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## Individualism and the Market Determination of Women's Wages in the United States, Canada, and Hong Kong

M. NEIL BROWNE AND MICHAEL D. MEUTI\*

What causes us to have sympathies for whales, small children, and those with disease? Why are we more censorious toward healthy adults when problems engulf them? The narratives of causation we use to explain actions of others and ourselves provide a powerful answer to those questions.<sup>1</sup> Different causal narratives and their constitutive metaphors lead to different degrees of anxiety about the use of law to rectify personal harm.<sup>2</sup> For instance, when we tell ourselves that life is a jungle, we compel ourselves to impinge on personal liberty as a social inoculation.<sup>3</sup>

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1. See, e.g., DONALD N. MCCLOSKEY, KNOWLEDGE AND PERSUASION IN ECONOMICS 260-61 (1994) (discussing the incisive account of the role of philosophical narrative as a creator of worldview).

2. See generally PETER BROOKS & PAUL GERWITZ, NARRATIVE AND RHETORIC IN LAW (1996); RONALD DWORKIN, LAW'S EMPIRE (1986).

3. One of the frightening aspects of philosophical atomism is the denial of the affiliative needs of organisms. See AMITAI ETZIONI, THE MORAL DIMENSION 1-19

We could hardly allow radical personal discretion if we sensed imminent peril in the presence of one another.

The Robinson Crusoe story, a tale of self-reliant rational planning, captures the foundational American narrative.<sup>4</sup> In such a story, each person is expected to define, analyze, and dominate whatever challenges may arise. The story goes by the name "individualism," and its promise and constraints direct our legal development.<sup>5</sup>

To demonstrate the impact of individualism on the attitudes toward legal restrictions on the market determination of women's wages, this paper focuses on one key problem: Should existing market forces establish the wages of men and women or should legislatures and courts reorient those extant market institutions so they yield greater equity? The focus is established by analyzing the role that individualism plays in Canada and Hong Kong, particularly in terms of their respective response to pay equity. The rationale for focusing on these two countries is their similar legal heritage, as well as their close ties as trading partners. Nevertheless, what makes the comparison especially revealing is the contrasting cultural background in the two countries. This argument contains an implicit caution about the danger of applying analytical models to an understanding of legal systems without a thorough cultural grounding in the target countries or region.

The first part of the argument is a delineation of the potency of individualism as a cultural force and the resulting reverence for market prices and wages. Succeeding sections describe the role of pay equity legislation in Canada and Hong Kong in reducing the pay equity gap. In light of those descriptions, this paper concludes that the degree of individualism in a culture is not necessarily the dependable predictor of attitudes toward pay equity that others

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(1988), for a disturbing account of the under-socialized individuals who inhabit an individualistic world.

4. The power of this story may reside in its primitive yet charming simplicity. Crusoe lives on the island as sole producer and consumer of goods and services. Because it is not cluttered with social relations, family, government, etc., his life permits maximum latitude for success and failure explained entirely in personal terms. See Gilliam Hewitson, *Deconstructing Robinson Crusoe*, 4 AUSTL. FEMINIST. STUD. 232 (1994).

5. See LAWRENCE E. MITCHELL, *STACKED DECK: A STORY OF SELFISHNESS IN AMERICA* (1998), for a discussion of the influence of individualism in shaping our legal process.

have argued.<sup>6</sup>

## I. INDIVIDUALISM, MARKETS, AND WOMEN'S WAGES

### A. *The Link Between Individualism and Markets*

The elevation of the individual's interests over the interests of the collective characterizes individualism.<sup>7</sup> Individualists downplay their ties to others, viewing themselves as essentially atomistic.<sup>8</sup> Consequently, individualism holds that "each individual is the controlling factor in shaping personal destiny."<sup>9</sup> This perception of reality leads to individualists valuing self-reliance, freedom from regulation (negative liberty),<sup>10</sup> rationality,<sup>11</sup> and personal choice.

Such a model of causation holds the individual responsible for whatever condition she happens to experience. Having chosen her

6. See Nancy Kubasek et. al., *Comparable Worth in Ontario: Lessons the United States Can Learn*, 17 HARV. WOMEN'S L. J. 103, 108 (1994).

7. See HARRY C. TRIANDIS, *INDIVIDUALISM & COLLECTIVISM* 2 (1995). Triandis defines individualism as follows:

[A] social pattern that consists of loosely linked individuals who view themselves as independent of collectives; are primarily motivated by their own preferences, needs, rights, and the contracts they have established with others; give priority to personal goals over the goals of others; and emphasize rational analyses of the advantages and disadvantages to associating with others.

See *id.*

8. Atomism assumes that the makeup of the individual is given independently from society. It "postulates independent disembodied entities volitionally charting their own paths in pursuit of personal well-being." Andrea Giampetro-Meyer et al., *Advancing the Rights of Poor and Working-Class Women in an Individualistic Culture*, 2 LOY. POVERTY L.J. 41 n.2 (1996) (holding that the only purpose of society is to benefit the individual, atomism places a high value on negative liberty (the absence of government interference in the lives of its citizens)). Atomistic psychology had a strong influence on the development of classical liberal thought. See E.K. HUNT, *PROPERTY AND PROPHETS: THE EVOLUTION OF ECONOMIC INSTITUTIONS AND IDEAS* 39-40 (7th ed. 1995). This influence remains evident in the market-oriented thought of neoclassical economists today.

9. Giampetro-Meyer et al., *supra* note 8, at 42 n.3.

10. See ROBERT N. BELLAH ET AL., *HABITS OF THE HEART: INDIVIDUALISM AND COMMITMENT IN AMERICAN LIFE* 23 (1985). Bellah notes that "[f]reedom is perhaps the most resonant, deeply held American value." *Id.* To Americans, freedom is often defined as the freedom from an oppressive authority and from having others' views and lifestyles forced upon them. Nonetheless, "[w]hat it is that one might do with that freedom is much more difficult for Americans to define." *Id.*

11. See *id.* at 144. Bellah also discusses middle class individualism and its emphasis on rationality and success. See *id.* at 149.

actions rationally, it follows that the joys and pains consequent to those decisions belong to her. Hence, when women claim that legislative intervention is necessary to provide them greater justice in labor markets, the response is brusque: choose to enter labor markets where your pay will be more appropriate for your skills and aspirations. If women fail to make this choice, appeals for pay equity sound to individualist ears like a moan of envy and little more.

Just where did this doctrine of radical personal responsibility begin and how has it flourished? Alexis de Tocqueville was among the first scholars to label such thought patterns as "individualism." In *Democracy in America*, he wrote:

'Individualism' is a word recently coined to express a new idea. Our fathers knew only about egoism.

Egoism is a passionate and exaggerated love of self which leads a man to think of all things in terms of himself and to prefer himself to all.

Individualism is a calm and considered feeling which disposes each citizen to isolate himself from the mass of his fellows and withdraw into the circle of family and friends; with this little society formed to his taste, he gladly leaves the greater society to look after itself.

Egoism springs from a blind instinct; individualism is based on misguided judgment rather than depraved feeling. It is due more to inadequate understanding than to perversity of heart.

Egoism sterilizes the seeds of every virtue; individualism at first only dams the spring of public virtues, but in the long run it attacks and destroys all the others too and finally merges in egoism.

Egoism is a vice as old as the world. It is not peculiar to one form of society more than another.

Individualism is of democratic origin and threatens to grow as conditions get more equal.<sup>12</sup>

The nation that Tocqueville analyzed almost two centuries ago

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12. Alexis de Tocqueville, *Democracy in America*, in *INDIVIDUALISM & COMMITMENT IN AMERICAN LIFE* 11 (Robert N. Bellah et al. eds. 1987).

(the United States) is the primary site where individualistic thought flourishes today. Evidence of individualism's strength in the United States includes its reliance on a market-driven economy,<sup>13</sup> its dominant form of religion,<sup>14</sup> and its emphasis on human rights.

The primary intellectual spokespersons for radical individualism are mainstream economists. Anyone wishing to champion pay equity in any country must answer the economist's challenges. Their textbooks contain little else than a complex, logical defense of market prices, market wages, market preferences, as well as those costs and benefits articulated by markets.<sup>15</sup> Mainstream economists believe that private exchange through the market is the best (most efficient)<sup>16</sup> device for effectuating personal choice. Individuals express themselves through their individual, private preferences for particular goods and services and indirectly for the labor of certain people. Economists presume collectivist concepts like society and community interest to be chimerical.

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13. See HUNT, *supra* note 8, at 38–45, for a discussion of the individualistic assumptions and attitudes that led to the rise of the market system.

14. See GERRY C. HEARD, BASIC VALUES AND ETHICAL DECISIONS: AN EXAMINATION OF INDIVIDUALISM AND COMMUNITY IN AMERICAN SOCIETY 5 (1990). Heard views American religious individualism as being closely related to the Protestantism that is dominant in the United States. See *id.*

15. See David George, *The Rhetoric of Economic Texts*, 24 J. ECON. ISSUES 861 (1990).

16. Mainstream economists emphasize certain values most. They value efficiency, in the sense of getting the most from a given amount of inputs or resources, and negative freedom, defined as acting without restriction from rules imposed by others. Mainstream economists, however, try to argue that their discipline is value-free. In other words, they claim that when economists make decisions, they make those decisions based on facts, not values.

Understanding the value preferences that certain groups ascribe to is important because those value preferences will influence policy formation. See, e.g., James A. Gross, *The Kenneth M. Piper Lecture: The Broken Promises of the National Labor Relations Act and The Occupational Safety and Health Act: Conflicting Values and Conceptions of Rights and Justice*, 73 CHI.-KENT L. REV. 351, 372 (1998).

Every economic system has historical roots and embodies value judgments about the individual person, law, private property, liberty, and the role of government. A particular system and theory are chosen because they yield policy implications compatible with someone's or some group's vision of what should be in the world . . . . [Economists'] underlying value premises, however, are at least as important as the extent of their empirical knowledge of the real world or the validity of their mathematical analyses.

*Id.*

Market reasoning, however, does not ignore public interest. In economic theory, whatever happens is by definition the optimal result for society.<sup>17</sup> Additionally, economic theory reduces the concept of social policy to an aggregation of individual, private choices as they are articulated in the forum for personal expression—the market.

Contrary to individualistic thought, collectivism, the common antinomy to individualism in cultural measures of values, elevates the needs of the collective above the needs of the individual.<sup>18</sup> Collectivists frequently define their well being in terms of the group's well being. Rather than emphasize individual rights, collectivists view their duties to the group as paramount. They emphasize interdependence and close relationships.<sup>19</sup> Because collectivists tend to see themselves as interconnected with other members of their society, they are more likely to implement economic policies that rely on political voice, rather than the supply and demand readings that drive the market.

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17. See DEBORAH STONE, *POLICY PARADOX: THE ART OF POLITICAL DECISION MAKING* 2 (1997).

A market can be simply defined as a social system in which individuals pursue their own welfare by exchanging things with others whenever trades are mutually beneficial. Economists often begin their discussions of the market by conjuring up the Robinson Crusoe society, where two people on a lush tropical island swap coconuts and small game animals. They trade to make each person better off, but since each person always has the option of producing everything for himself, trading is never an absolute necessity for either one.

*Id.* Stone continues:

The theory of markets says that as long as exchanges meet these conditions of being both voluntary and fully informed . . . they lead to the goal of allocative efficiency: Resources always move in a direction that make people better off. This is because exchanges are choices . . . . Since no one would voluntarily exchange in a trade that made him or her worse off, and people would engage in trades only when at least one side was made better off, all voluntary exchanges must lead to situations where at least one person is better off and no one is worse off. In the theory of markets, voluntary exchanges transform resources into something more valuable.

*Id.* at 68.

18. See TRIANDIS, *supra* note 7, at xii. Conflict between individual goals and the goals of the collective are rare in collectivist cultures, however, because of the high value that collectivist place on homogeneity within the in-group. See *id.* at 11. The result of such homogeneity is that individuals often adopt the collective's goals as their own.

19. See *id.* at 44. Relationships are so important to collectivists that they are a major component of how collectivists define their identities. See *id.* at 71.

### B. Pay Equity as an Alternative to Market Wage-Determination

Since women first entered the paid labor force, employers have compensated them at a lower rate than men.<sup>20</sup> In the late nineteenth and early twentieth centuries, such wage policies were defended as "protecting the family." Men were offered a "family wage," a wage designed to support a husband, a wife, and their children.<sup>21</sup> Women who worked were not offered the same family wage.<sup>22</sup> One reason for this differential is the assumption that women who were working did so either for "pin money" (because they already had a husband or a father who supported the family with his family wage) or merely to support themselves.<sup>23</sup> Such assumptions served to justify the difference between men's and women's wages.

Another reason for the pay differentials is that women who joined the labor market often entered jobs in which they played "supplementary and supportive roles."<sup>24</sup> When women worked as

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20. Such inequities continue today. As recently as 1992, women earned only \$.71 for each dollar that men earned. This figure demonstrates that despite the passing of two major pieces of anti-discrimination in the workplace legislation within the preceding thirty years, women's earnings relative to men's increased by only \$.12 to the dollar. See U.S. BUREAU OF THE CENSUS, CURRENT POPULATIONS REPORTS, SERIES P-60 184, *Money Income of Households, Families and Persons in the United States: 1992* at xvi (1993) cited in Sandra J. Libeson, *Reviving the Comparable Worth Debate in the United States: A Look Toward the European Community*, 16 COMP. LAB. L. 358, 359 (1995).

