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Pay Equity or Pay Up: The Inevitable Evolution of Comparable Worth into Employer Liability under Title VII

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**PAY EQUITY OR PAY UP: THE INEVITABLE
EVOLUTION OF COMPARABLE WORTH INTO
EMPLOYER LIABILITY UNDER TITLE VII**

TABLE OF CONTENTS

I.	INTRODUCTION	306
II.	THE WAGE GAP: BACKGROUND OF THE PROBLEM	311
	A. Earnings in Occupations and Industries: The Facts ..	311
	B. Measuring for the Causes of the Gap	313
	C. Understanding the Comparable Worth Debate	314
	1. Wage-Setting: Classical and Institutional Views ..	315
	2. The Costs—economics, inflation and lost jobs	317
	3. Apples and Oranges—comparing dissimilar jobs ..	319
	4. Debate Over a Partial Remedy for the Residual Gap	319
III.	DETERMINING AND COMPARING JOB VALUES & WAGES .	322
	A. History and Use of Job Evaluation Plans	322
	B. Job Evaluation Methodology	326
	C. Gender-based Biases in Job Evaluations and Wage Determinations	330
IV.	EXISTING FEDERAL LAW.....	331
	A. Equal Pay Act Prohibits Discrimination for Equal Work	332
	B. Title VII May Prohibit Discrimination for Comparable Work	333
	1. Title VII Burdens of Proof	335
	2. Evidentiary Sufficiency: Claims & Defenses under Disparate Treatment	338
	3. Evidentiary Sufficiency: Claims & Defenses under Disparate Impact	348
V.	STATE ACTIVITY.....	355
	A. State Legislation	356
	B. State Executive Orders and Local Laws.....	360
	C. Status of State Pay Equity Activities.....	362
	1. State Use of Job Evaluation	362
	2. State Pay Equity Policies	363
	3. State Pay Equity Studies	365
	D. State Judicial and Administrative Decisions	366

1. Alaska: harbinger or deviate?	366
2. Other States' Construction of State EPA & FEP Laws	370
VI. LEGISLATIVE PROPOSAL.....	371
A. Federal Legislation Presently Proposed	371
1. H.R. 387 & S. 552: A Pay Equity Study of the Federal Work Force.....	373
2. S. 5: A Pay Equity Program for Federal Contractors	377
3. Arguments For and Against Federal Study Legislation	379
B. A State Model for Future State & Federal Legislation.....	385
VII. CONCLUSION.....	386
VIII. APPENDIX: EXEMPLARY COMPENSATION LEGISLATION FROM WASHINGTON STATE	389

I. INTRODUCTION

In 1986 a full-time working woman earned sixty-four cents to every dollar earned by a full-time working man, a penny more than she earned relative to a man in 1956.¹ The major reason for this persistent² disparity in earnings is that female workers are concentrated in a limited number of occupations and industries where wages are lowest.³ Researchers can

1. BUREAU OF THE CENSUS, UNITED STATES DEP'T OF COMMERCE, FACT SHEET ON CIVILIANS 15 YEARS OLD AND OVER WORKING YEAR ROUND, FULL-TIME (ALL RACES) (1987) [hereinafter CIVILIANS' EARNINGS]. In 1956, the earnings differential was 63.3%; in 1986, 64.3%. *Id.*

2. *Id.* Thirty years of the gender-based wage gap is illustrated by a ratio of women's to men's full-time, year-round median earnings for the years 1956-1986. 1986—64.3; 1985—64.6; 1984—63.7; 1983—63.6; 1982—61.7; 1981—59.2; 1980—60.3; 1979—59.7; 1978—59.4; 1977—58.9; 1976—60.2; 1975—58.8; 1974—58.6; 1973—56.6; 1972—57.9; 1971—59.5; 1970—59.4; 1969—60.5; 1968—58.2; 1967—57.8; 1966—57.6; 1965—59.9; 1964—59.1; 1963—58.9; 1962—59.3; 1961—59.2; 1960—60.7; 1959—61.3; 1958—63.0; 1957—63.8; 1956—63.3. *Id.*

3. BUREAU OF THE CENSUS, UNITED STATES DEP'T OF COMMERCE, WOMEN IN THE AMERICAN ECONOMY 27, 29 (Nov. 1986) [hereinafter WOMEN IN THE ECONOMY]. 50.7% of all women work in only 19 of 503 occupational categories listed by the Department of Commerce. *Id.* at 18, Table 8. All except one of the 19 occupations in which women are concentrated are at least 60% female, and 15 of the 19 predominantly female occupations pay in the bottom half of 421 occupationally ranked earnings. *Id.* at 23.

Even women who fall within the 25-34 age bracket and who have five or more years of college education are clustered in traditionally "female" jobs: 15.9% work as elementary school teachers, and 15.6% as either secondary school teachers, social workers or registered nurses. *Id.* at 20. Where women in the same age group have made advances, they have made them in managerial and professional fields in predominantly female occupations. *Id.* at 22.

explain up to approximately one-half the wage gap through differences in job content⁴ and human capital⁵ factors such as education, work force attachment and worker preferences.⁶ Although unable to explain the remaining portion of the wage gap by statistical analyses,⁷ researchers generally conclude that present or past discriminatory employment practices, or both, account for at least some part of the residual pay gap.⁸

Federal and state laws, executive directives and court decisions prohibit gender-based wage discrimination in employment.⁹ Congress made the payment of wages on the basis of gender unlawful almost twenty-five years ago when it enacted the Equal Pay Act of 1963 (EPA)¹⁰ and Title

Between 1970 and 1980 when women moved into predominantly male occupations, they made the most notable gains in service occupations (female bartenders increased 23.1%); and in sales, administrative support and technical occupations (female sales supervisors earned 14.5%; real estate saleswomen 14.0%). *Id.* at 22-23. Although males and females earn between 90% and 105% of each other at entry level, 30% earn less than 90% of the salary males earn at skilled levels. *Id.* at 33. Additionally, fewer women than men attain higher level jobs. *Id.* at 34.

Women also are clustered in industries. Primarily, women work in industries at the bottom of the pay scale. *Id.* at 27. They work in four industry groups: professional and related services, half of which are elementary and secondary schools and hospitals; retail; finance, insurance and real estate; and business and repair services. *Id.* Two-thirds work in service and retail trade industries and in state and local government. *Id.* at 27.

4. See *infra* text accompanying notes 87-94 for a discussion of job content.

5. See *infra* text accompanying notes 95-102 for a discussion of human capital.

6. NATIONAL RESEARCH COUNCIL, WOMEN, WORK, AND WAGES: EQUAL PAY FOR JOBS OF EQUAL VALUE 42 (D. Trieman & H. Hartman, eds. 1981) [hereinafter WOMEN, WORK, AND WAGES] (Equal Employment Opportunity Commission contracted for study by National Academy of Sciences); GEN. ACCT. OFFICE, PAY EQUITY STATUS OF STATE ACTIVITIES, REP. NO. 141BR, at 5-14 (1986) [hereinafter PAY EQUITY STATUS].

7. WOMEN IN THE ECONOMY, *supra* note 3, at 33; WOMEN, WORK, AND WAGES, *supra* note 6, at 42.

8. WOMEN IN THE ECONOMY, *supra* note 3, at 33; WOMEN, WORK, AND WAGES, *supra* note 6, at 43; PAY EQUITY STATUS, *supra* note 6, at 5-14. Some opponents of comparable worth question that the earnings gap is actually attributable to sex discrimination, and they name non-measurement of factors or other factors such as work interruptions and experience, age, education, individual preferences and traditional cultural patterns, rather than employer exclusionary practices, as contributors to the wage gap. See R. WILLIAMS AND L. KESSLER, A CLOSER LOOK AT COMPARABLE WORTH 15-25 (1984) [hereinafter CLOSER LOOK AT COMPARABLE WORTH]; Cox, *Equal Work, Comparable Worth and Disparate Treatment: An Argument for Narrowly Construing* County of Washington v. Gunther, 22 DUQ. L. REV. 65, 85-90 (1983); Livernash, *An Overview*, in COMPARABLE WORTH: ISSUES AND ALTERNATIVES 3, 10-17 (E. Livernash ed. 1984) [hereinafter ISSUES AND ALTERNATIVES]; Milkovich, *The Emerging Debate*, in ISSUES AND ALTERNATIVES *supra*, 25, 38-46.

9. See *infra* notes 10-11 and accompanying text for text of pertinent federal statutes; see *infra* text accompanying notes 190-322 for a discussion of federal statutes and caselaw; see *infra* text accompanying notes 327-358 and 386-420 for a discussion of state statutes, case law and executive directives.

10. 29 U.S.C. § 206(d)(1) (1982) (EPA). The EPA is an amendment to the Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (Supp. III 1986). The EPA provides in part:

VII of the Civil Rights Act of 1964 (Title VII).¹¹ Under the EPA, the employer has a duty to pay equal wages to male and female employees performing "substantially" the same work which requires equal skill, effort and responsibility under similar working conditions.¹² The EPA applies only to employees performing virtually the same jobs for unequal pay. It does not apply to men and women working on different jobs which the employer determines are of equal value.

Title VII extends the employer's duty beyond paying equal *wage* rates to a broader responsibility to pay equal *compensation*.¹³ Further-

No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: Provided, That an employer who is paying a wage rate 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. § 206(d)(1).

11. §§ 701-18; 42 U.S.C. §§ 2000e-2000e-17 (1982) (Title VII). Title VII provides in pertinent part:

(a) 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. Title VII further provides:

(h) Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations It shall not be an unlawful employment practice under this title for an employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of Title 29.

Id. § 2000e-2(h).

12. 29 U.S.C. § 206(d)(1) (1982). Exceptions are permitted where wages are based on seniority, merit, production or any other factor other than sex (FOTS). *Id.* The United States Supreme Court and lower federal courts have interpreted equal work to mean either identical or "substantially equal" jobs. See *Corning Glass Works v. Brennan*, 417 U.S. 188 (1974). See *infra* text accompanying notes 194-97 for a discussion of the courts' interpretation of the EPA.

13. Whereas the EPA addresses employees' wages, Title VII addresses the broader concept of all compensation, including wages and fringe benefits. 42 U.S.C. § 2000e-2(a)(1). Further, EPA prohibitions are limited to employee categories within an establishment and under

more, Title VII is not limited to the "substantially similar" requirements under the EPA.¹⁴ Rather, this law applies to jobs which are both similar and not substantially similar to the employer. Title VII makes it unlawful for the employer to intentionally compensate jobs at lower rates *because* they are held by women.¹⁵ Title VII also proscribes employer conduct which adversely affects an employee's status by limiting, segregating or classifying the employee.¹⁶

The term "comparable worth," often used interchangeably with the term "pay equity,"¹⁷ is a theory under which plaintiffs have attempted to seek relief for gender-based wage discrimination under Title VII. Federal courts have addressed the evidentiary value of a comparable worth claim to determine its viability for establishing a *prima facie* case.¹⁸ In 1981, the United States Supreme Court decided *County of Washington v. Gunther*,¹⁹ and defined comparable worth as a "concept . . . under which plaintiffs might claim increased compensation on the basis of a comparison of the intrinsic worth or difficulty of their job with that of other jobs in the same organization or community."²⁰ The *Gunther* Court distinguished comparable worth claims from other claims of intentional wage

the purview of the Fair Labor Standards Act. An employee working in a "bona fide executive, administrative, or professional capacity" is exempt from coverage under the EPA. 29 U.S.C. §§ 201-219 (Supp. III 1986). Under the EPA, a single establishment may encompass the employer's different locations. *Id.* §§ 206(d)(1), 213(a). Alternatively, Title VII covers all employees companywide, including those at different locations. 42 U.S.C. § 2000e-2(a).

14. *County of Washington v. Gunther*, 452 U.S. 161 (1981). See *infra* text accompanying notes 198-322 for a discussion of comparable work claims under Title VII.

15. 42 U.S.C. § 2000e-2(a)(1); *Gunther*, 452 U.S. at 180.

16. 42 U.S.C. § 2000e-2(a)(2).

17. See *Federal Pay Equity Act of 1984, Parts I and II, Hearings Before the Subcomm. on Compensation and Employee Benefits of the House Comm. on Post Office and Civ. Serv.*, 98th Cong., 2d Sess. (1984). One commentator has noted:

Comparable worth and pay equity are broad terms with imprecise meanings and are often used interchangeably. Pay equity, however, is a broader term denoting fairness in setting wages. Comparable worth generally refers to measuring the relative values (or worth) to the employer of disparate jobs, specifically of those jobs done primarily by men and those done primarily by women. Pay equity, whether it be in the form of equal pay for equal work or equal pay for work of equal value, concerns the pay relationships among jobs in the same firms. A popular tool for establishing these pay relationships is a job evaluation or job classification system.

CONG. RES. SERV., LIBR. OF CONG., PAY EQUITY/COMPARABLE WORTH ACTIVITIES BY STATE GOVERNMENTS: A SUMMARY CRS-2, 86-954E (Sept. 30, 1986) (A. Ahmuty & M. Jickling, analysts).

18. See *infra* text accompanying notes 198-322 for a discussion of federal courts' decisions regarding comparable worth claims under Title VII disparate treatment and disparate impact analyses.

19. 452 U.S. 161 (1981).

20. *Id.* at 166.

discrimination which are actionable under Title VII²¹ and decided the case on grounds other than a comparable worth theory.²² In his majority opinion, Justice Brennan noted that the Court had not decided whether a comparable worth claim is sufficient to establish a prima facie case of sex discrimination.²³ To the present time, the Supreme Court has not ruled on a comparable worth or pay equity claim. The Court, then, has yet to determine whether a plaintiff's claim based, solely or in part, on comparable worth theory provides either the direct or circumstantial evidence sufficient to establish a prima facie case of discrimination under Title VII.²⁴

Consequently, lower federal courts have been left to grapple with the role of comparable worth in gender-based wage discrimination claims.²⁵ The lower courts have explicitly rejected comparable worth as the sole basis for establishing a cognizable claim under Title VII.²⁶ Currently, when the employer pays employees in a predominantly female job lower wages than employees in a predominantly male job, which the employer determines are equal in value, a court will not infer that the wages are lower simply *because* the job classification is female-dominated.²⁷ The plaintiff instead must present evidence in addition to comparable worth that the employer intended to discriminate before a court will find that the employer engaged in gender-based wage discrimination.²⁸ Even though comparable worth theory by itself is not sufficient evidence to establish gender-based wage discrimination at the present time, several options which include comparable worth are available to plaintiffs bringing wage discrimination claims under Title VII. These options are based on the theories of intentional discrimination (disparity in treatment from the employer's practices) and disparate impact (disproportionate adverse consequences from employer's practices).²⁹

In addition to federal prohibitions against gender discrimination, most states have equal pay acts and fair employment practice laws which generally address the same issues as the federal EPA and Title VII.³⁰ Many state statutes contain an equal pay for comparable work standard,

21. *Id.*

22. The Court found that the employer's non-compliance with its own job evaluation and wage-setting system constituted direct evidence of intentional discrimination. *Id.* at 180-81.

23. *Id.* at 166-67.

24. See *infra* text accompanying notes 233-41 for a discussion of *Gunther*.

25. See *infra* text accompanying notes 242-322.

26. See *infra* text accompanying notes 242-322.

27. See *infra* text accompanying notes 233-92.

28. See *infra* text accompanying notes 233-92.

29. See *supra* text accompanying notes 198-322.

30. See *infra* notes 328-46 and accompanying text.

yet practically all state judiciaries construe their laws as narrowly as the federal judiciary construes the federal laws.³¹ The states, however, have launched an accelerating effort to implement pay equity through collective bargaining, gubernatorial action and legislation.³² Nonetheless, despite applicable federal and state laws and court decisions outlawing gender-based discrimination in compensation, employment practices which discriminate on the basis of gender persist and continue to result in lower compensation for female employees than male employees.

This Comment will provide a legal, political and social analysis of comparable worth, alternatively known as pay equity, in five sections. First, it will examine various causes for the male-female wage gap. It will analyze comparable worth opponents' and proponents' arguments related to the gap. Second, this Comment will explain the key issue of job evaluation and explore its significance to gender-based wage discrimination litigation. The analysis will include recommendations for evaluating and comparing job worth to establish legitimate claims and defenses to pay rate differentials. Third, this Comment will analyze federal litigation to determine the present scope of cognizable gender-based wage discrimination claims and defenses under the EPA and Title VII. Fourth, it will review the scope of existing state laws—specifically to analyze how state courts have and have not interpreted state statutes which prohibit gender-based compensation practices. Fifth, this Comment will outline pending federal legislation and existing state laws which are aimed at closing a portion of the wage gap, and will suggest their potential impact on gender-based wage discrimination litigation under Title VII.

II. THE WAGE GAP: BACKGROUND OF THE PROBLEM

A. *Earnings in Occupations and Industries: The Facts*

The persistence of an earnings gap between female and male employees is an historically indisputable fact.³³ In 1986, a full-time working woman earned 64.3 percent of the amount a man earned.³⁴ By the year 2000, working women's wages are predicted to approximate seventy-four percent of men's wages.³⁵

31. See *infra* text accompanying notes 386-421.

32. See *infra* text accompanying notes 325-326.

33. See *supra* note 2 and accompanying text for chart demonstrating the ratio of year round full-time female to male earnings between 1956 and 1986. The earnings differential has fluctuated over the past thirty years. In 1956, a woman earned 63.3% of the wages a man earned; in 1966, 57.6%; in 1976, 60.2%; in 1986, 64.3%. CIVILIANS' EARNINGS, *supra* note 1.

34. *Id.*

35. J. SMITH & M. WARD, WOMEN'S WAGES AND WORK IN THE TWENTIETH CENTURY 82 (1984).

The major determinant of this statistical earnings gap is the clustering of female workers in a limited number of occupations and industries where wages are lowest.³⁶ Seventy percent of women employed full-time work in occupations which are at least sixty percent female-dominated.³⁷ The National Academy of Sciences (NAS) noted that in occupational segregation "[n]ot only do women do different work than men, but also the work women do is paid less, and the more an occupation is dominated by women the less it pays."³⁸ Almost eighty percent of employed women work in occupations which pay in the bottom half of the wage scale.³⁹ Although women are moving gradually into a somewhat broader range of occupations, such as law and medicine, they still tend to work in predominantly female occupations which pay less than those predominantly male.⁴⁰ To illustrate, over thirty percent of women age twenty-five to thirty-four with five or more years of college work as elementary and secondary school teachers, social workers and nurses.⁴¹ As women moved into predominantly male occupations during the last decade, they significantly penetrated only two occupational groups: service and sales, and administrative support and technical occupations.⁴² Women also are failing to attain higher level positions within integrated occupational groups.⁴³ Even though females' earnings approximate males' earnings at entry level, about one-third earn less than males at skilled levels.⁴⁴

Employed women are clustered into four industry groups with almost seventy percent in services and retailing and state and local government.⁴⁵ The Bureau of Labor Statistics projects increases in employment to 1995 to occur in service industries in some of the job classifications employing the largest numbers of women.⁴⁶ Industries with the highest

36. WOMEN IN THE ECONOMY, *supra* note 3, at 27, 29.

37. BUREAU OF LABOR STATISTICS, UNITED STATES DEP'T OF LABOR, 110 MONTHLY LABOR REV., No. 6 (June, 1987).

38. WOMEN, WORK, AND WAGES, *supra* note 6 at 28.

39. WOMEN IN THE ECONOMY, *supra* note 3, at 18.

40. *Id.* at 19-20. In 1980, 30% of law degrees were conferred on women compared to 5% in 1970; and 23% of medical degrees in 1980 compared to 8% in 1970. *Id.* at 15. Women are entering predominantly male managerial and professional specialty occupations (a 7.3% gain between 1970 and 1980), but are overrepresented in clerical (85% in 1986) and service occupations (61% in 1986) and underrepresented in production, craft and labor occupations (9% in 1986). *Id.* at 23; BUREAU OF THE CENSUS, UNITED STATES DEP'T OF LABOR, ANNUAL AVERAGE OCCUPATION TABLE (Dec. 1986).

41. WOMEN IN THE ECONOMY, *supra* note 3, at 23.

42. *Id.* at 22-23.

43. *Id.* at 34.

44. *Id.* at 33.

45. *Id.* at 37.

46. BUREAU OF LABOR STATISTICS, UNITED STATES DEP'T OF LABOR, WORKING WOMEN AND PUBLIC POLICY 4 (1984).

percentage of women employees generally pay the lowest wages.⁴⁷ Women have been and appear likely to remain clustered in low paying occupations and industries. The issue then becomes whether the disparity between male and female earnings is due to job, employee and workplace characteristics or is the result of discrimination.

B. Measuring for the Causes of the Gap

Researchers have been able to offer only a partial explanation for the wage gap.⁴⁸ At the NAS, researchers identified labor market segmentation, job segregation and employment practices as factors which permit earnings differentials between men and women.⁴⁹ Other statistical studies attribute women's lower earnings partly to the following factors: fewer work hours, age, marital status, worker preferences, mobility, and access to information.⁵⁰

Correlation, however, is not equivalent to causation. What appears to be the rational response to objective criteria may be laced with discrimination; and, what appears to be discriminatory may be a rational response to objective criteria. To the present time, no standard statistical methodology has either proved or disproved that discrimination contributes to any of the pay gap.⁵¹ It is possible that "no statistical exercise can ever prove definitively that any of the gap is caused by discrimination."⁵² Such studies can demonstrate that earnings or wage differentials are not fully explained by employee characteristics or job-related factors. Alternatively, studies cannot rule out the notion that other unmeasurable variables, including voluntary and discriminatory behavior, help create the wage gap.⁵³ The important lesson to legislatures and the courts, then, is that "[s]tatistical studies are just one type of evidence that people should consider in evaluating whether pay differences are attributable to discrimination."⁵⁴

Debate between proponents and opponents of comparable worth focuses on how much of the residual wage gap is due to discriminatory

47. WOMEN IN THE ECONOMY, *supra* note 3, at 27.

48. See WOMEN, WORK, AND WAGES, *supra* note 6, at 13-43; Milkovich, *The Emerging Debate*, in ISSUES AND ALTERNATIVES, *supra* note 8, at 38-46.

49. WOMEN, WORK, AND WAGES, *supra* note 6, at 11.

50. H. AARON & C. LOUGY, THE COMPARABLE WORTH CONTROVERSY 13-15 (1986) [hereinafter CONTROVERSY].

51. *Id.* at 12.

52. *Id.*

53. *Id.* at 15.

54. *Id.* at 12.

employment practices.⁵⁵ Depending on whether one is a proponent or opponent of comparable worth, conclusions of cited studies vary.⁵⁶ Proponents and opponents agree that historical or present discriminatory employment practices, or both, account for at least some unmeasured part of the residual pay gap⁵⁷ even though they are unable to isolate the extent to which wage disparities result from discrimination.⁵⁸

C. *Understanding the Comparable Worth Debate*

Opponents and proponents of comparable worth proffer various reasons for the residual wage gap. Opponents focus on voluntary, non-discriminatory factors to explain the gap. Proponents contend that current and historical stereotyping and other conduct constituting discrimination create a portion of the gap. Opponents and proponents also predict different results from implementing comparable worth, a program to eliminate that portion of the gap attributable to women's occupational concentration which correlates directly to lower wages for women than men for jobs of equivalent value. Opponents predict a comparable worth program would result in monumental costs, inflation and unemployment. They argue for the perpetuation of a market system free of governmental controls. Proponents contend that the market historically has been influenced by government controls and that claims of astronomical costs, unemployment and inflation are unfounded. Finally, opponents and proponents offer different remedies to rectify a portion of the residual gap. For opponents of comparable worth, the remedy for both wage discrimination and occupational segregation is job integration. For proponents, the remedy for wage discrimination is through job evaluation and for job segregation, job integration. Thus, while opponents and proponents agree job integration would remedy a portion of the gap, opponents

55. G. Milkovich, *The Emerging Debate*, in ISSUES AND ALTERNATIVES, *supra* note 8, at 23-47; Shattuck, *Sex-Based Wage Discrimination: A Management View*, DEN. U.L. REV. 393 (1985) (opponents' view) [hereinafter *Sex-Based Wage Discrimination*]; WOMEN, WORK, AND WAGES, *supra* note 6, at 44-68; Comment, *Comparable Worth: The Next Step Toward Pay Equity Under Title VII*, DEN. U.L. REV. 417 (1985) (proponents' view)[hereinafter *Next Step*].

56. G. Milkovich, *The Emerging Debate*, in ISSUES AND ALTERNATIVES, *supra* note 8, at 23-47; *Sex-Based Wage Discrimination*, *supra* note 55, at 393; WOMEN, WORK, AND WAGES, *supra* note 6, at 44-68; *Next Step*, *supra* note 55, at 417.

57. CONTROVERSY, *supra* note 50, at 6, 41-42; WOMEN, WORK, AND WAGES, *supra* note 6, at 65; Nelson, Opton & Wilson, *Wage Discrimination and the "Comparable Worth" Theory in Perspective*, 13 U. MICH. J.L. REV. 233 n.2 (1980) [hereinafter *Perspective*].

58. *Perspective*, *supra* note 57, at 253. "[T]he most that multiple regression analysis can tell us is that some of the gross earnings differences between the sexes are accounted for legitimately, while the remainder must result from unmeasured legitimate sources, and/or job separation, and/or wage discrimination." *Id.*

find job evaluation inappropriate to remedy an additional portion of the residual gap.

1. Wage-setting: the classical and institutional views

Opponents of comparable worth have attempted to explain the existing wage gap and project the effects of implementing comparable worth theory, paying females equitably for work performed, under the classical economic theory of wage-setting in the marketplace. Opponents claim that comparable worth will disrupt the free labor market economic system by artificially determining wages.⁵⁹ In their view, the market determines wages through interaction between the freely competitive, neutral supply of workers and the employer's demand for skills.⁶⁰ They claim that the existing system operates by avoiding subjective evaluations and by focusing instead on making the labor market as freely competitive as possible.⁶¹ Furthermore, opponents contend that, unlike comparable worth, the current system successfully offers flexibility by modifying wage rates to reflect the constantly changing interaction of supply and demand.⁶² Opponents thus assert that a comparable worth system would interfere with the free market system.

