, professors and physicians. While this is not a randomly selected sample of working women, their voices offer a candid window into today's working conditions and their recent experiences with pay inequity.

We asked women to respond to three questions—tell us of any recent experience(s) at work when you have been paid or treated unfairly; second, on what basis—with what data and facts—do you conclude that this treatment was inequitable or unfair; and third, what, if anything, did you do about it.

The responses are now being analyzed and a full report will be released, as planned, on Equal Pay Day, April 24, 2007. However, because the survey has direct bearing on this hearing, I would like to draw upon some survey responses to illustrate what women face and how S. 766 can assist and support them.

For example, one college educated woman in her late 40's living in the South reported: "About 3 years ago I worked for a major corporation in a supervisory capacity. My staff was 47 people and my male colleague's staff was 12. His salary was $28,000, mine was $22,500." She knew this because "I helped the manager calculate the salary increases for the upcoming year. The Vice President advised me that if I told what I found out I could be fired."

The Paycheck Fairness Act would help this woman. The nonretaliation clause in section 3 would enable this woman to raise her objections to the inequity she sees without worrying that she will be fired.

She is not alone. Many women in this survey reported fears of firing or retaliation in explaining why they chose not to act even though they had solid documentation of unfair pay. One woman said: "stayed silent. Would obtain worse treatment if confronted him," said one woman. Another: "I need this job. My husband is sick and cannot work." Another explained: "I need my salary and benefits." A former Vice President in a financial services institution, with a title and job you'd think would make her secure in raising an objection to unfair pay, explained in some detail: "I

took too long to speak up. I feared being fired. When I finally did, I was given the cold treatment. It was an awful environment to work in and since I value my health, I decided to find another career."

Another survey respondent, a Vice President in a call center said "in the 23 years I have worked here, I have never been paid the same pay as the male managers" How did she know this? "I have total access to payroll records."

If her company adopted the guidelines which the Secretary of Labor develops in section 7 to enable employers to evaluate job categories based on objective criteria, this woman could use these measures to initiate an objective discussion about her pay compared with others in her job category and equivalent jobs where she works. Even if her company does not adopt these guidelines, the existence and availability of the guidelines enables women to access some objective external data to make their case about pay equity for their particular jobs with their bosses.

The survey shows that all too often, even though women can document unfair treatment, there are other reasons that they do not act. For example: they have lost hope that they can rectify their circumstances or change the culture of their workplace. One women said: "That's the way it has always been here." "Just the facts of life!" exclaimed a 50-year-old office manager in the Midwest. "They don't care about the unempowered." "I tried once, and nothing happened."

Passage of S. 766 sends these women a message: that the Federal Government recognizes that they are experiencing unfair and inequitable treatment and pay; is taking action to bring them external data on which to raise their objections with their employers; and is pressing employers to be more accountable for pay equity among their employees. In the absence of Federal legislation for decades, many women have lost hope that their employers feel any pressure to do more to comply with anti-discrimination laws.

Financially, the passage of S. 766 would give women hope that working conditions will become more equitable where they now work. They would not have to leave their jobs. Listen to this woman, a 37-year-old case worker in a nonprofit organization. "They just hired a male and asked me to train him. He is starting out making more than me. There is (sic) certain criteria you must meet for this position which he does not meet. Then they want me to train him to do the same job I am doing." In response to the question "what did you do about it?' she replied "Nothing, because I have to keep my job to feed my children. I am, however, looking for another job." Her response is indicative of many others: when women encountered blatant pay inequity, often they decide to leave. Women said: "I quit." "I gave notice and left 1 month later." "I used up my vacation time and never went back."

Don't miss the financial point: it costs women money when they have to leave a job in order to be paid and treated fairly. They may lose several months of income until they find another job. They lost whatever seniority they had built up with the last employer. They may have to take a pay cut if the pressure to bring in a paycheck forces them to settle for a lesser position.

One other reason why women do not act can be found in this woman's account: "I challenged it and all I received was a hostile work environment, harassment, suspension with trumped up charges. Found a law firm to take the case. . . . it is almost cost prohibitive to take this on. I am at $20,000 and counting and I haven't even gotten through the investigative phase . . . This is why I feel that most women do nothing. They can't get the finances to do it." I can tell you from all the women whom I've interviewed, most women who pursue litigation to the very end lose their jobs, lose their careers, lose their husbands, lose their mental health. Lose, lose, lose. The only reason they stick it out through years of litigation, they say, is because they believe they just might make their employer treat other women better. This is not the price we as a society should ask women to pay to make workplaces more equitable.

Some women did speak up, but few reported reaching an equitable resolution. "I spoke my piece about how unfair it was but nothing ever came of it." "I spoke with personnel but it was swept under the carpet." After seeing a male colleagues' pay stub left out on her desk and learning that he, with fewer credentials and less seniority, was earning 40 percent more than she was, "I approached HR and was told paychecks are private and I shouldn't have looked at it. I decided not to pursue it any further for fear of backlash."

The Secretary's guidelines for evaluating pay for job categories can help these women make their cases for pay equity and protect them from retaliation as well.

For all women whose employers adopt and enforce the Secretary's guidelines for pay equity, they will be working in a workplace where pay equity is not only the law, but is also, where the practice of the employer and the values the employer embeds in the daily culture of the workplace. Let me be very clear, every employer

should adopt the guidelines to be developed by the Secretary of Labor. That is the surest way to establish pay equity in every American workplace in the near future.

And, speaking of the future, I also urge you to promptly pass S. 766 to avoid an unintended, painful legacy. Think about the economy during the last 14 years. In the late 1990s, this Nation enjoyed unprecedented economic advances. Yet we couldn't close the gap through that time! Not even a penny much less all 23 cents. The fact that the gender wage gap has been stuck for 14 years tells us that there is nothing inevitable about the wage gap going away on its own *if we continue to rely only on current laws and their implementation.* We will pass on to the next generation, and the next after that—to your daughters, Senators, and your granddaughters, nieces, aunts, and all the younger women in your families whom you love and respect—the same financial losses working women face today. Personalize that loss for your daughter or granddaughter or niece. Is that a legacy you want to pass on? Of course not. None of us wants to. But that will happen if no action is taken to address today's discriminatory treatment of women at work.

2. SPECIFIC LANGUAGE IN THE CURRENT BILL.

Now I would like to draw your attention to language in several sections of the current draft.

2a. Section 3. Enhanced Enforcement of Equal Pay Requirements. (d) Nonretaliation Provision

I have already illustrated how important this provision is to help working women act on their own behalf without fear of retaliation. Some employers may resist open discussion among employees about their salaries and pay scales as this woman confirms: "my employer intimidates us. We don't dare talk about what we earn while we're working." But those employers who do treat and pay women equitably have nothing to hide. Open discussions among employees and their employer about pay and pay scales can enable *all* employees to feel fairly and adequately compensated. As I have listened to working women, they are thoughtful and fair minded about pay. More transparency about pay and pay scales in America's workplaces would be beneficial for employers and employees alike. S. 766 promises to open up workplaces to healthy discussions about who gets paid what and why. I urge the committee to insist on this language in the final bill.

2b. Section 5. Negotiation Skills Training for Girls and Women

Here are my concerns. I leave to staff to wordsmith this section. First, I would urge language which clarifies that the intent is to focus on negotiation skills directly related to salary and total compensation matters, including not only skills in bargaining and communicating, but also, benchmarking techniques. It would be easy for rules and regulations to interpret the current language of this section to permit a broader set of negotiating skills in financial planning, flex time and other workplace conditions. These are important matters. But the key here is to maintain the priority and focus on negotiations skills training which bear directly on a woman's earnings. That is a hard task to accomplish through negotiation training and would be easy to avoid unless specifically given priority. Clarifying language to amend this section might not necessarily exclude these other topics involving a woman's finances, just establish that priority is given to funding training which bears directly on women's paychecks.

Secondly, in (a) (5) *Use of Funds.* In the second sentence, I would suggest substituting the words "equitable salaries and fair, equitable compensation packages for themselves" for the current language "higher salaries and the best compensation packages possible for themselves." The purpose of this bill is to establish pay equity. Training which focuses on women getting paid what they should, what is fair compared with others where they work given their job, experience, responsibility, etc. fits with the purpose of the bill. The current language suggests women training women to get promotions (higher salaries) and the most money (compensation package) they can. I have no doubt that once women get trained to negotiate for fair pay they will have the necessary skills for gaining more pay. But the intent of this bill as I understand it, is for women to achieve pay equity first. That, in itself, will be a significant outcome.

Finally, (c) *Report.* I hope the report includes not only "describing activities conducted under this section" but also "and an evaluation of the effectiveness of these activities in enhancing equity in women's paychecks." In these times of limited funds for domestic initiatives, some assessment of which training programs actually advance women's earnings and which do not is essential. I hope the committee will require an evaluation of training programs.

2c. Section 7. Technical Assistance and Employer Recognition Program (a) Guidelines

The time available to prepare for this hearing did not allow me to reflect on this section in detail. So, I cannot offer suggested changes in language. But I do want to express my hopes for revised language in this section. Voluntary guidelines are just that: voluntary. However, the adoption of such guidelines by every employer would dramatically advance pay equity. I ask the committee to strengthen this section so that employers are incentivized to adopt these guidelines and/or conversely, face disincentives for not adopting these guidelines over some period of time.

(b) (2) Please insert "or layoffs of employees" after men in the clause (. . . lowering wages paid to men). Women need men as allies in achieving fair and equitable treatment where they work. This clause is intended to make clear that neither layoffs nor lowered wages are an acceptable means for employers to achieve pay equity. The experience of the State of Minnesota is illuminating on this point. Minnesota achieved pay equity (97 cents on the dollar) without one man losing a job or losing money in his paycheck. Pay equity can be achieved not at men's expense.

2d. Section 8. Establishment of the National Award for Pay Equity in the Workplace. (b)(1)

I would urge the committee to add language which requires applicants for this prestigious award to disclose the relevant salaries by gender and by job category which were made more equitable. The language now makes it possible for an employer to describe worthy efforts but not report what actual effects their pay equity initiative had. Without measurable and measured advances, I would argue, no applicant should be eligible to receive this award.

2e. Section 9. Collection of Pay Information by the Equal Opportunity Employment Commission

This section of the bill is extremely important. It has the potential to provide breakthroughs in the Nation's understanding of pay inequities in today's workplaces and in the Nation's capability to eliminate the discrimination which underlies pay inequity.

I hope the committee will specify access and availability of the pay information gathered under this section to researchers, public policy analysts, and social service organizations. These professionals need this data to advance our understanding of workplace discrimination and what to do about it. While the Secretary of Labor may perform studies and inform the public under section 6, insuring access to a larger audience would stimulate the cross checks and debates of data which only develop when many and varied professionals look at the same data. The standard here ought to be the accessibility that professionals now have to data gathered by the Census Bureau and the Bureau of Labor Statistics.

The designation of the EEOC as lead agency for surveying available data and determining data needed to enhance their enforcement activities is appropriate. Anticipating that some adaptation of the EEO–1 form to capture pay information appears the most likely means to collect pay information, I call to your attention how limited the availability of EEO–1 data has been to this larger community of interests. Until 2000, EEO–1 data was unavailable to almost everyone and even now, only a handful of academics have access. I respect the need for confidentiality concerning company specific data, but believe that, *with adequate resources,* the EEOC could devise ways to enable more researchers and practitioners to access EEO–1 data. The difficulty in gaining EEO–1 data has seriously limited public debate, policy formulation, and even enforcement remedies. I have tremendous sympathy for extensive enforcement mandate the EEOC implements and I do not intend this as criticizism of the agency. Rather I want to ensure that, if the EEOC, becomes the collector of pay information, that the agency has the mandate and resources to make this data available to a large community of analysts and practitioners.

IN SUMMARY

Forty years ago, Title VII of the Civil Rights Act and the Equal Pay Act made gender discrimination illegal in America's workplaces and embraced the principle that women should be paid like men when they do the same work. More recently, in the 14 years since the last Congressional hearings on pay equity, one fact stands out: our Nation's progress toward reaching these goals has stalled. Prompt passage of The Paycheck Fairness Act can and will reactivate momentum.

Paycheck Fairness Act sends a strong message to working women that this Nation intends to eliminate paycheck discrimination in the foreseeable future. At the same time, the Paycheck Fairness Act sends just as strong a message to employers that they can and should *pay for the job, not who does the job.* If employers do that—

pay for the job, not who does the job—we will eliminate pay discrimination not just for women, but for minorities, older workers, and handicapped workers. That is the power of concepts in this bill.

I commend you on your leadership on this bill and offer to help in whatever you wish.

Thank you.

Senator HARKIN. Thank you, Ms. Murphy. And now we turn to our final witness and that would be Dr. Philip Cohen, Associate Professor and Director of Graduate Studies Department of Sociology at the University of North Carolina, Chapel Hill.

Welcome, Dr. Cohen.

STATEMENT OF PHILIP COHEN, ASSOCIATE PROFESSOR AND DIRECTOR OF GRADUATE STUDIES DEPARTMENT OF SOCIOLOGY AT THE UNIVERSITY OF NORTH CAROLINA, CHAPEL HILL, NORTH CAROLINA

Mr. COHEN. Thank you. I'd like to thank Chairman Kennedy, Senator Harkin, and Clinton for holding the hearing and inviting me here, giving me the opportunity to speak to you today, the other members as well.

I'm going to step back for just a moment and put some of this discussion of pay equity in the broader context of gender equality trends in the country to establish where we are at the moment that we look at these bills.