21. See ALICE KESSLER-HARRIS, *A WOMAN'S WAGE: HISTORICAL MEANINGS AND SOCIAL CONSEQUENCES* 8-11 (1990), for a discussion of the implementation of the family wage. In the early history of capitalism, earning a family wage required several family members to work. These family members pooled their income together to purchase the goods and services that the family required. See *id.* at 8. The struggle for a living wage was, in large part, a struggle for a different form of social order. See *id.* at 9. The family wage, assuming female dependency, provided men with the guaranteed domestic services of their wives. See *id.* at 10.

22. Women's wages were much lower. In fact, the average wage earned by a woman was about half the average for a working man. See *id.* at 8-9.

23. See *id.* at 8. "The woman's wage, at least for the early twentieth century, rested in large measure on conceptions of what women needed." *Id.* "[A woman's wage] reflected not what was but what ought to be. That men ought to be able to support wives and daughters implied that women need not engage in such support. They ought to be performing home duties." *Id.*

24. See Anne Cheung, *Pay Equity for Hong Kong: A Preliminary Exploration*, HONG KONG L.J. 383, 385 (1995).



nurses and secretaries, for instance, their tasks were viewed as natural to women. After all, women had traditionally performed such tasks in the home.<sup>25</sup> Thus, the skill levels of those occupations were assumed to be low, and women who worked in such occupations were paid less.<sup>26</sup> Additionally, due to social norms, such jobs were assumed to be for women only. This assumption facilitated the gender division of labor that persists even today.<sup>27</sup> Over time, the pay differentials between men's and women's work became embedded in the American wage system and led to the wide-scale devaluation of women's work.<sup>28</sup>

How might these differentials be overcome? While certainly there are many possibilities, two options have gained substantial followings. One option calls for encouraging women to enter occupations that are traditionally dominated by men (and therefore better compensated). Such an affirmative action approach, by providing incentives for employers to hire women into such positions, calls for a minor intervention in the market mechanism. The other option is pay equity (PE).<sup>29</sup>

Pay equity is the policy of paying women and men equally for performing different jobs with relatively equal value.<sup>30</sup> The object of this policy is to remove the systematic devaluation of women's

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KONG L.J. 383, 385 (1995).

25. See *id.* at 386. Cheung argues that, in this sense, "[t]he labor market can, in fact, be viewed as an extension of relations in the private home." *Id.*

26. See R. STEINBERG, COMPARABLE WORTH AND WAGE DISCRIMINATION: TECHNICAL POSSIBILITIES AND POLITICAL REALITIES 23 (1984).

27. Today 89 percent of working women are concentrated in traditional jobs in which over 75 percent of their fellow workers are women. See *Joint Hearing on the Fair Pay Act of 1994 Before the Subcomm. on Select Educ. and Civil Rights of the Comm. on Educ. and Labor and the Subcomm. on Compensation and Employee Benefits of the Comm. on Post Office and Civil Service*, 103d Cong. 56 (1994) (statement of Michele Leber, Treasurer, Nat'l Comm. on Pay Equity) [hereinafter *Joint Hearing on the Fair Pay Act of 1994*].

28. See Kathryn Branch, *Are Women Worth as Much as Men?: Employment Inequities, Gender Roles, and Public Policy*, 1 DUKE J. GENDER L. & POL'Y 119 (1994). "All available statistics show that men earn significantly more than women. This remains true no matter what the year the figures are from, or whether they are weighted according to age, labor force status, or educational attainment." (citations omitted).

29. The terms "pay equity" and "comparable worth" (CW) may be used interchangeably. In the United States, the latter term is more often used, whereas in Canada, the former is more common. For the purpose of this paper, we will use the term "pay equity."

30. See PAY EQUITY COMMISSION, QUESTIONS AND ANSWERS: PAY EQUITY IN THE WORKPLACE 2 (n.d.).

work that traditional pay differentials have both created and reflected.<sup>31</sup> Value, in a pay equity system, is determined along four axes: skill, effort, responsibility, and working conditions.<sup>32</sup>

To implement a pay equity system, an employer must perform job evaluations for each of its jobs based on these four axes. By doing so, the employer is able to compare the relative value of a wide variety of jobs. For example, it is possible for an employer to compare the jobs of secretary and groundskeeper, despite their great differences, under a pay equity job evaluation. While groundskeepers may have to exert effort that is more physical and endure dirtier working conditions, secretaries may have more responsibility and may require more mental effort to complete their job. Depending on the weight given to each of these criteria, the employer may conclude that the two jobs are comparable, and therefore the employer should compensate equally.

When pay equity job evaluations are completed and it is found that a female-dominated job is not compensated as well as a similarly ranking male-dominated job, pay equity requires that the wage of the female workers be raised to the level of the male-dominated job's wage. In this way, pay equity promotes equality by raising the valuation of jobs that are dominated by women rather than allowing employers to reach equality by lowering the wages in certain classes of men's jobs and thereby devaluing them as well.

Certainly, this method of improving women's status is not foolproof. Because job evaluations are largely subjective, it is likely that some of the traditional patterns of thought that marginalize women's value in the labor market will pollute the evaluations.<sup>33</sup> Skills that parallel characteristics that are

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31. See Owen M. Fiss, *What is Feminism?*, 26 ARIZ. ST. L.J. 413, 420 (1994) (arguing that pay equity may be justified as a policy to prevent subordination, but not as a policy to prevent discrimination).

32. Examples of skilled activities include reading, writing, innovative tasks, planning, reasoning, and communicating. In measuring effort, both physical and mental efforts are considered. Autonomy, complexity judgment, job knowledge, and experience are criteria that determine a worker's job responsibilities. "Working conditions" is defined as the worker's job environment. See Cheung, *supra* note 24, at 387.

33. Examples of such problems are evident in the United States' limited experience with pay equity. For example, a study commissioned by the Communication Workers of America showed that lifting boxes and driving vans qualified as "special skills," while typing and writing shorthand did not. See *id.*

traditionally thought of as "feminine" (e.g., care-giving)<sup>34</sup> may be defined as less "skilled" and therefore less valuable than skills that emphasize more "masculine" characteristics (e.g., strength or rationality).

By questioning the foundations for market wage determination, pay equity calls into question the entire capitalist system.<sup>35</sup> While capitalism allows groups with power (read "money" when discussing a capitalistic society) to define "value," pay equity removes this privilege. In this regard, pay equity alters the market system of power relations en route to transferring power to women.

Individualistic cultures are much more likely than collectivist cultures to rely on the market for determining economic justice. Indeed, the economic theory of capitalism is grounded in the individualistic thought of eighteenth and nineteenth century classical liberalism. Classical liberalism asserted that human beings are essentially inert, self-interested, and atomistic rational calculators.<sup>36</sup> According to this philosophy, human beings are truly motivated only when engaged in activities that they themselves chose and that would offer them a tangible benefit. This view of human nature led them to support an economic system that allowed individuals to maximize personal choice.

Adam Smith's market system did just that. Smith theorized that by allowing each person to choose what she wished to do for a living and which goods and services to purchase, the market system would lead to social harmony. It would provide for the division of labor, allowing each individual to channel his efforts into the tasks that would prove most beneficial to him.<sup>37</sup> Furthermore, through the channels of supply and demand, the market would provide price signals that would ensure that

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34. See, e.g., Suzanne Gordon, *Feminism and Caregiving*, 10 AM. PROSPECT 119 (1992). Gordon recognizes "that caregiving has been historically devalued as women's scutwork," and notes feminism's ambivalence toward this incredibly important human function. *Id.* at 120. She argues that both the labor market and the public should better respect the work of caregivers. *Id.* at 127. See also Branch, *supra* note 28, at 154 ("In our society, the attributes associated with women, and consequently women themselves and the work they do, have been devalued.").

35. See Nancy Kubasek et al., *supra* note 6, at 108.

36. See HUNT, *supra* note 8, at 38. For a more thorough discussion on the "psychological creed" of classical liberalism, see *id.* at 38-40.

37. See *id.* at 41.

producers offer only those goods and services that people desire and produce them in proper quantities.<sup>38</sup>

The fundamental idea underlying the market system is that social well being is maximized when each individual pursues his or her own interests.<sup>39</sup> Thus, individualistic cultures tend to support market ideology, for the market encourages individualistic behavior and thought.

Pay equity not only deviates from the market approach to wage determination, but also, as previously mentioned, questions its legitimacy. Because pay equity intervenes in the market's approach to wage-setting,<sup>40</sup> it makes sense to hypothesize that the likeliness of pay equity's being implemented in a particular nation is inversely related to the extent of individualism in that society.<sup>41</sup> This said, it is easy to understand why efforts to implement pay equity policies in the United States have been met with hostility.

### C. *The United States' Experience with Pay Equity*

The United States' experience with pay equity establishes the anchor point for examining this expected link between support for individualism and opposition to pay equity. While attempts at pay equity legislation in the United States date back to the early years of the twentieth century,<sup>42</sup> it was not until 35 years ago that the

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38. See ROBERT L. HEILBRONER, *THE WORLDLY PHILOSOPHERS: THE LIVES, TIMES, AND IDEAS OF THE GREAT ECONOMIC THINKERS* 46 (1953).

39. See *id.* at 11.

In the market system the lure of gain, not the pull of tradition or the ship of authority, steers each man to his task. And yet, although each is free to go wherever his acquisitive nose directs him, the interplay of one man against another results in the necessary tasks of society getting done.

*Id.*

40. Advocates of market wage setting argue that supply and demand are the only devices that will lead to a fair and efficient wage. They claim that the invisible hand of the market guides the wage, like any other price, and therefore wages are determined by an impersonal process in which there is no room for discrimination. Such arguments, however, overlook ways in which personal tastes and preferences guide the market devices of supply and demand, thereby creating a portal through which discrimination may enter the wage-setting process. See KESSLER-HARRIS, *supra* note 21, at 6-32, for an analysis of how patriarchal social norms in the late nineteenth and early twentieth centuries deflated the wages earned by women.

41. See Kubasek et al., *supra* note 6, for an exploration of the application of that logic to comparable worth in Canada and Hong Kong.

42. See Sandra J. Libeson, *Reviving the Comparable Worth Debate in the United States: A Look Toward the European Community*, 16 COMP. LAB. L. 358, 363 (1995).

United States Congress passed the first piece of legislation that addressed the gender wage discrepancy. The Equal Pay Act (EPA), passed in 1963, guarantees equal pay only for *equal work*.<sup>43</sup> Thus, it is easy for employers to justify legally paying higher wages to men.<sup>44</sup> Employers only need to alter a job description along only one of the four axes used for measuring value to make a "man's job" different from a similar "woman's job." At that point, disgruntled lower-paid women lose their grounds for a lawsuit.

A year after Congress passed the EPA, Congress passed the first comprehensive piece of anti-discrimination legislation in the United States: the 1964 Civil Rights Act.<sup>45</sup> Title VII<sup>46</sup> of the Act barred discrimination on the basis of race, color, national origin,

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"The equal pay movement for women around the world began during World Wars I and II. Women filled traditionally male jobs as men went off to battle, and the pay scales for 'men's work' were reassessed once women performed these jobs." *Id.* (citing Robert E. William & Thomas R. Bagby, *The Legal Framework*, in *COMPARABLE WORTH: ISSUES AND ALTERNATIVES* 197, 205 (E. Robert Livernash ed., 1984)). *See also* Cynthia Reddick-Martin, *Women's Right to Equal Pay in the International Workplace: Is the United States a Poor Leader and a Poor Follower?*, 9 FLA. J. INT'L L. 479, 481 (1994). "Initially, the War Labor Board adopted a policy authorizing equal pay for comparable work in 1942." *Id.* (citing Deborah L. Rhode, *Occupational Inequality*, 1988 DUKE L. J. 1202, 1227 (1988)).

43. *See* 29 U.S.C. § 206(d) (1982). The Equal Pay Act of 1963 states:

No employer having employees subject to any provisions of this section shall discriminate within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at rates less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor than sex: Provided, that an employer who is paying a wage differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

*Id.* Interestingly, the Equal Pay Act's origin was a bill that would have implemented a standard closer to pay equity than to the EPA's substantially equal work standard. *See* Reddick-Martin, *supra* note 42, at 483.

44. The Bennett Amendment to the EPA lists the four affirmative defenses that an employer can use to justify a wage gap for substantially equal work. They are seniority, merit, quantity or quality of production, and any factor other than sex. *See* 29 U.S.C. § 206(d).

45. *See* 42 U.S.C. §§ 2000a-2000h (1998).

46. *See* 42 U.S.C. §§ 2000e-2-17 (1998).

religion, or sex in public and private sector employment.<sup>47</sup> Despite this blanket condemnation of discrimination in hiring, firing, promotion, and terms and conditions of employment, the gender wage gap remained. Because of the failure to enforce<sup>48</sup> Title VII in a pro-pay equity fashion,<sup>49</sup> female victims of wage

47. Title VII holds:

It shall be an unlawful employment practice for an employer

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a) (1998).