Proponents point out that the labor market, with its unfettered adjustment of supply and demand, has not functioned as a perfectly competitive environment for employers' wage-setting. Historically, Congress has intervened in the marketplace to protect laborers by legislating child labor laws, health laws, collective bargaining, the Fair Labor Standards Act and the Civil Rights Act of 1964.⁶³ Employers also have directly interfered with the free market system by price-fixing, wage-setting and

59. *Sex-Based Wage Discrimination*, *supra* note 55, at 400-02; F. Morris, *A Legal Perspective* 23, in F. MORRIS, J. O'NEILL, J. CALHOON, J. SLOAN, S. MITCHELL & T. FAHNER, *JUDICIAL WAGE DETERMINATION . . . A VOLATILE SPECTRE: PERSPECTIVES ON COMPARABLE WORTH* (1984)[hereinafter *PERSPECTIVES ON COMPARABLE WORTH*].

60. J. O'Neill, *An Economic Perspective: An Argument Against Comparable Worth*, in *PERSPECTIVES ON COMPARABLE WORTH*, *supra* note 59, at 27-29; *CLOSER LOOK AT COMPARABLE WORTH*, *supra* note 8, at 39. See P. England, *Socioeconomic Explanations of Job Segregation*, in *COMPARABLE WORTH AND WAGE DISCRIMINATION* 28, 36-37 (H. Remick ed. 1984) [hereinafter *COMPARABLE WORTH*] for an in-depth discussion of neo-classical models, including arguments that "pre-market discrimination" and "socialization" account for a large part of the wage gap.

61. *CLOSER LOOK AT COMPARABLE WORTH*, *supra* note 8, at 48.

62. *Sex-Based Wage Discrimination*, *supra* note 55, at 401; *CLOSER LOOK AT COMPARABLE WORTH*, *supra* note 8, at 40-41, 43.

63. The government also has intervened to save Chrysler, Amtrak and Lockheed from bankruptcy. Remick & Steinberg, *Technical Possibilities and Political Realities: Concluding Remarks*, in *COMPARABLE WORTH*, *supra* note 60, at 285, 290; *Next Step*, *supra* note 55, at 443.

controlling product markets to reduce risk, reduce costs and increase profits.⁶⁴ Some significant portion of governmental and employer intervention, then, have proven to be successful contributors to the free-flowing forces of supply and demand.

Even absent direct intervention in the market economy, factors other than the supply of workers or their productivity still play a major role in wage-setting over an extended time period.⁶⁵ Employers often set wages, not on the basis of the "classical view" of a competitive marketplace, but on the basis of an "institutional view," which focuses on inherently rigid and inflexible factors not connected to the labor market.⁶⁶ Non-market institutional factors which influence wage-setting include employer and employee preferences and custom, employer inaccessibility to all possible employees, employee inaccessibility to all possible employers, promotional policies, seniority systems, collective bargaining and segmentation of labor markets into non-competing groups, primarily on the basis of sex, race and ethnicity of workers.⁶⁷

Opponents of comparable worth acknowledge that gender-based wage differentials, determined on the basis of institutional factors, become a customary company practice which reproduces itself throughout a given labor market.⁶⁸ They also concede that employment discrimination against women exists.⁶⁹ Yet, they argue that an individual employer is not and should not be liable for others' employment practices or for existing market conditions which reflect historical undervaluation of predominantly female jobs.⁷⁰ Advocates point out that the individual employer is not an innocent bystander; it is one employer's pay practices, in combination with all other employers' pay practices, that determines the market.⁷¹ The employer who thus reaps the beneficial effects of historically discriminatory labor supply and demand conditions should pay women the cost of the benefit received.

64. Remick & Steinberg, *Technical Possibilities and Political Realities: Concluding Remarks*, in *COMPARABLE WORTH*, *supra* note 60, at 290.

65. *CONTROVERSY*, *supra* note 50, at 6-7.

66. *CLOSER LOOK AT COMPARABLE WORTH*, *supra* note 8, at 44-45; see also *WOMEN, WORK, AND WAGES*, *supra* note 6, at 44-68, for an extensive discussion of institutional influences on the labor market.

67. *Sex-Based Wage Discrimination*, *supra* note 55, at 401; *CLOSER LOOK AT COMPARABLE WORTH*, *supra* note 8, at 43-44; *WOMEN, WORK, AND WAGES*, *supra* note 6, at 118.

68. *Sex-Based Wage Discrimination*, *supra* note 55, at 401; *CLOSER LOOK AT COMPARABLE WORTH*, *supra* note 8, at 43-45.

69. *CLOSER LOOK AT COMPARABLE WORTH*, *supra* note 8, at 46-48; *Sex-Based Wage Discrimination*, *supra* note 55, at 401.

70. *Id.*

71. *WOMEN, WORK, AND WAGES*, *supra* note 6, at 61.

Finally, comparable worth opponents admit that the present system determines wages by taking into account the same basic "subjective" values—such as skills, education, experience and working conditions—which also permeate a job evaluation system under the comparable worth theory.⁷² Job evaluation methodology, advocated by comparable worth proponents, considers the market a factor in wage-setting and, therefore, provides flexible responses to labor supply and demand.⁷³ It is inaccurate, therefore, for opponents to describe a wage-setting program based on comparable worth as subjective, inflexible and designed to ignore market forces.

2. The costs—economics, inflation and lost jobs

Opponents of comparable worth estimate that the cost to implement comparable worth could range from \$2 billion to \$150 billion.⁷⁴ Proponents contend that these estimates are based on the assumption that all employers will rectify all wage discrimination at the same time.⁷⁵ They argue that this assumption is unrealistic because "[m]ost legal reforms that impact upon the labor market have been implemented in stages: either the scope of coverage is initially restricted and gradually expanded to cover a larger proportion of employees over time, or the legal standard is introduced in steps."⁷⁶ Employers have been and are likely to continue implementing comparable worth in stages so that the costs will accrue over time.⁷⁷ To illustrate, proponents point to the Minnesota experience where implementation of comparable worth cost only a small percentage of payroll and was therefore manageable under the state budget.⁷⁸

Opponents posit that full implementation of comparable worth will increase inflation and unemployment because businesses will pass wage

72. *Sex-Based Wage Discrimination*, *supra* note 55, at 401.

73. Steinberg, *A Want of Harmony*, in *COMPARABLE WORTH*, *supra* note 60, at 18.

74. Remick & Steinberg, *Technical Possibilities and Political Realities: Concluding Remarks*, in *COMPARABLE WORTH*, *supra* note 60, at 290. *See infra* note 476 and accompanying text.

75. *Id.*

76. *Id.* (citation omitted).

77. *See* Remick & Steinberg, *Technical Possibilities and Political Realities: Concluding Remarks*, in *COMPARABLE WORTH*, *supra* note 60, at 290.

78. B. WATKINS, REMARKS OF PAY EQUITY COORDINATOR, STATE OF MINNESOTA AT CONGRESSIONAL STAFF BRIEFING ON PAY EQUITY: THE MINNESOTA EXPERIENCE 1 (May 15, 1987) (available at Loyola of Los Angeles Law School library) [hereinafter *MINNESOTA EXPERIENCE*]. *See infra* text accompanying note 81. "Several states have estimated that comparable worth costs will run from less than 1 percent to about 5 percent of present payrolls. The variations depend, of course, upon the degree of discrepancy found to exist between comparable male- and female-dominated jobs." Cook, *Developments in Selected States*, in *COMPARABLE WORTH*, *supra* note 60, at 283.

increases to consumers without corresponding productivity increases and will substitute capital or technology for labor. While proponents of comparable worth do not disagree that theirs is a potentially inflationary proposal, they argue that the severity of inflation opponents project is unwarranted because implementation will take several decades and discount any inflationary effect.⁷⁹ Proponents also can point to Australia which has experienced minimal, if any, inflation or rising unemployment subsequent to a nationwide implementation of comparable worth.⁸⁰ Furthermore, the State of Minnesota, which implemented pay equity at the state and local government level over three years ago, has experienced only a minimal increase in state and local payrolls and the percentage of women working for the state has increased.⁸¹ Finally, the United States Supreme Court established that cost does not justify discrimination.⁸²

79. See Remick & Steinberg, *Technical Possibilities and Political Realities: Concluding Remarks*, in *COMPARABLE WORTH*, *supra* note 60, at 292.

80. Australia is the sole country from which to observe the results of a national application of comparable worth. See *CONTROVERSY*, *supra* note 50, at 40. That country increased women's wages substantially and quickly to establish the principle of equal pay for comparable worth. Following adoption of an "equal pay for equal work" standard in 1969, and an "equal pay for work of equal value" standard in 1975, Australian women's wages rose from seventy-four percent of men's wages in 1970 to ninety-four percent of men's wages by 1980. *Id.*

The consequences of Australia's sharp wage adjustment are disputed. *Id.* One study shows that women's increased wages did not produce changes in resource allocation, that labor force demand for women did not decline in the late 1970's and that the female unemployment rate actually fell. *Id.* at 40-41. A second study reports that pay equalization slowed growth in women's employment by one-third, led to a lower number of average hours worked per week, and increased unemployment by 0.5 percent. *Id.* at 41. Neither study, however, found evidence to support the dire predictions of comparable worth opponents—substantial and detrimental costs, inflation and unemployment.

The authors did not discuss the Australian economy in the late 1970's. Thus, we do not know if an escalating economy may have created an increased demand for female labor in the marketplace. Yet, the authors concluded from the Australian experience that implementation of comparable worth in the United States would lead to only minor economic side effects.

Such an application of comparable worth would have little effect on overall economic efficiency, even if the fears of its opponents are solidly grounded. This conclusion is supported by the experience of Australia with wage adjustments similar to those that would follow from comparable worth. Whether the labor market effects of the Australian experiment with pay equalization were small or large, they suggest that the impact on demand for women in the labor market would be negligibly affected by . . . comparable worth We conclude that the economic side effects of the use of comparable worth . . . will be minor.

Id. at 50.

81. The Pay Equity Coordinator for the State of Minnesota reported that the total cost of implementing pay equity at the state level has been 3.7% of the state payroll and the average cost at the local level has been 2.6% of payroll. The number of women working for the state increased 6%. *MINNESOTA EXPERIENCE*, *supra* note 78, at 1.

82. *Los Angeles Dep't of Water and Power v. Manhart*, 435 U.S. 702, 716-17 (1978).

3. Apples and oranges

Opponents argue that like comparing apples and oranges, comparing dissimilar jobs is not possible.⁸³ Yet, employers have used job evaluation systems for over 100 years to determine which different jobs are equivalent in value from the employer's point of view.⁸⁴ Job evaluation methodology has traditionally provided employers with the ability to analyze job prerequisites and responsibilities to classify and set wages for different jobs.⁸⁵ Proponents of comparable worth proffer that "the same employer groups that have supported job evaluation systems when they have been used to create and justify an existing organizational hierarchy and wage structure contend that such systems cannot be used to compare male-dominated and female-dominated jobs within that wage structure."⁸⁶

4. The debate over a partial remedy for the residual gap

The comparable worth debate also focuses on the results of job content and human capital analyses, the notion that if job content and human capital factors are held constant, and female employees are being paid significantly less than male employees, the underpayment not due to these factors must be or is not attributable to discrimination, at least in the absence of any other explanation.⁸⁷ Job content and human capital serve two primary uses: (1) Employers often use these approaches to set salaries on the theory that the chief determinants of compensation ought to be the demands of the job (job content) and the attributes the worker brings to the job (economic/human capital); and (2) on the basis of job content and economic analyses, the employer evaluates the fairness of its existing pay system.

Objective job evaluation is "a quantitative method of rating positions within occupations based upon factors such as the skill, effort, re-

83. Chamber of Commerce handout on S. 519 (available at Loyola of Los Angeles Law School library). See also Remick & Steinberg, *Technical Possibilities and Political Realities: Concluding Remarks*, in COMPARABLE WORTH, *supra* note 60, at 288.

84. See *infra* note 109 and accompanying text.

85. Prior to adopting a formal job evaluation system to determine the value of jobs, the State of Minnesota was not able to analyze whether it was "fair" that workers, predominantly female, who cared for mentally retarded people were paid less than workers, predominantly male, who cared for animals at the state zoo. B. Watkins, *supra* note 81, at 2. See *infra* text accompanying notes 136-80 for a discussion of basic job evaluation methodology.

86. Remick & Steinberg, *Technical Possibilities and Political Realities: Concluding Remarks*, in COMPARABLE WORTH, *supra* note 60, at 289.

87. COMPTROLLER GEN. OF THE U.S., OPTIONS FOR CONDUCTING A PAY EQUITY STUDY OF FEDERAL PAY AND CLASSIFICATION SYSTEMS, REP. NO. 37, AT 35 (MAR. 1, 1985) [hereinafter OPTIONS FOR PAY EQUITY].

sponsibilities, qualification requirements, and working conditions involved so that comparisons may be made with respect to the positions and occupations involved."⁸⁸ Job content analysis focuses on characteristics of the job rather than on characteristics of the employee or the workplace.⁸⁹ The technique of job evaluation determines the relative value of jobs to the employer and identifies pay differences between jobs which are comparably evaluated.⁹⁰ Although criticized for its subjectivity and limitations,⁹¹ job evaluation provides information which the employer can use to identify and reduce pay differentials between jobs the employer determines are similar in value.⁹² Public and private sector employers traditionally use job content evaluation to measure the value of a job in relation to the value of other jobs and to set wages.⁹³ Employers have found that job content analysis "provided a framework for policy determination, and eliminated pay inequities caused by favoritism or undue pressure."⁹⁴

Employers also use the human capital theory, alternatively known as economic theory, to explain and rectify the wage gap.⁹⁵ Differing from job content analysis, economic analysis measures "the extent to which [wage] differentials are attributable to factors such as seniority, merit, productivity, education, work experience, geographic factors, supply and demand factors, or any other factors, exclusive of sex, race, or ethnicity"⁹⁶

Economic theorists contend that investments in labor, through such activities as schooling or job experience, increase productivity and earnings. Alternatively, theorists argue, the value of labor will decline and the human capital will depreciate when job skills get rusty from non-use.⁹⁷ An economic theorist would posit that people who commit to the labor force invest heavily in developing skills which increase their future earnings.⁹⁸ Theorists also state that women do not invest as much in

88. S. 552, 100th Cong., 1st Sess. § 2(7) (1987).

89. *OPTIONS FOR PAY EQUITY*, *supra* note 87, at 26.

90. *Id.* "[J]ob evaluation may not reveal the inherent value of jobs, but it can measure the relative worth of jobs." M. GOLD, *A DIALOGUE ON COMPARABLE WORTH* 95 (1983).

91. *CLOSER LOOK AT COMPARABLE WORTH*, *supra* note 8, at 56-57.

92. *OPTIONS FOR PAY EQUITY*, *supra* note 87, at iv.

93. E. JOHANSEN, *COMPARABLE WORTH: THE MYTH AND THE MOVEMENT* 13 (1984) [hereinafter *THE MYTH AND THE MOVEMENT*].

94. *Id.*

95. *OPTIONS FOR PAY EQUITY*, *supra* note 87, at iv-v.

96. S. 552, 100th Cong., 1st Sess. § 2(6).

97. England, *Socioeconomic Explanations of Job Segregation*, in *COMPARABLE WORTH*, *supra* note 60, at 33.

98. *CONTROVERSY*, *supra* note 50, at 13.

their future earnings capacity as do men and, therefore, their earnings will not increase as quickly as will men's earnings.⁹⁹ Theorists further contend that differences between the job experience of men and women contribute to the lower number of women in jobs which require much seniority.¹⁰⁰ This hypothesis is belied by the fact that most fields are sex-segregated even at entry levels.¹⁰¹ Furthermore, at every level of experience, women earn more money when they work in predominantly male as opposed to predominantly female occupations.¹⁰² Moreover, women do not increase their earnings to levels commensurate with men's earnings even when women and men are making similar investments in the labor force through schooling and job experience.

Economic and job content factors determine legitimate differences in wages. Yet, even if economic and job content factors are substantially the same for male and female workers, or even where they fully explain wage differentials, discrimination is possible.¹⁰³ Discrimination may affect economic and/or job content factors.¹⁰⁴ For example, researchers may have omitted discriminatory factors from their statistical analyses, such as the influence of sexual stereotyping on determining a job's value. Consequently, job content and human capital analyses have not ruled out the possibility that wage differentials result, in part, from unmeasured discriminatory variables.¹⁰⁵

Nonetheless, federal legislation currently under consideration proposes use of a single, bias-free job evaluation system employing both job content and economic analyses to identify and eliminate discriminatory job classification and wage-setting practices.¹⁰⁶

[O]bjective job-evaluation techniques now exist which are utilized by many public and private employers to determine the comparative value of different jobs through a system which numerically rates the basic features and requirements of a particular job, and additional efforts should be made to develop,

99. *Id.*

100. *Id.*

101. England, *Socioeconomic Explanations of Job Segregation*, in COMPARABLE WORTH, *supra* note 60, at 34.

102. *Id.*

103. *Id.* at 33-35. Beatty & Beatty, *Some Problems with Contemporary Job Evaluation Systems*, in COMPARABLE WORTH, *supra* note 60, at 72-75.

104. *Id.*

105. CONTROVERSY, *supra* note 50, at 15.

106. S. 5, 100th Cong., 1st Sess. §§ 2(b), 6(b)(7)-(8) (1987); S. 552, 100th Cong., 1st Sess. § 4(a)(1) (1987); H.R. 387, 100th Cong., 1st Sess. §§ 2(a)(1), 6(a) (1987). See *infra* text accompanying notes 431-63 for a discussion of multiple job evaluation plans as a potential form of gender-based wage discrimination.

improve, and implement these techniques so as to help eliminate discriminatory wage-setting practices and discriminatory wage differentials.¹⁰⁷

Even though opponents to comparable worth contend that job content and economic analyses are incapable of measuring for discrimination in wages and, therefore, are inappropriate to remedy any portion of the residual gap, Congress is likely to enact the proposed legislation in the near future.¹⁰⁸ Thus, employers utilizing recognized, objective job evaluation methods to identify and eliminate gender-based wage differentials will likely be in the best position to be deemed in compliance with existing laws.

III. DETERMINING AND COMPARING JOB VALUES AND WAGES

A. *History and Use of Job Evaluation Plans*

Since the 1880's, management has employed systematic job evaluation techniques to evaluate and compare jobs and to set wages.¹⁰⁹ The pay equity issue, involving claims that women are underpaid, first arose during World War I.¹¹⁰ During World War II, the National War Labor Board (WLB), created by executive order in 1942, established several precedents concerning equal pay for women.¹¹¹ First, women should be

107. S. 5, 100th Cong., 1st Sess. §§ 2(a)(8)-(9).

108. See *infra* note 430 and accompanying text; see *infra* text accompanying notes 464-91 for a discussion of arguments opposed to and in favor of proposed job evaluation study legislation currently under Senate and House consideration.

109. Beatty & Beatty, *Some Problems with Contemporary Job Evaluation Systems*, in COMPARABLE WORTH, *supra* note 60, at 67-68. Frederick W. Taylor designed the first formal job evaluation system for a steel company. *Id.* at 67. Merrill R. Lott designed the first "point factor" evaluation plan circa 1920. In the late 1930's or early 1940's, Edward N. Hay, Eugene I. Bengé and Samuel L. H. Burke developed the "factor comparison" method of evaluation. *Id.* at 67-68. See also THE MYTH AND THE MOVEMENT, *supra* note 93, at 14. The 1923 Federal Classification Act, an initial attempt by Congress to establish a pay system for federal white-collar employees, encouraged formal compensation systems using methods for analyzing relative job value. Beatty & Beatty, *Some Problems with Contemporary Job Evaluation Systems*, in COMPARABLE WORTH, *supra* note 60, at 67.

110. Steinberg, *A Want of Harmony*, in COMPARABLE WORTH, *supra* note 60, at 6. The National War Labor Board of World War I promulgated a policy of paying women equally for equal work ordinarily performed by men. Bellace, *Proving Sex-Based Wage Discrimination*, 69 IOWA L. REV. 655, 658-59 (1984) (citing Rep. of the Sec'y of the Nat'l War Lab. Bd. to the Sec'y of Lab. 69-71, Twelve Months Ending May 31, 1919, at 69-71 (1920)) [hereinafter *Proving Discrimination*]. The Board allowed a minimum wage rate lower for women than for men. *Id.* Peace treaty negotiations following World War I used "equal pay for work of equal value" terminology when establishing the International Labour Organization and at its subsequent conferences in 1951, 1957 and 1975. THE MYTH AND THE MOVEMENT, *supra* note 93, at 14.

111. Exec. Order No. 9017, 1 War Lab. Rep. xvii (1942); 1 National War Lab. Bd., Termination Rep. 290-97 (1945). The WLB's General Order No. 16 allowed employers to "equalize

paid the same as men for performing jobs not measurably different in job content from jobs men performed or formerly performed.¹¹² The WLB allowed different rates of pay for quantity and quality of work performed and specific additional costs incident to employing women workers, such as need for extra help or rest periods.¹¹³ Second, the WLB recognized that many historically, predominantly female jobs were paid less than the lowest predominantly male jobs and noted that a shortage of male workers during wartime created the differential.¹¹⁴ Third, the WLB presumed wage differentials were correct when women historically performed jobs measurably different from men's jobs.¹¹⁵ Fourth, the presumption of correct wage differentials could be overcome by a comparison of the content of predominantly male and female jobs.¹¹⁶ When female workers challenged wage differentials, the WLB remanded the issue to the parties to negotiate the appropriate wage adjustment.¹¹⁷ When the parties could not agree, the WLB ordered job evaluation to establish job worth based on job content, exclusive of gender as a compensable factor.¹¹⁸ Fifth, when parties were still unable to agree, the WLB ordered an arbitrator to determine the appropriate wage rate.¹¹⁹

Opponents of comparable worth argue that the policies of the WLB are not determinative of the present market value of predominantly female jobs.¹²⁰ They also contend that the WLB was concerned only with substantially equal, not comparable, jobs and did not engage in wage-setting to support the notion that Congress and the courts should also limit their inquiries to substantially equal jobs and not engage in wage-setting.¹²¹ Proponents claim WLB policies have reproduced themselves over time and are present in today's market which also reflects other

the wage or salary rates paid to females with the rates paid to males for comparable quality and quantity of work on the same or similar operations" 1 National War Lab. Bd., Termination Rep. 290 (1945). The WLB applied an equal pay for equal work standard to Order No. 16. *Id.* at 290-97. See also *United Electric Workers of America against General Electric and Westinghouse*, 28 War Lab. Rep. 666 (1945).

112. 1 National War Lab. Bd., Termination Rep. at 296-97; 28 War Lab. Rep. 668-69.

113. Differentials were not allowed for alleged costs, such as lack of prior training, relative impermanence in the industry and providing sanitary functions. 28 War Lab. Rep. 666-67.

114. *Id.* at 666.

115. *Id.* at 670.

116. 1 National War Lab. Bd., Termination Rep. 296-97; 28 War Lab. Rep. 666, 677.

117. 1 National War Lab. Bd., Termination Rep. 294; 28 War Lab. Rep. 669-670.

118. 28 War Lab. Rep. 669-670.

119. *Id.* at 670-71.

120. Williams, *The Legal Framework*, in *ISSUES AND ALTERNATIVES*, *supra* note 8, at 202-09.

121. *Id.* at 203.

discriminatory practices.¹²² They argue that the WLB engaged in evaluating similar and comparable jobs and in wage-setting to support their contention that the federal government and the courts have historically evaluated comparable jobs and set wages which they can capably do today.¹²³

Since World War II, both private and public sector employers have developed and used job evaluation to establish a hierarchy of jobs as a basis for setting salaries.¹²⁴ At present, many private sector employers, the federal government and most states use formal job evaluation systems to determine and compare job value and to set wages.¹²⁵

The United States Supreme Court also has acknowledged the role of job evaluation in American industry and its influence in creating the language of the Equal Pay Act.¹²⁶ At the trial and appellate levels, judges have historically relied on job evaluation findings in pay discrimination litigation.¹²⁷ Some judges have analyzed job worth¹²⁸ and a few have

122. Steinberg, *A Want of Harmony*, in COMPARABLE WORTH, *supra* note 60, at 6-9, 18; WOMEN, WORK, AND WAGES, *supra* note 6, at 57-62.

123. *Id.*

124. See, e.g., NAT'L RES. COUNCIL OF THE NAT'L ACAD. OF SCI., D. TREIMAN, JOB EVALUATION: AN ANALYTIC REVIEW 1 (Interim Rep. to the Equal Employment Opportunity Commission) (1979) [hereinafter NAS REPORT].

125. *Id.* at 45. According to a Bureau of National Affairs (BNA) report, Hay Associates, probably the largest and best known job evaluation consultants in the United States, "numbers among its clients approximately 40 percent of the Fortune 500 companies." *Id.*

126. *County of Washington v. Gunther*, 452 U.S. 161, 170 n.11 (citing *Corning Glass Works v. Brennan*, 417 U.S. 188, 198-201 (1974)). The *Corning Glass* Court stated:

In both the House and Senate committee hearings, witnesses were highly critical of the [Equal Pay] Act's definition of equal work and of its exemptions. Many noted that most of American industry used formal, systematic job evaluation plans to establish equitable wage structures in their plants. Such systems . . . took into consideration four separate factors in determining job value—skill, effort, responsibility and working conditions—and each of these four components was further systematically divided into various subcomponents. Under a job evaluation plan, point values are assigned to each of the subcomponents of a given job, resulting in a total point figure representing a relatively objective measure of the job's value.