There are a number of indicators that show dramatic improvements since the Equal Pay Act that was passed in the sixties but on closer scrutiny, those improvements are concentrated in the seventies and eighties and I'll give several examples. Starting with the gender pay gap itself, which was stalled from 1960 to 1980 at 60 cents on the dollar. In the eighties, there was a sharp increase. It went up to 72 cents and since then, we've picked up another few points but progress has largely stalled on the gender pay gap.

On women's employment rates, there were dramatic improvements again up until the mid-1990s, especially married mothers' employment. Their employment rates doubled in the 20-year period up to that point. But now they've leveled off and women's employment rates have actually declined absolutely for the first time during the recent recession and so-called jobless recovery. So their progress has also stalled.

And on gender segregation, the tendency of men and women to work in different jobs, again we had steady progress until about 1990 and then by most measures, it is now a much slower or even stalled—actually apropos of Senator Enzi's comment about blue collar work integration—occupational integration among blue collars has been much slower and more for professional and women with advanced education where integration has gone faster.

What were the sources of these positive developments when they were moving quickly? It's worthwhile to look at some of them because some of them, the conditions have changed. Some were not directly related to women's wages. For example, the birth control pill gave women a lot more options for planning their lives and their futures and increasing the incentives for them to make long-term investments in their careers. Overall economic shifts in the growth of the service economy, which drew women in because they were the occupations that traditionally hired women. They were

growing so rapidly. Feminism itself, which gave the popular expression, to the opportunity for equality for women. The declines in fertility, the possibility, the social acceptability of delayed marriage, all these things increased women's own investments in their careers.

But the government also intervened in important ways during this era. Not only the Equal Pay Act and Civil Rights Act but subsequent Federal equal employment opportunity and affirmative action enforcement, Roe versus Wade—these changed the ground on which gender played out in this country.

I just mentioned those to say that the economic, social and political engines of gender equality in this country seem to have lost steam in the last 10 years and I think that's an important context for today's hearing.

The benefits of equal pay for women are far reaching and some have already been touched on here today. I want to highlight lower pay for women means higher poverty rates for single mothers, in particular. We have 3.5 million poor, single-mother families in this country and they're twice as likely to be poor as single father families, even when they are both employed full-time and year round. The poverty rate is lower for those men and women but twice as high still for single mothers in that condition.

Lower pay means lower pensions for women when they retire. Obviously this is an issue of growing importance, the public burden of retirement support as the population ages and lower pay also increases stress on families, we now know, in a number of ways. Poor couples are less likely to get married when women have lower wages. Couples are more likely to divorce when women have lower wages and fathers are more likely to be involved in parenting and housework when women earn more within the couple.

Government intervention in this regard has been helpful before in important ways. In the seventies and eighties, EEO enforcement and affirmative action did change employer practices in some ways that we can now document and show that they had beneficial effects. More accountability and formalization in hiring and promotion practices, the reliance on human resource professionals, for example—these practices spread through industries and had a ripple effect beyond the targeted organizations.

I'm just going to touch briefly on one aspect of the two bills here. The expansion of the narrow definition applied under the Equal Work Standard of the Equal Pay Act. Men and women in this country largely do work in different jobs and that is an important part of the gender wage gap as Senator Harkin mentioned at the beginning. I can add an example to what you had. Nurse aids and truck drivers both do jobs that require medium amounts of strength. Both require the same amount of on-the-job training. Nurse aids have a higher average education. They are both the same average age and yet nurses' aids earn 57 percent of what truck drivers earn and that's 3.5 million workers in this country.

Because of this, if we only eliminate the wage gap within identical jobs at the same job location, we're just not going to close the gender gap in pay. And I see my time is expiring, so I'll wrap up on this point.

I did a very simple analysis that you have in my details in the testimony of 500 occupations in the Census Bureau and if we equalize the pay within each occupation, the gender gap would be reduced by about half. But we can't do that because under current law, even when those occupations—even within those detailed occupations, for example, bus driver, there are finely graded occupational job title classifications, which prohibit or prevent action for disparate pay between men and women.

We have to be able to challenge those small differences in job classification and title that are sometimes used to justify large gender disparities in pay and I think the reforms proposed in both of these bills might help address that shortcoming and help close the gender gap.

Thanks again for the opportunity to speak with you today.

[The prepared statement of Dr. Cohen follows:]

PREPARED STATEMENT OF PHILIP N. COHEN [1]

1. CONTEXT: TRENDS TOWARD GENDER EQUALITY STALLED BY 2000

Today's discussion of gender pay equity comes at an opportune time in the history of gender inequality in this country. The 1970s and 1980s witnessed dramatic improvement in many intersecting arenas:

• *Women's employment soared.*—This was concentrated among married mothers with children under six. For this group, annual hours worked increased from under 600 in 1978 to almost 1,100 by 1998. The percentage working full-time, year round more than doubled during that time, reaching 35 percent by 1998.[2]

• *The gender pay gap narrowed.*—From 1960 to 1981, women working full-time, year-round consistently had median earnings stuck at about 60 percent of men's. The 1980s were the most dramatic period of improvement, and the gap closed to 72 percent by 1990.

• *Occupational segregation by gender decreased.*—The level of segregation (which ranges from 1 to 100) dropped from 54.4 in 1970 to 46.3 in 1990. This occurred as women entered historically male-dominated occupations (such as medicine and law), and integrated occupations (such as those in real estate and educational administration) expanded, increasing opportunities for women's advancement.[3] One aspect of this desegregation involved access to management positions and the "glass ceiling." From the late 1970s to the late 1990s, women's representation in management occupations increased from about one-quarter to almost one-half (although they remained concentrated in the lower reaches of managerial hierarchies).[4]

• *Wives and husbands shared housework more equally.*—The most rapid change occurred between 1975 and 1985, when the ratio of married mothers' to married fathers' housework time dropped from 4.5 to 2.1—meaning married mothers did just over twice as much housework as their husbands.[5]

• *Public attitudes toward equality for women warmed.*—From the late 1970s to the mid-1990s, there was a steep increase in the percentage of Americans expressing support for female politicians and for mothers working outside the home; and

[1] I would like to express my gratitude for intellectual contributions by my advisors and mentors, Reeve Vanneman and Suzanne Bianchi; my colleague Matt Huffman, with whom I have conducted much of my research on gender inequality; graduate students with whom I have worked on these issues, including Jeanne Batalova, Makiko Fuwa, Jamie Lewis, Danielle MacCartney, and Miruna Petrescu-Prahova; and colleagues with whom I consult or collaborate with regularly, including Lynne Casper, David Cotter, Paula England, Joan Hermsen and Liana Sayer.

[2] Cohen, Philip N. and Suzanne M. Bianchi. 1999. "Marriage, Children, and Women's Employment: What Do We Know?" *Monthly Labor Review* 122(12):22–31.

[3] David A. Cotter, Joan M. Hermsen, and Reeve Vanneman [2004], *Gender Inequality at Work*, Russell Sage Foundation and Population Reference Bureau.

[4] Philip N. Cohen and Matt L. Huffman (forthcoming), "Working for the Man? Female Managers and the Gender Wage Gap," *American Sociological Review*.

[5] Suzanne M. Bianchi, John P. Robinson and Melissa A. Milkie (2006), *Changing Rhythms of American Family Life*, Russell Sage Foundation.

opposing the idea that women should stay at home, and that children suffer when their mothers work for pay.[6]

• *Women gained access to political and administrative power.*—The increases were especially pronounced in State government, among both elected legislators and State executives and administrators.[7] As noted, women's representation in management positions broadly increased as well.

What drove this unprecedented progress? Three of the most important factors were:

• *The pill.*—An often-overlooked medical breakthrough—the birth control pill—permitted young women in the 1960s and 1970s to control (and therefore plan) the sequencing of their family and professional lives to an unprecedented degree, especially by delaying childbearing and increasing their career investments.[8]

• *Economic restructuring.*—Women made these choices in a rapidly changing economic context marked by the expansion of the pink collar and service occupations that traditionally employed women, creating a booming demand for women's labor.[9]

• *Culture and politics.*—These economic and technological changes added fuel to the fire of change in the cultural and political realms. The feminist movement, declining fertility and the growing acceptability of divorce and delayed marriage all propelled women's independence and empowerment. Legal and legislative innovations, from the Equal Pay and Civil Rights Acts, to Equal Employment Opportunity and Affirmative Action, to *Roe* v. *Wade*, changed the ground upon which gender played out.

This era of rapid progress toward gender equality now has definitively stalled. Equalizing trends in these areas have slowed (the wage gap, desegregation, political representation), stopped (women's employment, the division of housework) or even reversed (mother's employment, public attitudes) in the last 10 years.[10] The economic, social and political engines driving gender equality appear to have lost steam.

In summary, today's discussion of pay equity occurs in the context of an overall movement toward gender equality that sorely needs a boost. Can equal pay provide such a boost?

2. EQUAL PAY: FOUNDATION FOR EQUALITY AND WELL BEING

Improving pay equality between men and women can be an important impetus for equality in many areas, and for other social benefits for women, families and children, with far-reaching consequences:

• *Poverty.*—Because of lower earnings for women, single mothers are twice as likely to live below the Federal poverty line as single fathers (36 percent versus 18 percent). Thus, there are 3.5 million single mother families in poverty. Even among single parents who work full-time and year-round—the comparison we commonly make to assess the gender wage gap—single mothers are more than twice as likely to be in poverty as single fathers (12.1 percent versus 5.7 percent).[11]

• *Pensions.*—Men are more likely than women to work in jobs that provide pensions upon retirement, but even among men and women who do receive pensions or Social Security, accumulated earnings differences lead to large gender gaps in pension amounts.[12] This issue is of growing importance as the number of retirees and the costs of public retirement support increase.

---

[6] David A. Cotter, Joan M. Hermsen, and Reeve Vanneman (2007), "The End of the Gender Revolution? Gender Inequality in the 1990s and Beyond," paper presented at the annual meetings of the Population Association of America. Details are available at *http://www.bsos.umd.edu/socy/vanneman/endofgr/*.

[7] Cotter et al. (2007).

[8] Claudia Goldin (2006), "The Quiet Revolution That Transformed Women's Employment, Education, and Family," *American Economic Review* 96(2):1–21.

[9] Cotter, David A., Joan M. Hermsen, and Reeve Vanneman (2001), "Women's Work and Working Women: The Demand for Female Labor," *Gender & Society* 15(June):429–452.

[10] Trends in the last few years are ambiguous, complicated by the recession and weak employment during the recovery. See Heidi Hartmann, Vicky Lovell, and Misha Werschkul (2004), "Women and the Economy: Recent Trends in Job Loss, Labor Force Participation, and Wages," Institute for Women's Policy Research Publication #B245. On the recent pay gap see, David Leonhardt, "Gender Pay Gap, Once Narrowing, Is Stuck in Place," *New York Times* December 24, 2006.

[11] Figures reported by the U.S. Census Bureau, from the March 2006 Current Population Survey (*http://www.census.gov/hhes/www/poverty/poverty.html*).

[12] William E. Even and David A. Macpherson (2004), "When will the gender gap in retirement income narrow?," *Southern Economic Journal* 71(1):182–200; William E. Even and David A.

Continued

• *Marriage and children.*—Wives' higher levels of earnings and employment are associated with greater marital stability, even as they make it more possible for women to leave bad marriages,[13] and reduce the negative repercussions of divorce for children.[14] Higher earnings—for women as well as for men—also increase the chance of men and women marrying, especially among the poor.[15]

• *Domestic labor.*—Within marriages, housework and childcare are divided more evenly in couples with more equal earnings,[16] partly because wives' deploy their own incomes toward domestic and caring services.[17] Husbands' contributions to childcare improve children's development,[18] and their greater contribution to housework, in turn, boosts wives' career prospects and encourages them to invest more in their careers.[19]

If government policy can help rekindle the movement toward gender equality, then the prospects for a more equal society will be greatly enhanced. What role, then, can government play?

3. LAW AND POLICY EFFECTS ON EQUALITY

In the 1970s and 1980s, research shows that government policy, especially Equal Employment Opportunity enforcement and Affirmative Action practices, led to changed practices among employers. This improved pay and access to jobs for women and minorities (especially in management). These policies promoted the formalization of hiring practices, which reduces particularism, or subjective hiring and promotion without adequate consideration of the merits of candidates.[20] For example, more companies began relying on human resource professionals and formal internal labor markets for promotion.[21] The influence of State policy has been shown, for example, with the finding that establishments with closer institutional ties to the State (public agencies, non-profits, those in California, and those with personnel offices and ties to labor attorneys) were more vigorous in their adoption of due process mechanisms for employees (disciplinary hearings and grievance procedures) in the 1970s and 1980s.[22] As some firms implement practices that reduce discrimination, these practices diffuse through industries. Thus even targeted legal or social interventions can have important ripple effects.

A drop in government involvement can also have negative effects. For example, many firms responded to civil rights enforcement in the 1970s with EEO and AA

Macpherson (1994), "Gender Differences in Pensions," *Journal of Human Resources*, 29(2):555–587.

[13] R. Schoen, S.J. Rogers and P.R. Amato (2006), "Wives' employment and spouses' marital happiness: Assessing the direction of influence using longitudinal couple data," *Journal of Family Issues* 27(4):506–528; Liana C. Sayer and Suzanne M. Bianchi (2000), "Women's economic independence and the probability of divorce: A review and reexamination," *Journal of Family Issues* 21(7):906–943. For a review, see Lynn White and Stacy J. Rogers (2000), "Economic Circumstances and Family Outcomes: A Review of the 1990s," *Journal of Marriage and the Family* 62(4):1035–1051.

[14] Yongmin Sun, Yuanzhang Li (2002), "Children's Well-Being during Parents' Marital Disruption Process: A Pooled Time-Series Analysis," *Journal of Marriage and Family* 64(2):472–488. (This finding is with regard to family income, not mother's income specifically.)