48. Section 705 of Title VII created the Equal Employment Opportunity Commission to enforce the statute's laws. The section states:

There is hereby created a Commission to be known as the Equal Employment Opportunity Commission, which shall be composed of five members, not more than three of whom shall be members of the same political party. [Members of the Commission] shall be appointed by the President by and with the advice and consent of the Senate . . . .

The Commission shall have power—

(1) to cooperate with and, with their consent, utilize regional, State, local, and other agencies, both public and private, and individuals;

(2) to pay to witnesses whose depositions are taken or who are summoned before the Commission or any of its agents the same witness and mileage fees as are paid to witnesses in the courts of the United States;

(3) to furnish to persons subject to this title such technical assistance as they may request to further their compliance with this title or an order issued thereunder;

(4) upon the request of (i) any employer, whose employees or some of them, or (ii) any labor organization, whose members or some of them, refuse or threaten to refuse to cooperate in effectuating the provisions of this title to assist in such effectuation by conciliation or such other remedial action as is provided by this title;

(5) to make such technical studies as are appropriate to effectuate the purposes and policies of this title and to make the results of such studies available to the public;

(6) to refer matters to the Attorney General with recommendations for intervention in a civil action brought by an aggrieved party under section 706, or for the institution of a civil action by the Attorney General under section 707, and to advise, consult, and assist the Attorney General on such matters.

42 U.S.C. § 2000e-2(a) (1998).

49. See *Equal Employment Opportunity Commission's Handling of Pay Equity Cases: Hearings before a Subcommittee of the Committee on Government Operations*, 98<sup>th</sup> Cong. 18 (1984) (statement of Representative Geraldine Ferraro) [hereinafter *EEOC's Handling of Pay Equity Cases*].

What has happened to the pay equity cases before the EEOC? In the words of

discrimination were forced to go to the courts.

The first major pay equity case in the United States was *County of Washington v. Gunther*.<sup>50</sup> This 1981 case forced the Supreme Court to clarify the relationship between Title VII and the EPA by deciding whether a wage discrimination charge under Title VII may be filed if the "substantially equal work" standard of the EPA is not met. Recognizing that Title VII is "a more comprehensive vehicle for attacking discrimination than the Equal Pay Act,"<sup>51</sup> the Court ruled that Gunther's failure to meet the EPA's "substantially equal work" standard did not preclude her from pursuing action under Title VII. The Court also decided in *Gunther*, however, that plaintiffs who sue for gender-based wage discrimination must prove intentional discrimination.<sup>52</sup> By

one EEOC Commissioner, they have been 'warehoused,' intentionally set aside, probably put in a pile somewhere in a dusty filing cabinet. He said they are in this holding pattern while the Commissioners develop the EEOC's policy on pay equity.

*Id.* See also *id.* at 3 (statement of Representative Mary Rose Oaker) ("[In 1982,] the EEOC . . . was not moving on some 215 comparable worth cases because the Commission did not have a clear-cut definition of what comparable worth really was all about." *Id.* at 20 (comments of Representative Frank)).

The reason they have no policy is that they have not made a policy. Not having made a policy and then saying that they can't do anything because they don't have a policy is what I have called in other contexts the politician's reverse Houdini . . . . You tie your own hands behind your back, and then you go before the public and say, "Gee, I would love to help you, but my hands are tied."

*Id.* See also, Melinda P. Chandler, *Equal Pay for Comparable Work Value: The Failure of Title VII and the Equal Pay Act*, 75 NW. U. L. REV. 914-43 (1980) (arguing for Congressional support of pay equity legislation because Title VII and the EPA did not sufficiently eradicate sex discrimination); *Equal Pay, Comparable Work, and Job Evaluation*, 90 YALE L.J. 657-80 (1981) (arguing that Title VII requires equal pay for comparable work).

50. See *County of Washington v. Gunther*, 452 U.S. 161 (1981). In this case, female guards brought a class action suit against the County because the County paid them 30 percent less than male guards did. See *id.* at 180-81. According to the job evaluation surveys used by the County, the female guards should have received 95 percent of the male guards' wages. See *id.* at 180.

51. M. Neil Browne & Andrea Giampetro-Meyer, *The Overriding Importance of Market Characteristics for the Selection of Pay Equity Strategies: The Relative Efficacy of Collective Bargaining and Litigation in the Nursing Industry*, 11 INDUS. REL. L. J. 414, 428 (1989).

52. See *Gunther*, 452 U.S. at 170-71. Cases in which the plaintiff alleges intentional discrimination are known as disparate treatment cases. For a discussion of how a plaintiff in such a case can establish a prima facie case, see *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). In this case, an employer discharged an employee for engaging in disruptive and illegal activities against his employer. When the company, McDonnell

removing the possibility of disparate impact<sup>53</sup> claims, the Court made it more difficult for plaintiffs to win pay equity suits. The Court dodged a decision on the merits of pay equity as public policy,<sup>54</sup> however, by stating that Gunther's claim "is not based in the controversial concept of comparable worth."<sup>55</sup>

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Douglas, put forth an advertisement for open positions, the former employee applied and was rejected. He filed suit under Title VII, alleging that he was not hired because he was a black civil rights activist. See *id.* at 800.

The Court stated, "The critical issue before us concerns the order and allocation of proof in a private, non-class action challenging employment discrimination." *Id.* It noted that in the lower courts, there had been a "notable lack of harmony" in defining the rules concerning each party's burden of proof and how to establish a prima facie case. See *id.* at 801. The Court decided that a plaintiff in a disparate treatment case must prove:

- (i) that he belongs to a racial minority [or is a member of another protected class]; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after this rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

*Id.* at 802.

53. Disparate impact is the doctrine by which an employer can be found guilty of violating the 1964 Civil Rights Act's anti-discrimination provisions for engaging in employment practices that produce an underrepresentation of employees from a particular protected class. The difference between disparate treatment is intent. Disparate treatment cases require discriminatory intent; disparate impact cases do not. Disparate impact arose from the landmark case *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). In this case, the Supreme Court held that "practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices." *Id.* at 431. For a pay equity case in which the discrimination claim was rejected under the disparate impact test, see *Spaulding v. Univ. of Washington*, 740 F.2d 686 (9<sup>th</sup> Cir. 1983), *cert. denied*, 469 U.S. 1036 (1984). For a discussion on disparate impact theory and pay equity, see generally Barbara A. Norris, *Comparable Worth, Disparate Impact, and the Market Rate Salary Problem: A Legal Analysis and Statistical Application*, 71 CAL. L. REV. 730 (1983) (arguing that in cases alleging discrimination as a result of market rate salary systems, the disparate impact theory ought to be used).

54. The Court's decision in *Gunther* "provided no guidance on setting the boundaries of sex-based wage claims brought under Title VII." *EEOC's Handling of Pay Equity Cases*, *supra* note 49, at 24 (statement of Clarence Thomas, EEOC Chairman).

55. *Gunther*, 452 U.S. at 166. For a more thorough analysis of the *Gunther* case and its implications, see, e.g., Paul N. Cox, *Equal Work, Comparable Worth and Disparate Treatment: An Argument for Narrowly Construing County of Washington v. Gunther*, 22 DUQ. L. REV. 65 (1983) (arguing that the Court's decision in *Gunther* should be narrowly interpreted and that disparate treatment theory is the only theory by which a court may impose liability on an employer as a result of the *Gunther* case); Barbara N. McLennan, *Sex Discrimination in Employment and Possible Liabilities of Labor Unions: Implications of County Of Washington v. Gunther*, 33 LAB. L. J. 26 (1982) (considering the possibility of holding labor unions liable for sex discrimination when the unions treat female workers differently on the basis of their sex).



Four years after *Gunther*, the Ninth Circuit faced *AFSCME v. State of Washington*,<sup>56</sup> another major pay equity case.<sup>57</sup> This case involved a female-dominated class of employees who earned about 20 percent less than workers in male-dominated categories.<sup>58</sup> The district court ruled for the plaintiffs, holding that pay equity was a valid instrument for correcting gender-based wage discrimination that violates Title VII.<sup>59</sup> The Ninth Circuit, however, reversed, with Judge (now Supreme Court Justice) Anthony Kennedy penning the opinion. The Ninth Circuit held that "[d]isparate impact analysis [should be] confined to cases that challenge a specific, clearly delineated employment practice applied at a single point in the job selection process,"<sup>60</sup> and that "reliance on a free market system in which employees in male-dominated jobs are compensated at a higher rate than employees in dissimilar female-dominated jobs is not in and of itself a violation of Title VII."<sup>61</sup>

Like the courts, economists were hostile to feminist and labor attempts to introduce pay equity into American public policy. The prospect of tampering with their all-powerful, neutral wage-setter, the market, shocked and outraged economists across the country.<sup>62</sup> The paranoia of admitting the existence of market imperfections also struck political figures.<sup>63</sup> The chair of the Civil Rights

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56. See *AFSCME v. State of Washington*, 770 F.2d 1401 (9<sup>th</sup> Cir. 1985).

57. But see *EEOC's Handling of Pay Equity Cases*, *supra* note 49, at 28 (statement of Clarence Thomas, EEOC Chairman). "[T]he much-publicized decision in *AFSCME v. State of Washington* is not, in my opinion, one based on comparable worth but rather a clear case of intentional sex-based wage discrimination." *Id.*

58. See *AFSCME*, 770 F.2d at 1403. A state-commissioned pay equity study revealed these discrepancies. See *id.*

59. See *AFSCME v. State of Washington*, 578 F. Supp. 846, 864 (W.D. Wash. 1983).

60. *AFSCME*, 770 F.2d at 1405.

61. *Id.* at 1408. For a more thorough analysis of *AFSCME*, see, for example, Note, *AFSCME v. Washington: The Death of Comparable Worth?*, 40 U. MIAMI L. REV. 1039 (1986); Comment, *AFSCME v. State of Washington: The Future of Equal Pay for Comparable Worth*, 21 N. ENG. L. REV. 673 (1986).

62. See, e.g., M. Neil Browne, *The Metaphorical Constraints to Pay Equity: Why So Many Economists Are Outraged by Comparable Worth*, 6 POPULAR RES. & POL. REV. 29-46 (1987). About 90 percent of economists in the United States are neoclassical economists. These economists adhere to the individualistic assumptions, value orientations, and love of the market that characterized the classical liberals. That such a large majority of American economists fall into this category and the resistance with which they met comparable worth attempts demonstrates the extent of individualism's grasp on American thought. But see Kubasek et al., *supra* note 6, at 131 (arguing that pay equity and markets are not mutually exclusive).

63. For a challenge to the alleged neutrality of market mechanisms in wage-setting,

Commission under President Ronald Reagan even went so far as to label comparable worth "the looniest idea since Looney Tunes."<sup>64</sup>

Because of this resistance, many pay equity movements failed<sup>65</sup> and the legislature failed to pass national pay equity legislation. The most recent attempt at passing federal pay equity legislation failed in 1994. The Fair Pay Act of 1994<sup>66</sup> was designed "[t]o amend the Fair Labor Standards Act of 1938 to prohibit discrimination in the payment of wages on the account of sex, race, or national origin and for other purposes."<sup>67</sup> In the bill, the sponsors<sup>68</sup> recognized, *inter alia*, that:

(1) Wage differentials exist between equivalent jobs segregated by sex, race, and national origin in Government employment and in industries engaged in commerce or in the production of goods for commerce;

(2) The existence of such wage differentials—

(A) depresses wages and living standards for employees necessary for their health and efficiency;

(B) prevents the maximum utilization of the available labor resources;

(C) tends to cause labor disputes, thereby burdening, affecting, and obstructing commerce;

(D) burdens commerce and the free flow of goods in commerce; and

(E) constitutes an unfair method of competition.

(3) Discrimination in hiring and promotion has played a role in

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see L. Clauss, Keynote Address for Colloquium on Employment Discrimination in the 1980's, in 13 N.Y.U. REV. L. & SOC. CHANGE 225, 229 (1984-85).

64. See BLUM, *infra* note 65, at 52.

65. For a review of pay equity movements in San Jose, California, see LINDA M. BLUM, BETWEEN FEMINISM AND LABOR: THE SIGNIFICANCE OF THE COMPARABLE WORTH MOVEMENT 54-91 (1991). For a similar review of the movement in Contra Costa County, California, see *id.* at 92-130.

66. See H.R. 4803, 103d Cong. (1994).

67. *Id.*

68. The primary sponsor of the bill was Rep. Eleanor Holmes Norton. See *id.*

maintaining a segregated work force.<sup>69</sup>

To remedy these problems, the Fair Pay Act included provisions explicitly supporting pay equity. For example, the bill disallows pay differentials between "equivalent jobs."<sup>70</sup> For purposes of this bill, equivalent jobs are "jobs that may be dissimilar, but whose requirements are equivalent, when viewed as a composite of skills, effort, responsibility, and working conditions."<sup>71</sup> Clearly, this bill extends coverage far beyond the EPA's substantial work requirement. In this way, the Fair Pay Act sought to "advance the cause of nondiscrimination in employment and wages."<sup>72</sup> Despite these high aims, the Fair Pay Act of 1994 did not gather enough support to drive it through Congress, and it died in committee.