Corning Glass Works, 417 U.S. at 199 (footnotes omitted).

127. See *infra* note 129 and accompanying cases; see also *Stathos v. Bowden*, 728 F.2d 15 (1st Cir. 1984) (relying on employer's management consultant's job evaluations of male and female jobs, court found that employer paid female workers less for work substantially equal to that of male workers, but court did not follow consultants' pay increase recommendations); *Fitzgerald v. Sirloin Stockade*, 624 F.2d 945, 950, 953 (10th Cir. 1980) (Tenth Circuit affirmed lower court's finding that female plaintiff performed substantial portion of duties of male advertising director and required that she be paid same salary).

128. *Hodgson v. Daisy Mfg. Co.*, 317 F. Supp. 538 (W.D. Ark. 1970) *aff'd*, 445 F.2d 823 (8th Cir. 1971) (district court reviewed skill, mental and physical effort, responsibility and working conditions of male and female punch press operators, paint line tenders, sub-assemblers, final assemblers, inspectors and packers and found that employer, gun factory, paid its female workers less to perform substantially same work as male workers); *Gunther v. County of Washington*, 502 F.2d 882, 885-88 (9th Cir. 1979), *aff'd*, 452 U.S. 161 (1981) (United States

even found expert testimony unnecessary to determine job value and wages.¹²⁹

In Title VII litigation, the employer's job evaluation system may provide an available defense to a claim of pay discrimination.¹³⁰ The evaluation plan, however, must be bona fide in that it cannot discriminate on the basis of sex.¹³¹ Presently, plaintiffs are challenging the employer's job evaluation methods as circumstantial evidence of intentional gender-based wage discrimination.¹³² Concurrently, the courts are not yet fully apprised of the subtle technicalities involved in job evaluation and wage determination methods to be able to evaluate whether either is laced with discrimination. The focus of litigation extends beyond *County of Washington v. Gunther*,¹³³ where the employer implemented its adopted evaluation plan for predominantly male jobs, but not for its predominantly female jobs, which provided direct evidence of intentional discrimination.¹³⁴ The focus is evolving into whether the employer's job evaluation and wage determination methods and practices are objective, equitable and designed to identify and eliminate discriminatory wage differentials.¹³⁵

Supreme Court affirmed lower court holding that employer violated Title VII by paying unequal wages to females for unequal work, analyzed on basis of job skill, effort, responsibility and working conditions); *Brennan v. Sears, Roebuck & Co.*, 410 F. Supp. 84, 86-97 (N.D. Iowa 1976) (district court analyzed job requirements of male and female division store managers and salespersons and found variations in job duties "ha[d] not affected the basic content of the job or the basic sameness of the degree of skill, effort and responsibility required to perform the jobs").

129. *See*, *Hodgson v. Robert Hall Clothes, Inc.*, 326 F. Supp. 264, 275 (D. Del. 1971), *modified on other grounds*, 473 F.2d 589 (3d Cir. 1972), *cert. denied*, 414 U.S. 866 (1973) (court found expert testimony unnecessary in Equal Pay Act case to determine if jobs of male and female salespersons, claimed by employer to be dissimilar, required equal skill, effort and responsibility); *Murphy v. Miller Brewing Co.*, 307 F. Supp. 829, 836 (E.D. Wis. 1969), *aff'd*, 457 F.2d 221 (7th Cir. 1972) (federal judge personally toured plant to determine whether jobs of male and female product testers were substantially same and found employer paid female employees less than male employees for jobs judge perceived as requiring equal skill, effort and responsibility); *Hodgson v. Fairmont Supply Co.*, 454 F.2d 490, 492-97 (4th Cir. 1972) (Fourth Circuit determined that employer had violated Equal Pay Act by paying male who worked at stock desk more than two females working at same stock desk because more highly paid male had previously performed sixteen duties additional to those performed by females but which court held made male no more valuable to company at his stock desk job).

130. *Corning Glass*, 417 U.S. at 201; *Teamsters v. United States*, 341 U.S. 324, 353 (1977).

131. *Corning Glass*, 417 U.S. at 201; *Teamsters*, 341 U.S. at 353 (seniority system is absolute defense to Title VII claim only if bona fide, did not have its genesis in racial discrimination, and has been maintained free from any illegal purpose).

132. *See infra* note 293 and accompanying text.

133. 452 U.S. 161 (1981).

134. *Id.* at 180-81.

135. *See infra* note 293 and accompanying text; S. 5, 100th Cong., 1st Sess.; S. 552, 100th Cong., 1st Sess.; H.R. 387, 100th Cong., 1st Sess.

B. Job Evaluation Methodology

Compensation practices address internal and external equity.¹³⁶ Internal equity determines the relative value of jobs within a company; external equity determines the value of each job in relation to its prevailing labor market price.¹³⁷ Job evaluation is an industrial engineering technique which provides "a way of systematically rewarding jobs for their content—for the skill, effort, and responsibility they entail and the conditions under which they are performed."¹³⁸ At the heart of the gender-based wage discrimination issue lies the technical question of whether job evaluation techniques can objectively determine gender discrimination as well as compare the value of different jobs and set wages.

Through job evaluation, the employer develops an internal job structure by establishing a hierarchy of jobs.¹³⁹ The hierarchy denotes the value the employer places on each job relative to other jobs within the company.¹⁴⁰ The employer then compares a job with external labor market prices to determine the correlation between the internal value of a job and its labor market value.¹⁴¹

Although various established methods exist for conducting job evaluation, the most commonly used in the United States is the point-factor method, developed in the 1920's.¹⁴² While job evaluation systems may differ in design and implementation, almost all employ a common methodology.¹⁴³ First, the employer chooses a packaged system of factors and factor weights for the purpose of evaluating jobs within the firm, called an *a priori* approach.¹⁴⁴ Alternatively, the employer may choose a *policy-capturing* approach, which uses a statistical analysis of the individual firm as the basis for generating factor and factor weights for job evaluation.¹⁴⁵ Under both the *a priori* and *policy-capturing* approaches,

136. Beatty & Beatty, *Some Problems with Contemporary Job Evaluation Systems*, in COMPARABLE WORTH, *supra* note 60, at 59.

137. *Id.*

138. WOMEN, WORK, AND WAGES, *supra* note 6, at 95.

139. Beatty & Beatty, *Some Problems with Contemporary Job Evaluation Systems*, in COMPARABLE WORTH, *supra* note 60, at 60.

140. *Id.*

141. *Id.*

142. See *id.* at 66-75 for a description and discussion of job evaluation systems; see generally ISSUES AND ALTERNATIVES, *supra* note 8, at 49-135.

143. D. Treiman, *Effect of Choice of Factors and Factor Weights in Job Evaluation*, in COMPARABLE WORTH, *supra* note 60, at 79; see also AM. SOC'Y FOR PERSONNEL ADMIN. & AM. COMPENSATION A., ELEMENTS OF SOUND BASE PAY ADMIN. 8-9 (1981) [hereinafter ELEMENTS].

144. Remick & Steinberg, *Technical Possibilities and Political Realities: Concluding Remarks*, in COMPARABLE WORTH, *supra* note 60, at 286.

145. *Id.*

factors may include skill, effort, responsibility and working conditions.¹⁴⁶ Factors the employer chooses constitute the job characteristics the employer desires to compensate.¹⁴⁷ The employer assigns each factor a maximum number of points and a relative weight.¹⁴⁸

Next, the employer's job evaluator and the job incumbent or supervisor, or both, write a job description for each position.¹⁴⁹ Typically, a job evaluation committee analyzes the job description and assigns each compensable factor a number value based on the amount of each factor the committee evaluates to be present in the job.¹⁵⁰ The committee multiplies each factor's numerical value by the factor's assigned weight and adds to create a total job worth score.¹⁵¹

The committee then hierarchically ranks all evaluated jobs on the basis of total overall points for each job.¹⁵² This hierarchy establishes the value the employer places on each job relative to other jobs within the company.¹⁵³ The committee designates maximum and minimum cutoff points for each grade and divides the ranked jobs into grades. The result is that different jobs are usually in the same grade.¹⁵⁴ For example, an accounting clerk with a total job value score of 32 and a sales clerk with a total job value score of 25 may both be in the same grade because they both fall within the range of points assigned to that grade.¹⁵⁵

To compare each job with external labor market salaries, the employer typically selects a labor market in which to conduct a salary survey.¹⁵⁶ The selected market may be regional or national, or both.¹⁵⁷ The employer selects benchmark jobs, a sample of jobs representative of the

146. *Id.* at 287; see also ELEMENTS, *supra* note 143, at 4, 9.

147. ELEMENTS, *supra* note 143, at 9.

148. *Id.* at 8-9.

149. *Id.* at 4-6.

150. *Id.* at 9.

151. *Id.* at 8-9. For example, the maximum number of points for each factor may be 100 and the job being evaluated may have 40 points in the responsibility factor and 10 points in the working conditions factor. The number of points evaluated for each factor are multiplied by the weight the employer assigned to each factor. After multiplication, these subtotals for each factor are added, establishing a total number of points for each job. For example, a job may have the following score: Skill-60 × .35, Effort-80 × .15, Responsibility-80 × .40, Working Conditions-1 × .10, generating a total score of 65.1. *Id.* at 7.

152. *Id.* at 8-9.

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.* at 10.

157. *Id.* The marketplace may include, for example, the employer's competitors located within its recruiting area. *Id.*

jobs in each grade.¹⁵⁸ The employer surveys the market by collecting salary data on benchmark jobs in the selected marketplace.¹⁵⁹ After gathering pay data, the employer analyzes the information.¹⁶⁰ Some employers choose the percent they will pay in relation to the average market rate, such as 75%, 100% or 125% of market, and apply that percent across the board to all salary information collected.¹⁶¹ While some employers simply use the going market rate, a percentage of the average of the labor market's pay rate, others use more sophisticated analytical techniques such as regression analysis.¹⁶² Through its analysis of labor market rates, the employer determines its pay structure.¹⁶³

To create this pay structure, the employer establishes pay grades.¹⁶⁴ Pay grades can be determined informally, through visual designation, or formally, through the statistical methods used for analyzing market data.¹⁶⁵ After establishing pay grades, the employer creates salary ranges.¹⁶⁶ The employer develops pay ranges around the firm's salary grades. Each salary grade is typically expressed in terms of minimum, mid-point and maximum dollars.¹⁶⁷ The resulting pay structure should reflect a balance between the employer's objectives, the marketplace, internal job values, the employer's philosophy on how it wishes to pay versus the market and the employer's economic ability to pay at a given level.¹⁶⁸

The employer usually conducts an annual survey to determine the percent it will increase all its salary ranges to accommodate individual

158. *Id.* Collectively, benchmark jobs provide a statistical data sample representative of jobs in the employer's firm. *Id.*

159. *Id.*

160. *Id.*

161. *Id.* Typically, the employer chooses to position itself in relation to the market on the basis of such considerations as its profit projections and recruiting difficulties. The percent competitive rate the employer chooses influences the final salary range for the grade. *Id.*

162. *Id.* Statistical analyses may include scattergrams, sample variances and standard deviations, linear and multiple regressions, and correlation coefficients (r) or coefficients of determination (r^2). *Id.*

163. *Id.*

164. *Id.* at 11. Pay grades are numerically designated salary ranges which are placed hierarchically to create the employer's salary structure. *Id.*

165. *Id.* at 12.

166. *Id.*

167. *Id.* at 11-13. The ranges reflect the lowest to highest pay rates the employer is likely to pay for jobs falling within the pay grade. Additionally, the company's pay levels reflect a percentage of salary rates paid in the market. The employer chooses whether to be a "pay leader" by paying at the top or above market salaries, match or pay less than the market average. *Id.* at 11.

168. *Id.* at 13.

employee's annual salary increases.¹⁶⁹ Additionally, throughout the year, the employer regularly conducts surveys of selected key jobs, such as those with which it is experiencing recruiting difficulties, to determine if the job is placed in a competitive salary range.¹⁷⁰ A dilemma arises when the market pays more for a job than the maximum the employer has allocated to the job's salary range. To resolve this problem and to retain and recruit employees for the affected job, employers often will pay above the maximum of the salary range, paying what is referred to as a "red-circled rate."¹⁷¹

In addition to the employer's establishing a pay structure for the company's jobs, the employer must establish procedures for setting and changing individual employee's salaries. Typically, an employee's starting salary is anywhere from the minimum to the mid-point of their job's salary range, depending on a balance between the employee's experience, labor market conditions and internal equity.¹⁷² Employees new to a position and inexperienced at the new job's level of responsibility usually receive a starting salary at or near the minimum of the job's salary range.¹⁷³ The more experienced a recruit in the new job's responsibilities, the higher into the salary range will be the new employee's salary.¹⁷⁴ The labor market and internal equity influence both the experienced and inexperienced employee's salary.¹⁷⁵

The employer provides continuing employees various types of salary increases, including cost-of-living, promotional and merit increases.¹⁷⁶ Merit increase programs usually provide for increases in the form of percentage of current salary.¹⁷⁷ Most programs vary the size and timing of the increase depending on the employee's current position in the pay range and level of job performance.¹⁷⁸ Objective performance-based pay increase programs require the employee's performance appraisal to be based on direct measures of the employee's output or generated results.¹⁷⁹ Performance criteria should be objective and related directly to the employee's job requirements.¹⁸⁰ Performance appraisal, then, gener-

169. *Id.* at 12.

170. *Id.* at 13.

171. *Id.*

172. *Id.* at 12-14.

173. *Id.*

174. *Id.*

175. *Id.* at 14.

176. *Id.*

177. *Id.*

178. *Id.*

179. *Id.* at 17.

180. *Id.*

ates each employee's merit increase and both programs together with pay structure comprise the employer's wage-setting system. The employer's job evaluation and wage-setting methodologies are subject to scrutiny for illegal biases by plaintiffs and the courts in gender-based wage discrimination claims under Title VII.

C. Gender-based Biases in Job Evaluations and Wage Determinations

Each decision in job evaluation and wage-setting procedures is vulnerable to subjective and even discriminatory biases. While biases may not be readily detected, they can substantially influence the employer's determination of a job's classification and salary. To illustrate, job evaluation committee members may possess both conscious and unconscious biases which influence presentation of the job content through the job description, choice of factors, assignment of factor weights and points, and salary grade cut-off designations. As a result, "male" work may be inflated while "female" work may be diminished. For example, the job evaluator, job incumbent and supervisor might develop a job description using stereotypical words to describe job responsibilities. Tough action words such as "promote the product to penetrate the market" could be used to describe a male sales task. Alternatively, nurturing soft words such as "meets with prospective customers to explain the product" could be used to describe the same sales task performed by a female. The likely result is that the evaluation committee will determine the male sales job to warrant higher points in the responsibility factor than the female sales job. Consequently, the committee will assign the male sales job a higher job classification and salary than the female sales job.

Evaluation plans can successfully mask another potential form of gender-based wage discrimination. Employers frequently use more than one job evaluation plan limiting the number of job families evaluated under a single plan. Each plan may cover one of three groups—production, clerical or technical-professional-managerial. The employer uses different evaluation criteria like different job factors and different salary ranges for each plan.¹⁸¹ Job comparisons across job evaluation plan lines are not possible. A multi-plan employer, for example, may have two identical jobs, one predominantly male and the other predominantly female. The employer typically evaluates these jobs under two different plans and pays the jobs different wages. Female accounting clerks, evaluated under the clerical plan, perform work identical to that performed by accountants, measured under the technical-professional-managerial plan,

181. *Id.*

but the accounting clerk is paid significantly less than the accountant. Although the jobs are identical, they are not compared because the employer has no system for measuring between evaluation plans.

The problem, then, is how to identify and eliminate or make adjustments in the employer's job evaluation methodology for subjective and even discriminatory biases to create a relatively bias-free plan. Comparable worth has been addressing this problem and litigants, the states and Congress are beginning to identify and to act to rectify gender-biased job evaluation and wage-setting.¹⁸² To rectify this inequity, comparable worth proponents require "the application of a single, bias-free point factor job evaluation system within a given establishment, across job families, both to rank-order jobs and to set salaries."¹⁸³ While a bias-free evaluation system has yet to be developed,¹⁸⁴ employers can use job content and economic analyses to minimize biases. Job evaluation experts probably will develop systems which will be significantly less capable of capturing gender biases and which will reflect evolving national values.

IV. EXISTING FEDERAL LAW

The federal government first implemented a national policy on equal pay for women during World War I.¹⁸⁵ The National War Labor Board required employers to pay male and female employees equally for equal work.¹⁸⁶ During World War II, a new National War Labor Board (WLB) promulgated a policy of equal pay for "comparable quality and quantity of work on the same or similar operations" to achieve wage equity.¹⁸⁷ In practice, the WLB applied an equal pay for equal work standard to "comparable work" and proscribed paying predominantly female jobs lower wages than predominantly male jobs valued equal in

182. See *infra* note 293 and accompanying text for a discussion of recent comparable worth litigation, see *infra* text accompanying notes 431-91 for a discussion of pending federal legislation, and see *infra* text accompanying notes 347-421 for a discussion of state pay equity activity.

183. Remick, *Major Issues in a priori Applications*, in *COMPARABLE WORTH*, *supra* note 60, at 99.

184. *Id.* at 100.

185. Steinberg, *A Want of Harmony*, in *COMPARABLE WORTH*, *supra* note 60, at 6; see *supra* note 110 and accompanying text.

186. *Proving Discrimination*, *supra* note 110, at 658-59 (citing Rep. of the Sec'y of the Nat'l War Lab. Bd. to the Sec'y of Lab. 69-71, Twelve Months Ending May 31, 1919 (1920)). WLB policy required that "[i]f it shall become necessary to employ women on work ordinarily performed by men, they must be allowed equal pay for equal work and must not be allotted tasks disproportionate to their strength." *Id.* at 659. Yet, the WLB permitted a minimum wage rate lower for women than for men. *Id.*

187. 1 National War Lab. Bd., Termination Rep. 290 (1945).

content, finding the practice to be sex discrimination.¹⁸⁸ The equal pay issue next surfaced in 1963 when the Kennedy Administration proposed federal legislation prohibiting gender-based wage discrimination "for work of *comparable* character on jobs the performance of which requires *comparable* skills."¹⁸⁹

A. *Equal Pay Act Prohibits Discrimination for Equal Work*

The Equal Pay Act of 1963¹⁹⁰ (EPA) enacted by the 88th Congress limits its prohibitions against discrimination in wages to work of *equal* character.¹⁹¹ The EPA proscribes paying lower wages to employees of the opposite sex for work equal in skill, effort and responsibility performed under similar working conditions in the same establishment.¹⁹² Exceptions are permitted where wages are based on seniority, merit, pro-

188. *Id.* at 290-97. See also United Electric Workers of America against General Electric and Westinghouse, 28 War Lab. Rep. 666 (1945).

189. *Equal Pay Act of 1963: Hearings Before the Subcomm. on Lab. of the Senate Comm. on Lab. and Pub. Welfare*, 88th Cong., 1st Sess. 2 (1963) (quoting S. 882, 88th Cong., 1st Sess., 109 CONG. REC. 2770 (1963) and S. 910, 88th Cong., 1st Sess., 109 CONG. REC. 2886 (1963)) (emphasis added).

190. For text of the Equal Pay Act, 29 U.S.C. § 206(d) (1982). See *supra* note 10 and accompanying text for text of Equal Pay Act, 29 U.S.C. § 206(d) (1982).

191. The basic purpose of the EPA as introduced on the Senate floor was:

to insure that those who perform tasks which are determined to be equal shall be paid equal wages. The wage structure of all too many segments of American industry has been based on the ancient but outmoded belief that a man, because of his role in society, should be paid more than a woman even though his duties are the same. This bill would provide, in effect, that such an outmoded belief can no longer be implemented and that equal work will be rewarded by equal wages.

109 CONG. REC. 8914 (1963) (remarks of Sen. McNamara).

[Last year] we went from "comparable" to "equal" meaning that the jobs involved should be virtually identical, that is they should be very much alike or closely related to each other.

We do not expect the Labor Department people to go into an establishment and attempt to rate jobs that are not equal

. [W]e want the private enterprise system . . . to have a maximum degree of discretion in working out the evaluation of the employee's work and how much he should be paid for it.

109 CONG. REC. 9197-98 (1963) (remarks of Rep. Goodell). See generally 109 CONG. REC. 9197-208 (remarks of Rep. Goodell), 9196 (remarks of Rep. Frelinghuysen), 9197-98 (remarks of Reps. Griffin and Thompson) (1963).

192. For text of the Equal Pay Act, 29 U.S.C. § 206(d). See *supra* note 10 and accompanying text. Similar to the WLB, the 88th Congress assumed that employers utilized job evaluation plans to compare jobs and to determine wages. See *Equal Pay Act, 1963: Hearings on S. 882 and 910 Before the Subcomm. on Lab. of the Senate Comm. on Lab. and Pub. Welfare*, 88th Cong., 1st Sess. 26, 73, 79, 138, 178 (1963); *Equal Pay Act, 1963: Hearings on H.R. 3861 Before the Special Subcomm. on Lab. of the House Comm. on Educ. and Lab.*, 88th Cong., 1st Sess. 145-46 (1963).

duction, or any other factor other than sex (FOTS).¹⁹³

The United States Supreme Court and lower federal courts have interpreted equal work to mean either identical or "substantially equal" jobs.¹⁹⁴ In applying the "substantially equal" standard, courts have determined whether the performance of two jobs requires virtually the same amount of skill, effort and responsibility under similar working conditions.¹⁹⁵ Under the EPA, the employee must prove that the content of both jobs is substantially similar and that a disparity exists between male and female wages. The burden then shifts to the employer to prove the differential is based on seniority, merit, production or FOTS.¹⁹⁶ The Supreme Court has rejected the following employer defenses under the EPA: "red-circled jobs," recruiting difficulties, gender-based wage disparities established prior to the Act and marketplace demands including market rates.¹⁹⁷ Courts have not determined that different jobs found equivalent under a job evaluation plan justify the same wages under the EPA. Moreover, the EPA prohibits only the most obvious form of gender-based wage discrimination, guaranteeing that men and women who perform virtually the same work will be paid equal wages.

B. Title VII May Prohibit Discrimination for Comparable Work

One year after enacting the EPA, the 88th Congress passed Title

193. See *supra* note 10 and accompanying text for text of Equal Pay Act, 29 U.S.C. § 206(d).

194. See *Corning Glass Works v. Brennan*, 417 U.S. 188 (1974). *Corning Glass* is the only Equal Pay Act case to come before the United States Supreme Court. In *Corning Glass*, male night shift quality control inspectors were paid a greater base wage than female day shift quality control inspectors, yet both performed the same tasks. Originally, all quality control inspectors were female and on the day shift. At that time, New York and Pennsylvania laws prohibited women from working at night. The company decided to establish a quality control operation on its night shift and, following a job evaluation study, revised its wage structure and established a night shift differential, and paid a higher base rate to the male night shift quality control operators. Following passage of the EPA, the company determined that all inspectors' jobs should be paid at the lower day shift rate. The company "red-circled" the male inspectors' jobs receiving the higher rate, meaning that the company would preserve their higher base rate differential. *Id.* at 191-94. The Court found that the company paid the male workers higher wages to induce men to perform what was perceived as women's work, not to compensate for night work and rejected market conditions as any other factor other than sex (FOTS) where equal work is performed. *Id.* at 191-92 n.3, 204-05, 209-10. See *Brennan v. Prince William Hosp. Corp.*, 503 F.2d 282, 285-91 (4th Cir. 1974), *cert. denied*, 420 U.S. 972 (1975) (applying the "substantially equal" standard to nurses' aides and orderlies).

195. Courts have applied the standard even to jobs with different titles. See *Prince William*, 503 F.2d 282 (applying the "substantially equal" standard to nurses' aides and orderlies).

196. *Corning Glass*, 417 U.S. at 196-97.

197. See *supra* note 194 and accompanying text.

VII of the Civil Rights Act of 1964¹⁹⁸ which established broader prohibitions against wage discrimination. The scope of Title VII extends beyond wages to all "compensation, terms, conditions, or privileges of employment."¹⁹⁹ Title VII makes it unlawful to discriminate against an individual in hiring, discharge, compensation or other conditions of employment because of an individual's sex.²⁰⁰ Further, Title VII prohibits depriving an individual of employment opportunities or otherwise adversely affecting an employee's status on the basis of sex by limiting, segregating or classifying an individual.²⁰¹ Differences in compensation, terms, conditions or privileges are permitted when based on bona fide seniority or merit systems, production or location.²⁰² Compensation may also be differentiated on FOTS.²⁰³ Title VII, then, provides women access to higher-paid jobs traditionally filled by men. The EPA provides that once women are in higher-paid jobs performing the same work as men, women will receive the same pay as men.²⁰⁴

Since the Civil Rights Act was directed primarily at protecting black Americans, the protected classification "sex" was added late in the debate on Title VII,²⁰⁵ creating notably brief legislative history. On the last day of the House floor debate, the classification "sex" was added to the Civil Rights Act.²⁰⁶ Senate debate about the relationship between the EPA and Title VII was even more brief and lasted only three minutes.²⁰⁷ As a result, courts were divided in interpreting the intent of the 88th

198. See *supra* note 11 for text of Civil Rights Act of 1964, §§ 701-18, 42 U.S.C. §§ 2000e-2000e-17 (1982) (Title VII).

199. Title VII § 703(a)(1), 42 U.S.C. § 2000e-2(a)(1).

200. *Id.*

201. Title VII § 703(a)(2), 42 U.S.C. § 2000e-2(a)(2).

202. Title VII § 703(h), 42 U.S.C. § 2000e-2(h).

203. *Id.*

204. "[R]ead together, Title VII and the Equal Pay Act provide a balanced approach to resolving sex-based wage discrimination claims. Title VII guarantees that qualified female employees will have access to all jobs, and the Equal Pay Act assures that men and women performing the same work will be paid equally." *International Union of Elec., Radio and Mach. Workers v. Westinghouse Elec. Corp.*, 631 F.2d 1094, 1114 (3d Cir. 1980) (Van Dusen, J., dissenting), *cert. denied*, 452 U.S. 967 (1981).