[15] Megan M. Sweeney (2002), "Two decades of family change: The shifting economic foundations of marriage," *American Sociological Review* 67(1):132–47; K. Edin and J. M. Reed, "Why don't they just get married? Barriers to marriage among the disadvantaged," Future of Children 15(2):117–137.

[16] Suzanne M. Bianchi; Melissa A. Milkie; Liana C. Sayer; John P. Robinson (2000), "Is Anyone Doing the Housework? Trends in the Gender Division of Household Labor," *Social Forces* 79(1):191–228; Liana C. Sayer and Sanjiv Gupta (2007), "Who's Opting Into Housewifery?", paper presented at the Population Association of American annual meetings.

[17] Philip N. Cohen (1998), "Replacing Housework in the Service Economy: Gender, Class, and Race-Ethnicity in Service Spending" *Gender & Society* 12(2):219–231.

[18] Lenna Nepomnyaschy and Jane Waldfogel (2007), "Paternity Leave and Fathers' Involvement with Their Young Children," paper presented that Population Association of America annual meetings.

[19] For evidence that reducing women's housework increases their wages, see, e.g., Joni Hersch and Leslie S. Stratton (1997), "Housework, Fixed Effects, and Wages of Married Workers," *Journal of Human Resources* 32(2):285–307. The unequal division of housework and the gender wage gap are therefore mutually reinforcing.

[20] Frank Dobbin, John R. Sutton, John W. Meyer, and W. Richard Scott, (1993), "Equal Opportunity Law and the Construction of Internal Labor Markets," *American Journal of Sociology* 99(2):396–427.

[21] Donald Tomaskovic-Devey and Kevin Stainback (2007), "Discrimination and desegregation: Equal opportunity progress in U.S. private sector workplaces since the Civil Rights Act," *Annals of the American Academy of Political and Social Science* 609(Jan.):49–84.

[22] John R. Sutton, Frank Dobbin, John W. Meyer and W. Richard Scott (1994), "The Legalization of the Workplace," *American Journal of Sociology* 99(4):944–971.

programs. But when enforcement was curtailed during the Reagan years, such programs were systematically eroded.[23]

4. POTENTIAL EFFECTS OF THE PROPOSED LAWS

This brief review suggests several possible benefits of the proposed legislation, the "Paycheck Fairness Act" and the "Fair Pay Act" (bill numbers not available at this writing). I will only comment on a few aspects of these proposals here.

Punitive and compensatory damages, class actions, procedural reform.—Both bills appear to improve incentives for employers to make employment practices more equitable, by increasing potential costs and narrowing exclusions. Successful lawsuits or settlements in this area may spur organizational innovations that spread through affected industries, as happened with earlier EEO and title VII cases.[24] Significantly, both bills would improve data collection and analysis, which are crucial tools for identifying and remedying problems of gender inequity.

Best practices.—Despite several decades of attempts at equal employment and anti-discrimination reforms, there is little consensus on what practices have been most effective.[25] The Paycheck Fairness Act's proposed rewards for innovative employers, and support for training and assistance, may help set examples to encourage the spread of such innovation. Past research has clearly shown that the benefits of occupational desegregation, for example, extend to all women in the surrounding labor market.[26]

The "equivalent jobs" standard.—Because men and women are so often segregated into jobs with different titles, even when they are similar in skill requirements and working conditions, the proposed change in the EPA standard language might permit legal scrutiny of segregation practices when those outcomes include unequal pay for men and women. This could have profound effects on both equal pay and segregation.

This last point requires additional elaboration. Men and women are largely segregated across occupations, establishments, and jobs within establishments. In 2000, 51 percent of either men or women would have had to change occupations in order to achieve equal distributions.[27] How does segregation affect the pay gap? Consider this example. There are 1.1 million nurse aides and 2.5 million truck drivers in this country. The nurse aides have more education on average, with 38 percent having at least some college training, compared with 29 percent of truck drivers. Both groups' average age is 43. Both do work that requires "medium" amounts of strength, and nursing aides require more on the job training to perform their duties (according to measures from the Bureau of Labor Statistics). And yet, those nurse aides, 89 percent of whom are women, have median earnings of only $20,000 per year, just 57 percent of the median earnings of truck drivers—97 percent of whom

[23] Erin Kelly and Frank Dobbin (1998), "How Affirmative Action Became Diversity Management: Employer Response to Antidiscrimination Law, 1961 to 1996," *American Behavioral Scientist* 41(7):960–984. Note that anti-discrimination enforcement is just one area where policy can have an effect on gender inequality. "Family-friendly" workplace regulations and policies may also promote more equitable employment practices (although some leave policies have been shown to reduce women's labor force participation, which may backfire on gender inequality). See Hadas Mandel and Moshe Semyonov (2005), "Family Policies, Wage Structures, and Gender Gaps: Sources of Earnings Inequality in 20 Countries," *American Sociological Review* 70(6):949.

[24] Alexandra Kalev and Frank Dobbin (2006), "New Legal Realism: Enforcement of Civil Rights Law in Private Workplaces: The Effects of Compliance Reviews and Lawsuits Over Time," *Law and Social Inquiry* 31:855–903.

[25] Alexandra Kalev, Erin Kelly, and Frank Dobbin (2006), "Best Practices or Best Guesses? Assessing the Efficacy of Corporate Affirmative Action and Diversity Policies," *American Sociological Review* 71(4):589–617.

[26] David A. Cotter, JoAnn DeFiore, Joan M. Hermsen, Brenda Marsteller Kowalewski, and Reeve Vanneman (1997), "All Women Benefit: The Macro-Level Effect of Occupational Integration on Gender Earnings Equality," *American Sociological Review* 62(5):714–734. Cohen and Huffman (2003), "Individuals, Jobs, and Labor Markets: The Devaluation of Women's Work," *American Sociological Review* 68(3):443–63.

[27] I use the standard index of dissimilarity and data on about 500 occupations from the 2000 Census, from *Earnings Distribution of U.S. Year-Round Full-Time Workers by 28 Occupation: 1999* (PHC–T–33); available at: *http://www.census.gov/population/www/cen2000/phct33.html.*

happen to be male.[28] This example suggests that segregation is a major source of wage inequality.[29]

Even though such a gap might seem unjust, the courts have not favored challenges based on the "comparable worth" of different jobs, preferring to let "the market" determine such differences—while disparities in wages within "equal" jobs have been successfully challenged under the rules of EPA.[30] Yet, at the very detailed level, studies that examine specific job positions in the same establishment often find very small gender gaps in pay.[31] If you look close enough, maybe everyone's job is a little different.

What is the proper balance? The Census data show, for example, average earnings of $170,000 for male physicians, compared to $100,000 for female physicians, which suggests a large pay disparity for men and women in the same jobs. Yet within those groups men and women specialize very differently, and work at different establishments.[32] If comparable worth permits too much legal intervention into wage setting, the current rules appear to permit too little—allowing small differences in job characteristics to justify large gender disparities in pay. Ultimately, eliminating the wage gap will require both integrating men and women more into the same occupations, and eliminating disparities within occupations and jobs. The chief benefit of the "equivalent jobs" reform might be to permit a broader comparison of work that is substantively equivalent but that is classified differently by employers. The pressure this brings to bear on employers might reduce the wage gap by calling into question practices that segregate men and women into different jobs—and that reward similar jobs differently.

Senator HARKIN. Dr. Cohen, thank you very much. Thank you all for excellent statements and for keeping them relatively short. I appreciate that very much.

To start our questioning, I will turn to Senator Clinton.

Senator CLINTON. Well, Professor Cohen, thank you for your very thorough understanding of this issue and I wanted to ask you about the study that came out yesterday by Vanderbilt University. Joni Hersch, a Professor of Law and Economics, found that even when taking into consideration characteristics that might affect wages, such as choices over household and child-related respon-

---

[28] Analysis of data from the 2004 Current Population Survey, published in Philip N. Cohen and Christin Hilgeman, review of *Occupational Ghettos: The Worldwide Segregation of Women and Men*, by Maria Charles and David B. Grusky, *Contemporary Sociology* (35[3], 2006). Job characteristics are from the *Dictionary of Occupational Titles*. Restricting the analysis to those working full-time and year-round, narrows the gender gap slightly, to 64 percent (Census 2000 data available at *http://www.census.gov/population/www/cen2000/phc-t33.html*).

[29] Segregation among lower-status workers has been more severe, and slower to change in recent decades (See Cotter et al. [2004]). Most analyses find small direct effects of segregation on the wage gap, compared to the size of the wage gap within occupations. I conducted a simulation testing the effect of (1) men and women being redistributed into the average overall occupational pattern, but keeping their average earnings in each occupation the same, which reduced the gender gap from .67 to .73 (a 19 percent reduction in the gap); and, (2) men and women earning the same average earnings *within* each occupation, which reduced the wage gap to .85 (55 percent reduction). This is within the range of previous estimates. Researchers in the 1990s found that anywhere from 9 to 38 percent of the wage gap was accounted for by the difference in occupational distributions. See David A. Cotter, JoAnn DeFiore, Joan M. Hermsen, Brenda Marsteller Kowalewski, and Reeve Vanneman (1997), "All Women Benefit: The Macro-Level Effect of Occupational Integration on Gender Earnings Equality," *American Sociological Review* 62(5):714–734. In my study with Matt Huffman, we analyzed the distribution of men and women across 62,000 occupation-by-industry cells, and found that gender segregation at that level of detail accounted for 27 percent of the gender wage gap in 1990. See Cohen and Huffman (2003).

[30] These cases are summarized in the CRS report "Pay Equity Legislation in the 110th 31 Congress," by Jody Feder and Linda Levine (2007).

[31] Trond Petersen and Laurie A. Morgan (1995), "Separate and Unequal: Occupation-Establishment Sex Segregation and the Gender Wage Gap," *American Journal of Sociology* 101(2):329–365. For background, see Paula England (1992), *Comparable Worth: Theories and Evidence*, Aldine de Gruyter.

[32] Many studies that try to account for all known sources of inequality, such as the 2003 GAO report on the gender gap, control for occupations at an even higher level of categorization—comparing, for example, all "service/household" workers with all "professional and technical" workers. The GAO report finds that women earned 20 percent less than men in 2000 once occupation and other standard variables, including work experience and patterns, were controlled. See "Women's Earnings: Work Patterns Partially Explain Difference Between Men's and Women's Earnings," GAO–04–35 (2003).

sibilities, market characteristics, working conditions, occupational segregation and so forth, sex discrimination remained a strong explanation for the gender pay gap. What accounts for that, Dr. Cohen? I mean, if you were to really just strip it all away, why is it so hard to penetrate society and the economy so that people get the best out of all their workers, regardless of gender?

Mr. COHEN. Well, Senator Clinton, that is, in my line of work, the million dollar question. It's difficult to answer. I think a very important part of it remains job segregation and that's why I think it's so important to broaden that consideration of equal work and equivalent work and also to consider jobs in different establishments as my colleagues mentioned.

Women do make choices that have negative effects on their long-term earnings but the choices they make are highly constrained and a lot of the times, those choices are constrained by factors at their places of work. So that you may be comparing women and men in different positions at the same workplace who have responded to opportunities at that workplace. It is very important to consider the factors in hiring and promotion and wage setting that work through people's careers, even within the workplace that they're in.

But I think from the research that we have, family obligations and burdens do account for some but when we account for that, like you say and the recent study shows—I haven't read in detail but we do have—in aggression terms, it's the coefficient that won't go away. The effect of being a woman is always there and I think the segregation of tasks is an important part of that and if we could look at the equivalency of jobs, which are classified somewhat differently and equalize those differences, I think it would have a big effect.

Senator CLINTON. Thank you. Dr. Murphy, you have spent so much of your career wrestling with these issues and I really personally admire your commitment to this both in the public sector and through your ongoing efforts to try to untangle the wage gap. What I would like to ask you is, with respect to the women who you have interviewed over a number of years, how much do you think they blame themselves for wage gaps and for their not getting ahead and how much do they see structural systemic problems that they think they just can't overcome?

Ms. MURPHY. Interesting question, Senator Clinton and thank you. You have been heroic in pressing for better opportunities for women for a long time as well.

My sense in the conversations, the discussions I have with working women every day is that most women today need jobs. It is such an important part of a family income or for their families if they are the sole supporter that they are struggling very hard to maximize their job performance and as much money as they can make. Sometimes there's a second guess, well, if I had done something a little differently, maybe I could make more money or be a better worker but I am struck by the troublesome part of how much women feel in the workplaces that they're just unfair—inequitably treated. It is profoundly there. And because we're so socialized not to grumble too much, we tend to—women get quiet and they don't confront this or because they do need the job or they

quietly leave, which also costs them time in promotions and time in rank wherever they were. So I'm finding—and then there's a kind of despair in all of this, an emotional part of it, which is they are either so angry or they despair and say, "I just can't change the stuff."

So to me, I think we are coming to the place where I think we've turned the corner, that with the wage gap stuck for the last 14 years, we've suddenly come to the place where we have to acknowledge there's something going on in the workplace that we're not dealing with here and while women have been quiet, it's largely because they haven't seen ways in which they can act constructively without losing their jobs or being set back. So I think a large part of this right now is the kind of trouble, the systemic intransigence that we need to get at.

Senator CLINTON. Finally, let me ask about the equivalence issue because that is a much harder case to make for many people. Senator Harkin's bill really requires people to more fairly assess the requirements for a job and to consider them more equivalent or comparable, even if they're not the same. I'll start with you, Ms. Samuels, do you have any advice about how best to make the case for comparability? And I know that it's worked in Minnesota and Iowa but how would you make the case more generally?