Because of this bill's failure, several states have picked up the Federal government's slack by implementing pay equity policies of their own. Only twenty states have passed any form of comparable worth or pay equity legislation, however, and the vast majority of these laws are extremely weak. Most of these laws cover only certain categories of employees, and none reach into the public sector. Furthermore, the lack of funding devoted to most pay equity legislation aggravates these problems.<sup>73</sup>

## II. THE IMPLEMENTATION AND RESPONSE TO PAY EQUITY IN CANADA

### A. *The General Acceptance of Pay Equity in Canada*

While pay equity has received remarkably limited support in the United States, Canada has openly embraced it.<sup>74</sup> The scope of

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69. *Id.* at § 2.

70. *See id.*

71. *Id.*

72. *Joint Hearing on the Fair Pay Act of 1994*, *supra* note 27, at 8 (1994) (statement of Rep. Scott).

73. The cost for the pay equity policies in ten of these states has been approximately \$20 million. *See* ELAINE SORENSON, COMPARABLE WORTH: IS IT A WORTHY POLICY? 11-12 (1994).

74. For information on comparable worth efforts in Europe, see Reddick-Martin, *supra* note 42, at 488-95 (reviewing the European Union's pay equity legislation and pay equity cases heard before the European Court of Justice); Sandra J. Libeson, *Reviving the Comparable Worth Debate in the United States: A Look Toward the European Community*, 16 COMP. LAB. L. 358 (1995) (arguing that the European Court of Justice's

Canada's embrace of pay equity may exceed that of any other country.<sup>75</sup> Except for Alberta, British Columbia, and Saskatchewan, all Canadian provinces have enacted pay equity legislation, as has the federal government.<sup>76</sup> In this sense, Canada has been a forerunner in the implementation of pay equity policies.

Canada's move toward pay equity as a national policy began in the 1970s. Quebec became the first province to implement pay equity legislation in 1976, and other provinces followed suit, most within the next decade. There are four different ways that Canadian provinces have included pay equity in public policy. Most Canadian provinces have passed specific pay equity legislation.<sup>77</sup> Other provinces have promulgated pay equity through provisions in other legislation.<sup>78</sup> Finally, Newfoundland is unique in that it has a pay equity policy without formal legislation. In 1988, its provincial government agreed to incorporate pay equity into collective bargaining agreements with unions in various employment sectors.<sup>79</sup> The Canadian Federal government's pay equity policy follows the second approach, including a pay equity provision in its Human Rights Act.

Just as the statutes containing pay equity legislation vary from province to province, so do the terms of the policies. For example, the different provinces implement different timelines for the life of a pay equity program. Manitoba, New Brunswick, Newfoundland, and Nova Scotia all require the allocation of one percent of payroll costs toward wage adjustments each year for four or five years.

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decision to support pay equity principles is a good model for the United States to follow).

75. See SORENSON, *supra* note 73, at 13. See also Gunderson & Riddell, *infra* note 76, at 85.

76. See ONTARIO PAY EQUITY COMM'N, POL'Y AND RES. BRANCH, ENVTL. SCANNING REP: PAY EQUITY LEGISLATION (1994) (on file at the Pay Equity Commission Library in Toronto, Ontario) [hereinafter, ESR 1994]. Even in those provinces that lack pay equity programs, complaint-based equal pay laws are in place. See Morley Gunderson & W. Craig Riddell, *Comparable Worth: Canada's Experience*, 10 CONTEMP. POL'Y ISSUES 89 (1992).

77. Provinces that fall into this category include Manitoba, New Brunswick, Nova Scotia, Ontario, and Prince Edward Island. See ESR 1994, *supra* note 76.

78. For example, Quebec's pay equity provisions may be found in its Charter of Rights and Freedoms. See *id.*

79. See Morley Gunderson, *Implementation of Comparable Worth in Canada*, 45 J. SOC. ISSUES 209-11 (1989).

Conversely, Ontario,<sup>80</sup> Prince Edward Island, and the federal government's policies provide for wage adjustments until employers pay employees working in jobs of comparable value equally.<sup>81</sup>

Additionally, the policies in different provinces rely on different methods and mechanisms of enforcement. While the federal government, Northwest Territories, Quebec, and the Yukon Territory call for complaint-based enforcement, Manitoba,

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80. Ontario's Pay Equity Act, R.S.O., ch. 34 (1988) (Can.), is one of the most comprehensive comparable worth bills passed in Canada. See, e.g., Judy Mann, *Ontario Leads the Way*, WASH. POST, Dec. 14, 1990, at C3 ("Ontario is the first, and, so far, the only, jurisdiction in the world that requires public and private employers to identify undervalued female-dominated jobs and to raise the pay so that women workers are paid comparably to men for similar jobs."). Ontario's PEA is based on six fundamental premises:

1. The legislation should be directed only toward gender discrimination. Accordingly, there will be no tampering with market influences on wages.
2. Comparisons mandated by the law should examine only how women's work is valued. This law will benefit not only women, but also male employees in female-dominated fields.
3. "Equal value" should not be interpreted as "identical value" and therefore there will be comparisons between different types of jobs to ascertain whether they are equally valuable to an employer.
4. Although the specific definition of "establishment" is not defined, the Green Paper mandates that comparisons be made inside an establishment.
5. The law should not have retroactive application.
6. The legislation should not allow wage decreases to fulfill its mandates.

Kubasek et al., *supra* note 6, at 109-10, citing IAN SCOTT, GREEN PAPER ON PAY EQUITY 5 (1985). The PEA requires that all employers with 100 or more employees complete pay equity job evaluations for their employee and management job classifications to determine the extent to which their pay practices discriminate on the basis of gender. See Pay Equity Act, R.S.O., ch. 34, § 10 (1988) (Can.). The PEA also requires that both public sector and private sector employers spend a minimum of 1 percent each of payroll on pay equity attempts to close the wage gap. Additionally, while only private sector employers with more than 100 workers are required to develop and post a comparable worth plan, all employers, regardless of size, are required to fix wage inequalities due to gender discrimination. See Kubasek et al., *supra* note 6, at 111.

81. See ESR 1994, *supra* note 76. Actually, Ontario's requirement for pay equity is even more rigid, as it required the public sector to achieve pay equity by this year. See *id.* A potential problem with encouraging such quick implementation is that by hurrying to get the plan in place, it is possible that severe errors in implementation may prevent the plan's basic goals from being met. See Lois Haignere, *Pay Equity Implementation: Experimentation, Negotiation, Mediation, Litigation, and Aggravation*, in JUST WAGES: A FEMINIST ASSESSMENT OF PAY EQUITY 160, 168 (Judy Fudge & Patricia McDermott eds., 1991). Despite Ontario's stringent temporal requirements for the public sector, private sector employers have an unlimited amount of time in which to implement pay equity policies to close the wage gap. See Pay Equity Act, R.S.O., ch. 34, § 13(7) (1988) (Can.).

New Brunswick, Nova Scotia, and Ontario employ more proactive policies. These latter provinces require employers whose pay systems are infected by gender-based wage discrimination under the pay equity job comparisons to seek out and implement plans to remove these discrepancies.<sup>82</sup> Prince Edward Island seeks a "best of both worlds" approach, as its policy incorporates both complaint-based and proactive strategies, while the mechanism of enforcement in Newfoundland varies from firm to firm, as it is determined by the collective bargaining process.<sup>83</sup>

Finally, the pay equity policies of the different provinces vary in terms of coverage. While all jurisdictions with pay equity policies cover some aspects of the public sector, they differ in the extent to which they do so. New Brunswick is the only province with pay equity legislation that does not cover the broader public sector, which includes employees of municipalities, school boards, and universities. Only the Yukon Territories and New Brunswick do not cover the Crown Corporations, while only Quebec, Ontario, and the Federal government do cover limited segments in the private sector. More specifically, the Canadian Federal government covers only those private sector employers in federally regulated industries that the Canadian Human Rights Act of 1977 covers.<sup>84</sup>

Because pay equity's impact in Canada has yet to be comprehensively analyzed, it is nearly impossible to describe its exact effects on Canadian society. Nonetheless, some evidence exists for several of the jurisdictions. For example, in Quebec between 1976 and 1984, pay equity policies helped approximately 3500 workers to secure Can\$500,000 in wage adjustments. The diminutive size of these figures is in part a consequence of the limited resources dedicated to publication of workers' rights under the pay equity scheme and to enforcing the policy.<sup>85</sup> Because Quebec's provincial government fails to support pay equity (at least in financial terms), few people (fewer than eighty) filed

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82. See Rosemary Warskett, *Political Power, Technical Disputes, and Unequal Pay: A Federal Case*, in JUST WAGES, *supra* note 81, at 172, 180.

83. See ESR 1994, *supra* note 76.

84. See NAN WEINER & MORLEY GUNDERSON, PAY EQUITY: ISSUES, OPTIONS, AND EXPERIENCES 112 (1990).

85. See Patrick Cihon, *Comparable Worth: The Quebec Experience*, 17 J. COLLECTIVE NEGOTIATIONS 249, 253 (1988).

complaints during the period.

The evidence regarding the results of the Federal and Ontario programs is more extensive and more recent because of a U.S. Congressional study.<sup>86</sup> The Federal pay equity provisions cover about 1.1 million employees, which amounts to almost ten percent of the Canadian labor force.<sup>87</sup> According to the Canadian Treasury Board, between 1978 and 1992, the Federal government and federally regulated employers paid Can\$558 million in adjustments for pay equity.<sup>88</sup> These adjustments benefited almost eighty thousand Canadian workers.<sup>89</sup>

The Ontario Pay Equity Act covers approximately 40 percent of the labor force of the province.<sup>90</sup> Although statistics for the private sector are unavailable, it has been established that through 1992, over thirty thousand workers had benefited from pay adjustments totaling Can\$372 million.<sup>91</sup> Data regarding pay equity's impact on the gender wage differential is available only for Manitoba, where the gender wage ratio increased from .82 to .87.<sup>92</sup> Such an increase amounts to reducing the gap between men's and women's wages by 28 percent.

How has Canadian society reacted to these pay equity policies and their impacts? What is the "Canadian attitude" toward pay equity? To answer these questions, we turn to the experience of Ontario. While this sample is certainly small, there is no evidence that Ontario is an anomaly among Canadian provinces in terms of its support of pay equity policies.

Under Ontario's Pay Equity Act, the Pay Equity Hearings Tribunal hears disputes. Although most cases are settled in that forum, some reach the court system. Even within this latter group

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86. See U.S. GEN. ACCOUNTING OFFICE, PAY EQUITY: EXPERIENCES OF CANADA AND THE PROVINCE OF ONTARIO (briefing report to Congressional requesters) (1993) [hereinafter, GAO 1993].

87. See *id.* at 13.

88. See *id.* at 4. The government was responsible for Can\$500 million of the adjustments, while private industry chipped in the remaining Can\$58 million.

89. Although women were the primary beneficiaries of these adjustments, many men also benefited. Some men work in occupations that are predominantly female. These men received wage increases from the adjustments, just as their female coworkers did. See *id.* 3-4.

90. See GAO 1993, *supra* note 86, at 3.

91. See Gunderson & Riddell, *supra* note 76, at 92-93.

92. See *id.* at 92.

of cases, the issues of contention have been procedural matters regarding the correct implementation of pay equity policies, not substantive issues questioning the constitutionality of pay equity as a policy.<sup>93</sup>

Ontario has enjoyed general acceptance of pay equity since its inception, as the lack of legal challenges to its constitutionality demonstrates. Even more telling of Canada's support of pay equity is an analysis of the Pay Equity Act's legislative history. Perhaps the most startling aspect of the debate surrounding the Pay Equity Act is the way the legislature treated the formulation of the policy as a procedural issue rather than a substantive issue *before even passing it into law*. During hearings held prior to the bill's introduction, Ontario legislators proceeded with the intention of making the issue "*How* should pay equity be enacted?" rather than "*Should* pay equity be enacted?" In this sense, Canadians made it clear that closing the gender wage gap was a high priority, and that they would support policies supporting that goal.

In addition, bureaucrats and academics have welcomed pay equity. Canadian bureaucrats have been virtually unified in their support for pay equity. In large part, this support is due to their realization of the cause of occupational segregation. In Canada, there is a wealth of literature attributing the gender wage gap to systematic devaluation and discrimination. Such themes dominate the literature attributing the gender-wage gap to personal choice.

Although pay equity in Canada is still young, its outlooks are favorable. Early indicators demonstrate that this legislation has had a positive effect on the status of working women in Canada. Additionally, the wealth of support that pay equity has received indicates that it is there to stay and that Canadian women will continue to approach their male counterparts in terms of status and income.