205. Representative Howard Smith presented the amendment adding "sex" to Title VII. See Miller, *Sex Discrimination and Title VII of the Civil Rights Act of 1964*, 51 MINN. L. REV. 877, 880-82 (1967).

206. *Id.*

207. See generally *General Elec. Co. v. Gilbert*, 429 U.S. 125. (1976) (legislative history of Civil Rights Act of 1964 and Bennett Amendment inconclusive regarding intended coverage of Title VII's prohibition against sex discrimination); see also 110 CONG. REC. 7217 (1964) ("The standards in the Equal Pay Act for determining discrimination as to wages, of course, are applicable to the comparable situation under title VII.") (statement of Sen. Clark, chief spokesman for Civil Rights Act); 110 CONG. REC. 13,647 (1964) ("The purpose of my amendment is to provide that in the event of conflicts, the provisions of the Equal Pay Act shall not be

Congress regarding the relationship between the two statutes until 1981. In 1981, the Supreme Court decided *County of Washington v. Gunther*²⁰⁸ and held that only the four affirmative defenses in the Equal Pay Act, not the equal work standard, were incorporated into Title VII.²⁰⁹

1. Title VII burdens of proof

A plaintiff may prove impermissible wage discrimination and resultant Title VII liability through either of two theories: disparate treatment or disparate impact. Disparate treatment focuses on the employer's intent and disparate impact, on the effects of the employer's practices.²¹⁰ Under the disparate treatment theory, a plaintiff must show that the employer *intentionally* treated member(s) of one gender less favorably than members of the opposite gender, because of their gender.²¹¹ Evidence of an employer's discriminatory intent may be direct or inferred from circumstantial evidence of disparity in treatment.²¹² A plaintiff claiming gender-based wage discrimination under the disparate treatment model, for example, must demonstrate that the employer intentionally treated women less favorably than men in the job evaluation or wage-setting process.²¹³

nullified.") (statement of Sen. Bennett, offering his amendment for purposes of distinguishing Title VII from Equal Pay Act). The Bennett Amendment reads:

It shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is *authorized by the provisions of section 206(d) of title 29*

Title VII, § 703(h), 42 U.S.C. § 2000e-2(h) (emphasis added).

One year following passage of the Civil Rights Act, Sen. Bennett explained his amendment: "[My] amendment means that discrimination in compensation on account of sex does not violate title VII unless it also violates the Equal Pay Act." 111 CONG. REC. 13, 359 (1965) (statement of Sen. Bennett); "[T]he Equal Pay Act standards requiring equal work . . . would also be applied under the Civil Rights Act." 111 CONG. REC. 18,263 (1965) (statement of Sen. Clark, quoting letter from Anne Draper, Chairman, National Committee for Equal Pay, to Franklin D. Roosevelt, Jr., Chairman, EEOC, U.S. Dep't of Commerce (June 30, 1965)); Senator Bennett's explanation of his amendment had been the subject of differing opinion; i.e., whether the statement he made introducing his amendment, or the explanatory memorandum submitted one year after the amendment's passage controlled.

208. 452 U.S. 161 (1981).

209. *Id.* at 179. The Court stated that if the Bennett Amendment were interpreted to include the equal work standard of the Equal Pay Act, "discriminatory compensation by employers not covered by the Fair Labor Standards Act [would be] 'authorized'—since not prohibited—by the Equal Pay Act." *Id.*

210. *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335-36 n.15 (1977).

211. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973) (setting out basic allocations of burdens of proof in disparate treatment case). *See also Teamsters*, 431 U.S. at 335 n.15 (summarizing disparate treatment and disparate impact theories).

212. *Teamsters*, 431 U.S. at 335 n.15.

213. In an individual discrimination claim, the employer's illegal motive may be inferred

In traditional Title VII litigation, the burden then shifts to the employer to articulate a legitimate, nondiscriminatory reason for its action.²¹⁴ The employer's burden is not persuasion, but production.²¹⁵ The employer is not required to prove it utilized the "best" employment procedures²¹⁶ or to prove the absence of a discriminatory motive.²¹⁷ If, however, the employer invokes the FOTS defense to an *equal-pay* claim brought under Title VII, the employer bears the burden of persuasion, not production.²¹⁸ In effect, the employer must demonstrate the reasonable use of a business-related practice.²¹⁹ Once the employer has met its burden, the burden shifts back to the plaintiff to prove the employer's proffered reasons were not its true reasons, but a mere pretext for discrimination.²²⁰ Under Title VII, absent an *equal-pay* claim, the burden of persuasion remains with the plaintiff in a disparate treatment case.²²¹

An alternative to the disparate treatment model to prove Title VII liability, disparate impact theory²²² promotes "Title VII's prohibition of discriminatory employment practices [which] was intended to be broadly

when the plaintiff shows she is a member of a protected class who was qualified, applied for and failed to obtain a job which remained open after her rejection. *McDonnell Douglas*, 411 U.S. at 802. The *McDonnell Douglas* model serves as a guideline to be applied broadly to different sets of facts. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 n.6 (1981). In government or class actions alleging a pattern or practice of discrimination under disparate treatment analysis, plaintiffs must establish a prima facie case by demonstrating "that unlawful discrimination has been the regular policy of the employer, i.e., that discrimination was the company's standard operating procedure—the regular rather than the unusual practice." *EEOC v. Sears, Roebuck & Co.*, 628 F. Supp. 1264, 1274 (N.D. Ill. 1986) (quoting *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 336, 360 (1977)). The focus often is on a pattern of discriminatory decision-making, not on individual employment decisions. *Id.* at 1280 (citing *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 360 n.46 (1977)). The plaintiff's prima facie case leading to an inference of illegal motive usually consists of statistical evidence of gross disparities between the protected and unprotected groups, buttressed by policies and specific instances of discrimination. *Segar v. Smith*, 738 F.2d 1249, 1265-66 (D.C. Cir. 1984), *cert. denied sub nom. Meese v. Segar*, 471 U.S. 1115 (1985) (citing *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977)); *see also Sears, Roebuck*, 628 F. Supp. at 1280 (citing *Coates v. Johnson & Johnson*, 756 F.2d 524, 532 (7th Cir. 1985)).

214. *McDonnell Douglas*, 411 U.S. at 802; *see also Burdine*, 450 U.S. at 254-55 (quoting *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978)).

215. *McDonnell Douglas*, 411 U.S. at 802; *see also Burdine*, 450 U.S. at 254-55 (quoting *Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 577 (1978)).

216. *Furnco*, 438 U.S. at 577-78.

217. *Board of Trustees of Keene State College v. Sweeney*, 439 U.S. 24, 25 (1978).

218. *Kouba v. Allstate Ins. Co.*, 691 F.2d 873, 875 (9th Cir. 1982). The court noted that *Burdine* does not controvert this affirmative defense. *Id.*

219. *Id.*

220. *McDonnell Douglas*, 411 U.S. at 804; *see also Burdine*, 450 U.S. at 256.

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

222. The United States Supreme Court announced the disparate impact theory in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

inclusive, proscribing not only overt discrimination but also practices that are fair in form, but discriminatory in operation.'"²²³ A disparate impact claim challenges "employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necessity."²²⁴ Proof of the employer's discriminatory motive is not necessary to disparate impact analysis.²²⁵ Instead the disparate impact model requires the plaintiff to prove that a facially neutral employment practice had a disproportionate adverse impact upon his or her protected class (sex).²²⁶ The burden of persuasion then shifts to the employer to refute the evidence by showing that no disparity exists.²²⁷ Alternatively, the employer may explain the disparity by proving business necessity or job relatedness.²²⁸ The burden on the employer is substantial and differs from a treatment case by shifting to the employer not merely the burden of going forward, but the burden of persuasion.²²⁹ Finally, the plaintiff may defeat the employer's defense by showing that other less discriminatory means would serve the employer's legitimate interest.²³⁰

In class actions, plaintiffs often assert both a disparate treatment and a disparate impact theory—disparity in treatment from the employer's practices and disproportionate adverse consequences from those practices.²³¹ In presenting evidence, the plaintiffs may show, for example, that the employer sometimes waives its promotional requirements for

223. *Gunther*, 452 U.S. at 170 (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971)).

224. *Teamsters*, 431 U.S. at 335-36 n.15.

225. *Id.*

226. *Id.*; see e.g., *Griggs*, 401 U.S. at 430-32. Proof of the disparity is often through statistical evidence. *Teamsters*, 431 U.S. at 339.

227. *Griggs*, 401 U.S. at 431; see also *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975).

228. *Griggs*, 401 U.S. at 431; see also *Dothard*, 433 U.S. at 329; *Albemarle*, 422 U.S. at 425. To demonstrate business necessity, the employer is required to show its practice promoted more than its business's purpose; rather it must show that the practice "substantially promote(d) the proficient operation of the business." *Atonio v. Wards Cove Packing Co.*, 87 L.A. Daily Journal D.A.R. 5850, 5851 (Sept. 4, 1987). To refute plaintiff's showing of the availability of other less discriminatory means, the employer may wish to demonstrate that no other less harmful alternative would suffice. *Dothard*, 433 U.S. at 329.

229. *Burdine*, 450 U.S. at 252 n.5 (1981); see also *Dothard*, 433 U.S. at 329; *Segar*, 738 F.2d at 1267.

230. *Dothard*, 433 U.S. at 329; see also *Albemarle*, 422 U.S. at 425.

231. *Segar*, 738 F.2d at 1266. The class plaintiff's disparate treatment claim may invoke a disparate impact analysis when the plaintiff challenges either specific employment practices or the employment system as a whole. *Id.* The class seeks to prove disparate treatment by showing a disparity and the employer seeks to defend by designating a specific, nondiscriminatory employment practice as the cause of the disparity. *Id.* The court thereby has been presented the elements of a disparate impact claim. As a result, the employer must prove the job-relatedness of its practices. *Id.*

men (disparate treatment) and that these requirements disproportionately exclude women from promotion (disparate impact). Either theory may be applied to a particular set of facts.²³² The outcome of a case may greatly depend on which theory is relied upon. If the facts fit the disparate treatment model, the plaintiff's burden of proving the employer's intentional discrimination is usually a heavy one, and the employer can easily articulate a non-discriminatory reason for its practice. If the disparate impact model is implicated, the plaintiff's task is easier because discriminatory intent need not be shown, and the employer's evidentiary burden of justifying its practice is often a heavy one.

2. Evidentiary sufficiency: claims and defenses under disparate treatment

Traditional disparate treatment analysis offers a plaintiff alleging gender-based wage discrimination the opportunity to demonstrate that the employer *intentionally* depressed her wages because she is a female. In *County of Washington v. Gunther*,²³³ the County of Washington conducted and implemented internal and external studies indicating that its female prison guards should be paid 95% of the salary paid its male correction officers, yet the County paid the female guards 70% of their job's value while paying the males 100% of their job's value.²³⁴ The United States Supreme Court held that the female prison guards who performed work not substantially the same as that of male guards could maintain an action of intentional wage discrimination under Title VII.²³⁵ *Gunther* thus held that Title VII did not require a plaintiff to prove her work was equal or substantially equal in skill, effort, responsibility and working conditions to work performed by a male.²³⁶ Moreover, the Court established that equal work was not a requirement for a cause of action under Title VII.

The Supreme Court has not ruled directly on the issue of whether a claim based solely on comparable worth theory may provide sufficient evidence to sustain a finding of intentional discrimination. While the Court held that Title VII allows claims involving jobs which are not substantially equal, it simultaneously asserted that the *Gunther* "claim is not based on the controversial concept of 'comparable worth,' under which plaintiffs might claim increased compensation on the basis of a compari-

232. *Teamsters*, 431 U.S. at 336 n.15.

233. 452 U.S. 161 (1981).

234. *Id.* at 180-81.

235. *Id.* at 181.

236. *See id.*

son of the intrinsic worth or difficulty of their job with that of other jobs in the same organization or community."²³⁷ In a dissenting opinion, Justice Rehnquist interpreted the *Gunther* decision to "suggest that allegations of unequal pay for unequal, but comparable, work will not state a claim on which relief may be granted."²³⁸ Following *Gunther*, a Title VII claim may be viable when the employer deviates from its own job evaluation and salary survey by applying its own standard unevenly to the disadvantage of employees in predominantly female, but not male, job classifications.²³⁹ Yet, beyond the narrow issue in *Gunther* which involved the most obvious form of an employer's direct intent to depress women's wages, the *Gunther* Court was not called upon to and did not define "the precise contours of lawsuits challenging sex discrimination in compensation under Title VII."²⁴⁰ Instead, the Supreme Court has left the lower courts to grapple with the issue of what proof establishes a sufficient prima facie case of disparate treatment in a gender-based wage discrimination claim under Title VII.²⁴¹

Lower federal courts allow plaintiffs alleging gender-based wage discrimination to rely on traditional Title VII principles which permit both

237. *Id.* at 166.

238. *Id.* at 203 (Rehnquist, J., dissenting). "[T]he opinion does not endorse [the] so-called" comparable worth theory: though the court does not indicate how a plaintiff might establish a prima facie case under Title VII, the court does suggest that allegations of unequal pay for unequal but comparable work will not state a claim on which relief may be granted. *Id.* at 203 (Rehnquist, J., dissenting). *Cf.* *Christensen v. Iowa*, 563 F.2d 353 (8th Cir. 1977). *Christensen* is a pre-*Gunther* case in which the employer undertook a job evaluation, determined that the jobs of exclusively female clerical workers were equal in value to the jobs of predominantly male plant workers and placed both jobs in the same salary grade; however, it paid the plant jobs a higher starting salary on the basis of prevailing rates in the marketplace. *Id.* at 354-55. The Eighth Circuit held that the plaintiffs had not established a prima facie case of sex discrimination because they "failed to prove by a preponderance of the evidence that they ha[d] been discriminated against in terms of compensation because of sex." *Id.* at 357. The court explained, "We do not interpret Title VII as requiring an employer to ignore the market in setting wage rates for genuinely different work classifications." *Id.* at 356..

239. *Id.* at 180-81.

[The female guards] contend that the County of Washington evaluated the worth of their jobs; that the [C]ounty determined that they should be paid approximately 95% as much as the male correctional officers; that it paid them only about 70% as much, while paying male officers the full evaluated worth of their jobs; and that the failure of the [C]ounty to pay respondents the full evaluated worth of their jobs [could] be proved to be attributable to intentional sex discrimination. Thus, [the suit] does not require a court to make its own subjective assessment of the value of the male and female guard jobs, or to attempt by statistical technique or other method to quantify the effect of sex discrimination on the wage rates.

Id. at 180-81.

240. *Id.* at 166 n.8, 181.

241. See *infra* text accompanying notes 242-93 for a discussion of cognizable gender-based wage discrimination claims under the disparate treatment model.

direct and circumstantial evidence of discriminatory intent. "Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment."²⁴² The courts have addressed whether a claim based on comparable worth provides sufficient evidence from which to infer that the employer engaged in a discriminatory practice. Judge Posner of the Seventh Circuit has set forth his definition of the parameters of a comparable worth claim.

"Comparable Worth" is . . . the view that paying higher wages in jobs held mostly by men than in jobs held mostly by women is discriminatory and improper unless the difference is justified by demonstrable differences in skill, responsibility, effort, or working conditions; it is no defense that men and women in the same jobs receive the same wages and that women are neither excluded from the higher-paying jobs by some criterion that cannot be justified on sex-neutral grounds of business need, nor otherwise steered into the lower-paying jobs by tactics for which the employer is responsible. Insofar as they are challenging different wages in . . . jobs that we have held to be different jobs . . . yet neither relying on a theory of intentional discrimination nor attacking some criterion that excludes them from the higher-paying . . . jobs, [they] are making a comparable worth claim²⁴³

Lower federal courts have consistently held that "comparable worth" is not a sufficient basis on which to bring a cognizable claim under Title VII.²⁴⁴ When plaintiffs have tried to base liability on the fact that their employer paid higher wages to predominantly male-occupied job classifications than to predominantly female-occupied job classifications, they have failed.²⁴⁵ The courts have found that a comparable worth claim does not challenge the employer's deliberate decision to benefit men at the expense of women.²⁴⁶ Instead a comparable worth claim

242. *Teamsters*, 431 U.S. at 335 n.15.

243. *EEOC v. Madison Community Unit School Dist. No. 12*, 818 F.2d 578, 587 (7th Cir. 1987).

244. *Colby v. J.C. Penney Co.*, 811 F.2d 1119, 1126 (7th Cir. 1987); *American Nurses' Ass'n v. Illinois*, 783 F.2d 716, 719-23 (7th Cir. 1986); *AFSCME v. Washington*, 770 F.2d 1401 (9th Cir. 1985) (relying in part on *Spaulding v. University of Wash.*, 740 F.2d 686 (9th Cir. 1983)). *Id.* at 1406-07; *Spaulding v. University of Wash.*, 740 F.2d 686 (9th Cir. 1983), *cert. denied*, 469 U.S. 1036 (1984), *overruled in part*, *Atonio v. Wards Cove Packing Co.*, 810 F.2d 1477 (1987) (en banc) (*explained*, 87 L.A. Daily Journal D.A.R. 5850 (Sept. 4, 1987)).

245. *AFSCME*, 770 F.2d 1401; *Spaulding*, 740 F.2d 686; *Lemons v. Denver*, 620 F.2d 228 (10th Cir.), *cert. denied*, 449 U.S. 888 (1980); *Christensen v. Iowa*, 563 F.2d 353 (8th Cir. 1977).

246. *American Nurses*, 783 F.2d at 722. The courts also have found that comparable worth

challenges wage differences between different job classifications.²⁴⁷ Courts reason that female workers are permitted to seek employment in higher-paying job classifications, and wage disparities, therefore, reflect the relative market value of the jobs.²⁴⁸ Courts proffer that they can correct discrimination when the employer pays male and female employees different wages for the same work by ordering the employer to pay the same wages or to allow females to compete for jobs.²⁴⁹ Yet, they contend that a court cannot correct the discrimination reflected in the marketplace.²⁵⁰ The courts also view a comparable worth case as requiring a court to correct the wage differential between different job classifications independent of the marketplace.²⁵¹ They proffer that separating compensation from market wages could seriously impair the efficiency of labor markets.²⁵²

[E]mployers may be constrained by market forces to set salaries under prevailing wage rates for different job classifications We find nothing in the language of Title VII or its legislative history to indicate Congress intended to abrogate fundamental economic principles such as the laws of supply and demand or to prevent employers from competing in the labor market²⁵³

One court has even concluded that it can "find no basis for thinking that Congress wanted the courts to get involved in the comparable worth question."²⁵⁴

Lower federal courts thus hold that reliance on the market to set wages may be non-discriminatory and can justify the employer's compensation system.²⁵⁵ Courts have upheld, for example, the employer's defense that it has not based wage differentials on gender, but on the competitive market.²⁵⁶ Participation in the market to set salaries has not by itself created an inference that the employer had a discriminatory motive to affect women's wages adversely.²⁵⁷ Conversely, the employer can-

does not challenge the employers' rule, test or criterion which might be challenged for its discriminatory effect (disparate impact). *Colby*, 811 F.2d at 1126.

247. *Colby*, 811 F.2d at 1126.

248. *Id.*

249. *Id.*

250. *Id.*

251. *Id.*

252. *Id.*

253. *AFSCME*, 770 F.2d at 1407.

254. *Colby*, 811 F.2d at 1126.

255. See *American Nurses*, 783 F.2d at 725; *AFSCME*, 770 F.2d at 1408.

256. *AFSCME*, 770 F.2d at 1406. See *infra* note 322 and accompanying text.

257. *Id.*; *American Nurses*, 783 F.2d at 725.

not use the market to justify pay differentials for "substantially equal" work under the Equal Pay Act.²⁵⁸ Yet, a market defense is valid under a Title VII wage discrimination claim involving jobs which are not substantially similar but are of comparable value to the employer.²⁵⁹ An important issue in a disparate treatment claim is whether a plaintiff can demonstrate that her employer's market reliance was based on an illegitimate motive or that her employer did not rely primarily on the market to establish her compensation. If the plaintiff carries this burden, the employer might be well advised to show, rather than articulate, that it determined the employee's compensation primarily by the market for a non-discriminatory reason.

The courts have exhibited unwillingness to infer discriminatory intent from circumstantial evidence of comparable worth presented in disparate treatment cases. These courts have been unwilling to infer that the employer possessed a discriminatory motive when it failed to eliminate gender-based wage disparities identified through a comparable worth study.²⁶⁰ "Knowledge of a disparity is not the same thing as an intent to cause or maintain it . . . [T]he failure to act would have to be motivated at least in part by a desire to benefit men at the expense of women."²⁶¹ Courts also have held that wage disparities reflecting seniority do not raise an inference of discriminatory treatment.²⁶²

A separate issue is whether comparable worth properly pleaded and proved may provide evidence admissible to bolster proof of the employer's intent to discriminate. The courts have determined that complaints of gender-based wage discrimination require a liberal reading.²⁶³

258. *Corning Glass*, 417 U.S. at 205.

259. *AFSCME*, 770 F.2d at 1406. See, e.g., *American Nurses*, 783 F.2d at 720; *Spaulding*, 740 F.2d at 708.

260. *American Nurses*, 783 F.2d at 722; *AFSCME*, 770 F.2d at 1408.

261. *American Nurses*, 783 F.2d at 722.

262. *Dugan v. Ball State Univ.*, 815 F.2d 1132, 1138 (7th Cir. 1987).

263. See *American Nurses*, 783 F.2d at 727. Post-*Gunther* cases generally have held that Title VII gender-based wage discrimination claims, unlike Equal Pay Act claims, do not require a showing that the jobs which are being compared are similar. See, e.g., *Craik v. Minnesota State Univ. Bd.*, 731 F.2d 465, 479 (8th Cir. 1984); *Plemer v. Parsons-Gilbane*, 713 F.2d 1127, 1133-34 (5th Cir. 1983); *Briggs v. City of Madison*, 536 F. Supp. 435, 445 (W.D. Wis. 1982). Nonetheless, a district court in the Seventh Circuit narrowly construed viability of claims under Title VII and stated that dissimilar jobs cannot be compared for the purpose of establishing a prima facie case. *Beard v. Whitley County REMC*, 656 F. Supp. 1461, 1472 (N.D. Ind. 1987). Moreover, that court requires the plaintiff's job to be similar in some respect to the job of the group allegedly receiving favorable treatment. *Id.* at 1473-74. The court noted that to compare entirely dissimilar jobs "would essentially entitle any protected group to an inference of discrimination merely because that group was compensated unequally . . ." *Id.* at 1473. If other courts were to follow this court's position, plaintiffs seeking relief for different, but comparable, jobs would be unable to bring a cause of action. The notion that S.

Consequently, following *Gunther* and the invalidity of comparable worth as the sole basis for a claim of disparate treatment, the lower courts have been evaluating the evidentiary sufficiency of comparable worth "plus."²⁶⁴ To demonstrate intentional discrimination under the disparate treatment theory, the courts have required a plaintiff to show job

552 and H.R. 387 could be interpreted by the courts as a standard from which to infer intentional discrimination would be negated. Consequently, absent explicit congressional intent to create legislation such as S. 5 which provides relief for different, but comparable jobs, no such relief would be available. See *infra* text accompanying notes 431-49 for a discussion of S. 552 and H.R. 387 and text accompanying note 450-63 for a discussion of S. 5.

264. The Ninth Circuit struck down a specific formula where the "plus factors" would be required in inverse proportion to the degree of comparability shown and stated that "such an unwieldy test might allow plaintiffs to bolster inadequate showings of comparability with a confusing potpourri of "plus factors," plunging courts into standardless supervision of employer-employee relations." *Spaulding*, 740 F.2d at 702. Even though the Ninth Circuit rejected a specific formula for "comparability plus," the courts have been looking at a broad combination of comparable worth and "plus" factors to determine the sufficiency of a claim of intentional discrimination. *Id.*; see *infra* text accompanying notes 265-92.

The United States Supreme Court recently may have provided the lower courts with the basis on which to uphold a comparable worth claim independent of "plus" factors. In a unanimous 1986 Supreme Court decision, Justice Rehnquist established the "hostile environment" gender-based discrimination claim under Title VII. *Meritor Savings Bank, FSB v. Vinson*, 106 S. Ct. 2399 (1986). In *Meritor*, a former bank employee brought an action against the bank and her former supervisor claiming that during her employment she had been subjected to sexual harassment involving sexual advances by her supervisor in violation of Title VII. *Id.* at 2402. The Court found that: (1) Title VII is not limited to economic or tangible discrimination and sexual harassment leading to a non-economic injury can violate the Act, *id.* at 2404; and (2) a hostile environment is determined by whether an employee indicated the sexual advances were unwelcome, not whether her participation was voluntary. *Id.* at 2406.

The *Meritor* Court noted that employees have the "right to work in an environment free from discriminatory intimidation, ridicule, and insult." *Id.* at 2405 (citing 45 Fed. Reg. 74,676 (1980); *Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972)). Justice Rehnquist analogized a Title VII hostile employment environment claim based on discriminatory sexual harassment to a hostile employment environment claim based on race. *Id.* In drawing the analogy, the Court noted that work environments polluted with racial discrimination can completely destroy minority workers' emotional and psychological stability. *Id.* (citing *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971), *cert. denied*, 406 U.S. 957 (1972)). Yet, the *Meritor* Court only recognized sexual harassment as a cognizable claim under Title VII when it was "sufficiently severe or pervasive 'to alter the condition of [the victim's] employment and create an abusive working environment.'" *Id.* at 2406 (quoting *Henson v. Dundee*, 682 F.2d 897, 904 (11th Cir. 1982)).