Ms. SAMUELS. Well, I think the key for it rests on what Dr. Cohen discussed, which is the continuing gender-based occupational segregation that we see in far too many industries and in far too many lines of work. It has worked in places like Minnesota and there are various State laws that do mandate the kind of comparability comparison that the Fair Pay Act would ask the government to undertake.

This is not a government mandate that would set pay for different industries. What it would require is that employers take a careful look at the credentials and qualifications that are required for each of their job lines and make a fair assessment about the value of that work to the company. It maintains employer discretion but also addresses this very systemic, endemic problem that traditionally female jobs, because of the historical devaluation of women's work, continue to pay significantly less than traditionally male fields.

Senator CLINTON. Dr. Murphy.

Ms. MURPHY. Thank you. Let me just add, you mentioned Minnesota and Minnesota is a very interesting example because Minnesota pays 97 cents on the dollar for all of the women versus American men. The interesting thing here is Minnesota took every job under the umbrella—under the roof of the State as an employer and ranked it, similar to the guidelines that you're suggesting and they ranked it by the qualifications and skills, the experience, the accountability, the dangers and all those things and it allows them to do—to solve this problem that you're hearing about sizing right now, which is about the job segregation because when you rank all the jobs under the State's umbrella as an employer, you can compare the nurse in the State hospital with the man who is driving the snowplow truck for the DPW and the woman who is a teacher at a professional university with the guy who is out managing the

forests and parks. It allows you to compare all those jobs and it gets at this occupational segregation problem under that roof.

So holding that employer accountable for that kind of fairness and equity allows you to pay for the job not who does the job. And once you do that and once every employer pays for the job not who does the job, you could solve all kinds of discrimination in the workplace. This is about race and handicap and age as well as gender. So it's a powerful concept and one final thing and then I'll shut up.

I interviewed Faith Remke, the State of Minnesota—it cost the State of Minnesota to do this, to implement this bill, One Paycheck right now. Her name is Faith Remke and I talked to Faith Remke in preparing my book and I asked her whether the methodology that the State of Minnesota uses could be used by any employer and she said, "yes." I mean, this can be used by a private employer as well as a public—so the methodology is here. The intellectual work has been done. It just needs to be applied to other employers.

Senator CLINTON. Thank you.

Senator HARKIN. I mean, heck, all you've got to do is look at the Board of Directors of all these companies and it is mostly white males.

Ms. MURPHY. Yes, indeed.

Senator HARKIN. And they try to get a few token women once in a while. But you look at who is running the businesses, who is running the companies.

Ms. MURPHY. That's right.

Senator HARKIN. And they set the policies. That's no secret. I mean, change the Board of Directors of a lot of these companies and put a majority of women on it and you might get some changes made.

Ms. MURPHY. I think you would.

Senator HARKIN. Senator Murray.

Senator MURRAY. Mr. Chairman, thank you so much for having this hearing. I think this is really enlightening. Senator Clinton, I want to thank you for your leadership on this issue and as I listened with interest to your question about women and perceptions, one of my concerns is that women oftentimes don't believe this is a problem. Your leadership really helps highlight it. You can't solve a problem if people don't believe it is a problem. Ms. Murphy, you talked about women just deciding to be quiet. I'm more concerned that perhaps they're not speaking up because they don't know it's an issue. Do you find that out there?

Ms. MURPHY. Oh, yes. Oh, yes, particularly women on campuses. I mean, I spent a lot of time the last couple weeks on campuses and young women think it's all equal and fair. When they graduate, they're sort of excited and then when you sort of talk about what happens and what they can lose, these women listen up in a way that's amazing because they suddenly get it. But this is a part in which lots of other women don't as well, Senator Murray but for young women on campuses, this is a very important lesson.

Senator MURRAY. Dr. Cohen, do you agree with that?

Mr. COHEN. Yes, I do. I think the one consequence of occupational segregation is women often don't have direct comparisons to make with men in the same job in the same establishment I guess,

if I can, while I'm already talking, in response to that question about this segregation issue, because it does get to the perceptions. The market does have some equalizing tendencies. You know, if you're way out of step with under paying or over paying some group, you may put yourself at a competitive disadvantage.

But the market also has a lot of historical and cultural baggage in the way that things are interpreted and so, it may be that the comparable work standard, the idea of comparing very different jobs and trying to establish the value of meddles in the market too much, as some courts have found. But the current mechanism seems to meddle too little. It doesn't allow enough comparison in ways that sometimes the market needs and I think the perceptions thing is a big part of that because, well, like I said, people don't see other occupations as being directly comparable and I think this sort of discussion can help highlight those comparisons.

Senator MURRAY. I think it is really important to have this discussion. I think part of the Paycheck Fairness Act is to help train young women with negotiation skills when they start work. The numbers you gave were startling—how much did you say you lose if you just have a high school education?

Ms. MURPHY. Seven hundred thousand dollars.

Senator MURRAY. And if you have a Ph.D., it was over——

Ms. MURPHY. Ten million.

Senator MURRAY. We want to make sure these young women know early on that there is a wage gap that will really impact them. Could you tell me what happens to the wage gap the longer a woman stays in the workforce? Does it close? Does it widen? Does it ever even up?

Ms. MURPHY. It tends to widen. I mean, the interesting thing is if you think about a young woman who graduates from college and gets a $30,000 job and she's excited because she says, "My heavens, I'm earning more money than I ever expected to. I didn't realize I was worth that." It's more than my mom ever made and the young man who just graduated from college with her gets a job in the same place and he's making $33,000 and so—well, it's not that much money. At the end of the year when the bonuses are paid, he gets a bigger bonus because it's a percentage of the salary. The end of the year, the boss says, "He's a real comer. He's hard charging, he's fired up so we'll bump him up to $38,000 and she's good, she's solid, she's working hard so we'll move her to $33,000" and suddenly she's earning the same the next year as he was the first year and the bonus at the end of the year is even bigger and at the end of that year, the boss says, "Well, he's going to be one of our executives. He's managerial potential. We'll bump him up to $43,000 and she just said she's pregnant and so, well, we want her when she comes back, when she's had her child and she's very good so we'll move her up to $35,000." And the longer they work, the wider this differential becomes until it accumulates to those huge losses.

Senator MURRAY. Talk to me then about the retirement gap. Senator Clinton and I have spent a great deal of time on it, especially with regard to the Social Security. What happens there?

Ms. MURPHY. Oh, it's huge. Because all the way along, we have an employer who is contributing to the IRA or you don't have as

much money to put aside for your own retirement or your employer doesn't put aside as much retirement so that accumulates as well. And because, as Senator Harkin said, women live longer. Then at the end of life, you have less money over a longer life so you're actually right. This confirms the problem for later on, if you don't get at it from the very beginning.

Senator MURRAY. Thank you very much. I really appreciate again, the leadership of Senator Harkin and Senator Clinton. I hope that we can start making women more aware that a gap exists and work to put in place the tools that women need to earn as much as they can. We will all benefit from that. Thank you very much.

Senator HARKIN. Thank you very much, Senator Murray. I just wanted to ask first Dr. Cohen—I hope I don't catch you off guard on this. How does the pay gap affect men and what would closing the pay gap mean to men? Married men, single men? I don't care, just men. How will it affect them?

Mr. COHEN. Well, if it would be accomplished by raising women's wages, it would improve the family incomes of married men, certainly.

Senator HARKIN. OK. Fine.

Mr. COHEN. It's not clear—I don't know of any evidence that remedying problems of gender discrimination has resulted in lower wages for men. There may be cases where that's the case but that certainly has not been the historical trend. When the gender gap was closing, it was not in general at the expense of male wages. The last few years actually are an interesting exception there, when wages for men were falling and the last couple points of the gender gap that we got were mostly from men's falling wages. But that's not a consequence of raising wages for women as far as I can tell.

Senator HARKIN. I throw this out for your consideration. You might get more men willing to take those jobs that have been previously considered women's jobs. Certainly there is a nurse's aid paid the same as a truck driver. Hey, I might not like getting beat around that truck cab all the time. I might want to be a nurse's aid if I had the same equal pay and benefits and retirement benefits and that type of thing. It might be a more appealing job but if there is this huge wage gap, well then, I'd gravitate to something else.

Mr. COHEN. Absolutely, I agree.

Senator HARKIN. So it would allow men to be able to pursue different careers and different occupations than they might want to pursue right now.

Mr. COHEN. It also does give families more flexibility as far as fathers——

Senator HARKIN. That's right, if the women's—then the man maybe has more flexibility to do different things than what they have right now, to choose different options, for example.

So I think that we tend to forget that men would be beneficiaries of this. We're always thinking about this as some kind of a zero sum game. If they win, we lose. I don't think that at all. I think that the whole society would gain on that.

Oh yes, I know—I want to ask—the example, I think that Ms. Samuels, you had in your—and I'm going to read it. You didn't read it but I'm going to read it.

Recent examples of pay discrimination cases because this is one that is very prominent now in the public. In the largest employment discrimination suit ever filed, female employees have sued Wal-Mart for paying women less than men for similar work and using an old boy's network for promotions that prevented women's career advancement. One woman alleged that when she complained of the pay disparity, her manager said that women would never make as much as men because "God made Adam first."

Another woman alleged that when she applied for a raise, her manager said, "Men are here to make a career and women aren't. Retail is for housewives who just need to earn extra money." The Ninth Circuit recently reaffirmed the case of the class action on behalf of more than the 1.5 million women who are current and former employees of Wal-Mart. I read that again because look—I mean, unless you live in some kind of isolated bubble in our society and you lack all sensitivity whatsoever, you know this goes on every day in workplaces all over this country. And again, I think in many cases—I've read a lot about this case and these women were very brave to come forward like they did. I think a lot of times women don't do that because they are single mothers. They do have kids to provide for and they're hanging on and they just don't need to be fired from a job and go out and beat around looking for another one. So they just tend to absorb it. And this old boy's network kind of thing goes on all over the place. We know that. Come on. We can't kid each other about this. So that's why I think it is so important not only for the Paycheck Fairness to provide for the kind of increased penalties and increased wherewithal for women to take these cases and to pursue them but also for broadening things out as we're trying to do with the pay equity, Fair Pay Act.

I just—again, I ask Ms. Brown. You are on the plaintiff's side in all this but surely you must recognize also that this kind of discrimination goes on every day—every day. Every day and so because women simply don't have the wherewithal a lot of times to file these suits and you go up against them, does it behoove us as government—and your statement, I read your statement. You're saying that there are things that government can do and government can't. Government can do training and better education and things like that. But I ask rhetorically, hasn't the government intervention in the past provided for better workplaces, everything from OSHA laws to the Americans with Disabilities Act that I'm probably more familiar with, the Civil Rights Act, all these things that would not have occurred other than through government intervention.

And are we short-sighting ourselves by saying that that's all that needs to be done? Now there were people before this Civil Rights Act who said, "We don't need that." We've done everything. There were people before the Americans with Disabilities Act who said, "We don't need to do that. We've done all these things." There are plenty of ways for people to access the courts and take their cases on. And I'm just wondering if we aren't being a little shortsighted

now by saying, "Well, we've done all we can do. We don't need to do any more in that regard because we know that these things happen every day," your comments.

Ms. BROWN. Yes, Senator, thank you. I'm usually on the defense side but I really—first of all, I really disagree with you that this happens every day everywhere. If you pluck a number of anecdotes out of the experiences of millions and millions of people, you get a distorted view and I think you should be comforted that at least in those workplaces that I interact with, I read cases about, I teach seminars. There has been radical change. I think the point of all the laws is to allow people to fulfill their potential, to express their values, to work in job conditions that they want to work in. Maybe they don't want to drive a truck. Maybe they would rather be in an office. But to tinker with the market forces in private employment, it seems to me, to get at the problem in a very, very potentially destructive way because it's the vibrancy of that market, the ability to come up with new jobs, to develop new technology, new services that we can sell globally that provides the opportunity for employees.

So what we need and what we have is the laws that say if you want a job, if you want the skills, if you want the education, if you want to work here, then go for it and to the extent that you find barriers there, I don't think it's the job of courts or Congress to read people's minds and decide for them, I think you're being mistreated or I think you're in the wrong job.

I think people have to step forward and the retaliation protections are substantial. These cases aren't little negative value cases. There are attorney fees provisions, there are punitive and compensatory damages so I think what we want to do is say, we're not going to decide that these jobs are comparable to these other jobs. In a public sector, if an employer—if a State or a locality chooses to do that, that's a legitimate choice. But for the private economy, you're talking something very different.

Senator HARKIN. But look what happened in Minnesota. First of all, you say that these anecdotes may give you this sort of view. I'm pained to ask, is Wal-Mart a distortion? I don't think so and I think life's experiences teach us that that's not a distortion. It's an every day occurrence.

Secondly, just take a look at what Minnesota did. Now Minnesota closed its pay gap 97 percent. They only have a 3 percent disparity. So we have a case study in what a change in policy can mean on that level. So it's not as if we don't have something to base this on, we do. So what is so different about Minnesota than compared to Massachusetts or New York or Iowa? We did a little bit in Iowa, not much. So I'm just saying—that wouldn't have happened had it not been for a government—in that case, the State government, doing something.

Ms. BROWN. Well, what they've said is we're going to spend more money and we're going to pay jobs in a way that is not consistent with what the market would pay for them. We're going to say that conditions, skills, responsibility and perhaps other factors——

Senator HARKIN. Working conditions.

Ms. BROWN [continuing]. Are not necessarily going to drive what jobs are paid but we're going to make a decision by FEOT that

we're going to have an equal result. That has never been the law. The law is, you can't intentionally discriminate against an individual because of a protected characteristic and you can't pay people who are doing equal work under similar job conditions, different amounts because of their gender.