### *B. Canadian Culture and Individualism*

Characterized by both geographical and ideological proximity, Canada and the United States display similar economic

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93. This statement is based on examination of the cases that have gone to the regular court system under the Pay Equity Act, which are on file at the Pay Equity Library in Toronto.



and social policies.<sup>94</sup> Yet, their experiences with pay equity are extremely different. Canada welcomed pay equity while the United States shunned it, opting instead to follow individualistic, market-oriented wage setting devices. What could have caused this difference? The hypothesis presented earlier explained that the relationship between individualism and propensity to implement pay equity is likely to be inverse. Was Canada's success with pay equity, then, due to anti-individualistic norms and assumptions?

Since Canada became a nation in 1867, it has struggled to construct a national identity. In large part, this struggle is the result of Canada sharing a British colonial and cultural heritage with the United States. Canadians face a major problem in attempting to create a national identity different from that of the U.S., while retaining their British cultural heritage.<sup>95</sup> This ambivalence has remained a defining element of Canadian culture.

In the early 20<sup>th</sup> century, English Canadian historians searched for unifying themes of Canadian society that could be used to create a sense of identity among the people spread across Canada's vast landscape.<sup>96</sup> Such a task was more difficult than it sounded. Following several decades of debate over and confusion as to the national identity of Canadians, the Canadian Federal Government established the Massey/Levesque Commission to study the federal cultural agencies in place and to make recommendations on how the government should establish national television and radio policies.<sup>97</sup> The Canadian government hoped to use the national television and radio systems to

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94. See SEYMOUR MARTIN LIPSET, *NORTH AMERICAN CULTURES: VALUES AND INSTITUTIONS IN CANADA AND THE UNITED STATES* 7 (1990) [hereinafter *NORTH AMERICAN CULTURES*].

95. See Tamara Palmer Seiler, *Multi-Vocality and National Literature: Toward a Post-Colonial and Multicultural Aesthetic*, 3 J. CANADIAN STUD. 148, 150 (1996) ("Canadian culture continues to be seen as a site of struggle, particularly *vis-a-vis* the United States[.]").

96. See Kenneth G. Pryke, *A Profile of Canadian History*, in *PROFILES OF CANADA* 13, 13-35 (Kenneth G. Pryke & Walter C. Soderlund eds. 1998) [hereinafter *Canadian History*, *PROFILES*]. A primary cause of their struggle was that Canada's original inhabitants saw little need to build a national culture or to solicit the help of government in doing so. See Allan Smith, *Canadian Culture, the Canadian State, and the New Continentalism*, 3 CANADIAN-AMERICAN PUB. POL'Y 7 (1990).

97. See Ioan Davies, *Theory and Creativity in English Canada: Magazines, the State, and Cultural Movement*, 1 J. CANADIAN STUD. 5, 8 (1995).

disseminate cultural messages.<sup>98</sup> In addition to achieving its stated purposes, the Massey/Levesque Commission also marked a turning point in Canadian culture by inviting the public to theorize about Canadian culture and involving theory in its definition. As a result of the Report, the government created an environment that took seriously concerns about culture, and the number of federally funded cultural institutions increased.<sup>99</sup>

As the century progressed,<sup>100</sup> other scholars joined the quest for Canadian identity. Literature became a leading discipline

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98. The Canadian government has been successful in this attempt. Even today, the Canadian Radio, Television, and Telecommunications Commission is charged with ensuring that broadcasts on various media carry a healthy supply of "Canadian content." The purpose of this requirement is to "support the all-important cultural industry infrastructure that nurtures Canadian performers and creative artists." See William Metcalfe, *Canadian Culture in the Late 1990s*, in *INTRODUCING CANADA* 91, 94 (William W. Joyce & Richard Beach eds., 1997).

99. See Davies, *supra* note 97, at 9 (arguing that the Massey/Levesque Commission "provided the climate of opinion within which such concerns [about cultural theory] were taken seriously. The emergence of publicly funded institutions devoted to aspects of the culture thus made theorizing about culture . . . of central significance in public discourse.").

100. The later years of the twentieth century have witnessed a "new nationalism" in Canada. This movement, which is defined as "a strong vocal popular effort to comprehend the history and character of the nation and to assert a pride in past achievements and the potential yet to be realized," began with Canada's Centennial in 1967. See Victor Howard, *An Introduction to the History of Canada*, in *INTRODUCING CANADA* 13, 23 (William W. Joyce & Richard Beach eds., 1997). As a result of the new nationalism, Canadians have developed an increased sense of national pride.

The benefits of this New Nationalism in Canada quickly became apparent: a new pride felt by Canadians in their country; a new excitement about the heritage and achievement of the nation; a cultural explosion that saw the creation of new publishing companies, new theaters and new endeavors in the arts; and new legislation that sought to curtail foreign investment. Plus a new vanity: it was O.K. to be Canadian.

*Id.* at 24. Despite the increased national pride brought on by the new nationalism, many signs of an "inferiority complex" among Canadians remain. This complex may be best expressed by the title of an article, written largely by Canadians, in *National Lampoon* in the 1970s. The article was entitled "Canada: The Retarded Giant on Your Doorstep." See DAVID OLIVE, *CANADA INSIDE OUT: HOW WE SEE OURSELVES, HOW OTHERS SEE US* 38 (1997). Other examples of Canadians' perception of their own inferiority come from quotes from sources as varied as national documents (e.g., Canada Report stated, "[Canada is] a refuge for people who by reason of their indolence or lack of intelligence, could not succeed in other employment." *Id.* at 28.), novelists (e.g., Barry Callaghan wrote, "Canadian culture is at the very front of the second rank." *Id.* at 4.), and even athletes (after winning the World Cup downhill skiing championship in 1982, Steve Podborski said, "Not bad for a Canadian, eh?" *Id.* at 42.).

studying Canadian culture,<sup>101</sup> as did gender and ethnic studies.<sup>102</sup> Scholars from each of these disciplines responded favorably to the open invitation to aid in establishing a Canadian cultural theory. From their works, several defining aspects of Canadian culture emerged.<sup>103</sup>

### 1. Civility

Perhaps the best way to gauge a nation's culture is by analyzing what that nation's citizens do and say. In their day-to-day lives, Canadians display an unusually high degree of civility. In fact, civility has been labeled the "one golden ideal" of Canadian society.<sup>104</sup> This greater sense of civility has led some to speak of the "feminine quality" of Canada,<sup>105</sup> as many visitors to Canada have noticed.<sup>106</sup>

101. See Seiler, *supra* note 95, at 150 ("Canadian literature continued to be seen by many during the 1960s as a reflection of national culture.").

102. See Pryke, *supra* note 96, at 25.

Academic and social critics did not really focus on the categories of gender and ethnicity until the 1970s, and when they did, they frequently presented these categories as essential components of personal identity. Thus, these new areas of historical research tended to regard the notion of Canadian identity as an irrelevant question. The feminist argument that there was a universal system of oppression of women by men brought into question the legitimacy of the state and the major social institutions.

*Id.* See also, *id.* at 30 ("Today the history of Canada is primarily concerned with social factors that control social continuity and change . . . . [T]he significance of gender, ethnicity and class have provided considerable insights into the nature of [Canadian] society.").

103. Although we are able to view these characteristics as composing a definition, there is still no unified view of what is meant by "Canadian culture." See *Canadian History*, PROFILES, *supra* note 96, at 1, 6.

104. See OLIVE, *supra* note 100, at 11.

105. See Metcalfe, *supra* note 98, at 93.

106. For example, Welsh poet and author Henry Davies said:

What a kind-hearted race of people are these Canadians! Here was I, and entire stranger among them, and yet every hour people were making enquiries, and interesting themselves on my behalf, bringing and sending books, grapes, bananas, and other delicacies for a sick man. When a second operation was deemed necessary, the leg had to be amputated at the knee, the whole town was concerned, and the doctors had to give strict injunctions not to admit such a number of kind-hearted visitors.

OLIVE, *supra* note 100, at 139. For more quotations by both native Canadians and visitors to Canada who recognize the friendly civil character of the Canadian people, see *id.* at 138-40, 146-47.

This sense of civility is also manifested in Canadians' public lives. Canadians enjoy a high rate of voter turnout on Election Day,<sup>107</sup> which demonstrates that they are interested in and concerned about the conditions of their country. The Canadian government's greater willingness to intervene in the economy,<sup>108</sup> which expresses the nation's commitment to the values of fairness and equal opportunity,<sup>109</sup> is strongly tied to Canadians' commitment to civility. Finally, this civil character has furthered Canada's international position as a leader in diplomacy.<sup>110</sup>

## 2. Emphasis on the Importance of A Unique Culture

Canada's relationship with the United States has created a major hurdle for the development of Canadian culture. The two nations are close trading partners<sup>111</sup> and share a similar history, as both were British colonies before gaining nationhood. The two nations' geographical proximity has also made it difficult for Canada to distinguish itself from the U.S.; as print and electronic media from the United States often spill across the Canadian border.<sup>112</sup> Canada has responded to such threats by emphasizing

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OLIVE, *supra* note 100, at 139. For more quotations by both native Canadians and visitors to Canada who recognize the friendly civil character of the Canadian people, see *id.* at 138-40, 146-47.

107. In Canada, voter turnout rates are usually around 75 percent. In contrast, the United States is able to muster only 50 percent on a good day. See Metcalfe, *supra* note 98, at 92.

108. "Canadians have shown more deference to authority and hierarchical elites, have been willing to accept more governmental and bureaucratic paternalism and intervention in the economy[.]" *Id.* at 92. See also *id.* at 93 (arguing that Canadians' attitude toward competition is that it is "healthy so long as the weakest are provided for and not too many live in poverty").

109. Despite the strength of these values in Canadian society, some Canadians still feel that Canada "does not have any dominant cultural values." See *Canadian History, PROFILES*, *supra* note 96, at 7.

110. See OLIVE, *supra* note 100, at 13.

111. Canada is the largest foreign market for goods produced in the United States. See John Urquhart, *Bank of Canada, Following U.S. Lead, Once Again Lowers Key Interest Rates*, WALL ST. J., Nov. 18, 1998, at A4.

112. See Frank Innes, *Physical and Cultural Geography*, in *PROFILES OF CANADA* 37, 37-38 (Kenneth G. Pryke & Walter C. Soderlund eds. 1998).

Indeed Canada had always found sharing a continent with the United States to be a challenge to separate identity; from the age of railway building in the nineteenth century to the present when Canada's cultural industries are seen to be threatened by television and print media from its southern neighbor with its much larger markets and, hence, economies of scale.

that it is different from the United States.<sup>113</sup>

The Canadian Federal Government has been instrumental in this task. It has shown a strong dedication to the development of Canadian culture,<sup>114</sup> as have provincial and municipal governments. All three levels of government have allocated substantial funds toward the promotion and dissemination of Canadian culture.<sup>115</sup> For example, in fiscal 1993-94, all levels of government spent a combined \$5.8 billion on cultural industries and activities.<sup>116</sup>

In addition to this high level of state support, Canadian culture also enjoys strong showings of popular support.<sup>117</sup> Canadians spent over \$12.2 billion on cultural goods and services in 1992.<sup>118</sup> This figure amounts to around \$1600 per household. The 1992 General Social Survey on time use indicated that 56

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*Id.* This problem is especially severe because the vast majority of Canada's citizens live within 100 miles of the United States border, and thus are within the broadcast range of many American TV and radio broadcasts. *See Metcalfe, supra* note 98.

113. *See Smith, supra* note 96, at 10 ("The most critical role in generating support for the idea that the state involve itself in the community's cultural life was concern about the growing American cultural presence."); *Metcalfe, supra* note 98, at 91 ("The most important fact about Canada's culture is that Canadians know it to be different from American culture."); *id.* at 101 ("Canadian culture may seem slightly anti-American—it is certainly by definition non-American[.]").

114. Such State involvement in social policy is not atypical of Canada. *See David Ralph Matthews, Ways of Understanding: Canada and the Concept of Canadian Culture*, 1 J. CANADIAN STUD. 28, 32 (1997). "Canada has long maintained a strong liberal political tradition and a socialist movement that has . . . historically had a significant influence on national social policy. The United States has generally lacked any such left-of-center mainstream political movement." *Id.* A recent political shift to the right, however, has led to an increasing gap between the rich and the poor. *See Introduction, in Canadian History, PROFILES, supra* note 96, at 2.

115. A result of the increased funding of cultural activities is that a new "cultural bureaucracy" has emerged. When questioned about this growing bureaucracy, Canadian politicians often answered that culture was "an industry like any other and therefore the expenditure on culture could be measured by the amount of money it generated and the jobs it produced." *Davies, supra* note 99, at 11. Many Canadian Artists view this notion of culture as an industry as doing "harm to the cause of the arts." *See id.* at 12. Despite this harm to the arts, viewing culture as an industry is at least somewhat appropriate, as over 670,000 Canadians reported some form of cultural employment as their primary source of income in the 1991 census. *See STATISTICS CANADA, CANADA'S INTERNATIONAL INVESTMENT POSITION 23* (1993) [hereinafter *STATISTICS CANADA*].

116. *See STATISTICS CANADA, supra* note 115, at 24.

117. This interest in supporting and developing culture is typical of Canadians. Mystery writer John le Carre described Canadians as "people with a tremendous cultural appetite and with a great intellectual reach." *OLIVE, supra* note 100, at 10.