Members of Congress in commentary and states in pay equity policy statutes describe the effects of underpayment on female employees in a manner similar to the *Meritor* Court's description of the effects of sexual harassment. Introducing federal legislation to rectify the effects of wage discrimination on federal workers, Representative Mary Rose Oakar stated: "It is imperative that our federal government be free of any discriminatory practices that violate our laws and sap the morale and productivity of employees." Rep. M. R. Oakar, Statement to the House on the introduction of H.R. 387, 100th Cong., 1st Sess. 2-4 (Jan. 6, 1987) (available at Loyola of Los Angeles Law School library). State pay equity statutes note that unequal pay for comparable jobs creates low morale, a decrease in employee mobility, discouragement from training for and seeking career advancement, a threat to maintenance of an adequate standard

comparability accompanied by wage disparities *plus* additional circumstantial evidence of the employer's discriminatory conduct. Courts will recognize comparable worth theory to uphold a Title VII disparate treatment claim when a plaintiff also presents circumstantial evidence that the employer: failed to implement the results of a comparable worth study because it believed men ought to be paid more than women;²⁶⁵ steered women into the lower-paid, predominantly female jobs, but courts are not required to find that scattered evidence of steering amounts to intentional discrimination;²⁶⁶ discouraged women from applying for higher paid predominantly male jobs;²⁶⁷ and excluded women from positions for which they were qualified, and nonapplicants may claim exclusion when the employer has created an atmosphere in which employees understand they "need not apply" for certain positions.²⁶⁸

A disparate treatment claim may also be viable when unequal pay is related to circumstantial evidence of sex-segregated job classifications. The Seventh Circuit deemed an employer's maintenance of sex-segregated job classifications highly suspect, reasoning that segregated classifications cannot be perpetuated absent discriminatory recruiting, hiring, transfer and promotion practices.²⁶⁹ Plaintiffs need not allege steering or

of living and an overall threat to the general welfare and well-being of employees. See *infra* text accompanying notes 368-78 for text and discussion of state pay equity statutes.

Arguably, a pinch or a proposition provides stronger evidence of sexual harassment than women's lower wages provide of gender-based wage discrimination. Yet, wage discrimination, although voluntarily accepted, will result in unwelcome, diminished psychological well-being, discouragement from seeking advancement, decreased work productivity, intimidation and even ridicule. In light of the severity of the effects attributed to gender-based wage discrimination and their similarity to effects which the Supreme Court has used to strike down racial discrimination and sexual harassment claims, *supra*, it would not be unreasonable for courts to lower plaintiff's evidentiary burden by recognizing comparable worth as a sufficient prima facie case of wage discrimination under Title VII. The Ninth Circuit recently has taken a step in this direction in *Atonio v. Wards Cove Packing Co.*, 810 F.2d 1477 (9th Cir. 1987) (en banc) (*explained*, 87 L.A. Daily Journal D.A.R. 5850 (Sept. 4, 1987)). Following *Atonio*, plaintiffs may establish a prima facie case of disparate impact gender-based wage discrimination under Title VII simply by articulating specific employment practices which plaintiffs demonstrate collectively have caused an adverse impact on them. *Id.* at 1482. See *infra* notes 318 and 322.

265. *American Nurses*, 783 F.2d at 726.

266. *Id.* at 727.

267. *Id.* at 720.

268. *Id.* at 725; *Madison Community*, 818 F.2d at 588. A claim of exclusion requires two determinations: the nonapplicant would have applied but for discrimination and the nonapplicant would have been rejected. *Teamsters*, 431 U.S. at 368 n.52.

269. *Babrocky v. Jewel Food Co.*, 773 F.2d 857, 866 (7th Cir. 1985). The court noted that the "Supreme Court has recognized that ordinarily 'nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired.'" *Id.* at 865 (citing *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 340 n.20 (1977)).

some other method of segregating jobs by sex even if it is in some sense implicit in their claim.²⁷⁰ Use of hiring ratios constitutes evidence of the defendant's discriminatory practices and may be relevant to proving the defendant's discriminatory intent to treat women less favorably than men in payment of wages.²⁷¹ Disparate terms and conditions for promotion and advancement for traditionally male and female job classifications also constitute cognizable claims under Title VII.²⁷² The terms and conditions include but are not limited to: imposing test and other requirements for promotion in traditionally female jobs, but not for promotion in traditionally male jobs; denying job training for employees in traditionally female jobs while providing training for employees in traditionally male jobs; establishing shorter career ladders for traditionally female jobs than for traditionally male jobs;²⁷³ or advancing employees in female jobs more slowly in their career paths than employees in male jobs.²⁷⁴ Presence of shorter, slower career path scenarios tends to prove that women have been discriminatorily relegated to low-wage, dead-end jobs.²⁷⁵ Denials of requests for transfer and demotions to inferior job titles and duties while maintaining same salaries also are cognizable claims under Title VII.²⁷⁶

Some evidence when considered alone may be insufficient to state a claim for relief under disparate treatment theory; however, the evidence may state a sufficient claim when considered in its totality: failure to classify female employees according to the work actually performed resulting in lower pay than the employer's rules entitled them to; hand-picked successors and word-of-mouth recruitment; and female jobs abolished to spare males during layoff.²⁷⁷ An employer's policy of paying predominantly male and female jobs on the basis of two different types of compensation schemes may also be discriminatory, and at a minimum, entitles plaintiffs to injunctive relief.²⁷⁸ While these assertions of inten-

270. *American Nurses*, 783 F.2d at 728-29.

271. *Babrocky*, 773 F.2d at 865.

272. District Council 33, AFSCME v. City of Philadelphia, No. 85-7418, 2-3 (E.D. Pa. Nov. 4, 1986) (WESTLAW, DCT file).

273. *Id.*

274. *American Nurses*, No. 84 C 4451 at 3 (N.D. Ill. May 28, 1987) (WESTLAW, DCT file).

275. *Id.*

276. *Cox v. American Cast Iron Co.*, 784 F.2d 1546, 1561 (11th Cir. 1986).

277. *American Nurses*, 783 F.2d at 728-29.

278. *Cox*, 784 F.2d at 1561. The traditionally male jobs in the manufacturing division were compensated on the basis of an objective system of detailed job descriptions, standardized evaluations, formal job classifications, pay scales and review provisions, while compensation for non-manufacturing women's jobs were subjectively determined. *Id.* at 1560-61.

tional gender-based discrimination are cognizable to show an employer's intent to treat female employees less favorably than male employees, it remains unclear specifically what combination of cognizable factors will create employer liability under Title VII.²⁷⁹

Plaintiffs also may rely on statistics, including comparable worth and sex-based job segregation statistics, as circumstantial evidence to support an inference of discrimination when the statistics clearly show differences in treatment.²⁸⁰ Courts find statistical evidence critical to creating an inference of discriminatory intent.²⁸¹ In some cases when "gross disparities" are shown, statistics alone may constitute a prima facie case.²⁸² Plaintiffs also may use statistics to show that a defendant's articulated nondiscriminatory reason for wage disparities is pretextual.²⁸³

The weight which courts will give to statistical evidence implicitly depends on corroboration of supporting facts and the absence of unmeasured variables which respectively could bolster or undermine a reasonable inference of discriminatory motive.²⁸⁴ The more sophisticated the statistical method used, such as multivariate regression analysis, the more likely a discriminatory factor can be identified.²⁸⁵ All variables thought to effect salary and meaningful comparisons are necessary for a statistical analysis to distinguish legitimate differences from discriminatory factors.²⁸⁶ Yet, even though regression analyses can provide useful information, the more complex the intricacies involved in the decision-making being measured, generally the less accurate a regression model will be.²⁸⁷ Nonetheless, "failure to include variables will affect the analy-

279. *American Nurses*, 783 F.2d at 724-28; *Philadelphia*, No. 85-7418 at 2-3.

280. *Spaulding*, 740 F.2d at 703.

281. *Atonio v. Wards Cove Packing Co.*, 87 L.A. Daily Journal D.A.R. 5850, 5852 (Sept. 4, 1987).

282. *Coates*, 756 F.2d 532 n.6; *Segar*, 738 F.2d at 1278; *Sears, Roebuck*, 628 F. Supp. at 1285.

283. *Penk v. Oregon State Bd. of Higher Educ.*, 816 F.2d 458, 462 (1987). The *Penk* court reviewed not only all of the statistical evidence of pretext but also evidence of sexist attitudes on the part of male administrators and the State Board's compliance with affirmative action policies. *Id.*

284. *Spaulding*, 740 F.2d at 703; *Dugan*, 815 F.2d at 1137 (female professor failed to provide anecdotal support to statistical evidence which did not include important variables).

285. *Spaulding*, 740 F.2d at 704. The Seventh Circuit has recommended using "extreme caution" in drawing any conclusions from statistical significance at a two-to-three standard deviation level. *Sears, Roebuck*, 628 F. Supp. at 1286.

286. *Spaulding*, 740 F.2d at 704. Statistical evidence of general underrepresentation of women in a position, absence of information indicating the number of males and females who applied for promotion and failed a requisite test, and an absence of information about the gender composition of the relevant workforce during a meaningful time period fails to provide statistical evidence from which to infer discriminatory intent. *Dugan*, 815 F.2d at 1137.

287. *Sears, Roebuck*, 628 F. Supp. at 1287.

sis' probativeness, not its admissibility."²⁸⁸ Thus, plaintiffs may establish the employer's discriminatory intent by offering statistical, nonstatistical, and anecdotal evidence.²⁸⁹

Defendants may rebut statistical evidence of disparate treatment by showing its inaccuracy, unreliability, statistical insignificance or inappropriateness to the question at issue.²⁹⁰ Rebuttal evidence usually explains statistical disparities through neutral factors which dispel the plaintiff's proposed inference of intentional discrimination.²⁹¹ Although discriminatorily-based salary disparities created prior to the time Title VII applied to the employer is not actionable, the preexisting disparities can support an inference that the employer perpetuated the discriminatory practice for which a court may impose liability.²⁹²

Beyond the most obvious form of intentional discrimination present in *Gunther*, lower federal courts are developing guidelines for a prima facie case of intentional gender-based wage discrimination under the disparate treatment theory. They are noting that claims based on some evidence alone or in combination with comparable worth demonstrates the employer's intent to discriminate against women in compensation. A plaintiff might establish a prima facie case of intentional discrimination if she proves (1) her job classification is sex-segregated; (2) a predominantly male classification is equivalent in value; (3) the equivalent, predominantly male classification is paid higher compensation; (4) the employer is not relying totally on the market to establish the wages it pays these equivalent job classifications; and (5) the employer excludes or channels its female employees or engages in other practices in recruiting, hiring, promoting, transferring or training which treat women less favorably than men. Even though not clearly delineated at the present time, the burden on plaintiff appears quite heavy. As plaintiffs test claims based on newly framed circumstantial evidence of employers' intent to discriminate in female compensation, the contours of a claim of disparate treatment in compensation may become more precise.²⁹³

288. *Penk*, 816 F.2d at 464.

289. *Id.* at 463.

290. *Babrocky*, 773 F.2d at 867.

291. *Penk*, 816 F.2d at 464.

292. *Bazemore v. Friday*, 106 S. Ct. 3000, 3010 (1986). Although *Bazemore* is a race-based wage discrimination case, a plaintiff claiming gender-based wage discrimination might rely on the principles set out in *Bazemore*.

293. Cases are currently pending in federal court in California, Michigan and Illinois.

California State Employee's Ass'n (CSEA) v. California, C-84-7275 (N.D. Cal.). In this case plaintiffs are claiming historical evidence of a discriminatory wage and classification system since the 1930s. Plaintiff's Brief in Opposition to Defendant's Motion for Summary Judgments at 29-36, CSEA v. California (No. 84-7275) (N.D. Cal. 1987). Plaintiff's also claim

3. Evidentiary sufficiency: claims and defenses under disparate impact

In 1971, the United States Supreme Court announced the disparate impact model for establishing a *prima facie* case of discrimination under Title VII. The Supreme Court interpreted congressional intent in enacting Title VII and decided *Griggs v. Duke Power Co.*²⁹⁴

[Title VII was designed] to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, *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.²⁹⁵

Since 1971, the Court has applied the disparate impact theory which, unlike disparate treatment, does not require proof of discriminatory motive. The Court has invoked the disparate impact model in cases involving objective criteria and found Title VII violations where adverse impact on a protected classification resulted from use of intelligence tests,²⁹⁶ high school diplomas,²⁹⁷ height and weight requirements,²⁹⁸ and written

statistical evidence, evidence of job segregation, and other circumstantial evidence, including channeling women into predominantly female jobs and tolerating harassment of women in predominantly male classes, maintaining a transfer policy adversely affecting women and failure to make a good faith effort to implement the affirmative action plan. *Id.* at 37. Further, plaintiffs challenge the state's job classification and wage setting system as highly subjective. *Id.* at 39. Charges of discriminatory wage-setting include starting, average and promotional salary disparities between predominantly male and female classes as well as failure to adhere to asserted reliance on market rates. *Id.* at 9-16, 17-19. This case is in discovery until early 1988. Telephone interview with Mel Dayley, Attorney for Plaintiff, August 6, 1987.

UAW v. Michigan, 85CV75483 (E.D. Mich.). In this case, plaintiffs claimed sex-based segregation and assignment of job classifications, lower payment of predominantly female classifications than predominantly male classifications with equivalent job evaluation points, setting maximum on job evaluation points lower for females in a job family than males in the same job family and not basing wage rates on market as alleged. Plaintiff's Brief in Response to Motion to Dismiss and/or for Summary Judgment at 8-16, *UAW v. Michigan* (No. 85CV75483 (1986)). This case went to trial in August, 1987 and a decision was pending as this article went to print. Telephone interview with Laura Einstein in the office of Plaintiff's Attorney, Winn Newman (Aug. 19, 1987).

American Nurses Ass'n v. Illinois, 606 F. Supp. 1313 (N.D. Ill. 1985), *rev'd and remanded*, 783 F.2d 716 (7th Cir. 1986), is in discovery until July 1988. Telephone interview with Edith Barnett, Attorney for Plaintiff, August 6, 1987. See *American Nurses*, 783 F.2d at 727-28 for a discussion of plaintiffs' claims.

294. 401 U.S. 424 (1971).

295. *Id.* at 429-30 (emphasis added).

296. *Id.* at 436; *Albemarle*, 422 U.S. 405 (1975).

297. *Griggs*, 401 U.S. 424 (1971).

298. *Dothard*, 433 U.S. 321 (1977).

examinations.²⁹⁹ Under disparate impact, the Court has upheld the rejection of narcotics/methadone-using job applicants as job related³⁰⁰ and the exclusion of pregnancy from disability benefits as non-sex-based.³⁰¹

Courts have applied standard disparate impact analysis to wage discrimination claims. They have found Title VII violations when employer fringe benefit policies adversely impacted women and involved not obviously job-related, identifiable practices about which an employer exercised business judgment and could offer proof of job relatedness or business necessity.³⁰² Generally, however, courts have held the disparate impact model inapplicable to comparable worth gender-based wage discrimination claims.³⁰³ Plaintiffs have not been able to establish a violation of Title VII when they show that employees of different genders receive different compensation for comparable work of equal value to the employer because of the employer's facially neutral policy to set wages according to the market.³⁰⁴ Courts which have denied comparable worth claims do not find the employer's reliance on the market a neutral non-job-related pretext shielding a discriminatory judgment.³⁰⁵ They reason that the employer's reliance on a market which creates wage disparities is not the result of a policy about which the employer made an independent business judgment.³⁰⁶ Thus, employers are not held to engage in culpa-

299. *Connecticut v. Teal*, 457 U.S. 440 (1982).

300. *New York City Transit Auth. v. Beazer*, 440 U.S. 568, 587 (1979).

301. *Gilbert*, 429 U.S. 125 (1976). Congress undid the result in *Gilbert* by granting rights to pregnant women. See 42 U.S.C. § 2000e(k), added by Pub. L. 95-555, Oct. 31, 1978, 92 Stat. 2076.

302. *Colby*, 811 F.2d 1119 (7th Cir. 1987) (challenges to "head of household" policy determining spousal eligibility for medical benefits); *Wambheim v. J.C. Penney Co.*, 705 F.2d 1492 (9th Cir. 1983) (same).

303. *American Nurses*, 783 F.2d 716 (7th Cir. 1986) (nurses paid differently than equivalent predominantly male jobs); *Spaulding*, 740 F.2d 686 (9th Cir. 1984) (female nursing faculty paid differently than male faculty); *Lemons*, 620 F.2d 228 (10th Cir. 1980) (comparable worth claim by city-employed nurses); *Christensen*, 563 F.2d 353 (8th Cir. 1977) (comparable worth claim by university female clerical employees); *Beard*, 656 F. Supp. 1461 (N.D. Ind. 1987) (female office and clerical group denied wage increase and benefits based on market survey).

304. *Spaulding*, 740 F.2d at 705-06. See also *American Nurses*, 783 F.2d at 722.

305. *Spaulding*, 740 F.2d at 708 (Reliance on market prices does not constitute a policy or practice for purposes of disparate impact analysis); *Pouncy v. Prudential Ins. Co. of Am.*, 668 F.2d 795 (5th Cir. 1982); *Beard*, 656 F. Supp. at 1469 n.7.

306. *Spaulding*, 740 F.2d at 708. In *Spaulding*, the Ninth Circuit held that relying on the market was not the sort of policy at which disparate impact analysis is aimed and reasoned:

Every employer constrained by market forces must consider market values in setting his labor costs. Naturally, market prices are inherently job-related, although the market may embody social judgments as the worth of some jobs. Employers relying on the market are, to that extent, "price-takers." They deal with the market as a given, and do not meaningfully have a "policy" about it in the relevant Title VII sense. Fringe policies, which are discretionary, are altogether another matter. Additionally, allowing plaintiffs to establish reliance on the market as a facially neutral

ble discrimination in the form of business decisions which have a discriminatory impact and which are not justified by their job relatedness.³⁰⁷

Alternatively, a plaintiff may state a claim for relief under the disparate impact model if she does not claim that two different jobs should be paid equally. She may claim she should not be excluded from the higher-paying job by a criterion which, even if not deliberately discriminatory, has no business justification outweighing its discriminatory impact.³⁰⁸ Also, if a plaintiff shows that the employer discourages females from entering the higher paying jobs, she will establish a prima facie case of gender discrimination.³⁰⁹ The pre-eminent issues that will decide whether a plaintiff can use a disparate impact model in a gender-based wage discrimination case rests on whether the employer's market reliance results from a policy about which the employer made an independent business judgment, and whether the employer is in fact relying solely on the market to set wages.

If a plaintiff can pass the market-based hurdle, she may then have a cognizable claim under the disparate impact model. The United States Supreme Court has not delineated the types of cases to which a disparate impact theory may be applied. Nonetheless, the Court obliquely suggested in *International Brotherhood of Teamsters v. United States*³¹⁰ that disparate impact may be applicable to claims of discrimination involving subjective criteria.³¹¹ Subsequently, in *Furnco Constr. Corp. v. Waters*,³¹²

policy for Title VII purposes would subject employers to liability for pay disparities with respect to which they have not, in any meaningful sense, made an independent business judgment.

Id. A district court of the Northern District of Indiana stated the broader societal reasons for refusing to allow disparate impact claims to focus on the employer's policy of paying the market.

The practice of paying market rates is an impermissible focus for a disparate impact claim, not because it is too broad but because it is a manifestation of, and fully consistent with the nation's basic economic policy: that goods and services are to be produced through the functioning of product and labor markets. This market-oriented policy has existed and continues to exist despite its obviously different impacts on societal groups. Therefore, paying market rates is beyond challenge under a disparate impact claim unless Congress decides otherwise.

Beard, 656 F. Supp. at 1470 (citation omitted). Plaintiffs might question what legitimate differences exist in the employer's decision to grant a variety of benefits as a part of an employee's total compensation package as opposed to the salary portion of the package when both are discretionary and determined by the market.

307. *American Nurses*, 783 F.2d at 725; *Spaulding*, 740 F.2d at 708.

308. *Madison Community*, 818 F.2d at 589.

309. *Id.*

310. 431 U.S. 324 (1977).

311. *Id.* at 336 n.15.

312. 438 U.S. 567 (1978).

the Court addressed by footnote whether disparate impact theory applied to subjective criteria.³¹³ Interpreting the *Furnco* footnote, the lower courts have emerged with two conflicting views as to the scope of the impact model—whether impact analysis is applicable only to evaluate objective criteria or is also applicable to subjective criteria. The First, Second, Third, Sixth, Ninth, Tenth, Eleventh and District of Columbia Circuits apply impact analysis to subjective criteria and practices.³¹⁴ The Fourth Circuit does not apply impact analysis to subjective criteria and

313. *Id.* at 575 n.7. In *Furnco*, plaintiffs were not hired because they applied at the job site, rather than through the regular hiring process of referrals and rehires. *Id.* at 570. The Court ruled that the hiring policy should be evaluated under a disparate treatment, not disparate impact, analysis as the case did not involve height and weight requirements, standardized tests or a class action. *Id.* at 575 n.7. The Court found the employer's referral-in-hiring practice was not discrimination. *Id.* at 578.

314. The First, Second, Third, Sixth, Ninth, Tenth, Eleventh and District of Columbia Circuits apply disparate impact analysis to subjective criteria and practices.

FIRST CIRCUIT: *Robinson v. Polaroid Corp.*, 732 F.2d 1010 (1st Cir. 1984) (layoff guidelines, including evaluations of employees' knowledge, past performance and potential).

SECOND CIRCUIT: *Coser v. Moore*, 739 F.2d 746 (2d Cir. 1984) (prior experience requirements held job-related for women professors and classified staff); *Zahorik v. Cornell Univ.*, 729 F.2d 85 (2d Cir. 1984) (tenure decision involving peer evaluations upheld); *Grant v. Bethlehem Steel Corp.*, 635 F.2d 1007 (2d Cir. 1980), *cert. denied*, 452 U.S. 940 (1981) (haphazard hiring process).

THIRD CIRCUIT: *Wilmore v. City of Wilmington*, 699 F.2d 667 (3d Cir. 1983) (fire department promotion system incorporating performance evaluations); *Green v. United States Steel Corp.*, 570 F. Supp. 254 (E.D. Pa. 1983) (hiring process dependent on interviewer's "gut-level reaction" to individual applicants).

SIXTH CIRCUIT: *Rowe v. Cleveland Pneumatic Co.*, 690 F.2d 88 (6th Cir. 1982) (rehire, promotion and transfer procedures almost entirely dependent on recommendation of foreman).

NINTH CIRCUIT: *Atonio v. Wards Cove Packing Co.*, 810 F.2d 1477 (1987) (*explained*, 87 L.A. Daily Journal D.A.R. 5850, 5851 (Sept. 4, 1987)) (separate hiring channels, word-of-mouth recruitment, nepotism and rehire policies); *Peters v. Lieuallen*, 746 F.2d 1390 (9th Cir. 1984) (interviews for hiring); *Yartzoff v. Oregon*, 745 F.2d 557 (9th Cir. 1984) (promotion criteria in age discrimination case); *Wang v. Hoffman*, 694 F.2d 1146 (9th Cir. 1982) (hiring and promotion policies); *Nanty v. Barrows Co.*, 660 F.2d 1327 (9th Cir. 1981) (requirements that delivery truck drivers be neat, articulate and personable).

TENTH CIRCUIT: *Hawkins v. Bounds*, 752 F.2d 500 (10th Cir. 1985) (United States Post Office standardless promotion system based on temporary appointment to higher positions as basis for later permanent appointment); *Lasso v. Woodmen of World Life Ins. Co.*, 741 F.2d 1241 (10th Cir. 1984), *cert. denied*, 471 U.S. 1099 (1985) (promotion practices); *Mortenson v. Callaway*, 672 F.2d 822 (10th Cir. 1982) (multiple factors combined to evaluate chemists for promotion to supervisory positions); *Coe v. Yellow Freight System, Inc.*, 646 F.2d 444 (10th Cir. 1981) (employee attending law school applied for and was rejected for management training program); *Williams v. Colorado Springs School Dist. No. 11*, 641 F.2d 835 (10th Cir. 1981) (hiring practices).

ELEVENTH CIRCUIT: *Griffin v. Carlin*, 755 F.2d 1516 (11th Cir. 1985) (promotion practice); *Watson v. National Linen Serv.*, 686 F.2d 877 (11th Cir. 1982) (standardless hiring procedure based on daily policies not communicated to employees and not followed).

D.C. CIRCUIT: *Segar v. Smith*, 738 F.2d 1249 (D.C. Cir. 1984), *cert. denied sub nom. Meese v. Segar*, 471 U.S. 1115 (1985) (performance appraisal).

practices,³¹⁵ and the Fifth, Seventh and Eighth Circuits have split internally on the issue.³¹⁶ Thus, a substantial majority of circuit court rulings support a disparate impact analysis to evaluate the legality of subjective criteria and procedures. The courts consider wage-setting to involve subjective criteria³¹⁷ and, therefore, a plaintiff may bring a wage discrimination suit under the disparate impact model in the majority of circuits.

315. The Fourth Circuit does not apply disparate impact analysis to subjective criteria and procedures.

FOURTH CIRCUIT: *Lilly v. Harris-Teeter Supermarkets*, 720 F.2d 326 (4th Cir. 1983), *cert. denied*, 466 U.S. 951 (1984) (management's unbridled discretion creating disparity in hiring rates did not permit disparate impact analysis); *E.E.O.C. v. Federal Reserve Bank*, 698 F.2d 633 (4th Cir. 1983), *rev'd on other grounds sub nom. Cooper v. Federal Reserve Bank*, 467 U.S. 867 (1984) (promotion policies); *Pope v. City of Hickory*, 679 F.2d 20 (4th Cir. 1982) (hiring criteria; Fourth Circuit upheld District Court opinion that statistical sample size was too small to show disparate impact); *contra Brown v. Gaston County Dyeing Mach. Co.*, 457 F.2d 1377 (4th Cir.), *cert. denied*, 409 U.S. 982 (1972) (hiring and promotion practices including failure to post job vacancies); *Robinson v. Lorillard Corp.*, 444 F.2d 791 (4th Cir.), *cert. denied*, 404 U.S. 1006 (1971) (seniority system).