But to tinker with the economy, to have the Labor Department say, "We think a job is worth a certain amount," when we need people to go do the jobs that the economy needs and wants and values, seems to me to be a very, very wrong way to go about solving the problem if you believe there is a problem. What you need to do is have a level playing field so that people can make the choices they want to make and take the jobs that they want to take, not to decry an equality of result. That's just not been the way that the equal opportunity law——

Senator HARKIN. Then you obviously haven't read my bill. The Equal Pay Act provides that level playing field. It doesn't mandate exactly what you've got to pay. It just says, "Let's put it all out there. Let's get the information we need and let's compare them and let's provide a basis that if it requires equal skill, responsibility, effort and working conditions, then the pay should be equalized."

It just provides an avenue for women to bring an action, if employers aren't living up to that. We didn't say you've got to do it. But Minnesota did it because that was the public sector. I'm just saying that in that case, you can see what happens when the government did do that. It closed the gap. And did it in a way, I think, that benefits all of the State. I don't know about that but I'm just saying that the Equal Pay Act basically says, "Look, we're going to get the information out. We're going to compare these. We're going to make this information available so that women know what these other jobs are paying and therefore, then they have a case of action to take." It's similar to what we've done under so many other civil rights laws in our country.

The Americans with Disabilities Act doesn't say you have to hire a person with a disability. We didn't say that. We just said, if you're hiring people, you can't discriminate against someone because they have a disability. That's all we're saying.

Ms. BROWN. Absolutely.

Senator HARKIN. And that's what we're saying in the Equal Pay Act, too.

Ms. SAMUELS. Senator Harkin, if I could just respond to your comment for 1 minute. I agree with you completely that there is unfortunately pervasive and systemic sex discrimination as well as discrimination on the basis of race and national origin and disability that still persists in the workforce.

Where I part company with Ms. Brown is that I think that the problem that these bills are intended to address is that the market forces themselves, not only cannot alone solve these inequities but, in fact, are based on the kinds of prior barriers and discrimination that have prevented people like women, like minorities, like people with disabilities from reaching the same level playing fields that men have occupied.

All these bills will do—they would not diminish innovation. They would not mandate particular levels of pay for particular jobs.

What they would do is insist that employers take a look at the jobs that they have in their workforces and make sure that there aren't artificial barriers that are limiting the pay that people should get for working in them.

Senator HARKIN. So your point being, how can you expect a system to adjust itself to change the basis when the system itself is set up on that basis? You're right. Interesting point.

Ms. SAMUELS. It's metaphysical.

Senator HARKIN. Yeah, it's getting metaphysical here, you're right. I really didn't have anything else that—oh, one question I just want to get on to the record, to all of you. Do you believe that there is an incentive for bringing frivolous lawsuits under the current law? Are there incentives for bringing the frivolous lawsuits? I hear that all the time. Is there an incentive for that or can you speak to that or not?

Mr. COHEN. I can't speak very much to that but I can say one thing about that, which is, it's hard for women whose damages are not great to be able to bring lawsuits because they can't afford the upfront costs or get lawyers to take on their cases. So the way the law is now certainly privileges those who have higher earnings and therefore higher damages when they are discriminated against. Unless you can get qualified as a class and do the Wal-Mart thing, which is very difficult, it's very hard to get over those hurdles.

Ms. SAMUELS. I might also add that it is not a pleasant experience to be engaged in a lawsuit. I don't know very many people who would choose that route and in fact, part of the problem with the current law that the Paycheck Fairness Act and the Fair Pay Act would fix is that the likelihood of success, even in meritorious cases under current law, is very low because of the procedural hurdles, because the remedies, as Dr. Cohen mentioned, are not great enough to ensure that a woman will be fairly compensated for her time and because the substantive standards of the law don't allow her to make her case in a way that really goes to the heart of the basis for these wage disparities.

Ms. MURPHY. And to pile on—in addition—women know. It's very expensive to pursue any kind of litigation. And most of us don't have that money to do this. So you have to think long and hard whether you want to sue and pursue even the slightest grievance for the cost, both financially for what it does. You lose your job. You can lose your career. You lose your husband often and your mental health. Every woman I've talked to who has pursued litigation have paid a horrific personal price and usually hangs on only to try and change that employer's environment for the women who are working there or come after her because it is such a long, hard and expensive process.

Senator HARKIN. Ms. Brown.

Ms. BROWN. Yes, if I may, several points. First of all, I think there are a certain number of frivolous lawsuits but I think that the courts are set up to screen those out. I think that the more energy is spent and would be spent under this bill with employers having to try to think about whether they could record contemporaneously every objective factor that goes into every pay decision, which is something they have to make about every employee periodically, than they make defending frivolous lawsuits.

The problem with the bill is that it's putting the onus on the employer for all sorts of choices that people make that are a result of social and familial patterns of behavior and I think to try to dictate something different is wrong and to suggest that if those guidelines are out there, they'll be purely voluntary, I think is naïve and I don't think that's really the intention because the expectation or the hope would be that courts will impose them on employers and I think that really would wreck havoc.

The other thing I would say is, since the Supreme Court in the sexual harassment context and the punitive damages context, urged employers to create effective, internal complaint processes so that they could avoid liability or the imposition of punitive damages, there has been a very, very healthy development of effective internal complaint processes. So you only see the tip of the iceberg when you see things that get to court. But the effective resolution of many, many complaints doesn't reach the public record and I think it's an encouraging development since those cases that has greatly helped work things out informally.

Ms. MURPHY. I'd just add that I think that's a perfect example of the way in which the laws can spur necessary social change.

Senator HARKIN. All right. Anything else? Well listen, this has been a very good, very enlightening hearing. I thank you all for being here and your testimonies and I thank Senator Clinton again, for her great leadership on this issue and for calling this hearing together and making sure that we have it. I think that this is an issue that's not going to go away and we've just got to keep at it until we overcome the obstacles and get a better system of fairness out for people in our society, on so many bases—sex discrimination, race, disability—all these areas, just to make our society more fair and more equitable and I think then the free enterprise system works even better.

So with that, the committee will stand adjourned.

[Additional material follows.]

ADDITIONAL MATERIAL

PREPARED STATEMENT OF SENATOR KENNEDY

One of the most profound economic shifts of the past century has been the entry of vast numbers of women into the workforce. In 1900, women made up only 18 percent of the working population. Today, more than 46 percent of our workers are women. Nearly three-quarters of all mothers are in the labor force, and nearly four million women hold multiple jobs in order to provide adequately for their families.

Although America's women are working harder than ever, they're not being fairly compensated for their contributions to our economy. Today, women earn 77 cents for each dollar earned by men, and the gap is even greater for women of color. African-American women earn only 67 percent of what white men earn, and Hispanic women earn only 56 percent. Women are routinely paid less than men for performing the same jobs, and occupations dominated by women tend to be lower-paying than male-dominated occupations, even when the skill sets required are the same.

The problem is not getting better. This year's wage gap of 23 cents is the same as it was in 2002. Since 1963, when the Equal Pay Act was passed, the wage gap has narrowed by less than half of a cent a year. At that rate, women won't achieve fairness in the workplace for at least another 50 years. That's unacceptable in the 21st century.

It's true that the wage gap is caused in part by how society deals with the realities of working women's lives. Many women have to take time out from the workforce to care for children or other family members, and these gaps in employment can permanently reduce their future earnings. It's an unfortunate reality, but it shouldn't have to be this way. No one should have to give up fair treatment in the workplace in order to have children or care for elderly parents.

We also can't blame the pay gap exclusively on women's dominant role in child care. Outright *gender discrimination* also accounts for the disparity between men and women's pay.

There's ample evidence of such discrimination. Multiple studies—including a study by the Census Bureau in 2004, a General Accounting Office report in 2003, and a 2006 study by the Maryland Department of Labor, Licensing, and Regulation—have examined the gap in earnings between men and women and all reached the same conclusion. This gap cannot be explained by differences in education, tenure in the workforce, working patterns, or occupation. Gender discrimination alone causes a significant portion of the pay gap, and it illustrates the continued prevalence of discrimination against women in our society.

It's appalling that such discrimination still exists in America. It's preventing working women from achieving their full potential, and Congress needs to act now to bring fairness to the workplace.

Women are not getting paid equally for doing the same jobs as men. It's illegal and it's unacceptable, but it happens every day. There are too many gaps in the law, and too many barriers to effective enforcement.

Senator Clinton's Paycheck Fairness Act will give America's working women the support they need to fight for equal pay. It will make sure our fair pay laws apply to everyone, and it will strengthen the penalties for employers who are not obeying the law. These basic reforms are long overdue, and I urge my colleagues on the committee to support this important legislation.

Equal pay for equal work is a key part of the solution. But we also need to deal with the problem that our economy often undervalues and therefore underpays work done by women, particularly women of color. Women are not getting paid what they are worth for doing jobs that may be different than those performed by men, but are of equal value to the employer.

Senator Harkin's Fair Pay Act addresses this challenge. It will require employers to provide equal pay for jobs that are comparable in skill, effort, responsibility, and working conditions. It will give workers the information they need to determine whether female-dominated jobs are being under-valued, and it provides a remedy for workers who are victims of such systemic discrimination. It is the second key step on the path to workplace fairness, and it deserves our strong support as well.

I look forward to hearing from our witnesses today about these important proposals and other ideas for closing the wage gap. America's working women deserve full fairness on the job, and today's hearing is a step in the right direction.

PREPARED STATEMENT OF SENATOR BROWN

I want to thank the Chairman for holding this important hearing and I also want to thank the witnesses who have joined us today.

All of us have mothers, sisters, daughters, or female coworkers and I think we would all agree that if they're doing the same work as their male counterparts, they deserve to be paid the same wage. Too often this is not the case.

The wage gap between women and men has remained stagnant for 14 years, even though more and more women are graduating from high school and college and entering the workforce.

It is unacceptable that in this day and age, on average, my three daughters can expect to earn $1 million less over the course of their lives than their male co-workers on the same career path.

In 1963 when President Kennedy signed into law the Equal Pay Act, who would have imagined that 44 years later women still wouldn't be earning an equal wage for equal work? With that bill women made real and important gains. But the expected economic equality is yet to materialize.

In my home State of Ohio, 25 percent of single mothers live in poverty. Yet these women, who need our help the most, still earn more than 20 percent less than men.

I'm proud to be a co-sponsor of the Paycheck Fairness Act, legislation that will help close the pay gap for good.

The Paycheck Fairness Act would create a training program to help women strengthen their negotiation skills, allow employees to pursue litigation for punitive damages, and require the Department of Labor to continue collecting and distributing much needed information on women workers.

I am also a co-sponsor of the Fair Pay Act. This bill would amend the Fair Labor Standards Act to prohibit discrimination in the payment of wages on the basis of sex, race, or national origin. It would require employers to provide equal pay for jobs that require comparable levels of skill and enable employees who are discriminated against to file a complaint with the EEOC or go to court.

When the Equal Pay Act became law, women had the hope of righting years of economic injustice by earning equal pay for equal work. With these pieces of legislation we can finally make these hopes a reality.

I again would like to thank the Chairman for holding this hearing and look forward to working with all of my colleagues to pass this important legislation to ensure the rights of all American workers. Thank you.

RESPONSE TO QUESTIONS OF SENATOR KENNEDY BY BARBARA BROWN, JOCELYN SAMUELS, EVELYN MURPHY, AND PHILIP N. COHEN

BARBARA BROWN

Question 1. In your testimony you argue that much of the pay gap between men and women is a result of choices made by individual employees. Yet, several recent studies have found that a substantial pay gap remains even when controlling factors such as amount and type of education or training, prior experience, hours worked, and family obligations are accounted. How do you explain these troubling findings? Do you agree that some portion of the pay gap must be attributable to actual gender discrimination?

Answer 1. **Not available.**

Question 2. You have stated you don't believe additional legislation is necessary to address the pay inequity between men and women. Yet, despite years of progress for women, the pay gap has held relatively steady since the late 1980s. How do you believe that the pay gap will be remedied in the absence of a change in the law?

Answer 2. **Not available.**

JOCELYN SAMUELS

Question 1. Opponents of the Paycheck Fairness Act have argued that the bill would make it impossible for employers to prove that there was a legitimate nondiscriminatory reason that explain differences between the salaries of male and female employees. How would an employer make such a demonstration under the act? Do you believe the changes the act makes would unfairly disadvantage employers in such litigation?

Answer 1. Under the Paycheck Fairness Act, an employer could continue to rely on the four affirmative defenses authorized under the Equal Pay Act—namely, that a pay disparity was based on "(1) a seniority system; (2) a merit system; (3) a system which measures earnings by quantity or quality of production; or (4) a differential based on any other factor other than sex." These defenses would continue to offer the employer a robust opportunity to explain, and justify, a decision to pay a female employee less than a male employee performing equal work.

What the Paycheck Fairness Act would do is simply to ensure that the "factor other than sex" defense—which has been applied under the Equal Pay Act in ways that seriously undermine the principles of equal pay for equal work—could be used only in circumstances in which sex discrimination did not in fact taint pay decisions. The Paycheck Fairness Act would restore Congress's original intent, as recognized by the Supreme Court, to ensure that factors like the value assigned by the market to men's and women's work, or the greater bargaining power that men have historically commanded, were not used to excuse pay disparities. As such, the Paycheck Fairness Act would clarify that the "factor other than sex" defense applies only where the employer can show that a pay differential is truly caused by something other than sex and is related to job performance.

The bill's clarification of the defense would not unfairly disadvantage employers. Employers would be able to satisfy the defense by using familiar principles of anti-discrimination law, including those that underlie the requirement of Title VII of the Civil Rights Act of 1964 that a practice that disproportionately disadvantages a protected group be shown to be "job related and consistent with business necessity."