118. *See STATISTICS CANADA, supra* note 115, at 22.

percent of Canadians had visited a heritage institute in the previous year, 46 percent had visited a nature park, and 51 percent had attended a festival, fair, or exhibition.<sup>119</sup>

### 3. Multiculturalism

An important element of Canadian culture given substantial state support is multiculturalism.<sup>120</sup> Canada is essentially a multicultural<sup>121</sup> society, as 29 percent of its residents describe themselves as multiethnic.<sup>122</sup> The remaining 71 percent are comprised of a mosaic of different cultures and backgrounds. Canada displays a full array of ethnic and cultural varieties,<sup>123</sup> including native peoples,<sup>124</sup> descendants of European settlers,<sup>125</sup>

119. See *id.* at 16. Canadians under age 25 were "especially active" in all cultural activities. In addition to those activities enumerated, large numbers of Canadians were also engaged in other activities, such as reading and going to the movies, that might be considered cultural. See *id.*

120. This emphasis on State support of multiculturalism has impacted Canada's culture. See Seiler, *supra* note 95, at 159 ("The increasing diversity of Canadian immigration throughout the twentieth-century ultimately has transformed not only the country's demography, but also its culture.").

121. "[M]ulticulturalism in Canada is used to refer to the government policy, to a philosophical ideal, and to the reality of ethnic diversity." See Yasmeen Abu-Laban, *For Export: Multiculturalism in an Age of Globalization*, in *PROFILES OF CANADA* 94 (Kenneth G. Pryke & Walter C. Soderlund eds. 1998).

122. See STATISTICS CANADA, *supra* note 115, at 12.

123. Canada's diversity is so pronounced that it has been referred to as a "key feature" to understanding Canadian society. See Matthews, *supra* note 114, at 37.

The key feature of Canadian social organization, I would contend, is that virtually every aspect of Canada's political, economic, social, and cultural life is organized around the accommodation of diversity. That is, it is the divisions in Canada, and not any sense of institutional cohesion, that give rise to the uniqueness of its social organization.

*Id.* Canadian literature is a reflection of this increased diversity. See Seiler, *supra* note 95, at 159 ("Once limited to those works reflecting Anglo-Canadian sensibilities, Canadian literature in English is increasingly being recognized as pluralistic and polyphonic [as a result of the diversity of recent immigrants to Canada].").

124. Native peoples compose only 2.7 percent of Canada's population today. See Innes, *supra* note 112, at 44. "Canada is much more conscious of the presence, rights, aspirations, and demands of its aboriginal Indian and Inuit populations [than is the United States]." Metcalfe, *supra* note 98, at 96.

125. In addition to English and French settlers, many Europeans came to Canada to work on the railroads during the 1800s. See Howard, *supra* note 100, at 18. After World War II, Canada welcomed even more European immigrants. See *id.* at 21. These immigrants came from nations all across Europe and provided a firm basis for the diversity that exists in Canada today.

descendants of escaped slaves,<sup>126</sup> and recent immigrants from Asia.

Canada first expressed its dedication to include multiculturalism into public policy in 1971.<sup>127</sup> Since that time, the government has allocated millions of dollars to ethnic groups to enable them to preserve their cultural traditions and customs. Additionally, Canada renewed its commitment to multiculturalism in 1982 by defining Canada as a multicultural nation in the Canadian Constitution.<sup>128</sup> Although government support has waned in recent years,<sup>129</sup> multiculturalism still comprises an important element of Canadian society because it highlights Canada's embracing the notion of community.<sup>130</sup>

An unintended consequence of Canada's government supported multiculturalism has been its effect of weakening national unity.<sup>131</sup> Canada has always struggled with its lack of a

126. The Underground Railroad, by which slaves escaped the Southern United States, brought a multitude of blacks to Canada. The descendants of these slaves are an "enduring keystone" of Canada's black community today. *See id.* at 17. *See also* OLIVE, *supra* note 100, at 11 (arguing that slaves in the United States saw Canada as a haven).

127. *See* Pryke, *supra* note 96, at 24 (describing the origins of Canadian multiculturalism). In 1971, Canada created a ministry charged with encouraging multiculturalism, and that ministry has allocated "millions of tax dollars . . . to ethnic groups for the preservation and fostering of their cultural traditions and customs[.]" Metcalfe, *supra* note 98, at 95.

128. *See* Metcalfe, *supra* note 98, at 95 ("[T]he Canadian Constitution of 1982 defines the country as being multicultural as well as bilingual in essence.").

129. *See* Yasmeen Abu-Laban, *For Export: Multiculturalism in an Age of Globalization*, in PROFILES, *supra* note 96, at 90. "In the early 1990s, the budget for multiculturalism was about \$27 million annually, or about one dollar for every Canadian. In contrast, the budget for multiculturalism in 1996-97 [was] \$18.7 million[.]" *Id.*

130. For a Communitarian analysis of multiculturalism, see AMITAI ETZOINI, *THE SPIRIT OF COMMUNITY* 147-57 (1993). Despite the apparent contradiction between Communitarianism, which emphasizes shared values, and multiculturalism, which celebrates differences, Communitarians support multiculturalist policies. Rather than view a society as a single, unified entity or as "a hodgepodge of unrelated clusters," Communitarians favor an approach "that allows us to keep a set of shared values while providing full opportunities for the constituent ethnic and racial communities to honor their particular heritages as important, indeed enriching subcultures." *Id.* at 149.

131. *See* Seiler, *supra* note 95, at 151-52 (arguing that government-driven multiculturalism has perpetuated the fragmentation of Canadian society). *See also* Yasmeen Abu-Laban, *For Export: Multiculturalism in an Age of Globalization*, in PROFILES 98 (Kenneth G. Pryke & Walter C. Soderlund eds. 1998).

When Prime Minister Trudeau introduced a policy of multiculturalism, he did so in the context of promoting national unity. In contrast, over the course of the 1990s, the policy of multiculturalism has been the subject of public controversy in English-speaking Canada and has been challenged as being divisive and

coherent national identity.<sup>132</sup> In the past, the splintering device was regionalism.<sup>133</sup> Canadians have traditionally defined themselves as residents of their particular provinces rather than as Canadians. Consequently, provinces have frequently brought their own desires to the forefront of national politics, often at the expense of other provinces.<sup>134</sup> A prominent example of this regionalism, is Quebec's attempt to separate from the Canadian nation. In recent years, government supported multiculturalism has aroused fears, especially among English-speaking Canadians, that ethnicity was just one more obstacle to a unified society with an integrated culture.

Each of these cultural patterns poses a unique challenge to individualism. Civility, pride in the uniqueness of their country, and multiculturalism all require a heightened sense that Canada is a national entity and that many groups of Canadians have legitimate interests affected by individual choices. Nevertheless, Canada's historical and geographical similarities with the United States strongly suggest the likelihood that Canadians will feel warmly to individualism. One prominent scholar's recent comparative judgment is that individualism runs strong in Canada,<sup>135</sup> and it is growing increasingly stronger.<sup>136</sup> The large proportion of Canadians who believe that employers should pay a person according to his or her own performance supports this contention.<sup>137</sup> While Canada is similar to the United States in that

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promoting disunity.

*Id.*

132. Some Canadian scholars argue that this lack of coherence is an important part of Canadian society's beauty. See, e.g., Matthews, *supra* note 114, at 37 ("[T]he essence of Canadian social life lies not in unity, but in how it is organized to reflect and maintain the diversity of Canada's regions, ethnic groups and even social classes.").

133. In the late 1960s, when the national identity movement began to fade, several Canadian authors began to argue that Canada was not in fact a unified nation, but rather five separate regions. See Pryke, *supra* note 96, at 24.

134. For example, richer provinces, like Alberta, have pushed their agendas on the national scene by throwing support toward policies that will help them at the expense of poorer provinces like Saskatchewan. Problems such as these are likely to continue, as there has been a broad movement toward devolving power to the provinces. See Introduction, in PROFILES, *supra* note 96.

135. See NORTH AMERICAN CULTURES, *supra* note 94, at 33-34.

136. See SEYMOUR MARTIN LIPSET, THE CONTINENTAL DIVIDE: THE VALUES AND INSTITUTIONS OF THE UNITED STATES AND CANADA 2-3 (1990) [hereinafter THE CONTINENTAL DIVIDE].

137. In 1981, the proportion of Canadians surveyed who believed in this notion was 74



both countries are basically individualistic, the two nations differ in the brands of individualism practiced.

While both Canadians and Americans support normative individualism,<sup>138</sup> Canadians have a better appreciation for the limits of the individual in reaching this goal of self-reliance. Evidence from Canada's pay equity hearings indicates that Canadians are much more willing to believe that people ought to strive for self-reliance without taking the next step of assuming that people essentially are self-reliant.<sup>139</sup>

Another way to view the difference between Canadian and American individualism is through the distinction between self-contained individualism and ensemble individualism.<sup>140</sup> Self-contained individualism identifies the locus of power and control within the individual.<sup>141</sup> Such individualism is consistent with the notion that women who earn inferior wages are responsible for their earnings because they *chose* their jobs. This view of individualism dominates American thought.

Ensembled individualism provides for a softer boundary between the "self" and the "other" than does self-contained individualism.<sup>142</sup> It recognizes that the self is but one of a field of forces that determines power and control. Therefore, ensembled individualists are much more hesitant to point the finger at the actor; instead, they look for forces outside the actor that may

percent. By 1990, the figure was 82 percent. These figures ranked Canada second and third, respectively, among European and North American countries. See THE INDIVIDUALIZING SOCIETY: VALUE CHANGE IN EUROPE AND NORTH AMERICA 147 (Peter Ester et al. eds., 1994).

138. Normative individualism takes at least two forms. The first is of a libertarian ethic. Herbert J. Gans labeled this belief pattern "popular individualism." See HERBERT J. GANS, MIDDLE AMERICAN INDIVIDUALISM: THE FUTURE OF LIBERAL DEMOCRACY 1 (1988). Gans defined it as, "liberation from unwelcome cultural, social, political, and economic constraints." *Id.* at 2. The second form of normative individualism is based on each individual's social responsibility to become self-reliant. The writings of Henry David Thoreau provide a solid example of this latter brand of normative individualism.

139. See M. Neil Browne et al., Divergent Reactions to Individualism in Canada and the United States: The Case of Comparable Worth, (Nov. 1995) (unpublished speech on file at the William T. Jerome Library at Bowling Green State University).

140. See Edwards E. Sampson, *The Debate on Individualism: Indigenous Psychologies of the Individual and Their Role in Personal and Societal Functioning*, 43 AM. PSYCHOLOGIST 15 (1988).

141. See *id.* at 16.

142. In ensembled individualism, there are "more fluidly drawn self-nonsel boundaries." *Id.*

influence the amount of power that she has. Canada's recognition that broad, powerful sociological and historical forces shape women's labor market choices is congruent with ensembled individualism. Using this dichotomy, we are therefore better able to understand how two nations that are both dominated by individualistic thought have had such different experiences with a policy that is very much linked to anti-individualism.

### III. THE RESPONSE TO PAY EQUITY IN HONG KONG

Like the West, strong patriarchal norms and attitudes characterized traditional China.<sup>143</sup> Such conditions have survived in China and in other countries,<sup>144</sup> like Hong Kong, that are Chinese in cultural orientation. Traditional Chinese culture expects women to subordinate their desires completely to those of the family. Their options were limited because they were expected to obey and follow men throughout their lives.<sup>145</sup> Generations of Chinese people absorbed such cultural lessons, and their implications for the status of women in today's labor market are clear.

#### A. Discrimination Against Working Women

Women in Hong Kong's labor market have been discriminated against in two ways: by being segregated according to occupation and by being paid less than male counterparts who work the same jobs.<sup>146</sup> Occupational segregation occurs when women become concentrated in certain occupations, generally

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143. See, e.g., Robert I. Westwood et. al., *The Politics of Opportunity: Gender and Work in Hong Kong, Part I: The Gendered Segmentation of the Labour Market*, in *ENGENDERING HONG KONG SOCIETY: A GENDER PERSPECTIVE ON WOMEN'S STATUS* 41, 44 (1997).

144. "There is still evidence that the majority of the traditional Chinese cultural values are still held in modern days." David A. Ralston et al., *The Relevance of Equity Values in Eastern Cultures*, in *WHOSE BUSINESS VALUES?: SOME ASIAN AND CROSS-CULTURAL PERSPECTIVES* 69, 73 (Sally Steward & Gabriel Donleavy eds. 1995).

145. The Confucian ideology that shaped the Chinese psyche demanded "three obediences" from women. The ideology commanded women "to obey their father before marriage, their husband after marriage, and their eldest son should they become widows." *Id.*

146. See LAI-CHING LEUNG, *LONE MOTHERS, SOCIAL SECURITY AND THE FAMILY IN HONG KONG* 43 (1998) (arguing that vertical segregation occurs both when women are channeled into different occupations and when they are paid less than men).

those that pay less. Over time, society starts to view these positions as "women's jobs" and consequently devalues them.<sup>147</sup>

Evidence of job segregation in Hong Kong is abundant. Women are extremely underrepresented in the administrative and managerial jobs in Hong Kong's economy.<sup>148</sup> Those women fortunate enough to obtain employment in the white-collar sector are concentrated in the lower-paying junior positions, while men are strongly overrepresented among top-earning senior administrators and managers.<sup>149</sup>

Hong Kong society directs men and women toward certain types of occupations. Consequently, men have almost completely eschewed certain occupations, such as nursing and teaching kindergarten.<sup>150</sup> Such occupations are defined as "women's work" and they are left for women to perform. Additionally, firms in Hong Kong unabashedly funneled men and women into different occupations in the past.