316. The Fifth, Seventh and Eighth Circuits sometimes apply disparate impact analysis to subjective criteria and practices.

FIFTH CIRCUIT: *Bunch v. Bullard*, 795 F.2d 384 (5th Cir. 1986) (disparate impact analysis applied in employment and promotion practices); *Page v. U.S. Indus., Inc.*, 726 F.2d 1038 (5th Cir. 1984) (applying impact analysis to subjective promotion system dependent on evaluation and recommendation of supervisor); *Carroll v. Sears, Roebuck & Co.*, 708 F.2d 183 (5th Cir. 1983) (employment tests subject to disparate impact analysis); *Pegues v. Mississippi State Employment Service*, 699 F.2d 760 (5th Cir.), *cert. denied*, 464 U.S. 991 (1983) (applied disparate impact analysis to employment referrals and tests); *Rowe v. General Motors Corp.*, 457 F.2d 348 (5th Cir. 1972) (applying impact analysis to promotion and transfer policies involving foreman recommendation and no notice to employees of opportunity or requirements); *contra Vuyanich v. Republic National Bank*, 723 F.2d 1195 (5th Cir.), *cert. denied*, 464 U.S. 1073 (1984) (disparate impact analysis inapplicable to hiring policies involving statistical proof); *Pouncy v. Prudential Ins. Co. of Am.*, 668 F.2d 795 (5th Cir. 1982) (disparate impact model inapplicable to promotional criteria).

SEVENTH CIRCUIT: *Coates v. Johnson & Johnson*, 756 F.2d 524 (7th Cir. 1985) (merit increases based on evaluations by supervisors subject to disparate impact analysis); *Clark v. Chrysler Corp.*, 673 F.2d 921 (7th Cir.), *cert. denied*, 459 U.S. 873 (1982) (disparate impact analysis applied to employment practices); *United States v. City of Chicago*, 549 F.2d 415 (7th Cir.), *cert. denied*, 434 U.S. 875 (1977) (hiring/selection and promotion requirements including character, moral conduct and habits subject to disparate impact analysis); *Frink v. United States Navy*, 16 Fair Empl. Prac. Cas. (BNA) 67 (E.D. Pa. 1977), *aff'd without opinion*, 609 F.2d 501 (3d Cir. 1979), *cert. denied*, 445 U.S. 930 (1980) (promotion standards including two supervisory appraisals, review by panel, and detailed written instructions for appraisers subject to disparate impact analysis); *contra Griffin v. Board of Regents*, 795 F.2d 1281 (7th Cir. 1986) (excluding disparate impact analysis from supervisory evaluation of work quality).

EIGHTH CIRCUIT: *Gilbert v. Little Rock*, 722 F.2d 1390 (8th Cir. 1983), *cert. denied*, 466 U.S. 972 (1984) (promotion system including oral interview and performance appraisal subject to disparate impact analysis); *Talley v. United States Postal Serv.*, 720 F.2d 505 (8th Cir. 1983), *cert. denied*, 466 U.S. 952 (1984) (disparate impact applied to firing); *contra Harris v. Ford Motor Co.*, 651 F.2d 609 (8th Cir. 1981) (refusing to apply impact analysis).

317. *Atonio*, 810 F.2d at 1478.

Even if subjective criteria and procedures fall within disparate impact analysis, the next issue is whether a plaintiff may challenge an entire system or must challenge a specific practice at a single point in the system. On this issue, the circuit courts also have split.³¹⁸ Under *Connecticut v. Teal*³¹⁹ and the *Pouncy*³²⁰ line of cases, plaintiffs are required to challenge a specific component of the employer's program. The *Segar*³²¹ line of cases permit broad-based challenges to employment practices. Courts consider the employer's compensation decisions, including its reliance on the market, to be the result of multifaceted decision-making involving complex factors.³²² Thus, even if she overcomes the market defense and passes the objective criteria hurdle, a plaintiff may bring a cognizable gender-based wage discrimination claim only in those circuits not requiring challenges to specific employer practices.

Once a plaintiff has established a prima facie case in circuits permitting a gender-based wage discrimination claim under impact analysis, courts will require the employer to prove that virtually all its challenged employment decisions and programs are job-related or substantially promote the efficiency of the business. Affected practices could include recruitment, hiring, training, promotion, demotion, layoff, and termination. Additionally, the courts could scrutinize the employer's entire job classification and wage-setting methodology. To illustrate, if the plaintiff were to identify the component(s) of the job classification and/or

318. Compare *Pouncy*, 668 F.2d 795 (5th Cir. 1982) (requiring challenges to a specific component of an employer's program), and *Spaulding*, 740 F.2d 686 (9th Cir. 1984), cert. denied, 469 U.S. 1036 (1984) (same) overruled on related grounds, *Atonio v. Wards Cove Packing Co.*, 810 F.2d 1477 (9th Cir. 1987) (en banc) (explained, 87 L.A. Daily Journal D.A.R. 5850 (Sept. 4, 1987)) (requiring only articulation of specific employment practices plus proof of their individual or collective adverse impact), with *Segar*, 738 F.2d 1249 (D.C. Cir. 1984), cert. denied sub nom., *Meese v. Segar*, 471 U.S. 1115 (1985) (allowing broad challenges to entire systems), and *Griffin v. Carlin*, 755 F.2d 1516 (11th Cir. 1985) (same).

319. 457 U.S. 440 (1982) (a favorable bottom-line does not preclude individual employees from establishing a prima facie case by challenging a specific component of the employer's system).

320. 668 F.2d 795 (5th Cir. 1982). See supra note 318 and accompanying text.

321. 738 F.2d 1249 (D.C. Cir. 1984). See supra note 318 and accompanying text.

322. *AFSCME*, 770 F.2d at 1406. "[T]he decision to base compensation on the competitive market, rather than on a theory of comparable worth, involves the assessment of a number of complex factors not easily ascertainable, an assessment too multifaceted to be appropriate for disparate impact analysis." *Id.* (citing *Spaulding v. University of Wash.*, 740 F.2d 686, 708 (9th Cir. 1984), cert. denied, 469 U.S. 1036 (1984), overruled on related grounds, *Atonio v. Wards Cove Packing Co.*, 810 F.2d 1477 (9th Cir. 1987) (en banc) (explained, 87 L.A. Daily Journal D.A.R. 5850 (Sept. 4, 1987))). Even though the courts have yet to determine the implications of *Atonio*, plaintiffs and defendants in the Ninth Circuit would be well advised to note that *Atonio* in part overruled *Spaulding*, the case upon which the *AFSCME* court relied to find that a claim based on comparable worth was not viable.

wage-setting process that caused an adverse impact on her salary and demonstrate the bottom-line adverse impact of the practice on her wages, the burden of proof would shift to the employer. Courts could require the employer to meet its burden by proving the business necessity for its choice of factors, factor weights, job description, evaluation points assigned the job, grade cutoff levels, selection of benchmark jobs, salary survey, pay ranges, performance appraisals and the timing and amount of increases. If the employer has documented its decisions and has a rationally-based systematic program, it will be capable of carrying its burden.

Given the difficulty of overcoming the market defense, which is available to the employer in all circuits, as well as the objective and specific criteria hurdles required of the employee in several circuits, a plaintiff's likelihood of success in establishing employer liability under disparate impact analysis will often present an uphill battle. Consequently, a plaintiff claiming gender-based wage discrimination would be well advised to claim intentional discrimination as well as disparate impact when challenging the employer's compensation practices.

The scope of cognizable gender-based wage discrimination claims based on both disparate treatment and disparate impact analyses, although evolving, appears limited at present. The employer's failure to adhere to its own standard, as in *Gunther*, was only the first of several gender-based intentional wage discrimination claims which the courts could capably construe as viable. Nonetheless, with seven years in which to act following the *Gunther* decision, the federal judiciary has failed to establish a formula beyond that presented in *Gunther* for a cognizable prima facie case of disparate treatment. Cases also may succeed under disparate impact analysis when a plaintiff challenges the market defense and the employer's job evaluation or wage-setting methods showing that they operate to depress women's wages. Yet, to the present no plaintiff has succeeded in establishing a prima facie case of gender-based wage discrimination under the disparate impact model unless she attacked the fringe benefit portion of her compensation package. Absent additional evidence of congressional intent, the federal judiciary will likely continue to construe Title VII as providing women substantially limited entitlements to equitable compensation.

The scope of women's federal statutory protections from unequal compensation for work equivalent to men's appears narrow or, under a liberal reading, laced with ambiguity. Congressional limitations on women's entitlements to fair compensation began with the 88th Congress in 1963 and continued through the 99th Congress in 1986. Brief legislative

history at the onset of the Civil Rights Act of 1964 and the absence of congressional clarification of women's rights regarding compensation through the 99th Congress have contributed to women's narrow protection from unfair employer compensation practices. Several alternatives are available for expanding women's protections from gender-based wage discrimination: (1) Congress can expressly clarify its intent to expand employer prohibitions against discriminatory compensation practices; (2) the federal judiciary can construe Title VII's prohibitions more broadly than it has to the present; and (3) the states can act to provide women greater protection against discriminatory employer practices than the federal government currently provides.

V. STATE ACTIVITY

Justice Brennan recently commented on the emerging development of state level activity as a primary force in shaping the constitutional jurisprudence of individual rights:

We can and should welcome this development in state constitutional jurisprudence—indeed, my own view is that this rediscovery by state supreme courts of the broader protections afforded their own citizens by their state constitutions—spawned in part certainly by dissatisfaction with the decisional law being announced these days by the United States Supreme Court—is probably the most important development in constitutional jurisprudence of our times. For state constitutional law will assume an increasingly more visible role in American law in the years ahead. Lawyers should take heed: . . . “A lawyer today representing someone who claims some constitutional protection and who does not argue that the state constitution provides that protection is skating on the edge of malpractice.”³²³

Justice Brennan noted that “state supreme courts are increasingly evaluating their state constitutions and concluding that those constitutions should be applied to confer greater civil liberties than their federal counterparts”³²⁴

Comparable worth theory has not been incorporated into any state constitution to date, but in recent years state legislators, governors and executive officials have launched an accelerating state level effort to apply

323. Brennan, *Color-Blind, Creed-Blind, Status-Blind, Sex-Blind*, 14 HUMANRIGHTS 30, 37 (1987) (citation omitted) [hereinafter BRENNAN].

324. *Id.*

comparable worth to wage discrimination prohibitions.³²⁵ This state level activity is antithetical to the federal agenda and primarily attributable to a congressional unwillingness to move into the comparable worth arena, lack of specificity in congressional intent as to the scope of prohibited gender discrimination in compensation under Title VII and the federal judiciaries' unwillingness to read comparable worth/pay equity into Title VII. Despite the increased level of state activity in the comparable worth arena, the state judiciary, like their federal counterparts, are declining to construe comparable worth in their statutes prohibiting gender-based wage discrimination.³²⁶ This section of the Comment will examine what protections against gender-based wage discrimination the states have and have not conferred and could justifiably confer on its citizens.

A. State Legislation

While two federal laws, the Equal Pay Act³²⁷ (EPA) and Title VII,³²⁸ provide individual workers with relief from wage discrimination, most states also have equal pay and fair employment practice laws.³²⁹ The state equal pay movement began with the first state EPA statute, twenty-four years before the 1963 federal EPA was passed, and since then many more state statutes have been passed.³³⁰ Presently, only eleven states have no form of state equal pay law.³³¹ Seven states model

325. "Th[is] new 'era' legislation tends to deal exclusively with the state employer and with pay equity in state employment." Cook, *Developments in Selected States*, in COMPARABLE WORTH, *supra* note 60, at 271.

The [state comparable worth] activity begins typically with a study of the degree of job segregation into sex-dominated occupations and then proceeds to relate wage differentials to these categories. Much of the job evaluation work that is the key to determinations of comparability is being carried out by outside consultants who are experts in this field. The assignment of wages to the reclassified categories is the work of the collective bargaining partners where union activity is legal in public employment. Where it is not, the personnel departments or civil service commissions proceed on their own to put the recommendations into operation. Funds for studies have usually been part of the enabling legislation.

Id. at 282. State and local governments have been settling federal litigation by providing pay equity adjustments for state and city employees. See generally *Pay Equity and Comparable Worth*, Special Rep. (BNA) (1984) (state and local developments in comparable worth).

326. See *infra* text accompanying notes 414-20.

327. See *supra* note 10 for text of Equal Pay Act, 29 U.S.C. § 206(d)(1).

328. See *supra* note 11 for the text of Title VII, §§ 701-18; 42 U.S.C. §§ 2000e-2000e-17.

329. Dean, Roberts & Boone, *Comparable Worth under Various Federal and State Laws*, in COMPARABLE WORTH *supra* note 60, at 239.

330. *Id.* at 240.

331. Equal pay standard refers to equal pay for equal work. Comparable pay standard refers to equal pay for work of comparable value. States without equal pay laws of any kind

their EPAs after the federal EPA and use identical language.³³² Of the remaining thirty-two states, fifteen have EPAs with a comparable pay standard³³³ and seventeen have a standard other than equal pay or comparable pay.³³⁴ All state equal pay acts cover public and private sector

include: Alabama, Delaware, Iowa, Louisiana, Mississippi, New Mexico, North Carolina, South Carolina, Utah, Vermont and Wisconsin. *See id.* at 241-43, 265-66.

332. States with an equal pay standard include the following: Florida, FLA. STAT. ANN. § 448.07, § 725.06 (West 1985); Indiana, IND. CODE ANN. § 22-2-2-4 (Burns 1985); Minnesota, MINN. STAT. ANN. § 181.67 (West 1986); Nevada, NEV. REV. STAT. 608.017 (1985); Ohio, OHIO REV. CODE ANN. § 4111.17 (Baldwin 1985); Pennsylvania, PA. STAT. ANN. tit. 43 § 336.3 (Purdon 1986) (first enacted 1947), and VA. CODE ANN. § 40.1-28.6 (1984). *See id.* These state statutes use the same language as the federal Equal Pay Act:

No employer having employees subject to any provision of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort and responsibility, and which are performed under similar working conditions.

Id. at 242 n.2.

333. States with a comparable pay standard include the following: Arkansas, ARK. STAT. ANN. §§ 81-624, 81.333 (using equal pay for comparable work and equal compensation for equal services respectively); Georgia, GA. CODE ANN. § 54-100 (1985) (using comparable worth); Idaho, IDAHO CODE § 44-1702 (1985) (using comparable work); Kentucky, KY. REV. STAT. ANN. § 337.423 (Michie/Bobbs-Merrill 1986) (using comparable work); Maine, ME. REV. STAT. ANN. tit. 26, § 628 (1985) (using comparable work); Maryland, MD. ANN. CODE art. 100, § 55A (1986) (using comparable work); Massachusetts, MASS. GEN. LAWS ANN. ch. 149, § 105A (West 1984) (using comparable work); Nebraska, NEB. REV. STAT. § 48-1219 (1985) (using comparable work); North Dakota, N.D. CENT. CODE § 34-06.1-03 (1985) (using comparable work); Oklahoma, OKLA. STAT. ANN. tit. 31, § 198.1 (West 1985) (using comparable work); Oregon, OR. REV. STAT. § 652.220 (1985) (using comparable work); South Dakota, S.D. CODIFIED LAWS ANN. § 60-12-15 (1986) (using comparable work); Tennessee, TENN. CODE ANN. § 50-321 (1984) (using comparable work); and West Virginia, W. VA. CODE § 21-58-1 (1985) (using comparable work). *See Dean, Roberts & Boone, Comparable Worth under Various Federal and State Laws*, in COMPARABLE WORTH, *supra* note 60, at 241-43, 265-66.

334. States with a standard other than equal or comparable pay include: Arizona, ARIZ. REV. STAT. ANN. § 23.340 (1983) (using equal pay for the same classification); California, CAL. LAB. CODE § 1997.5 (Deering 1984) (using equal pay for the same classification); Colorado, COLO. REV. STAT. § 8-5-05 (1983) (prohibiting discrimination in wages solely on account of sex); Connecticut, CONN. GEN. STAT. § 31-75 (1984) (prohibiting discrimination in wages solely on the basis of sex); Florida, FLA. STAT. ANN. § 724.06 (West 1983) (using equal pay for equal services); Hawaii, HAW. REV. STAT. § 387-4 (1983) (prohibiting "discrimination in any way in payment of wages . . . as . . . between the sexes"); Illinois, ILL. ANN. STAT. ch. 48 para. 4a (1983) (using equal work); Michigan, MICH. COMP. LAWS ANN. § 750.556 (West 1981) (prohibiting sex-based wage discrimination for persons similarly employed); Missouri, MO. ANN. STAT. § 290.400 (Vernon 1983) (using equal pay for the same classification); Montana, MONT. CODE ANN. § 39-3-104 (1985) (using equal pay for equivalent services or for the same amount or class of work or labor); New Hampshire, N.H. REV. STAT. ANN. § 275:37 (1986) (using equal work); New Jersey, N.J. REV. STAT. ANN. § 34:11-56.2 (1982) (prohibiting discrimination "in any way in the rate or method of payment of wages . . . because of sex"); New York, N.Y. LAB. LAW § 199.a (McKinney 1985) (prohibiting discrimination because of

employees except for that of Texas, which extends only to public employment.³³⁵

State Fair Employment Practice (FEP) laws generally address the same issues which Title VII³³⁶ addresses federally.³³⁷ Exactly half the states passed FEP laws prior to the passage of the federal Civil Rights

sex); Texas, TEX. REV. CIV. STAT. ANN. tit. 117, art. 6825 (1979) (using same work); and Washington, WASH. REV. CODE § 49.12.75 (1983) (prohibiting sex-based wage discrimination for persons similarly employed). See Dean, Roberts & Boone, *Comparable Worth under Various Federal and State Laws*, in COMPARABLE WORTH, *supra* note 60, at 241-43, 265-66.

335. Dean, Roberts & Boone, *Comparable Worth under Various Federal and State Laws*, in COMPARABLE WORTH, *supra* note 60, at 241 n.1.

336. See *supra* note 11 for text of Title VII, §§ 701-18; 42 U.S.C. §§ 2000e-2000e-17.

337. Typically, Fair Employment Practice (FEP) laws prohibit discrimination in employment on the basis of race, color, religion, sex and age. "Many of the laws include language prohibiting discrimination in 'compensation' or acts that 'limit, segregate, or classify' an individual on the basis of sex or other protected categories." Dean, Roberts & Boone, *Comparable Worth under Various Federal and State Laws*, in COMPARABLE WORTH *supra* note 60, at 244. The following is a listing of the state FEP laws together with the year of enactment/year gender added as a protected category (if known). Designations after the state name indicate specific language on compensation (*), and specific language on classification and/or segregation (**):

Alaska *, ALASKA STAT. § 18.80.010 (1953/1972) (the only FEP law specifically mentioning comparable work pay disparities as a discriminatory employment practice); Arizona * **, ARIZ. REV. STAT. ANN. § 41.1461 (1965); California, CAL. GOV'T CODE § 12940 (West 1959); Colorado *, COLO. REV. STAT. § 24-34-301 (1957); Connecticut * **, CONN. GEN. STAT. § 46a-51 (1947/1967); Delaware * **, DEL. CODE ANN. tit. 19, § 710 (1953); Florida, FLA. STAT. ANN. § 23.161-167 (West 1967/1972); Georgia * **, GA. CODE ANN. § 89.1707 (1978); Hawaii * **, 5 HAW. REV. STAT. § 378-1 (1963); Idaho * **, 11 IDAHO CODE § 67-5909 (1961); Illinois **, ILL. REV. STAT. ch. 9, para. 15 § 81-1216 (1961); Indiana, IND. CODE ANN. § 22-9-1-1 (Burns 1961/1971); Iowa **, IOWA CODE ANN. § 601A.1 (West 1963); Kansas * **, KAN. STAT. ANN. § 44-1001 (1953); Kentucky * **, KY. REV. STAT. ANN. § 344.030 (Baldwin 1966/1977); Maine *, ME. REV. STAT. ANN. tit. 5, § 4551 (1965/1973); Maryland * **, MD. ANN. CODE art. 49B, § 1-28 (1951); Massachusetts *, MASS. GEN. LAWS ANN. ch. 151B, § 4 (1964/1965); Michigan * **, MICH. COMP. LAWS ANN. § 37.2201 (1964); Minnesota * **, MINN. STAT. ANN. § 363.01 (West 1955/1969); Missouri * **, MO. ANN. STAT. § 296.010 (Vernon 1961); Montana *, MONT. CODE ANN. § 49-2-301 (1947); Nebraska *, NEB. REV. STAT. § 48-1116 (1965); Nevada * **, NEV. REV. STAT. § 613.330 (1961/1965); New Hampshire *, N.H. REV. STAT. ANN. § 354-A (1965/1971); New Jersey *, N.J. STAT. ANN. § 10:5-1 (West 1945/1970); New Mexico *, N.M. STAT. ANN. § 28-1-1 (1949/1969); New York *, N.Y. LAB. LAW § 290 (McKinney 1945/1965); North Carolina, N.C. GEN. STAT. § 143-422 (1977); North Dakota *, N.D. CENT. CODE § 34-01-19 (1979); Ohio, OHIO REV. CODE ANN. § 4112.99 (Baldwin 1959); Oklahoma *, OKLA. STAT. ANN. tit. 4, § 25:1101 (1963); Oregon *, OR. REV. STAT. § 659.110 (1949/1955); Pennsylvania *, PA. STAT. ANN. tit. 43, § 956 (Purdon 1955/1969); Rhode Island * **, R.I. GEN. LAWS § 28-5-1 (1949/1971); South Carolina * **, S.C. CODE ANN. § 1-13-10 (Law. Co-op. 1972); South Dakota, S.D. CODIFIED LAWS § 20-13-1 (1972); Tennessee * **, TENN. CODE ANN. § 4-21-101 (1967/1972); Utah, UTAH CODE ANN. § 34-35-6 (1953) (using "substantially equal experience, responsibilities and competency for the particular job."); Vermont, VT. STAT. ANN. tit. 21, § 495 (1963/1971); Washington **, WASH. REV. CODE ANN. § 49.60.010 (1949/1969); West Virginia *, W. VA. CODE § 5-11-1 (1967/1977); Wisconsin *, WIS. STAT. ANN. § 111.31 (West 1945/1961); and Wyoming *, WYO. STAT. § 27-9-101 (1965). See Dean, Roberts & Boone,

Act³³⁸ in 1964.³³⁹ New York's was the first in 1945, although "sex" was not added as a protected category until 1965.³⁴⁰ Only six states have no form of FEP law.³⁴¹ The remaining forty-four states have FEP laws which vary in specific language on statutory scope including compensation, job classification, segregation or a combination of these.³⁴² A few state FEP laws specify conduct constituting sex-based wage discrimination.³⁴³ Alaska is the only state with a statute which specifically mentions "comparable" work pay disparities as a discriminatory employment practice.³⁴⁴ All state FEP laws cover both private and public sector employees except those of Georgia, Texas and North Carolina.³⁴⁵

Federal EPA and Title VII statutes provide minimum protection to prospective plaintiffs in wage discrimination actions. These federal statutes state that they do not preempt state EPA and FEP statutes when the latter are more stringent.³⁴⁶ Thus, litigants who bring EPA wage dis-

Comparable Worth under Various Federal and State Laws, in *COMPARABLE WORTH*, *supra* note 60, at 246-47, 265-66.

338. See *supra* note 11 for text of Title VII, §§ 701-18; 42 U.S.C. §§ 2000e-2000e-17.

339. See Dean, Roberts & Boone, *Comparable Worth under Various Federal and State Laws*, in *COMPARABLE WORTH* *supra* note 60, at 244.

340. *Id.*

341. States without fair employment practices laws include: Alabama (Alabama has no FEP law, but in 1976, 1978, 1979, 1980 and 1982, the state budget bill included a clause forbidding discrimination based on race or sex in state employment); Arkansas, Louisiana (in 1981 an FEP bill was introduced in the Louisiana legislature but died during the legislative session), Mississippi, Texas and Virginia. *Id.* at 246-47, 265-66.

342. See *supra* note 337 and accompanying text.

343. Dean, Roberts & Boone, *Comparable Worth under Various Federal and State Laws*, in *COMPARABLE WORTH*, *supra* note 60, at 244. For instance, Utah's Anti-Discrimination Act defines compensation discrimination as "the payment of differing wages or salaries to employees having substantially equal experience, responsibilities and competency for the particular job." UTAH CODE ANN., § 34-35-6 (1953). Dean, Roberts & Boone, *Comparable Worth under Various Federal and State Laws*, in *COMPARABLE WORTH*, *supra* note 60, at 247 n.6, 266.

344. Dean, Roberts & Boone, *Comparable Worth under Various Federal and State Laws*, in *COMPARABLE WORTH*, *supra* note 60, at 247 n.3. Alaska's statute provides that it is unlawful for:

an employer to discriminate in the payment of wages as between the sexes, or to employ a female in an occupation in this state at a salary or wage rate less than that paid to a male employee for work of comparable character or work in the same operation, business or type of work in the same locality.

Id. at 245 (quoting ALASKA STAT. § 18.80.010 (1980)). This 1980 amendment replaced an Alaskan EPA law which contained identical language. *Id.* (currently *Alaska Stat.* § 18.80.220(a)(5) (1981)).

345. *Id.* at 247 n.1.

346. *Id.* at 239. The federal EPA does not excuse noncompliance with any state equal pay standards higher than those set forth in the federal law. Additionally, Congress expressly provides that state statutes defining sex discrimination more comprehensively than Title VII are not pre-empted or superseded by Title VII. Two sections address this issue:

crimination claims in either state or federal court may rely on state statutes which contain language broader than the narrow equal work standard. Litigants should be aware, however, that to the present the state judiciary have interpreted their EPA laws as applying only to jobs which are substantially equal. Similarly, comparable pay claims may be brought under state FEP laws which, because of specific language, or state judicial statutory construction, may also afford plaintiffs greater protection than does Title VII.