Like that disparate impact defense, the Paycheck Fairness Act's treatment of the "factor other than sex" defense is not designed to—and would not—prevent an employer from basing pay decisions on legitimate business considerations. It would simply ensure that those considerations could not be used in a way that would mask underlying sex discrimination.

Question 2. In her testimony, Ms. Brown argued that there is a significant amount of frivolous litigation on equal pay issues under current law. Does empirical evidence bear this out? Given the relatively low awards in such cases and the Supreme Court's recent ruling addressing punitive damages more generally, do you expect the Paycheck Fairness Act to generate an onslaught of frivolous lawsuits?

Answer 2. The Equal Pay Act has not generated, and the Paycheck Fairness Act will not generate, an onslaught of frivolous lawsuits. As noted in my testimony, a plaintiff pursuing an Equal Pay Act claim faces numerous hurdles to proving and obtaining remedies for pay disparities based on sex, starting with showing that she is paid less than a male employee performing equal work at the same establishment—a demanding standard that one commentator has said "provides women with a very limited substantive right indeed." Even those women who *do* succeed in proving pay discrimination receive only limited relief. Unlike those who challenge wage disparities based on race or ethnicity, who are entitled to receive full compensatory and punitive damages—and unlike those who challenge sex discrimination in other employment decisions, such as hiring, promotions and the like—successful plaintiffs under the Equal Pay Act receive only back pay and, in limited cases, an equal amount as liquidated damages. These limitations on remedies not only deprive women subjected to wage discrimination of full relief; they also substantially limit the deterrent effect of the Equal Pay Act.

The Paycheck Fairness Act would address these limitations, but not in ways that will produce frivolous litigation. The act would simply ensure that the prohibitions of the Equal Pay Act are applied effectively and would place women subject to wage discrimination on an equal footing with those who challenge pay discrimination on grounds of race or ethnicity. There is simply no basis to assert that ensuring that the law means what Congress intended it to mean more than four decades ago—or providing women the same remedies available to other civil rights plaintiffs—will produce meritless claims. To the contrary, these improvements to the law are necessary to ensure that the promise of equal pay for equal work becomes a reality.

Question 3. In your testimony, you point to a few recent gender discrimination cases where the companies involved are household names—Wachovia, Wal-Mart, and Morgan Stanley stand out because of their prominence and the number of Americans they employ. It appears that pay discrimination is not an anecdotal phenomenon practiced by a few "bad apples" but is instead a widespread phenomenon affecting some of our Nation's largest employers. How do these prominent cases illustrate the need for improvements in our equal pay laws?

Answer 3. Pay discrimination, far from being an anecdotal phenomenon practiced by a limited number of employers, is unfortunately all too often a way of doing business across the country. Shortly after this committee's hearing took place, for example, Morgan Stanley agreed to pay—in its second settlement of a sex discrimination lawsuit in 3 years—at least $46 million to settle a class-action suit filed by eight current and former female brokers who claimed that they were subject to discrimination in training, promotion and pay. And the American Association of University Women recently released a study, *Beyond the Pay Gap*, which reveals that just 1 year out of college, women working full-time already earn only 80 percent of what their male colleagues earn, even when they work in the same field. The report shows that 10 years after graduation, the pay gap widens—women earn only 69 percent of what their male counterparts make.

As studies have repeatedly shown, these pay gaps are not the result of choices that women make. A 2003 study by the U.S. Government Accountability Office found that, even when all the key factors that influence earnings are controlled for—demographic factors such as marital status, race, number and age of children, and income, as well as work patterns such as years of work, hours worked and job tenure—women still earn, on average only 80 percent of what men earn, leaving a 20 percent pay gap that cannot be explained or justified. The just-released AAUW study confirms this point.

The persistence of the pay gap, more than 40 years after enactment of the Equal Pay Act, demonstrates the critical need to improve the protections of that act. While Congress intended to sweepingly prohibit pay discrimination when it passed the Equal Pay Act in 1963, subsequent interpretations of the act have significantly limited its effectiveness. In addition, because the act was signed into law before the

other major anti-discrimination laws passed by Congress, it does not reflect the remedies and procedures that have been efficacious in addressing other forms of discrimination. Enactment of the Paycheck Fairness Act and the Fair Pay Act is critical to making the promise of equal pay for equal work a reality.

EVELYN MURPHY

Question 1. Some have argued that evidence for actual cases of pay discrimination is mostly anecdotal. Given your experience with the WAGE project, would you agree? What does research demonstrate about how widespread such discrimination truly is?

Answer 1. **Not available.**

Question 2. You pointed to the excellent example set by Minnesota in the State's own hiring practices. Clearly, the State's efforts have been very successful in dramatically narrowing the pay gap among its employees. Can you point to similar examples where public employers have proactively adopted these kinds of policies? How successful have they been? How well would these kinds of efforts transfer into the private sector?

Answer 2. **Not available.**

Question 3. You have said that one factor greatly affecting the inequality of wages is the fear of asking for a raise or bringing an issue of inequality to a superior. Do you have any knowledge of, or experience with, programs that train women to be more effective in salary negotiations? Is there reason to believe that such programs would make a real impact in pay disparity?

Answer 3. **Not available.**

PHILIP N. COHEN

Question 1. Ms. Brown argued against making a comparison of pay between jobs in different establishments of the same employer because of variances in local markets. However, without comparing across establishments, employees working for the same bank in different branches across the street or the city cannot be fairly evaluated.

Do you believe that comparisons between establishments are valid? What limitations do we face in addressing the wage gap when we limit our comparison to within a single establishment?

Answer 1. Because the level of gender segregation is so high, between occupations, but also between establishments and within establishments, a very strict standard of comparison—such as the current standard—makes it very difficult to address gender inequity. Even if we were to require comparisons only across identical job titles or job descriptions, the requirement to make comparisons only within establishments is unnecessarily restrictive and permits gender discrimination in the sorting of workers across establishments within an organization.

Question 2. You have made a compelling case for looking at the comparable worth of jobs that require different tasks but relatively equal skill levels. You gave the example of nurse aides and truck drivers, which are roughly comparable in terms of education, training, and the strength required to do the job.

Do you have other specific examples of such comparable occupations and the difference in their wages? Has there been any research done to systematically identify these pairings or groupings?

Answer 2. I do not have other specific examples at hand. The most systematic analyses have been conducted by State governments (e.g., Washington State), in attempts to implement comparable worth standards in State employment. A rough comparison is readily achieved using levels of formal education and work experience from surveys such as the Current Population Survey, combined with occupational characteristics from the *Dictionary of Occupational Titles* or the new O*Net occupational classification scheme.

RESPONSE TO QUESTIONS OF SENATOR ENZI BY JOCELYN SAMUELS

Question 1. This committee also has jurisdiction over education. It strikes me that much of the "occupational segregation" that exists is due not to decisions made by an employer, but to decisions made by the employee when she was still a student. These decisions were no doubt heavily influenced by her teachers, school environment, family environment and peers. How can we most effectively address THIS aspect of occupational segregation?

Answer 1. Occupational segregation is indeed influenced by educational sex segregation at an earlier stage; educational sex segregation remains pervasive in fields that have traditionally been dominated by one gender. The National Women's Law Center has, for example, studied enrollment patterns of girls and boys in high-school level career and technical education (CTE) classes that are nontraditional for their gender. Although title IX has been in effect for 35 years, girls remain pervasively under-represented in traditionally male CTE fields; nationwide, girls make up 87 percent of students enrolled in traditionally female training courses, such as cosmetology and home health care, and only 15 percent of those taking courses in traditionally male fields such as construction or welding.[1]

These enrollment patterns have critical consequences for girls' economic security as adults; girls who take up traditionally female occupations can expect to earn half (or less) of what they could make if they went into traditionally male fields. In fact, the highest median wage for a traditionally female category ($14.63 for health professions) was lower than the lowest median wage in a traditionally male field ($16.63 for agricultural management).[2]

But critically, the Center's research has also revealed that these patterns of sex segregation, far from resulting exclusively from choices made by young men and women, are in fact in large measure the product of barriers and discouragement that students face, ranging from steering by guidance counselors to selective recruitment of boys or girls for particular courses to harassment and differential treatment in nontraditional classrooms.[3]

It is critical to take the steps necessary to address this educational sex segregation and its impact on employment opportunities and wages for women. Congress' reauthorization of the Carl E. Perkins Act last year made progress in creating enhanced mechanisms to hold States accountable for eliminating barriers to recruitment and retention of students in CTE classes nontraditional for their gender. But more must be done. Among other things, the Department of Education must step up to its responsibility to proactively and fully enforce title IX to investigate, and ensure elimination of, school-based barriers that limit girls' access to educational opportunities. And Congress should both exercise its oversight responsibilities over the Department of Education and move expeditiously to enact additional laws that would provide incentives for students to explore nontraditional training and requirements that schools take proactive steps to address gender-based barriers in education.

These steps would substantially advance efforts to realize the promise of gender equity in education enacted by Congress in title IX three and one-half decades ago. But such steps will not be effective in fully addressing occupational segregation and pay disparities in the workforce without the additional enactment of the Paycheck Fairness Act and the Fair Pay Act, both of which create appropriate and targeted mechanisms to remedy the sex discrimination in which far too many employers across the country continue to engage.

Question 2. If much of the "occupational segregation" that exists today IS due not to decisions made by an employer, but to decisions made by the employee, is it fair to hold the employer responsible for any of these choices?

Answer 2. It is simply not accurate to state that much of the occupational segregation that exists today is due to decisions made by employees. As noted in my previous response, the educational sex segregation that contributes to continued segregation in the workplace is not a product of choice but of a multitude of factors including, importantly, gender stereotyping and artificial barriers to equal educational opportunity that are imposed at or by schools. And additional barriers are imposed in the workforce when women apply for jobs that are nontraditional for their gender. While schools and employers may have largely abandoned the types of explicit statements that "women need not apply" that characterized education and employment several decades ago, the constraints on women's choices remain as powerful, albeit perhaps not as overt, as they have ever been. The recent Supreme Court decision in *Ledbetter* v. *Goodyear Tire & Rubber Co.* illustrates all too forcefully the problems faced by women in nontraditional work environments. Lilly Ledbetter, who was one of the very few female supervisors at the Goodyear tire plant in Gadsden, Alabama, faced persistent sexual harassment at the plant and was told by her boss that he didn't think a woman should be working there. Before her case was dismissed by the Supreme Court on statute of limitations grounds,

[1] National Women's Law Center, *Tools of the Trade* (October 2005), available at http://www.nwlc.org/pdf/NWLCToolsoftheTrade05.pdf.
[2] *Id.*
[3] *Id.*

moreover, Ledbetter had proven that she was subject to sex discrimination in pay so egregious that a jury awarded her $3.3 million in compensatory and punitive damages.

Moreover, the pay scales that currently attach to female-dominated occupations reflect not the intrinsic value of that work to employers or to the economy, but the fact that wages have historically been suppressed for fields that are viewed as "women's work." The pernicious and persistent effects of the stereotypes that limit the pay for jobs held by women were recently reflected in the class action lawsuit filed against Wal-Mart, in which a plaintiff stated that when she applied for a raise, her manager said "[m]en are here to make a career and women aren't. Retail is for housewives who just need to earn extra money."[4] As a result, employers who continue to undervalue female-dominated occupations are simply benefiting from historic patterns of discrimination that have yet to be corrected.

Question 3. There are some choices we are discussing here that I hope you agree women should be permitted to continue to make, such as taking time out for child rearing. Once we allow for those choices, what is the appropriate statistical wage gap?

Answer 3. It is critical that employers across the country develop workplace policies that enable all employees, both male and female, to integrate career and family and other responsibilities. This is why, for example, the Center supports enactment of the Healthy Families Act, which would provide 7 paid days of sick leave for employees to address the health needs of themselves and their families. It is also crucial that the Department of Labor maintain and expand strong protections in regulations implementing the Family and Medical Leave Act and that Congress enact amendments to that law to ensure, for example, that the leave it provides is fully available to workers in smaller businesses. Employers must also be encouraged to provide flexible work arrangements to ensure that workers need not choose between their families and their jobs.

But even allowing for the fact that some employees, including women, may choose to take time out of the workforce for child-rearing, available evidence demonstrates that unexplained pay disparities persist. For example, a 2003 study by the U.S. Government Accountability Office (then the General Accounting Office) found that, even when all the key factors that influence earnings are controlled for—demographic factors such as marital status, race, number and age of children, and income, as well as work patterns such as years of work, hours worked, and job tenure—women still earned, on average, only 80 percent of what men earned in 2000.[5] That is, there remains a 20 percent pay gap between women and men that cannot be explained or justified.

Moreover, new research released in April 2007 by the American Association of University Women Educational Foundation shows that just 1 year out of college, women working full-time already earn less than their male colleagues, even when they work in the same field—and even though women typically outperform men on academic measures in college. According to the report, *Behind the Pay Gap*, 1 year after college graduation, women earn only 80 percent of what their male counterparts earn. Ten years after graduation, women fall further behind, earning only 69 percent of what men earn. Even after controlling for hours, occupation, parenthood, and other factors known to affect earnings, the research indicates that one-quarter of the pay gap remains unexplained and is likely due to sex discrimination. Over time, the unexplained portion of the pay gap grows.[6]

This research unequivocally demonstrates that pay disparities persist regardless of choices that women—or men—make and that all necessary steps must be taken to address the underlying discrimination that these disparities manifest.

RESPONSE TO QUESTIONS OF SENATOR HARKIN BY EVELYN F. MURPHY

Question 1. Dr. Murphy, data from the Census Bureau, the Department of Labor, and others have shown that the pay gap has been decreasing at a greater rate in recent years than during the 1990s.