For example, S.C. Ho performed a study in 1980 in which he reviewed approximately 10,000 newspaper ads to determine the degree of gender discrimination in Hong Kong's labor market. He found that women applicants were preferred in the wholesale/retail business, the import/export trade, and the hotel/restaurant industry, while male workers were preferred in the manufacturing, public utilities, transport, communications, and financial sectors. Men were also preferred in managerial and supervisory positions.<sup>151</sup> Even the government's hiring practices were guilty of such discriminatory hiring practices, denying women access to certain civil service positions until 1992.<sup>152</sup>

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147. See *supra* notes 31-35 and accompanying text.

148. See Westwood et al., *supra* note 143, at 75. In the 1970s, women held only about 10 percent of the positions in the managerial and administrative sector. In 1991, the ratio of men to women in such positions improved to 4:1. *Id.* Clearly, these statistics indicate that progress has been made, but also that women have a way to go toward achieving equality with men.

149. See, e.g., Grace C.L. Mak & Chung Yue-ping, *Education and Labor Force Participation in Hong Kong*, in *ENGENDERING HONG KONG SOCIETY: A GENDER PERSPECTIVE ON WOMEN'S STATUS* 13, 19 (1997).

150. See *id.* at 19 (noting that a vast majority of nurses and kindergarten teachers in Hong Kong are female).

151. See generally S.C. Ho, *Sex Role Portrayals in Print Advertisements: The Case of Hong Kong*, 2 *EQUAL OPPORTUNITIES INT'L* 1-4 (1983).

152. See Hong Kong Government, *Hong Kong Report to the Fourth UN World Conference on Women, Beijing 1995*, in *ENGENDERING HONG KONG SOCIETY: A*

Causes of such segregation are difficult to pinpoint. The Hong Kong Equal Opportunity Commission recognized that, once in place, "differences [in status and wages between men's and women's jobs] can be reinforced by discriminatory recruitment, selection and promotion procedures which restrict the range of work persons of each sex perform."<sup>153</sup> Many critics, making arguments that could have been taken directly from a mainstream economics text in the West, argue that women choose their occupations, so if they find themselves in occupations that pay less than occupations dominated by men, the women themselves are responsible for their poor wages. These arguments charging women with total responsibility for their conditions overlook the power that patriarchal norms may have on the selection of careers.<sup>154</sup>

Others argue that the reason men and women tend to fall into different occupational categories is that there is a difference in the levels of education attained by men and women in Hong Kong. It is beyond dispute that formal education has a positive effect on labor force participation.<sup>155</sup> It is also beyond dispute that women have been cut off from educational opportunities in Hong Kong.<sup>156</sup> These facts, however, do not adequately account for the wage gap in Hong Kong. Even among women and men with equal

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GENDER PERSPECTIVE ON WOMEN'S STATUS 361, 364 (1997). ("In the past . . . female candidates were not considered suitable to take up positions in a few grades in the Civil Service. This policy has been changed following a review conducted in 1992.").

153. See HONG KONG EQUAL OPPORTUNITIES COMMISSION, PRACTICAL GUIDELINES FOR EMPLOYERS § 12.5 (visited Sept. 4, 1998) <<http://www.eoc.org.hk/sdo/sdo12.htm>>.

154. See generally NANCY FOLBRE, WHO PAYS FOR THE KIDS?: GENDER AND THE STRUCTURES OF CONSTRAINT (1994). Folbre argues that neoclassical economists, in their view of the market as a neutral device, overlook ways in which people's preferences and social norms may enter the market process and flaw price signals. In this regard, the market is not an objective determinant of value, but rather a system through which prejudices and attitudes held by dominant groups are expressed and reinforced.

155. See Mak & Yue-ping, *supra* note 149, at 35.

156. For example,

[I]n 1991 women constituted 49 percent of all person aged fifteen and over in Hong Kong, yet they were proportionally represented only at the lowest level of matriculation. They were the majority at the lowest end and the minority at the uppermost . . . . [E]xcept for the 15-19 age group, women consistently made up the majority of least educated.

*Id.* at 16.

education, substantial compensation differentials remain.<sup>157</sup> Additionally, as levels of educational attainment have become more equal,<sup>158</sup> corresponding equality in wages has not followed. Finally, differentials in education do not explain the differentials in wages of men and women who perform the same job.

This direct wage discrimination has infected Hong Kong's labor market for generations. It was actually made a part of the Hong Kong government's national labor policy in 1947, when the Salaries Commission stated that "the remuneration of a woman officer should be approximately 80 percent of that of a male officer doing comparable work."<sup>159</sup> Such discrepancies have continued, as women today only earn about 70.8 percent of what men working the same job earn,<sup>160</sup> and they pervade the job market, existing at almost every sector of employment.<sup>161</sup>

Explanations for these gaps vary. One reason that women earn substantially less than men is that many male managers assume that women who work are doing so only for "pin

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157. See LEUNG, *supra* note 146, at 44.

[A]mong women and men with the same education level, there are nonetheless stark income differentials. The greater differences are among those with primary level and university level education with income differentials of 37 per cent and 35 per cent respectively. The evidence rules out the claim that income differentials between male and female workers stem from differences in education received. Instead, it is obviously the result of gendered division in the labouring process.

*Id.* See also Westwood et al., *supra* note 143, at 101, 107. "Ho (1983) reported that, at least in 1982, the educational attainment of women in administrative and managerial jobs was higher than that of men, but that they tended to earn less: 44 percent of females earned more than HK\$4,000 per month compared with 60 percent of men." S.C. Ho, *The Era of the Female Managers?—Looking Back at Looking Forward*, HONG KONG MANAGER, May 1983, at 8–11.

158. See Mak & Yue-ping, *supra*, note 149, at 17. "On the whole, we can say that educational opportunity at primary and secondary level has more or less been equalized for women and men in Hong Kong." *Id.*

159. See Kwok Pui-lan et al., *Women and the State in Hong Kong*, in ENGENDERING HONG KONG SOCIETY, *supra* note 143, at 237, 248. See also Westwood et al., *supra* note 143, at 80 (stating that women who worked on government construction projects earned about 20 percent less than the men who worked alongside them, and that "the average daily wage for craftsmen and other operatives in March 1990 stood at HK \$217 for men and \$152 for women.").

160. See LEUNG, *supra* note 146, at 43. "In 1991, women only earned 70.8 per cent of the earnings of their male counterparts in the same occupations." K.W. Chan & C.H. Ng, *Women, Employment Segregation and Class in Hong Kong*, in INEQUALITIES AND DEVELOPMENT (S.K. Lau et. al. eds. 1994).

161. See Westwood et al., *supra* note 143, at 81.

money.”<sup>162</sup> Such a notion, however, is “not borne out of reality,”<sup>163</sup> as women’s wages provide a crucial part of family income.<sup>164</sup> Another reason for the gap in earnings in the same jobs relates to broader cultural phenomena. In patriarchal Asia, society generally assumes that women’s “purpose” is housework, while a man’s proper role is that of the breadwinner.<sup>165</sup> Therefore, any wage-earning work that a woman performed would be viewed as ancillary to her husband’s income.<sup>166</sup>

Regardless of the causes of rampant gender wage discrimination in Hong Kong, its effects are unmistakable. The devaluation in the labor market is both a cause and an effect of women’s continued subordination in Hong Kong’s larger society.<sup>167</sup> Many women are unemployed.<sup>168</sup> Those who do work are unable to earn wages comparable to those earned by men. These poor wages that women receive combined with the high female unemployment rates have the effect of putting children in danger of poverty. There are more than twice as many single mothers in Hong Kong than there are single fathers.<sup>169</sup> Because of

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162. See CHING KWAN LEE, *GENDER AND THE SOUTH CHINA MIRACLE* 153 (1998). Lee interviewed a series of workers and told them that he would provide them with HK \$100 in order to reward them for participating. When he informed the company’s manager that he would make such an offer, the manager “suggested that it was not necessary because they did not have much need for money.” *Id.* at 154. When the women were told of the manager’s reaction, they “laughed at the idea that they ‘earned money to buy flowers,’ as many managers put it.” *Id.*

163. *Id.*

164. “[W]omen’s income, albeit meager, was a crucial part of the family budget.” *Id.*

165. See Po-king & Ching-kwan, *The Hidden Abode of Domestic Labor: The Case of Hong Kong*, in *ENGENDERING HONG KONG SOCIETY*, 157, 186 (discussing the patterns of housework division in Hong Kong and describing the breadwinner-homemaker system in which husbands and wives attempt to keep their roles as separate as possible). See also Westwood et. al., *supra* note 143, at 45 (“Women’s preeminent role was the reproductive role . . . . Beyond that, women were expected to labor in the household in other reproductive functions and barely emerge in the public domain.”).

166. See *id.*

167. See Pui-lan et. al., *supra* note 159, at 261 (arguing that Hong Kong society’s refusal to recognize women’s political contributions prevents more women from taking a serious interest in politics). See also LEUNG, *supra* note 146, at 49.

168. See Hong Kong Women’s Coalition for Beijing, 1995 at 385. “[S]ince the early 1980’s women in Hong Kong have faced high unemployment rates with the relocating of factories and the resulting economic restructuring.” See also, Pui-lan et al., *supra* note 159, at 246 (noting that about half the working age women in Hong Kong are looking for work).

169. See Hong Kong Government, *supra* note 152, at 378. “In 1991, there was a total of 34,538 single parents in Hong Kong, of which 23,059 were single mothers and 11,479

their decreased earnings potential, many of these mothers have a difficult time supplying their children with the necessary ingredients for a good life. Such deficiencies are likely to haunt Hong Kong in the future, as these children will struggle to become productive citizens.

### *B. Hong Kong's Legislative Response*

Hong Kong has been extremely slow to follow the West's lead in implementing equal pay legislation.<sup>170</sup> It was not until 1975 that women working in the public sector won the right to receive equal pay for equal work.<sup>171</sup> The private sector denied women the same for an additional twenty-one years.<sup>172</sup> During this time, international covenants in Hong Kong covered the governance of basic human rights and guaranteed equal pay regardless of gender.<sup>173</sup> From the information above, it is clear they

were single fathers. A majority (76.1 percent) of the single mothers fall into the 30-49 age group. About 64 percent were working while the rest were either homemakers, retired persons or unemployed." *Id.*

170. See Westwood et al., *supra* note 143, at 92 ("The Hong Kong Government has been slow to address the issue of the needs of women in the workforce and even as an employer has continued to use discriminatory practices[.]"). A major reason for the government's lackadaisical attitude toward passing legislation to benefit the conditions of women in the labor market is that much of Hong Kong's economic success was attributed as the result of its laissez-faire economic policies. See, e.g., Kwok Pui-lan et al., *supra* note 149, at 246, 262. The government feared that any regulation of the economy would thwart the country's success, and hence, they relied almost exclusively on the market mechanism for setting wages.

171. See Betty L.L. Lai et al., *Women's Concern Groups in Hong Kong*, in *ENGENDERING HONG KONG SOCIETY: A GENDER PERSPECTIVE ON WOMEN'S STATUS* 267 (1997).

172. See *id.* Yet, despite the Hong Kong government's delinquency in implementing equal pay legislation, it passed legislation guaranteeing childbearing women a paid maternity leave and job protection in 1981. See *id.* While the passing of this legislation is certainly impressive, it has been criticized for being too narrow. See, e.g., Westwood et al., *supra* note 143, at 87.

Statutory maternity leave pay is only an entitlement if the woman has had 40 weeks continuous service immediately prior to the commencement of her leave; given the proper notice to her employer of her intention to take maternity leave; provided a proper medical certificate if so requested by her employer; and, at the time of so giving notice, has no more than two surviving children.

*Id.*

173. See Hong Kong Government, *supra* note 152, at 362-63.

The provisions of the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the International Covenant on Civil and Political Rights (ICCPR) are applicable to Hong Kong following the UK ratification of the two

disregarded these treaties.

In 1994, Hong Kong's legislature drafted and presented its first major piece of legislation designed to give women equal rights.<sup>174</sup> The Sexual Discrimination Ordinance (SDO) mandates equal pay for "like" work, the standard for which is practically the same as that for "equal" (as opposed to "equally valuable") work.<sup>175</sup> Additionally, the SDO encourages employers to implement pay equity, yet it does not mandate it.<sup>176</sup> Although employers are not required to implement pay equity, the SDO recommends that those who choose to implement it follow the model of measuring value along the axes of skill, effort, responsibility, and working conditions and of having different jobs evaluated professionally.<sup>177</sup>

Covenants in 1976. Both Covenants require States Parties to ensure the equal right of men and women to the enjoyment of all economic, social, cultural, civil and political rights set forth in the two Covenants.