B. State Executive Orders and Local Laws

Approximately eighty-five state and local governments have either studied or implemented pay equity.³⁴⁷ Comparable worth mandates may be found in state and city executive orders as well as in city and county government laws, ordinances and statutes.³⁴⁸ These regulations vary considerably in requirements and cover governmental entities and private

42 U.S.C. 2000h-4: Nothing contained in any title of this Act shall be construed as indicating an intent on the part of Congress to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter, nor shall any provision of this Act be construed as invalidating any provision of State law unless such provision is inconsistent with any of the purposes of this Act, or any provision thereof.

42 U.S.C. 2000e-7: Nothing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State, other than any such law which purports to require or permit the doing of any act which would be an unlawful employment practice under this subchapter.

Id.

See Comment, *Preemption of Recovery in Cigarette Litigation: Can Manufacturers Be Sued for Failure to Warn Even Though They Have Complied With Federal Warning Requirements*, 20 LOY. L.A.L. REV. 867, 869-878 (1987) (authored by Taylor A. Ewell) for an extensive discussion of the theories under which current preemption challenges may be brought.

347. Remick & Steinberg, *Technical Possibilities and Political Realities: Concluding Remarks*, in COMPARABLE WORTH, *supra* note 60, at 299.

348. Dean, Roberts & Boone, *Comparable Worth under Various Federal and State Laws*, in COMPARABLE WORTH, *supra* note 60, at 251.

In June 1984, the U.S. Conference of Mayors adopted a resolution urging cities and other governmental jurisdictions "to address any existing pay inequities within their jurisdictions" and calling "upon the Congress, the Administration, the States and the Courts to study further the issues raised by 'comparable worth' with particular attention to ways any existing pay inequities can be addressed in a prompt, orderly and fiscally responsible manner."

In July 1984, the National Governors Association supported "equal pay for equal work" for public employees. In considering the policy, it was noted that 21 pay equity lawsuits were pending against public employers, and that 30 states had taken action on comparable worth. CONG. RES. SERV., LIBR. OF CONG., PAY EQUITY/COMPARABLE WORTH ACTIVITIES BY STATE GOVERNMENTS: A SUMMARY, REP. NO. 954E (Sept. 30, 1986) (A. Ahmuty & M. Jickling, analysts) (footnotes omitted).

employers alike.³⁴⁹ Furthermore, state and local governments, like the federal government, often regulate government contractors to ensure that they do not discriminate on the basis of gender.³⁵⁰

One city government regulation is San Francisco's Non-Discrimination in Contract Ordinance³⁵¹ which prohibits contractors, subcontractors and suppliers from discriminating on the basis of gender.³⁵² This law authorizes a commission to promulgate regulations within the scope of those adopted under federal Executive Order 11,246, as amended.³⁵³ Moreover, a government contractor has a contractual duty not to discriminate on the basis of sex and a corresponding obligation to take "affirmative action" to increase women's employment opportunities in accordance with employer-established goals and timetables.³⁵⁴

Through an alternative model for implementing pay equity, the city of Madison, Wisconsin adopted the unique program of "pay parity." The affirmative action plan for the City of Madison Vendors³⁵⁵ bars discrimination and sets affirmative action goals on the basis of "making progress toward achieving wage parity."³⁵⁶ Accordingly, government contractors must pay ". . . the extent to which salary distribution approximates the representation of women, minorities and handicapped persons in the workforce."³⁵⁷ In Madison, then, women must earn the percent-

349. Dean, Roberts & Boone, *Comparable Worth under Various Federal and State Laws*, in COMPARABLE WORTH, *supra* note 60, at 251.

350. *Id.* "Regulating private employers who do business with state and local governments is one way in which rule-making bodies can reach beyond the confines of their own employment settings to reduce sex bias and the wage gap in the private sector." *Id.* at 252-53.

351. SAN FRANCISCO ADMIN. CODE, NON-DISCRIMINATION IN CONTRACTS, chs. 12, 13 (1984) (cited in Dean, Roberts & Boone, *Comparable Worth under Various Federal and State Laws*, in COMPARABLE WORTH, *supra* note 60, at 252 n.14.

352. Dean, Roberts & Boone, *Comparable Worth under Various Federal and State Laws*, in COMPARABLE WORTH, *supra* note 60, at 252.

353. *Id.*

354. Each President since Lyndon Johnson has promulgated executive orders and implemented regulations requiring government contractors to undertake affirmative action to hire and promote women. While no private right of action exists, injured individuals may file complaints with the Department of Labor and receive a contractual-type remedy. If the government concludes in an administrative hearing that the employer is not in compliance with its affirmative action obligation, the government may specifically enforce the contract provisions, cancel the contract or bar the contractor from future government contracts. 2 C.F.R. § 339 (1986).

355. The plan was adopted November 15, 1983, and is available from the Affirmative Action Office, City-County Bldg., 210 Monona Ave. Rm. 515, Madison, Wisconsin 53710. Dean, Roberts & Boone, *Comparable Worth under Various Federal and State Laws*, in COMPARABLE WORTH, *supra* note 60, at 252 n.16.

356. *Id.* at 252 (quoting the City of Madison's affirmative action plan, RCW 41.06.010 at IX.A.1, Goals and Timetables).

357. *Id.*

age of total payroll equal to the percentage of women employees in the contractor's workforce.³⁵⁸ This pay parity program is designed to eliminate the gender-based wage gap, not on the basis of job evaluation, but on the basis of workforce representation. Consequently, women could not be segregated into devalued, low-paid job classifications, and women could be paid the same as men performing work of equal value.

C. Status of State Pay Equity Activities

In 1986, the United States General Accounting Office (GAO) conducted a survey and reported that of forty-eight states responding, forty-six states use job evaluation to set pay levels for classified positions,³⁵⁹ ten states have a pay equity policy³⁶⁰ and twenty-eight states have conducted pay equity studies.³⁶¹ Although more than fifty percent of all states have conducted pay equity studies, only twenty-two percent of these studies resulted in pay equity increases.³⁶²

1. State use of job evaluation

The states use one or a combination of four general methods of job evaluation: point-factor (twenty-one of thirty-four states using only one system), grading (thirteen states), ranking (seven states) and factor comparison (three states).³⁶³ Of sixty-four job evaluation systems used by the states, thirty-four have been used for more than ten years and nineteen for more than twenty years.³⁶⁴ While thirty-four states use only one method of job evaluation for all jobs,³⁶⁵ twelve use between two and

358. For example, if the employer's workforce is eighty percent female and the total payroll is \$1,000,000, the employer's aggregate female payroll must total \$800,000.

359. PAY EQUITY STATUS, *supra* note 6, at 15, Table II.4. Every state which reported except Kansas and Mississippi has a job evaluation system. *Id.* Pennsylvania and Alabama chose not to provide information. *Id.* at 15 nn.2 & 5.

360. *Id.* States with pay equity policies include: Hawaii, Iowa, Maine, Michigan, Minnesota, Montana, Ohio, Oregon, Washington and Wisconsin. "California personnel officials said they could not say whether the state had a pay equity policy or not, as it may be superseded by the state's collective bargaining agreements." *Id.* at 15 n.3. "Though Massachusetts stated that it did not have a written pay equity policy, officials indicated that the governor, in concert with the legislature, made a public commitment to deal with pay equity through the collective bargaining process." *Id.* at 15 n.4.

361. *Id.* at 15, Table II.4. States with pay equity studies include: Arizona, California, Hawaii, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nebraska, New Jersey, New Mexico, New York, North Carolina, Ohio, Oregon, Rhode Island, Vermont, Washington, West Virginia, Wisconsin and Wyoming. *Id.*

362. *Id.* at 12. For states with pay equity policies, see *infra* notes 368-378.

363. PAY EQUITY STATUS, *supra* note 6, at 7.

364. *Id.* at 9, Table II.3.

365. *Id.* at 7.

eleven such systems to set pay.³⁶⁶ Reasons most commonly given for use of job evaluation include administrative efficiency, internal consistency and pay equity.³⁶⁷

Job evaluation, then, has been the tried and familiar method of choice for determining job value and setting wages in at least ninety percent of the states for an average of over thirteen years. Further, approximately two-thirds of the states employ a single evaluation plan. Consequently, the states are sufficiently positioned to inject comparable worth as just one more factor in their existing systems.

2. State pay equity policies

Ten states have a pay equity policy, meaning legislation, executive order or administrative policy which states a compensation goal of equal pay for work of comparable value for state employees.³⁶⁸ Pay equity studies or evaluations of job classes, by themselves, are not pay equity policies.³⁶⁹ The governor, the legislature, the union and women's interest groups have provided the impetus for establishing these policies.³⁷⁰

California, for example, enacted a broad comparable worth policy:

The legislature, having recognized December 1980 statistics from the U.S. Department of Labor, finds: that 60 percent of all women 18 to 64 are in the workforce, that two-thirds of all those women are either the head of household or had husbands whose earnings were less than ten thousand dollars (\$10,000), and that most women are in the workforce because of economic needs; that the average working woman has earned less than the average working man, not only because of the lack of education and employment opportunities in the past, but because of segregation into historically undervalued occupations where wages have been depressed; and that a *failure to reassess*

366. *Id.* at 8, Table II.2. Nine of the twelve states using more than one system use different job evaluation systems for different types of positions. *Id.* at 9. Forty states use their primary system to evaluate administrative, clerical/secretarial, laborer, craftsperson, managerial, professional and technical positions. *Id.* at 8.

367. *Id.* at 7.

368. *Id.* at 10. Six states are considering implementation of a pay equity policy. *Id.* The accuracy of the states' information to the GAO is questionable. For example, ten states not including Nebraska reported the existence of a state pay equity policy. Yet, Nebraska has a statute which parallels other states' pay equity policies. See *infra* note 372 and accompanying text for text of Nebraska's pay equity statute; and see *infra* text accompanying notes 368-78 for text and discussion of state pay equity statutes.

369. PAY EQUITY STATUS, *supra* note 6, at 10.

370. *Id.* Of the 10 state pay equity or comparable worth policies, seven were established by legislation, two by administrative policy and one by executive order. *Id.*

*the basis on which salaries in state service are established will perpetuate these pay inequities, which have a particularly discriminatory impact on minority and older women; and, therefore, it is the intent of the Legislature in enacting this statute to establish a state policy of setting salaries for female-dominated jobs on the basis of comparability of the value of the work.*³⁷¹

Similar to the California statute, other state comparable worth policies explicitly acknowledge that pay disparities between men and women continue to exist in general and in state government in particular.³⁷² The statutes note that these disparities exist because of both overt sex discrimination and subtle biases which, although more difficult to recognize, inherently undervalue the work of women.³⁷³ Further, the statutes cite a statistical basis for their findings, including statistics from studies being conducted throughout the states.³⁷⁴ Finally, the statutes promote setting salaries by a standard of equal pay for jobs of comparable worth.³⁷⁵

371. CAL. GOV'T CODE § 19827.2(a) (West Supp. 1986) (emphasis added).

372. For example, Nebraska's pay equity statute recognizes the imperative to be free of discriminatory pay practices.

Discriminatory wage practices based on sex; policy.

(1) The practice of discriminating on the basis of sex by paying wages to employees of one sex at a lesser rate than the rate paid to employees of the opposite sex for comparable work on jobs which have comparable requirements:

- (a) Unjustly discriminates against the person receiving the lesser rate;
- (b) Leads to low worker morale, high turnover, and frequent labor unrest;
- (c) Discourages workers paid at the lesser wage rates from training for higher level jobs;
- (d) Curtails employment opportunities, decreases workers' mobility, and increases labor costs;
- (e) Impairs purchasing power and threatens the maintenance of an adequate standard of living by such workers and their families;
- (f) Prevents optimum utilization of the state's available labor resources; and
- (g) Threatens the well-being of citizens of this state, and adversely affects the general welfare.

(2) It is therefore declared to be the policy of this state through exercise of its police power to correct and, as rapidly as possible, to eliminate discriminatory wage practices based on sex.

NEB. REV. STAT. § 48-1219 (1984). See also MINN. STAT. ANN. § 43A.01(3) (West 1983); N.D. CENT. CODE § 34-06.1-01 (1980); OR. REV. STAT. § 240.190 (1983); WASH. REV. CODE § 41.06.155 (1986).

373. MINN. STAT. ANN. § 43A.01(3) (West 1983); NEB. REV. STAT. § 48-1219 (1984); N.D. CENT. CODE § 34-06.1-01 (1980); OR. REV. STAT. § 240.190 (1983); WASH. REV. CODE § 41.06.155 (1986).

374. MINN. STAT. ANN. § 43A.01(3) (West 1983); NEB. REV. STAT. § 48-1219 (1984); N.D. CENT. CODE § 34-06.1-01 (1980); OR. REV. STAT. § 240.190 (1983); WASH. REV. CODE § 41.06.155 (1986).

375. MINN. STAT. ANN. § 43A.01(3) (West 1983); NEB. REV. STAT. § 48-1219 (1984); N.D. CENT. CODE § 34-06.1-01 (1980); OR. REV. STAT. § 240.190 (1983); WASH. REV. CODE § 41.06.155 (1986).

While these state policies appear to provide the basis for a viable cause of action based on disparate impact, not on intent, they do not provide for a private cause of action. Further, any branch of state government can bar implementation of its state's pay equity statute. California provides an illustration of one branch of state government continuously thwarting legislative intent to implement the state's pay equity policy statute. In this state, the legislature enacted the policy in 1983.³⁷⁶ The legislature then appropriated funds for pay equity adjustments for state employees in 1984 and in 1985.³⁷⁷ Both legislative appropriations were vetoed by Governor Deukmejian who prefers "concession bargaining" to achieve pay equity.³⁷⁸ Moreover, Governor Deukmejian would require that both male and female employees abrogate some existing benefits, such as sick pay, to ensure that females receive pay commensurate with the value of their work. Although pay equity policy statutes may appear to commit the states to equal pay for women, they fail to provide women an enforceable right to equal pay.

3. State pay equity studies

The states have conducted three general categories of pay equity-related studies: (1) *data collection efforts*, which identified sex-based wage differences or occupational segregation by sex among state employees; (2) *job content pay equity studies*, which compared the pay of male and female job classes with comparable job evaluation scores; and (3) *economic pay equity studies*, which compared the pay of male and female employees with comparable individual characteristics, such as education or experience.³⁷⁹

The states have demonstrated substantial concern over the status of gender-based wage differences within their own borders by conducting voluminous pay equity-related studies. Yet, few results have flowed from the states' major investment of human and financial resources. Twenty-

376. CAL. GOV'T. CODE § 19827.2(a) (West Supp. 1986).

377. Budget Act of June 27, 1984, ch. 258; Budget Act of June 28, 1985, ch. 111. The California legislature is evaluating appropriation of funds for 1988 to establish a pay equity commission which would conduct a pay equity study of the state civil service classification and wage-setting system. SB 511. (1987). The Governor vetoed two similar bills, SB 2 and SB 1957. See Fact Sheet on SB 511, Hearing before Assembly Public Employees, Retirement and Social Security Committee (July 14, 1987) (available at Loyola of Los Angeles Law School library).

378. Governor's Message to the State Legislature Exercising Line Item Veto of Pay Equity Adjustments (June 27, 1984); Governor's Message to the State Legislature Exercising Line Item Veto of Pay Equity Adjustments (June 28, 1985). Telephone interview with Steve Cooney, Legislative Aide to Senator Roberti, President Pro Tem of the Senate (Aug. 12, 1987).

379. PAY EQUITY STATUS, *supra* note 6, at 11.

seven states conducted thirty-nine data collection studies of which twenty-nine demonstrated gender-based wage differences and twenty-eight found gender-based occupational segregation.³⁸⁰ Only six states implemented pay equity increases to correct pay on the basis of gender.³⁸¹ Further, twenty states conducted twenty-nine job content studies of which twenty exhibited gender-based wage differences.³⁸² Only five pay equity increases were implemented.³⁸³ Additionally, five states conducted five economic studies in which three exhibited sex-based pay differences.³⁸⁴ No pay equity increases resulted.³⁸⁵

The reasonable conclusion to be drawn from state pay equity studies parallels that of pay equity policies: while job classification studies may appear to stand for the states' commitment to achieving equal pay for women, they fail to provide women pay commensurate with the value of their work. Moreover, even when employers—the states—determine that they have historically paid or are currently paying women less than men to perform equal work *because* the work is performed by women, the states may continue the practice without risk of liability. Studies demonstrating gender-based wage differentials do not provide women an enforceable right to equal pay. Alternatively, state administrative and judicial decisions may require that employers pay women the same wages as men for comparable work.

D. State Judicial and Administrative Decisions

The majority of state judicial and administrative decisions have construed state FEP and EPA laws to provide no broader protection than the federal EPA or Title VII in gender-based wage discrimination claims. Alaska serves as an example of one state which has broadly construed its FEP law to include comparable worth claims.

1. Alaska: harbinger or deviate?

Alaska historically has supported wage-discrimination claims based on comparable worth. A 1979 case interpreting the Alaska EPA,³⁸⁶ now repealed and amended to the state FEP law,³⁸⁷ addressed comparable worth in the form of a unique job. In *Rinkel v. Associated Pipeline Con-*

380. *Id.* at 11-12.

381. *Id.* at 12.

382. *Id.* at 13.

383. *Id.*

384. *Id.* at 13-14.

385. *Id.* at 14.

386. For Alaskan EPA language, see *supra* note 344 and accompanying text.

387. ALASKA STAT. § 18.80.810 (1980).

tractors, Inc.,³⁸⁸ a female plaintiff alleged that the unique job she occupied would have been paid more had a male performed the work.³⁸⁹ The Alaska Superior Court allowed the plaintiff to pursue an equal pay claim which was not viable under the federal EPA.³⁹⁰ The federal law covers only similarly-situated jobs and plaintiff's job lacked a male counterpart.³⁹¹ The Alaska state court found the state statute provided for penalizing the employer for the wage differential it would have paid a male employee in the same position and concluded that Alaska's statute covers unique jobs.³⁹²

More recently, the Alaska State Commission of Human Rights has construed the Alaskan FEP statute³⁹³ to uphold a claim of gender-based wage discrimination based on work of "comparable character."³⁹⁴ The gravamen of the complaint in *Alaska State Commission of Human Rights ex rel. Bradley v. State of Alaska*³⁹⁵ was that the State of Alaska violated state law by paying its almost exclusively female Public Health Nurses (PHNs) less than its exclusively male Physician's Assistants (PAs) for work of comparable character.³⁹⁶ Considering the nurses' claim under a

388. 20 EPD 30,222 (Alaska Super. Ct. 1979).

389. *Id.* at 30,224. The job was unique because no one else performed the same or substantially similar work. The unique job was not named in the decision. *Id.*

390. *Id.* at 30,223.

391. *Id.* at 30,226.

392. *Id.* at 30,222.

393. ALASKA STAT. § 18.80.220(a)(5) (1981).

394. Alaska State Comm'n of Human Rights *ex rel. Bradley v. State*, No. D-79-0724-188-E-E (Alaska St. Comm'n on Hum. Rts. Jan. 29, 1986).

395. *Id.*

396. *Id.* at 1-2. The court stated that Public Health Nurses (PHNs) "are responsible for the promotion and preservation of wellness, the early detection of disease and the minimization of the disability of disease They focus on health concerns such as tuberculosis, maternal/child care, family planning, and venereal disease." *Id.* at 1. Further, the court noted that PHNs make home visits, conduct clinics at various locations and work in established health centers. *Id.*

[Physician's Assistants (PAs)] are the primary health care providers to inmates at the state's correctional facilities. They conduct sick call and physical examinations of the inmate population and are also available on an on-call basis. The PAs medically diagnose and treat the more straightforward medical abnormalities presented to them. They are also expected to identify those conditions outside of their competence and refer the patient to the appropriate specialist, while providing life-sustaining treatment in emergency situations until specialist care is available [They] work under the supervision of a physician, who is usually not present at the facility

Id. at 1-2.

These two job descriptions reflect biases in words used to capture job content. The female positions are descriptive, using nurturing, inactive words. They fail to describe the level of judgment exercised, supervision received and specific tasks performed. Conversely, the male jobs are described by action verbs specific in nature. They describe the level of independent judgment exercised and specific tasks in specific situations. Subjective biases are present in

disparate treatment theory, the Commission evaluated whether "PA and PHN job classifications [were] so similar in their requirements of skill, effort, responsibility and working conditions that it can reasonably be inferred that they are of comparable value to the employer."³⁹⁷ The Commission held that "if the character of the tasks is comparable, that is, if the evaluated worth of the two positions is essentially equivalent to the employer and one position is held by a female employee, the other by a male employee," the positions should receive the same wages.³⁹⁸

Interpreting the state FEP statute, the Commission found that a prima facie case of sex-based wage discrimination was established when:

- (1) the complainants are members of a protected class of female employees;
- (2) they occupy a sex-segregated job classification;
- (3) they are paid less than a sex-segregated job classification occupied by men; and
- (4) the two job classifications at issue are *so similar in their aggregate requirements of skill, effort, responsibility and working conditions that it can reasonably be inferred that they are of comparable value to the employer.*³⁹⁹

Both an independent job-evaluation expert and the Commission evaluated PHN and PA classifications using the *a priori*⁴⁰⁰ approach to job evaluation.⁴⁰¹ The Commission found that results of a job evaluation using this approach provided sufficient evidence to establish a prima facie case of comparable value between PHN and PA classifications.⁴⁰²

The Commission also found that a *policy-capturing*⁴⁰³ approach to job evaluation, which included the market as a factor, cannot rebut the showing of job comparability. "[W]e conclude that reliance on market rates to justify wage disparities, either in a direct sense or, as is presented here, through a job evaluation methodology expressly designed to perpetuate market wages, will not create a defense to a claim of wage discrimination"⁴⁰⁴ Accordingly, the Commission unilaterally rejected the market as the appropriate criterion to determine job worth because that rate reflects biases and operates to freeze the status quo of prior discrimi-

these descriptions and these biases apparently influenced grade and resultant pay level. *See supra* text accompanying notes 181-84.

397. *Bradley*, No. D-79-0724-188-E-E at 66.

398. *Id.* at 63.

399. *Id.* at 65 (footnote omitted) (emphasis added).

400. *See supra* text accompanying note 144.

401. *Bradley*, No. D-79-0724-188-E-E at 70.

402. *Id.*

403. *See supra* text accompanying note 145.

404. *Bradley*, No. D-79-0724-188-E-E at 75.

nation.⁴⁰⁵ The Commission found that job evaluation factors which measure job value determine job worth. The Commission also determined that its holding was consistent with the United States Supreme Court's decision in *Griggs v. Duke Power Co.*⁴⁰⁶ It used the *Griggs* opinion to support the proposition that market rates, although fair on their face, serve as a proxy to perpetuate historical and impermissible sex-based wage discrimination which has depressed women's wages.⁴⁰⁷

The Commission concluded that objective job evaluation techniques aimed at achieving pay equity were important tools for reducing sex-based wage discrimination in the Alaskan economy.⁴⁰⁸ It proffered that had "the state implemented a properly constructed, objective job evaluation system to determine the relative worth of these positions, the results of such an evaluation would be presumptively valid."⁴⁰⁹ Complainants would then have the burden to prove to the Commission that the comparability determination on the basis of objective methodology was invalid.⁴¹⁰ "Such proof could be made either by challenging the evaluation methodology employed by the state and producing independent comparability conclusions, or challenging the specific application of the State's chosen methodology to the job position at issue."⁴¹¹ Thus, had the State used an objective, bias-free job evaluation methodology as a defense, rather than the market, the nurses' burden would have been much greater than was presented in this case.

Alaskan statutory protection against wage discrimination extends

405. *Id.* at 78 (citing *McLean v. State*, 583 P.2d 867, 870-71 (Alaska 1978)).

406. *Id.* (citing *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971) (practices cannot be maintained if they operate to "freeze" the status quo of prior discrimination employment practices)).

407. The Commission noted that:

[D]iscrimination against women by their employers is responsible for much of the difference between wages paid to men and those paid to women. To allow an employer to simply point to the market as justification for a wage differential would undoubtedly perpetuate this latent discrimination. Reliance on market rates is particularly inappropriate for the state of Alaska—the largest employer in our state. It can hardly be refuted that in that role, *the state exerts a dominant influence in determining the market rates in the state. To then allow it to rely on such rates which it, in effect, had created, would clearly run counter to the goal of elimination of discrimination on account of sex within our state boundaries.*

Id. at 79 (footnote omitted) (emphasis added).

408. *Id.* at 93.

409. *Id.* at 76 (footnote omitted). The Commission found job evaluation techniques which the state used to classify the jobs and set the wages of state employees were inadequate. The non-quantitative state classification method established a number of classes or grades of jobs and then subjectively fit jobs into the classes. *Id.* at 65.

410. *Id.* at 76.

411. *Id.*

further than federal legislation and includes comparable worth theory.⁴¹² Notably, Alaska is the first state to construe comparable worth in its state law. Federal court decisions on the subject are inapposite.⁴¹³ Alaska focuses on job evaluation methodology as the basis for a gender-based wage discrimination claim. It suggests that a plaintiff's best approach is to challenge the employer's evaluation methods or their application and produce comparability conclusions independent of the employer's findings. Finally, Alaska rejects the market defense because of the market's inherent gender biases. Similar to Alaska, other states could capably construe comparable worth in their state statutes.