---

[4] Bob Egelko, *Sex Discrimination Cited at Wal-Mart: Women Accuse Wal-Mart, Lawyers Seek OK for Class-Action Suit*, San Francisco Chronicle, Apr. 29, 2003, at B1, available at sfgate.com/cgi-bin/article.cgi?file+chronicle/archive/2003/04/29/BU303648.DTL.

[5] U.S. General Accounting Office, *Women's Earnings: Work Patterns Partially Explain Difference Between Men's and Women's Earnings* 2, GAO-04-35 (Oct. 2003), *available at* www.gao.gov/cgi-bin/getrpt?GAO-04-35.

[6] American Association of University Women Educational Foundation, *Behind the Pay Gap* (April 2007), *available at* www.aauw.org.

To what extent can this decrease be attributed to the drop in men's wages rather than gains made by women? Are there other factors?

Answer 1. Let me start with highlighting some puzzling aspects of gender wage gap since 1990 according to U.S. Census data, along with policy questions raised by these seeming anomalies.

1. In 1993, the gender wage gap reached an historic low of 23 cents—that is, median weekly earnings for year-round, full-time working women were 77 cents for every dollar earned by year-round full-time working men. Then the gap widened to 26 cents over the next 4 years even though the Nation's economy was in an expansion which would last through the rest of the decade. Policy researchers attributed this erosion in the gender wage gap to the passage of national welfare reform legislation, saying this was the result of large numbers of welfare women forced into taking low paying jobs. An analysis I did for my book, *Getting Even*, indicated that the effects of welfare reform legislation only took effect in the *late* 1990s when the wage gap was narrowing once again. The welfare reform explanation for changes in the gender wage gap in the mid-1990s is simply wrong when the time allowed after passage of the law before women were forced to take jobs and the related TANF data sets about when women actually took jobs are examined in detail. What then really explains the gender wage gap's erosion in these years? Using the current data, no one has a credible answer.

2. The gender wage gap only returned to 23 cents in the early years of the 21st century—when the Nation's economy was contracting, not expanding. In the booming economy between 1993 and 1999, why couldn't women lop off one penny of difference in their wages compared with men's? Again, using the data currently gathered by the Census Department and Bureau of Labor Statistics, no one has a credible explanation.

3. If the reasons for the gender wage gap were simply about merit—that women are not as well educated, as well trained, do not work as hard, have not worked as long as men—then the Nation should be debating why women only earn 95 cents or so for every dollar men earn because these differences have been essentially gone for several decades now. So, if the gender wage gap cannot be explained by differences in the characteristics of working women and working men, what is the explanation? I am a Ph.D. economist whose dissertation was based on regression analyses, correlation coefficients, tests of significance, and the like. If you carefully examine technical papers "explaining" the gender wage gap by the most respected statistical economists in this field, you will find sufficient caveats about their "explanations" to undermine any certainty that more than 5 cents of this difference is due to differences in women's characteristics compared with men's. In short, using Census and BLS data, no one has a definitive answer.

All of these questions are to caution you about drawing conclusions regarding the causes of the gender wage gap and changes in the gap based only on analyses of the labor force and ignoring analyses of employers' behavior. Researchers and policy analysts can only use what data are available, i.e., U.S. Census and Labor Department of labor force characteristics. Their answers get framed by the data they have to use. These data historically have taken into account only one dimension: workers characteristics. Employers' contributions to the gender wage gap have been left out. EEO–1 filings, the only data currently collected by the Federal Government about employers, are the only large scale data set about workplaces. These filings give only glimpses into employer's behavior regarding wages. A more comprehensive EEO–1 data gathering effort would give the U.S. Senate and policy analysts information to assess how much of the 23 cents difference is due to employer's discrimination. In 1999, an analysis by Professors Alfred and Ruth Blumrosen of EEO–1 filings[1] showed *de facto* "visible, intentional job discrimination" by gender and race on the part of a significant number of employers. Their analysis covered only differences in job titles held by women and men. A more rigorous comparison of wages by gender by job title would enable policy analysts to gain a first approximation of the part employers pay practices in contributing to the gender wage gap. I urge the committee to review the complete report of the Blumrosens to understand the value of employer data in addressing the gender wage gap.

So when you ask what other factors affect the gender wage besides men's declining real wages, I would ask you to look at employer data about: (1) differences in wages paid by gender for employees holding similar job titles who have similar

[1] THE REALITY OF INTENTIONAL JOB DISCRIMINATION IN METROPOLITAN AMERICA—1999; ALFRED W. BLUMROSEN, Thomas A Cowan Professor of Law, Rutgers Law School, Director, Intentional Discrimination Project, Rutgers Law School; RUTH G. BLUMROSEN, Adjunct Professor of Law, Rutgers Law School, General Advisor, Intentional Discrimination Project, Rutgers Law School.

training and education, years of experience, comparable responsibilities and conditions at work; (2) differences by gender in time to promotion (and more pay) for employees with similar performance ratings along with comparable training, experience, responsibilities, conditions; and (3) turnover of employees by gender with comparable skills, experience, authority, conditions of work. These three analyses would provide a solid start at assessing, for the first time in this Nation's history, the contribution of employer's discriminatory behavior to the gender wage gap.

Finally, in response to the matter you raise with regard to women's recent gains in the wage gap due to men's declining real earnings, here's a cautionary note. Because the gender wage gap is a ratio, one needs to look at what happens to *both* the numerator and the denominator. For example, according to the Census Bureau, the gender wage gap narrowed between 2003 and 2004. You asked whether this is due to men's real median earnings declining. The answer is yes, *but* that's not a complete picture. Women's earnings declined, too, yet at a lower rate than men's. In that particular year, women did not gain at men's expense. Both lost ground. Women just lost less ground relative to men.

Thank you for the opportunity to respond to your question. I would be glad to discuss this further with staff or committee members. I hope that the committee will report out favorably the pay equity legislation before them at this time. These bills are much needed to help not only working women, but also the families who rely on their paychecks to maintain a decent standard of living.

RESPONSE TO QUESTIONS OF SENATOR REED BY PHILIP COHEN

Question 1. Dr. Cohen, evidence suggests that the effects of the pay gap are more pronounced when we look specifically at single mothers. In particular, data from my State of Rhode Island shows that, in 2005, the median income for female-headed households was $19,964; yet, for single fathers, the median income was $31,016.

What pressures does this disparity put on the economy as a whole? What provisions within the bills we have been discussing today will most directly address this particular part of the pay gap?

Answer 1. The lower incomes and higher poverty rates among single mothers are important because children of unmarried parents are much more likely to live and be cared for by their mothers. When those women do not earn wages that can lift their families out of poverty, children's poverty is increased. This increases the cost of welfare and harms the quality of life for those children and their mothers.

The proposed legislation could have a beneficial effect in this regard. Occupational segregation between men and women has declined much slower among workers with lower levels of education than it has in the professions. Because single mothers are disproportionately less educated, that means they are more likely to work in female-dominated jobs that suffer from gender devaluation—the tendency of women's work to be paid less, partly because of the historical association of female workers with secondary incomes ("pin money"). That historical legacy is very hard to shake, even when a simple examination of worker skill levels reveals that women's jobs are equally skilled as men's. So the proposed provisions that would allow broader comparison of compensation across non-identical but equivalent jobs under the Fair Pay Act might benefit working-class women directly.

On the other hand, gender segregation among working-class women also means women are excluded from jobs that do require more skill and therefore provide more lifetime earnings and security. That is, the problem is not just that women are paid less for working at the same skill level—they are also blocked from many skilled blue-collar jobs. I am not aware of provisions in the proposed laws that would directly address occupational segregation (beyond the possible ripple effect of desegregation following from more equal pay scales). This remains a serious problem, not easily challenged under current anti-discrimination law, which makes it difficult to sue employers for not hiring people fairly.

RESPONSE TO QUESTION OF SENATOR CLINTON BY BARBARA BROWN

Question 1. I noticed throughout your testimony that you emphasized the importance of training and trying to get women into high paying jobs. I think I can safely say that nobody on this panel is suggesting women shouldn't be helping themselves. As Senator, I've introduced and supported several pieces of vocational training legislation, including the Workforce Investment Act and legislation specifically honoring tradeswomen. The "Paycheck Fairness Act" itself actually includes negotiating training for women so they can combat a difference in salary before it starts.

It seems there are three parties responsible for ensuring equity: (1) the employee, who is responsible for complying with the law; (2) the government, to make sure everyone is playing by the rules and (3) the employee. Ms. Samuels and Ms. Murphy

have shared some stories with us today, however, that illustrate how there's only so much a woman can do to help herself if discrimination exists in the workplace.

In your testimony, you suggest the committee's time might be "better spent on creating opportunities for women to choose whatever jobs they want, including those that the market rewards with high levels of pay." Women today, however, are heeding your call to achieve higher-paying jobs. From the year 2000 through 2005, women posted a net increase of 1.7 million jobs paying above the median salary, while men gained a net increase of just over 220,000 of such positions, according to a Bureau of Labor Statistics. The issue of the wage gap, however, continues to affect women workers. In 2005, the median weekly pay for women was $486, or 73 percent of that for men—$663. And just this year, Wimbledon has finally agreed to pay its women tennis champions the same amount of prize money as their male counterparts. Last year's men's champion received $1.170 million, while the tournament's women's winner got $1.117 million.

Just because women are entering fields with higher pay doesn't mean we shouldn't be looking at other professions. And to that end, my question is—rather than just encouraging women to get higher-paying jobs, which is one part of the equation—shouldn't we also be examining professions traditionally held by women such as teaching, nursing, and child care so we can learn to value them in the same way we value other professions?

Answer 1. **Not available.**

RESPONSE TO QUESTIONS OF SENATOR CLINTON BY EVELYN MURPHY AND JOCELYN SAMUELS

Question 1. I'd like to direct this question towards Ms. Murphy and Ms. Samuels. As you heard, Ms. Brown states "current law is reliable and effectively remedies discriminatory practices," and yet each of you and your studies show that the wage gap is stagnating and discrimination remains prevalent today.

In fact, in 2003, the GAO found that, even when all the key factors that influence earnings are controlled for—demographic factors such as marital status, race, number and age of children, and income, as well as work patterns such as years of work, hours worked, and job tenure—women still earned, on average, only 80 percent of what men earned in 2000. That is, there remains a 20 percent pay gap between women and men that cannot be explained or justified.

And over time, as you note in your statement, Ms. Murphy, this adds up. Over the course of a woman's working life she stands to make a considerably smaller sum than that of her male counterpart. If she is a high school graduate, that sum amounts to $700,000. If she is a college graduate, she will lose $1.2 million compared to a man receiving the same degree during the same year. And if she earns an MBA, law degree or medical degree? She'll lose $2 million.

And yet, some continue to claim not only that current law is adequate, but also that legislation to strengthen what we have on the books now—bills like the "Paycheck Fairness Act" and the "Fair Pay Act" are gratuitous. Given what you know about the wage gap, how would you respond to those who argue that: (a) current law supplies sufficient protection for women and that (b) additional legislation to strengthen current law is unnecessary?

Answer 1. Current law is simply inadequate to make the promise of equal pay for equal work a reality. This is so for several reasons, some of which I discuss below. First, court interpretations of the Equal Pay Act have narrowed its application in ways that make it difficult to demonstrate a violation of the law, even in cases where wage disparities are in fact based on sex. For example, it is insufficient for a plaintiff to show that she is paid less than an individual who works at a branch of her company several miles away; she must instead find a comparator within her same physical "establishment." In addition, judicial interpretations of the employer's "factor other than sex" defense have in some cases authorized pay disparities based on the very types of sex discrimination the Equal Pay Act was intended to prevent—such as a man's higher prior salary or greater bargaining power, which can themselves be the product of underlying sex discrimination.

Second, the Equal Pay Act's remedies and procedures, which were enacted before the seminal civil rights acts that began to follow in 1964, are insufficient to protect women who are subject to wage discrimination. For example, unlike those who challenge wage disparities based on race or ethnicity, who are entitled to receive full compensatory and punitive damages, successful Equal Pay Act plaintiffs receive only back pay and, in limited cases, an equal amount as liquidated damages. These amounts not only deprive women subjected to wage discrimination of full relief; they also substantially limit the deterrent effect of the Equal Pay Act.

Additionally, current law does not address wage disparities premised on occupational segregation. In female-dominated fields, wages have traditionally been depressed and continue to reflect the artificially suppressed pay scales that were historically applied to so-called "women's work." But courts have not interpreted the Equal Pay Act or Title VII of the Civil Rights Act of 1964 to address this chronic problem.

The Paycheck Fairness Act and the Fair Pay Act would respond, in appropriate and targeted ways, to each of these deficiencies in current law. Enactment of these bills is critical if the promise of equal pay for equal work is to become a reality.

Question 2. Ms. Samuels, I'd like to call on your legal expertise to address some of Ms. Brown's concerns expressed in her testimony regarding the "Paycheck Fairness Act."

Ms. Brown claims that by not requiring a court to find intentional discrimination before liability is imposed under the Equal Pay Act, employers are left "legally defenseless." In fact, Brown claims this provision would make it "virtually impossible for an employer to prove the legitimacy of its compensation decisions." Is that true?

Answer 2. The claim that it is "virtually impossible for an employer to prove the legitimacy of its compensation decisions" in a lawsuit brought under the Equal Pay Act is incorrect. Under the Equal Pay Act, a plaintiff bears the initial burden of establishing that she is being paid less than a man who is performing equal work in the same establishment. Courts have imposed a heavy burden on plaintiffs trying to make this showing. Once a plaintiff meets this burden, moreover, an employer may avoid liability by proving that the wage disparity is justified by one of four affirmative defenses—that is, that the employer has set the challenged wages pursuant to "(1) a seniority system; (2) a merit system; (3) a system which measures earnings by quantity or quality of production; or (4) a differential based on any other factor other than sex."