*Id.*

174. See Hong Kong Women's Coalition for Beijing, 1995, *supra* note 168, at 389. The Women's Coalition described the bill as "prohibit[ing] discrimination based on sex, pregnancy, and marital status, in the workplace, in education, training programs and social life, requir[ing] advertisers placing discriminatory advertisements to pay a fine, and forbidding sexual harassment . . . as well." *Id.*

175. See HONG KONG EQUAL OPPORTUNITY COMMISSION, *supra* note 153. The relevant portion of the Guidelines states:

12.2—In respect of the terms and conditions of employment, employers should maintain the principle of equal pay for equal work. That is, a female employee is entitled to equal pay when she is doing 'like work' or the same work as that of a man. 'Like work' means work which is of a broadly similar nature and where the differences between the tasks performed by either of them are not of practical importance to the terms and conditions of employment.

...

12.4—Examples of 'like work' are:

12.4.1. male and female tellers working in the same bank;

12.4.2. women working in an employment agency supplying clients with temporary staff and men supplying permanent staff in the same agency; and

12.4.3. foremen and line supervisors working in different sections of a production line.

*Id.*

176. The EOC's Guidelines state:

12.6—A related principle to equal pay for equal work is that of equal pay for work of equal value. Where women undertake work as demanding as that of their male colleagues, even though the work is different, women should receive the same pay and benefits. That is, jobs of equal value warrant equal pay.

*Id.*

177. The Guidelines state:

12.7—Overseas experience suggests that different jobs done by a man and a



The SDO is without a doubt a major step forward for the women's movement in Hong Kong. There is substantial doubt, however, as to whether the SDO will realize its high principles. For example, the Hong Kong Women's Coalition stated that the SDO is "riddled with exemptions that weaken its effectiveness."<sup>178</sup> For example, phenomena such as "a reevaluation and downgrading of the position of an employee based on objective work-related criteria,"<sup>179</sup> an "internal labor shortage,"<sup>180</sup> or "economic factors"<sup>181</sup> may allow an employer to justify wage differentials. Additionally, the SDO allows wage differentials as a result of "regional rates of pay."<sup>182</sup> In these ways, the SDO provides a window through which the rains of discrimination may fall and thereby dampen the position of working women in Hong Kong's economy.

### C. *The Attitude Toward Individualism In Hong Kong*

When researchers first analyzed the culture of Hong Kong along a continuum of individualism and collectivism, they consistently labeled Chinese cultures (Hong Kong included) as individualist.<sup>183</sup> Researchers attached this label to Hong Kong

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woman can be compared on the basis of the demands made on a worker in terms of effort, skill, responsibility and working conditions. Employers can set individual pay rates based on market forces and individual performance but should not pay a class of workers less for doing work of equal value on the basis of sex.

12.8—Employers should maintain the principle of equal pay for equal work and are encouraged to consider progressive implementation of equal pay for equal value. This will require objective and professional evaluation of different jobs within the same establishment, or alternative methods of approaching the issue of equal pay which can be demonstrated to be non-discriminatory. Large organisations in both the public and private sectors with a structured human resources department could take a lead in this.

*Id.*

178. Hong Kong Women's Coalition for Beijing, 1995, *supra* note 152, at 387.

179. HONG KONG EQUAL OPPORTUNITY COMMISSION, *supra* note 153, at § 12.12.3.

180. *Id.* § 12.12.5.

181. *Id.* § 12.12.8. The Guidelines give the example of "a temporary shortage in a particular type of skilled labor." *Id.*

182. *Id.* § 12.12.7.

183. See David A. Ralston et al., *The Relevance of Equity Values in Eastern Cultures, in WHOSE BUSINESS VALUES?: SOME ASIAN AND CROSS-CULTURAL PERSPECTIVES* 69, 74 (1995); Westwood et al., *supra* note 143, at 47 (stating that Geert Hofstede labeled Hong Kong a collectivist culture in 1980).

almost twenty years ago, and the rapid economic growth and modernization that Hong Kong has faced has altered Hong Kong's society in several ways. In the realm of culture, industrialization and technological advancement have brought an increase in the level of individualism in Hong Kong.<sup>184</sup> Despite this increase and despite Hong Kong's reliance on a market-based economy, Hong Kong is certainly not an individualistic entity. Instead, Hong Kong represents a challenge to those who wish to explain legislative patterns in terms of attitudes toward individualism.

The population of Hong Kong is overwhelmingly Chinese.<sup>185</sup> Additionally, when Chinese citizens leave Mainland China, they tend to hold on to their culture wherever they go. In this sense, Chinese culture is far "stickier" than other cultures,<sup>186</sup> and given the large proportion of Hong Kong's citizens, who are ethnically Chinese, it is hardly surprising that Hong Kong is also culturally Chinese.<sup>187</sup>

A major element of Chinese culture is Confucianism.<sup>188</sup> Dating back to the fifth century BC, Confucianism was an attempt to provide a social structure that would lead to harmony. It is based on three primary tenets: "(a) man exists through, and is defined by, his relationships to others; (b) these relationships are structured hierarchically; [and] (c) social order is ensured through each party's honouring the requirements in the role relationship."<sup>189</sup>

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184. See Westwood et al., *supra* note 143, at 47. "The Hong Kong social system probably exhibits a unique mixture of traditional values and those materialist, consumerist and individualistic values of modern capitalist economies." *Id.*

185. This strong majority amounts to ninety-five percent of Hong Kong's 5.7 million people. See GANNON AND ASSOC., *infra* note 193, at 337.

186. See *id.* at 324. In each chapter of his book, Gannon creates a metaphor for a different culture. Generally, these metaphors do not apply very well to members of a particular culture who have left behind their native country. In such cases, the immigrants need new metaphors. In the case of the Chinese, however, a single metaphor is suitable. Gannon states, "This does not seem to be true for other ethnic groups." *Id.*

187. See Philip H. Birnbaum-More et al., *Acquisition of Managerial Values in The People's Republic of China and Hong Kong*, 26 J. CROSS CULTURAL PSYCHOL. 255, 260 (1995) (labeling Hong Kong as a "Chinese society").

188. See Ralston et al., *supra* note 183, at 72. "Many Chinese cultural values are largely formed and created from interpersonal relationships, and can be traced to the Confucian value of relational orientation." (citation omitted).

189. Michael Harris Bond & Kwang-kuo Hwang, *The Social Psychology of Chinese People*, in THE PSYCHOLOGY OF THE CHINESE PEOPLE 216 (Michael Harris Bond ed., 1986).

Confucian thought is virtue-based,<sup>190</sup> and it holds that each individual holds certain rights and obligations derived from his or her relationships. The emphasis is on five primary relationships: sovereign and subject, father and son, elder brother and younger brother, husband and wife, and friend and friend.<sup>191</sup> Each relationship is one of hierarchy; the latter must defer to the former.<sup>192</sup>

It is telling that three of the five key relationships occur within the confines of the family. For this reason, the family is of extreme importance to citizens of Hong Kong.<sup>193</sup> Family members are asked to subordinate their own interests to those of the family, and people outside the family often are not easily trusted.<sup>194</sup> Clearly, Chinese culture is in many ways antithetical to the individualistic North American cultures we have mentioned previously.

Why, then, has this nation characterized by an anti-individualistic culture had so little interest in implementing pay equity? Certainly, increasing women's earnings would provide the family with more resources and therefore be in its best interests. Research focusing on the American economy suggests strongly that individualism and the resultant affection for market wages are a major obstruction to American pay equity legislation. Using that simplistic analogy, Hong Kong should be a major pacesetter in pay equity.

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190. See Julia Tao, *The Moral Foundation of Welfare in Chinese Society: Between Virtues and Rights*, in *ETHICS IN BUSINESS AND SOCIETY: CHINESE AND WESTERN PERSPECTIVES* 10 (Gerhold K. Becker ed. 1996).

191. See *id.* at 215. Note the near absence of women in these relationships.

192. Among Chinese women strongly affected by Confucianism, there is often a tendency to defer to employers as the surrogate head of household. See, e.g., NATIONAL TRADES UNION CONGRESS, *LEGAL RIGHTS AND SUPPORT SERVICES FOR WOMEN WORKERS* 5 (1994). Where the lack of any law against sexual harassment in Singapore is noted, a woman's only means of recourse is to claim an "outrage of modesty" under the penal code.

193. In fact, Gannon chose "the family alter" as his metaphor of Chinese culture. See GANNON AND ASSOC., *UNDERSTANDING GLOBAL CULTURES* 323 (1994). He states, "The Chinese family alter is the cornerstone of family life for Chinese in many parts of the world. It is the tie that binds a dispersed family and serves as a focal point for viewing an extended family that includes the living, the dead, and those yet unborn." *Id.* at 329.

194. See Ralston et al., *supra* note 183, at 73. "[T]he Chinese are only group-oriented toward the social units or in-groups in which relationship have been developed, most notably the extended family. As such, they are more motivated toward achieving the goal of the group than their own personal goals." *Id.*

Nevertheless, such a presumption binds cultural determinants to an overly narrow construct. Both law and attitudes toward law are pushed and pulled by a much larger congeries of forces than where a country is located on an individualism/collectivism scale. Hong Kong illustrates well the need to look at an additional array of cultural factors to appreciate attitudes toward the role of law in alleviating an assortment of social problems.

A primary reason for Hong Kong's lack of interest in pay equity lies in the hierarchical nature of Confucian relationships. If wives were to earn as much as (or possibly even more than) their husbands, the husband's superior status would be threatened.<sup>195</sup> To avoid such a disruption of the Confucian order, women often shape their work preferences around their family demands.<sup>196</sup> Additionally, many women, when they make job choices, will not take work unless the job has the appropriate degree of femininity.<sup>197</sup> In this sense, Hong Kong's family-centered collectivism has been a hindrance, rather than a help, to the bid for pay equity in Hong Kong.

#### IV. CONCLUSION

Because pay equity calls for changes to be made to existing market outcomes, it is basically an anti-individualist policy. Consequently, we would expect countries that are anti-individualistic to be more receptive to enacting pay equity legislation than those that are individualistic. Such a claim has great logical power and, *ceteris paribus* is no doubt true. But Canada and Hong Kong belie this simple predictive model. Canada, a country with strong individualistic norms, has implemented one of the most advanced pay equity plans in the world. In contrast, Hong Kong, a country characterized by its Chinese Confucianist culture, has none. Furthermore, Hong Kong's prospects for implementing significant pay equity

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195. See Po-king Chan, *Industrialization and Sexual Equality—The Case of Hong Kong*, 4 ASIAN EXCHANGE 41 (1984), for an extensive review of employment data and cultural trends in Hong Kong. He concluded that the subsidiary position of Hong Kong women cannot be explained without reference to their role in the family.

196. In fact, Ching Kwan Lee argues that these familial demands of women are "the most important variables determining women workers' behavior in the labor market." Lee, *supra* note 162, at 94.

197. See *id.* at 104.

legislation are dim.

These unexpected results can be explained by examining each country's distinct culture. The individualism that flows through Canadian society is of a different brand than that which thwarted pay equity movements in the United States. This different brand of individualism allowed Canada to pass substantial pay equity legislation despite the fact that Canada is an individualistic nation. Additionally, Confucianism has retained its stronghold in Hong Kong's society. Despite Confucianism's downplaying of individual desires, its patriarchal norms and supreme emphasis on the family has led women to deny their own needs so that the needs of the family might be met. In this regard, those women in Hong Kong who have tried to escape patriarchal structures<sup>198</sup> are not able to muster support from their natural constituencies--low wage women workers and those who identify with their plight. The work-family tensions that most Hong Kong women<sup>199</sup> feel will be an ongoing hurdle for feminists attempting to achieve pay equity in Hong Kong.

Gaining a deep understanding of individualism is an important tool when analyzing how different cultures respond to legislative proposals for altering market wages, prices, working conditions, and allocative decisions. The extent to which two countries have individualism as a core value, however, is surely not the only factor that one should consider when performing comparative legal analysis. As the narratives of pay equity in the United States, Canada, and Hong Kong demonstrate, religious, historical, and general cultural variables are necessary complements to individualism as explanatory variables.

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198. While there is no automatic link among education, worker participation and negative reaction to the gender wage gap, the link has been present in industrialized Western countries. If that link is at all valid for Hong Kong, its presence in the Hong Kong workforce will accelerate as more and more women workers acquire education and, as a consequence of that education, enter the labor force in increasing numbers. See generally Suet-ling Pong, *Education, Women's Work, and Family Income Inequality*, in *THE ECONOMICS AND FINANCING OF HONG KONG EDUCATION* 172-74 (Y.C. Wong ed., 1992) for regression results showing a positive relationship between the educational level of Hong Kong women and the probability of their working.

199. See Thomas D. P. Wong, *Women and Work: Opportunities and Experiences*, in *WOMEN AND WORK* 70-73 (Veronica Peterson & Benjamin K.P. Leung eds., 1995); Benjamin K. P. Leung, *Women and Social Change: The Impact of Industrialization on Women in Hong Kong*, in *WOMEN AND WORK* 29 (Veronica Peterson & Benjamin K.P. Leung eds. 1995).