These defenses hardly leave the employer unable to justify its compensation decisions. In fact, the "factor other than sex" defense has been interpreted by some courts in ways that seriously undermine the principles underlying the Equal Pay Act and allow employers to justify decisions that are, in fact, based on sex. Some courts have, for example, accepted a "market forces" defense to pay discrimination; others have allowed employers to pay men more on the grounds that higher pay was necessary to attract a male candidate away from his prior employer. These cases fail to recognize that the prior salary earned by a male comparator may itself be the product of sex discrimination or may simply reflect the residual effects of the traditionally enhanced value attached to work performed by men.

These cases also convert what Congress intended to be an affirmative defense for an employer—a defense that demands that the employer prove that its failure to pay equal wages for equal work is based on a legitimate reason divorced from sex discrimination—into a requirement merely that an employer articulate some ostensibly nondiscriminatory basis for its decisionmaking. The Paycheck Fairness Act would correct this problem by requiring an employer to show that a pay differential is truly caused by something other than sex and is related to job performance. It would in no way prevent an employer from justifying legitimate pay decisions; it would simply ensure that the "factor other than sex" defense could not be used to mask decisions that in fact rest on discriminatory rationales.

RESPONSE TO QUESTIONS OF SENATOR CLINTON BY EVELYN MURPHY

Question 1. I'd like to direct this question towards Dr. Murphy and Ms. Samuels. As you heard, Ms. Brown states "current law is reliable and effectively remedies discriminatory practices," and yet each of you and your studies show that the wage gap is stagnating and discrimination remains prevalent today.

And yet, some continue to claim not only that current law is adequate, but also that legislation to strengthen what we have on the books now—bills like the "Paycheck Fairness Act" and the "Fair Pay Act" are gratuitous. Given what you know about the wage gap, how would you respond to those who argue that: (a) current law supplies sufficient protection for women and that (b) additional legislation to strengthen current law is unnecessary?

Answer 1. Senator Clinton, first allow me to thank you for your leadership in rekindling American women's quest for pay equity. Through your initiative, the hearing on the The Paycheck Fairness Act and the Fair Pay Act has refocused public policy discussion away from its preoccupation over the last decade with women's qualifications and commitment to work toward the conditions working women encounter in the workplaces throughout America. That is a much-needed paradigm shift.

In response to this specific question, Senator Clinton, you are the lawyer, I am not. So you understand better than I do the tactics of those who claim that current laws sufficiently protect women. They shift the burden of proof to those of us who cannot disprove their claim without data about what is happening to women at work.

The Federal Government *does not now collect from employers and make readily available* the essential salary data to disprove this assertion. EEO–1 filings by employers provide a starting point in examining workplace discrimination. More salary information from employers still needs to be collected. The EEOC's track record with protecting the privacy of information should assure employers that additional company-specific salary data can be protected, too.

Absent that data, let me raise questions to challenge the assertion that current laws sufficiently protect women:

1. If current laws provide sufficient protection then the gender wage gap is not about discrimination at work. So why is the gap still so large? If the gap were simply about women's qualifications, years of experience, commitment to work, etc., that is, the "merit" arguments, the overall differences in these measures between year-round, full-time working men and women have been essentially gone for over a decade. By "merit" reasoning, why isn't the wage gap closer to 5 cents than a gaping 20 cents?

2. In 1999, Professors Alfred and Ruth Blumrosen reported their analysis of EEO–1 data about the gender and racial composition of job holders (Executive Summary attached). Using very conservative methodology, they found a large portion of employers exhibiting *de facto* intentional discrimination. How do those who claim that women are sufficiently protected with current laws refute this documentation that workplace discrimination exists on a significant scale?

3. For years, national surveys have reported that working women put pay equity as a top concern and legislative priority. In the recent WAGE Project survey of over 700 women living and working in every State in the Nation and in a wide variety of public, private and nonprofit jobs, 7 out of 10 respondents reported a recent experience with unfair treatment or pay. (See Executive Report at http://www.wageproject.org/content/news/ under National Wage Survey Results, Wage Survey of Working Women Highlights, April 24, 2007.) The EEOC reports a steady stream of over 23,000 sex discrimination filings each year for the last decade. Add to that 10,000 retaliation claims filed each year under title VII. Bear in mind that these figures do not include the claims of sex discrimination filed with State discrimination authorities every year. So, when one looks beyond Census and BLS data, which are used to compare workers' characteristics, and instead looks at workplace characteristics, there is considerable evidence that workplace discrimination in America is widespread. If laws provide adequate protection, why do so many women continue to claim discrimination? Why don't *they* feel protected?

Question 2. Ms. Murphy, thank you for your testimony and for sharing so may women's personal experiences with the wage gap. Their voice is one that is constantly silenced—be it in the boardroom or on the assembly line, and we thank you for representing those voices today. After hearing from you and some of our other witnesses, I think it's fair to say there is a consensus that: first, the pay gap is not improving; second, current law is not covering the problem, or at the very least, is not being used effectively; and third, that's why Senator Harkin and I have introduced legislation in an attempt to address this discrimination.

Could you discuss how, from your perspective, the "Paycheck Fairness Act" would help the average female employee who suspects discrimination from her employer or, worse, a female employee who has learned of discrimination in her workplace?

Answer 2. I see four significant ways in which the average female employee who suspects she has been disadvantaged by discrimination by her employer or knows about the existence of discrimination where she works could be helped by passage of the Paycheck Fairness Act:

(a) She would be able to share salary information with co-workers in order to validate or disprove her suspicions without fear of retaliation; over the last 2 years, I have discussed working conditions with literally thousands of women in groups of 20–200. On practically every occasion one woman will say she cannot find out whether her salary is fair because her employer has threatened her with dismissal if she mentions her salary to anyone at work. Such threats are commonplace today in America's offices, plants, and worksites. Because so many women and their families depend on a woman's paycheck, these threats effectively stop women from pursuing even reasoned and reasonable questions about unfair pay.

(b) She would be able to consult the Secretary of Labor's guidelines on job categories in order to get an external, objective criteria to compare her job with others.

The Secretary's guidelines would give her a starting point to make sure she is comparing her job fairly with another—apple to apple—before she compares her salary with that of a comparable job.

(c) She and her female *and* male co-workers could urge their employer to adopt practices which eliminate pay inequities identified through the research and studies authorized by the Secretary of Labor. Most importantly, they could urge their employer to adopt the practices of the company which wins the prestigious national award. Many women do not want to litigate. They know the financial and emotional price they would pay. Nonetheless, women do want to change the conditions where they work so that they and others are treated fairly and equitably. The prescriptive information generated by the Paycheck Fairness Act would be a valuable resource to help women change the culture where they work.

(d) Finally, for women who have substantial evidence of discrimination and consider litigation, the financial penalties which would be available to them if their litigation were successful would pressure employers to resolve pay inequities to avoid costly judgments or settlements.

Not only would passage of the Paycheck Fairness Act offer working women added protections and support at work, it would signal employers and working women alike that Congress intends to pursue its 40-year agenda to eliminate discrimination against working women until all vestiges of inequity are erased.

Thank you for this opportunity to respond to questions prompted by my testimony at the hearing before the U.S. Senate Committee on Health, Education, Labor, and Pensions. If I can be of further assistance, please have your staff contact me.

ATTACHMENT

THE REALITY OF INTENTIONAL JOB DISCRIMINATION IN METROPOLITAN AMERICA—1999 *

Alfred W. Blumrosen—Thomas A. Cowan Professor of Law, Rutgers Law School, Director, Intentional Discrimination Project, Rutgers Law School

Ruth G. Blumrosen—Adjunct Professor of Law, Rutgers Law School, General Advisor, Intentional Discrimination Project, Rutgers Law School

EXECUTIVE SUMMARY

Intentional discrimination was "the most obvious evil" that the Civil Rights Act of 1964 was designed to prevent. Is intentional discrimination still a potent force restricting job opportunities for women and minorities? Or, is it what University of California Regent Ward Connerly suggested in 1998, "Black Americans are not hobbled by chains any longer. We're free to compete. We're capable of competing. It is an absolute insult to suggest that we can't."[1] Which is it: a "level playing field," or an uphill struggle for women and minorities against intentional job discrimination that favors whites/males?

This question is answered in a 4 year, 1,400 page study of the race color and sex of employees in large and mid sized private business establishments—THE REALITIES OF INTENTIONAL JOB DISCRIMINATION IN METROPOLITAN AMERICA—1999, by Rutgers Law School Professor Alfred W. Blumrosen and adjunct Professor Ruth G. Blumrosen. Supported by a grant from the Ford Foundation to Rutgers University, the study is based on employers' annual reports to the Federal Government involving 160,000 establishments employing 37 million workers. It involved a computer analysis of these reports, combined with Supreme Court and Congressional rules to identify "patterns and practices" of intentional job discrimination of the Supreme Court and Congress.

In 1991, Congress confirmed that intentional discrimination exists when "race, color, religion, sex or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice."[2] "Intent to discriminate" is not the equivalent of "evil motive," where a personal wish or desire to oppress women or minorities is the *only* explanation for the harm done. If an employer has both a legitimate reason for its practices and also a discriminatory reason, it is engaged in intentional discrimination.

---

* This study was supported by a grant from the Ford Foundation to Rutgers University. The views expressed are those of the authors, not necessarily those of the Foundation or the University.

[1] Interview on "60 Minutes" by Mike Wallace, Aug. 2, 1998, transcript, p. 22.

[2] Sec. 703 (m) of Title VII.

• The study found that intentional job discrimination continues on a major scale. Blacks, Hispanics, Asian Pacific workers and White Women who have the knowledge, skills, abilities, and experience to compete are deprived of that opportunity by intentional discrimination between a quarter and a third of the time they seek such opportunities.

• In 1999, intentional discrimination affected 2 million minority and female workers. It exists in every region of the country, in each of nine occupational categories from officials and managers to labor and service jobs.

• Seventy five thousand establishments discriminated intentionally against 1.3 million minorities; while 60,000 establishments discriminated intentionally against 952,000 women. Despite the persistence of intentional discrimination, the majority of establishments did not appear to engage in it. As a result, minorities and women have increased their participation in the labor force and in their proportion in better paying jobs.

• Forty industries were "equal opportunity discriminators"—discriminating against 75 percent of the Blacks, Hispanics, Asian-Pacific workers and White women who were affected. The top 10 of these industries were Hospitals, Eating and Drinking Places, Department Stores, Grocery Stores, Nursing and Personal Care Facilities, Computer and Data Processing Services, Hotels and Motels, Telephone Communications, Commercial Banks and Motor Vehicles and Equipment Manufacturing.

• Medical, Drug and Health related industries alone accounted for 20 percent of Women, Blacks, Hispanics and Asian Pacific workers affected by discrimination.

• Ninety percent of the affected workers were subjected to discrimination that was so severe that there was only one chance in 100 that it occurred by accident. That is far more than enough to trigger a legal presumption of intentional job discrimination.

• Between one third and one half of this discrimination was caused by "hardcore" establishments that had been discriminating for at least 9 years.

RESPONSE TO QUESTIONS OF SENATOR CLINTON BY PHILIP COHEN

Question 1. Dr. Cohen, I believe your knowledge of the history of gender inequality in this country may lend itself well to this question. Most criticism of legislation aimed at strengthening current equal pay law is rooted in the belief that such legislation would place an undue burden on employers.

I think it's critical to note, however, that these bills are not anti-employer. For example, the *Paycheck Fairness Act* creates a "Secretary of Labor's National Award for Pay Equity in the Workplace." This bill is not anti-employer. It's anti-discriminatory employer—a label I think most, if not all, people in this room would adopt. In order to achieve pay equity, we have to reward the good actors as often as we seek to remedy practices by bad ones.

My question to you is whether you agree with this notion. Is their sociological research that shows rewarding successful companies might in fact have a positive impact on competitors, if by only leading by example?

Answer 1. I cannot site a specific study that confirms this prediction. However, there are two reasons to suspect it is true based on current research. First, we know that organizations within a field compete with each other in many ways. To the extent that the treatment of workers and their compensation is visible to those outside an organization, more equitable treatment may confer a competitive advantage on an employer. This could affect who applies for jobs at the organization, or who patronizes it. We know from some studies that organizations that hire more female managers have benefited from that competitively, and that companies hire more female managers when their clients themselves have more women in leadership positions. Second, organizations learn from others within their fields, and often copy each other's practices in order to increase their legitimacy or to appear in compliance with a changing social or legal environment. All of this suggests that public recognition of firms dedicated to gender equity might lead to more widespread adoption of such practices.

Question 2. Related to the idea that work-family flexibility ideas need to be a part of the solution to the wage gap, this question is for anyone on the panel.

I recently read in *Business Week* that Best Buy has started an endeavor called ROWE—"results-only work environment." The ROWE concept defies the traditional notion that physical presence at work directly results in productivity. Best Buy is now expanding this successful experiment to give all employees at its corporate office 100 percent flexibility and the company plans to roll out the clock-free world to its retail stores. Since the program's implementation, Best Buy reports that the

average voluntary turnover has fallen drastically and productivity is up an average 35 percent in departments that have switched to ROWE. Of course, all employees, not just women enjoy this policy; but surely it helps the mother who is struggling to make it home on time for her kids while keeping her job.

And Best Buy is not alone—Sun Microsystems Inc. calculates that it's saved $400 million over 6 years in real estate costs by allowing nearly half of all employees to work anywhere they want. At IBM, 40 percent of the workforce has no official office.

Can anyone share other stories of corporate efforts to make the workplace more flexible not just for their female employees, but for everyone? And do you think these sorts of policies can eradicate the pay gap?

Answer 2. **Not available.**

[Whereupon, at 3:25 p.m., the hearing was adjourned.]

○