2. Other states' construction of state EPA and FEP laws

State judiciaries have arrived at results different from Alaska's when interpreting their state FEP and EPA laws in gender-based wage discrimination claims. The most recent interpretations of state EPA and FEP laws uphold pay differentials between men and women on the basis of defenses such as recruitment,⁴¹⁴ retention,⁴¹⁵ market,⁴¹⁶ merit pay,⁴¹⁷ employee morale⁴¹⁸ and red circle rates.⁴¹⁹ They strike down pay differentials based on cost.⁴²⁰ Essentially, the states' construction of their state laws parallel the federal courts' construction of the federal EPA and Title VII. Apparently then, state courts are not providing women any greater protection against wage discrimination than federal courts.

State activity in the comparable worth area has been substantial only in the form of pay equity studies, collective bargaining agreements and litigation. At the present time, Alaska is the only state to construe its statutory protections against wage discrimination to include comparable worth theory and extend its protections further than the other states and the federal courts. Most states already have statutes which provide their courts with explicit authority to confer greater protection against wage discrimination than is presently conferred on women. Fifteen states have EPA's with a comparable pay standard and forty-four states have FEP laws which contain specific language on compensation. Thus,

412. *Id.* at 92.

413. *See supra* text accompanying notes 233-322.

414. *Latona v. Department of State Civil Serv.*, 492 So. 2d 27 (La. App. 1986); *Smith v. Bull Run School Dist. No. 45*, 80 Or. App. 226, 722 P.2d 27 (Or. App. 1986).

415. *Latona*, 492 So. 2d 27.

416. *Bohm v. L.B. Hartz Wholesale Corp.*, 370 N.W.2d 901 (Minn. App. 1985).

417. *Smith*, 80 Or. App. 226, 722 P.2d 27.

418. *Adams v. University of Wash.*, 106 Wash.2d 312, 722 P.2d 74 (1986).

419. *Id.*

420. *Bureau of Labor and Indus. v. City of Roseberg*, 706 P.2d 956 (Or. App. 1985).

women bringing wage discrimination claims in either state or federal court could rely on existing state statutes to provide them pay commensurate with the value of their work. Accordingly, state laws could assume an increasingly more visible role to provide women an enforceable right to equal pay in the future.

While state courts may potentially confer greater civil rights on women than the federal judiciary, the need for federal governmental action cannot be ignored. "One of the great strengths of our federal system is that it provides a double source of protection for the liberties of our citizens. Federalism is not served when the federal half of that protection is crippled."⁴²¹ What appears necessary to achieve pay equity for women is a combination of federal and state action.

VI. LEGISLATIVE PROPOSAL

A. Federal Legislation Presently Proposed

In Washington, the political agenda on comparable worth did not end with the Kennedy Era,⁴²² but reemerged under the Carter Administration.⁴²³ During the Reagan Administration, the Equal Employment Opportunity Commission (EEOC) has asserted a narrow theory of gen-

421. BRENNAN, *supra* note 323, at 37.

422. *See supra* text accompanying note 189. Senator Hubert Humphrey also exemplified congressional commitment to female economic equality.

"It would be ironic indeed if [the Equal Pay Act,] a law triggered by a Nation's concern over centuries of [sexual discrimination] and intended to improve the lot of those who had been excluded from the American dream for so long" were to lead to the contraction of their rights under Title VII.

International Union of Elec. Workers v. Westinghouse Elec. Corp., 631 F.2d 1094, 1107 (3d Cir. 1980), *cert. denied*, 452 U.S. 967 (1981) (Higginbotham, J., dissenting) (quoting *United Steelworkers of America v. Weber*, 443 U.S. 193, 204 (1979) (quoting Sen. Humphrey, 110 Cong. Rec. 6552 (1964)) (alterations in Judge Higginbotham's opinion).

423. In 1980, the Office of Federal Contract Compliance Programs (OFCCP), the federal agency which monitors affirmative action programs of federal contractors, revised its affirmative action regulations to include comparable worth language. *See Pay Equity and Comparable Worth*, Special Rep. (BNA), at 43 (1984). Scheduled to become effective after the Reagan Administration took office in January 1981, the regulations were never implemented. *Id.* The Carter Administration's proposed revisions would have modified OFCCP guidelines § 60-20.5. *Id.* *See also Pay Equity: Equal Pay for Work of Comparable Value—Part I: Joint Hearings before the Subcomms. on Hum. Resources, Civ. Serv. Compensation and Employee Benefits of the House Comm. on Post Off. & Civ. Serv.*, 97th Cong., 2d Sess. 40 (1982) (statement of Eleanor Holmes Norton, Chairman, Equal Employment Opportunity Commission). *See, e.g.*, EEOC, HEARINGS BEFORE THE UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMM'N. ON JOB SEGREGATION AND WAGE DISCRIMINATION (Apr. 28-30, 1980); MANUAL ON PAY EQUITY: RAISING WAGES FOR WOMEN'S WORK (J. Grune ed. 1980); WOMEN, WORK, AND WAGES, *supra* note 6 (produced after EEOC commissioned study on comparable worth from the National Academy of Sciences (NAS)).

der-based wage discrimination for comparable jobs under Title VII,⁴²⁴ and the United States Commission on Civil Rights has concluded that "the implementation of the unsound and misplaced concept of comparable worth would be a serious error."⁴²⁵ The Reagan Administration also has dismissed comparable worth as a "cockamamie idea"⁴²⁶ and as "probably the looniest idea since Looney Tunes came on the screen."⁴²⁷ The executive branch's attack on comparable worth has not been limited to political dialogue, but has included political subterfuge involving overzealous tactics of the Watergate and Irangate genre.⁴²⁸ Conversely, the

424. Title VII, §§ 701-18; 42 U.S.C. §§ 2000e-2000e-17 (1982); 37 Fair Emp. Prac. Cas. (BNA) 1889, 1891 (1985).

425. 1 U.S. COMM'N ON CIV. RIGHTS, COMPARABLE WORTH: ISSUE FOR THE 80'S (1984) (1984 Commission conference on comparable worth). The Commission formally adopted this staff report one year later. UNITED STATES COMM'N ON CIV. RIGHTS, COMPARABLE WORTH: AN ANALYSIS AND RECOMMENDATIONS 70 (June 1985).

426. N.Y. Times, Aug. 17, 1985, at A7, col. 6 (quoting President Reagan).

427. N.Y. Times, Sept. 5, 1985, at A25, col. 6 (quoting Clarence Pendleton, Reagan-appointed chairman of the United States Commission on Civil Rights).

428. In a single memorandum, James L. Byrnes, Deputy Associate Director of the Office of Personnel Management (OPM), left the Reagan administration open to charges of political chicanery and violations of the Hatch Act.

If the Oakar Bill passes, it would be a tremendous opportunity for OPM to develop a *real* comparable worth system, and show how preposterous it would be. . . . [A] little more irrationality wouldn't hurt that much. But it would show a clear picture to the private sector about how ridiculous the concept of comparable worth is, and that in fact it is only job discrimination. . . .

The political possibilities of this situation should not be underestimated. By doing job evaluation across clerical and blue collar occupations, a comparable worth study would immediately divide the white collar and blue collar unions. This would not be limited to those in the Government, . . . but it would also directly affect the private sector unions. Since our occupational standards are often applied outside Government, private sector unions could not afford to let the Government go too far. The blue collar craft union would especially be concerned, since they would be the inevitable losers in such a comparable worth adjustment process. Moreover, the unions would be pitted against the radical feminist groups and Oakar to manipulate the Administration on the gender issue, we could create disorder within the Democratic House pitting union against union and both against radical feminist groups.

This situation presents opportunities that we should not ignore. Of course, it is a dangerous course, but it might change the nature of the whole debate on comparable worth.

Memorandum from James L. Byrnes, Deputy Director of the Office of Personnel Management to Donald J. Devine, Director, *reprinted in Federal Pay Equity Act of 1984: Part 2, Hearings on H.R. 4599 and H.R. 5092 Before the Subcomm. on Compensation and Employee Benefits of the Comm. on Post Off. and Civ. Serv.*, 98th Cong., 2d Sess. 3 (1984).

Dr. Donald Devine, Director of the Office of Personnel Management, took the first step in implementing this memorandum by holding a meeting on May 22, 1984 with representatives of the half-million federal blue collar union workers. Devine warned the unions that some of their members might suffer if the pay equity bill before the House were enacted into law. *Id.* at 4, 6.

Speaking of the Byrnes and Devine activities, George Hobt, director of pay and classification of the American Federation of Government Employees, commented:

I think it is a sorry commentary on our system, that . . . this administration is so

Democratic Party has continued its endorsement of the comparable worth theory in its platform and most Democrats and some Republicans have endorsed comparable worth in Congress.⁴²⁹ Since the Democrats constitute the majority in the 100th Congress, comparable worth theory may become the law.⁴³⁰

1. H.R. 387⁴³¹ & S. 552⁴³²: a pay equity study
of the federal work force

The 100th Congress is examining H.R. 387, the "Federal Equitable

morally bankrupt to come up with an individual in a position of responsibility that would propose destroying or damaging the pay systems and the livelihood of 2 million Federal workers all in a ploy to defeat a piece of legislation that represents a first step in attempting to provide a fair day's pay for a fair day's work for the 45 million working women in this country. . . . The arrogance shows and the worst thing would be to attempt to implement and so misjudge the solidarity of Federal unions and unions in general. We may not be the smartest people in the world, but we didn't just come into this town on a load of squash either

Id. at 51.

Further, an AFL-CIO official noted that "[T]his obvious political activity on the part of Mr. Byrnes, a high-ranking official of the Office of Personnel Management, is a clear violation of the Hatch Act. The conduct of Mr. Devine . . . [is also] a Hatch Act violation." *Id.* at 53.

429. "We will insist on pay equity for women The Democratic Party defines nondiscrimination to encompass both equal pay for equal work *and* equal pay for work of comparable worth, and we pledge to take every step, including enforcement of current law . . . to close the wage gap." THE REPORT OF THE PLATFORM COMMITTEE TO THE 1984 DEMOCRATIC NATIONAL CONVENTION 32 (1984). See also *Options for Conducting a Pay Equity Study of Federal Pay and Classification Systems—Report of the General Accounting Office: Hearings Before the Subcomm. Civil Service, Post Office, and General Services of the Comm. on Governmental Affairs*, 99th Cong., 1st Sess. (May 22-23, July 24-25, 1985); *Options for Conducting a Pay Equity Study of Federal Pay and Classification Systems: Hearings Before the Subcomm. on Compensation and Employee Benefits of the Comm. on Post Office and Civil Service*, 99th Cong., 1st Sess. (Mar. 28, Apr. 4, May 2, May 30 and June 18, 1985); *Federal Pay Equity Act of 1984: Parts I & II, Hearings on H.R. 4599 and H.R. 5092 Before the Subcomm. on Compensation and Employee Benefits of the Comm. on Post Office and Civil Service*, 98th Cong., 2d Sess. (Apr. 3-4, May 30, July 17, Oct. 18, 1984); *Pay Equity: Equal Pay for Work of Comparable Value, Parts I & II, Joint Hearings Before the Subcomms. on Human Resources, Civil Service, Compensation*, 97th Cong., 2d Sess. (1982).

430. See 133 CONG. REC. S2383 (daily ed. Feb. 23, 1987) (statement of Sen. Cranston).

431. H.R. 387, 100th Cong., 1st Sess. (1987). Representative Mary Rose Oakar (D-Ohio) introduced H.R. 387, the *Federal Equitable Pay Practices Act of 1987* to the 100th Congress on January 6, 1987, with 47 co-sponsors. 133 CONG. REC. E32 (daily ed. Jan. 7, 1987) (statement of Rep. Oakar). Rep. Oakar introduced and the House passed similar legislation during the 98th Congress, H.R. 5680, *The Federal Pay Equity and Management Improvement Act of 1984*, and during the 99th Congress, H.R. 3008, *The Federal Equitable Pay Practices Act of 1984*. *Id.*; *Pay Equity and Comparable Worth*, A BNA SPECIAL REPORT at 53 (1984) [hereinafter BNA SPECIAL REPORT].

432. S. 552, 100th Cong., 1st Sess. (1987). Senator Daniel Evans (R-Wash.) introduced S. 552, the *Federal Employee Compensation Equity Study Commission Act of 1987*, to the 100th Congress on February 19, 1987, with 23 co-sponsors. 133 CONG. REC. S2239 (daily ed. Feb. 19, 1987). Almost one-third of the Senate had joined in co-sponsoring S. 552 two months after

Pay Practices Act of 1987,"⁴³³ and S. 552, "The Federal Employee Compensation Equity Study Commission Act of 1987,"⁴³⁴ which require a pay equity study of the entire federal job classification and wage-setting system.⁴³⁵ Pay equity is "the notion that individuals will be paid fairly for their work, regardless of their sex, race, or ethnic heritage."⁴³⁶ Sena-

its introduction. *Federal Employee Compensation Equity Act of 1987: Hearings on S. 552 Before the Subcomm. on Federal Services, Post Office, and Civil Service Senate Committee on Governmental Affairs*, 100th Cong., 1st Sess. (Apr. 22, 1987) (statement of Sen. Cranston). Senator Evans introduced similar legislation to the 98th Congress, S. 83. BNA SPECIAL REPORT, *supra* note 431, at 53. Senator Daniel Evans sponsored and Senator Alan Cranston (D-Cal.) co-sponsored S. 519, the *Federal Employee Anti-Sex Discrimination in Compensation Act of 1985*, in the 99th Congress. S. 519, 99th Cong., 1st Sess. (Feb. 27, 1985). Senator Cranston introduced S. 5, the *Pay Equity Act of 1987*, to the 100th Congress on January 6, 1987, which provides in part for a pay equity study of the federal classification and wage-setting system. 133 CONG. REC. S173 (daily ed. Jan. 6, 1987) (statement of Sen. Cranston); see *infra* text accompanying notes 450-63.

433. H.R. 387, 100th Cong., 1st Sess. § 1 (1987).

434. S. 552, 100th Cong., 1st Sess. (1987).

435. This detailed legislation is not a novel idea, but is the result of extensive information compiled through bi-partisan congressional hearings initiated in 1982 and continued through 1986. See *supra* notes 429 and 432 and accompanying texts for congressional hearings on pay equity. Furthermore, both houses of Congress have introduced similar legislation since 1983. For a synopsis of comparable worth legislation which has been presented to the Congress, and its subsequent history, see BNA SPECIAL REPORT, *supra* note 431, at 53.

See generally General Accounting Office, B-217675 App. II (July 29, 1986) for an in-depth discussion of the statutory and judicial authority for the proposed legislation. "The classification principles expressed in 5 U.S.C. Chapter 51 are similar to the Equal Pay Act insofar as 5 U.S.C. § 5101(1)(A) requires 'equal pay for substantially equal work.'" *Id.* at 3. "[T]he Equal Pay Act does not require equal pay for dissimilar jobs of equivalent value. In contrast . . . 5 U.S.C. Chapter 51 . . . contain[s] language which strongly indicates that an objective of the General Schedule system is to align pay with job worth." *Id.* at 7 (citing 5 U.S.C. § 5102(a)(5); § 5104; § 5101(1)(B)). "[P]rinciples expressed in 5 U.S.C. Chapter 51 are broader than the Equal Pay Act's requirement of 'equal pay for equal work' . . . they reflect [the] . . . tenet [that] . . . the worth of a position, measured in terms of its duties and responsibilities, should determine . . . pay" *Id.* at 6. "[I]mplementation of 5 U.S.C. Chapter 51 should result *not only in equal pay for equal work, but also in (1) equal pay for different work which is valued equally in terms of difficulty, responsibility and qualification requirements, and (2) proportionate pay for work that differs in value.*" *Id.* at 8 (emphasis added).

"[T]he Supreme Court has held that the principle of 'equal pay for substantially equal work' stated in 5 U.S.C. § 5101(1)(A) does not vest individual employees with an entitlement to backpay for a period of wrongful classification." *Id.* at 5 (citing *United States v. Testan*, 424 U.S. 392, 398-405 (1976)). Furthermore, 5 U.S.C. § 5101(1)(A) has been construed to allow reducing the wage rates of employees who are reclassified in order to conform with the equal pay requirements of that section. *Id.* at 6 (quoting *Haneke v. Secretary of Health, Educ. & Welfare*, 535 F.2d 1291, 1299 (D.C. Cir. 1976)). Such a reduction is specifically prohibited under the Equal Pay Act. *Id.* Proposed legislation also prohibits this latter option. H.R. 387, 100th Cong., 1st Sess. § 7(c)(3).

436. 133 CONG. REC. E32 (daily ed. Jan. 7, 1987) (statement of Rep. Oakar introducing H.R. 387).

tor Daniel Evans (R-Wash.) introduced S. 552 to the Senate with an explanation of its underpinnings and purpose:

The public policy concern underlying this study is the same as it was in 1938 when Congress passed the Fair Labor Standards Act. It is the same as it was in 1963 when the Equal Pay Act was enacted and it is the same as it was when title VII of the Civil Rights Act was passed in 1964. The only thing new about the issue is that in 1986 we call it "comparable worth" or "pay equity." But our express objective has not changed—the elimination of unfair practices in the workplace based on race, sex and ethnicity.⁴³⁷

When introducing the proposed legislation to the House, H.R. 387, endorsed by forty-seven co-sponsors, Representative Mary Rose Oakar (D-Ohio) stated that existing federal pay and classification systems are anachronistic and potentially discriminatory:

The Federal Pay and classification systems were developed over half a century ago, at a time when classified ads listed jobs as "Help Wanted-Male" and "Help Wanted-Female." We need to reexamine our federal pay and classification practices, therefore, to see if they need updating to conform with Fair Pay Laws.

The Federal Equitable Pay Practices Act of 1987 mandates a study of the federal pay and classification systems to determine whether they are marred by illegal discrimination

. . . [W]ithin the federal workforce, a pay gap of nearly \$12,000 exists between the annual salaries of male and female employees. Furthermore, . . . most female federal employees are clustered in the lowest-paying occupations

. . . .

. . . [A]lready *all fifty states* have begun examining the issue of sex-based discrimination within their own government pay systems, either through studies, collective bargaining, or legislation. As an employer and as the defender of civil rights in this nation, the federal government must now address the issue of pay equity among its own employees. We must make certain that our pay practices continue to conform to national laws guaranteeing protection from discrimination. . . .

. . . It is imperative that our federal government be free of

437. 133 CONG. REC. S2239 (daily ed. Feb. 19, 1987) (statement of Sen. Evans).

any discriminatory practices that violate our laws and sap the morale and productivity of employees.⁴³⁸

The purpose of H.R. 387 and S. 552⁴³⁹ is to determine whether the federal government's job classification and prevailing rate systems comply with Title V, the EPA and Title VII of the Civil Rights Act of 1964.⁴⁴⁰ Moreover, the government would evaluate whether sex, race and ethnicity are among the factors determining the rate of pay for any federal employee or position.⁴⁴¹ Specifically, the bills provide for a study to determine if the wages paid in predominantly female and minority positions are lower than the position skill, effort, responsibilities, difficulty or qualifications required by the work performed.⁴⁴²

H.R. 387 and S. 552 establish a Commission⁴⁴³ to select and oversee

438. 133 CONG. REC. E32 (daily ed. Jan. 7, 1987) (emphasis added) (statement of Rep. Oakar introducing H.R. 387).

439. S. 552 states that its purpose is

[t]o determine whether distinction between rates of basic pay for Federal jobs in executive agencies of the United States Government reflect substantial differences in the duties, difficulty, responsibility, and qualification requirements of the work performed, in accordance with sections 5101 and 5341 title 5, United States Code, and are not based on considerations of sex, race, or national origin, the Commission will provide, by contract with the consultant selected pursuant to section 9, for—

(1) the conduct of a study of classification, grading, and pay-setting processes within and between the position—classification system chapter 51 of such title and the job—grading system under subchapter IV of chapter 53 of such title, using standard subjective job—evaluation and economic analysis techniques, to determine whether the development or implementation of these processes result in the payment of rates of basic pay for positions in which either sex is numerically predominant or any race or ethnic group is disproportionately represented that are not in proportion to the duties, difficulty, responsibility, and qualification requirements of the work performed; and

(2) the preparation and submission of a report containing the findings of such study, including a list of any such positions and the extent of the differences in the rates of pay in such cases.

S. 552, 100th Cong., 1st Sess. § 4(a). H.R. 387 states:

[T]he purpose of this Act [is] to determine (1) whether the Government's position-classification system under chapter 51 of title 5, United States Code, and prevailing-rate system under subchapter IV of chapter 53 of such title, are designed and administered in a manner consistent with the general policy, as expressed in title VII of the Civil Rights Act of 1964 and section 6(d) of the Fair Labor Standards Act of 1938, that sex, race, and ethnicity should not be among the factors considered in determining the rate of pay payable to any individual or for any position . . .

S. 552, 100th Cong., 1st Sess. § 2(a).

440. H.R. 387, 100th Cong., 1st Sess. § 2; S. 552, 100th Cong., 1st Sess. §§ 4(a), 10.

Nothing in this Act may be construed to limit or expand any of the rights or remedies provided under the Civil Rights Act of 1964, section 6(d) of the Fair Labor Standards Act of 1938, or any other provision of law relating to discrimination on the basis of race, color, religion, sex, national origin, handicap, or age.

S. 552, 100th Cong., 1st Sess. § 10.

441. H.R. 387, 100th Cong., 1st Sess. § 2(a); S. 552, 100th Cong., 1st Sess. § 4(a).

442. H.R. 387, 100th Cong., 1st Sess. § 7(b); S. 552, 100th Cong., 1st Sess. § 4(a).

443. H.R. 387, 100th Cong., 1st Sess. § 3(a); S. 552, 100th Cong., 1st Sess. § 3. The Com-

a consultant who would conduct a job evaluation study utilizing both job content *and* economic analyses.⁴⁴⁴ The study would focus on “a representative sample of occupations in which either sex is numerically predominant, any race is disproportionately represented, or either ethnic group is disproportionately represented.”⁴⁴⁵ The consultant would compare jobs on an intraagency and interagency basis, and within and between the several federal job classification systems.⁴⁴⁶ Finally, the bills would require the consultant and Commission to report their findings and recommendations, which would be advisory in nature, to both the House and the Senate.⁴⁴⁷ During the 98th and 99th Congresses, the House of Representatives passed similar pay equity legislation which stalled in the Senate Committee on Governmental Affairs.⁴⁴⁸ Yet, representatives from both Houses of Congress proffered that their bills would be voted out of committee for floor debate during 1987.⁴⁴⁹

2. S. 5:⁴⁵⁰ a pay equity program for federal contractors

During the 100th Congress, Senator Cranston (D-Cal.) introduced S. 5, The Pay Equity Act of 1987,⁴⁵¹ which includes a pay equity study of the federal workforce in a pay equity proposal more expansive than H.R. 387 or S. 552 as it would reach into the private sector.⁴⁵² When introducing S. 5, Senator Cranston noted that:

[D]iscrimination against female employees has persisted despite applicable State and Federal laws and directives and court decisions outlawing gender-based wage discrimination.

mission would be composed of appointees by the President, by the House, by the Senate and by the Director of the Office of Personnel Management (union representatives). H.R. 387, 100th Cong., 1st Sess. § 3(b); S. 552, 100th Cong., 1st Sess. § 6(a)(1).

444. H.R. 387, 100th Cong., 1st Sess. §§ 5(b), 6(a); S. 522, 100th Cong., 1st Sess. §§ 9(c), 4(a)(1) (1987).

445. H.R. 387, 100th Cong., 1st Sess. § 6(a); S. 522, 100th Cong., 1st Sess. § 4(a)(1) (1987).

446. H.R. 387, 100th Cong., 1st Sess. § 6(b); S. 522, 100th Cong., 1st Sess. § 4(a)(1) (1987).

447. H.R. 387, 100th Cong., 1st Sess. §§ 7(a), 7(b), 7(c), 8(b) (1987); S. 522, 100th Cong., 1st Sess. §§ 5(b), 5(e) (1987).

448. Telephone interview with Curtis Copeland, General Accounting Office, Azar Kattan, Congressional Caucus for Women's Issues, and legislative assistants to: Sen. Cranston—Barbara Masters; and Sen. Evans—Lisa Marchese (Dec. 16, 1986).

449. Telephone interviews with minority Staff Director for the Senate Subcomm. Civil Service, Post Office, and General Services of the Comm. on Governmental Affairs Jeff Landry, majority Staff Director for Comm. on the Senate Governmental Affairs Comm., Ed Gleiman (Aug. 5, 1987), and Public Relations Director for Rep. Oakar, Joe Grimes (Aug. 12, 1987).

450. S. 5, 100th Cong., 1st Sess. (1987). Senator Alan Cranston (D-Cal.) introduced similar bills, S. 1900, *The Pay Equity Act of 1983*, and S. 5, *The Pay Equity Act of 1985*, to the 98th and 99th Congresses respectively.

451. *Id.*

452. *Id.* §§ 5, 6. See *infra* text accompanying notes 460-63.

Unfortunately, the existence of these laws and court decisions has not been translated into elimination of these unlawful practices. What is clearly needed is a strong national commitment to ending once and for all the practice of paying certain employees lower wages because those employees are female.⁴⁵³

The stated purpose of S. 5 is "[t]o require the executive branch to enforce applicable equal employment opportunity laws and directives so as to promote pay equity by eliminating wage-setting practices which discriminate on the basis of sex, race, ethnicity, age or disability, and result in discriminatory wage differentials."⁴⁵⁴ The bill establishes the existence, discriminatory causes and impact of the earnings gap between male and female workers and the failure of federal agencies to enforce applicable, enacted laws and directives.⁴⁵⁵

S. 5 also recognizes that objective job evaluation techniques utilizing job content and economic analyses are necessary for elimination of discriminatory wage-setting practices and differentials.⁴⁵⁶ Further, it requires equal pay for work of comparable value.⁴⁵⁷ The bill directs the federal agencies responsible for enforcement of federal equal employment opportunity laws, specifically the EEOC, to research, develop and disseminate to public and private sector employers equitable job evaluation and wage-setting techniques.⁴⁵⁸ The bill encourages public and private employers to use equitable, objective job evaluation techniques to eliminate discriminatory wage-setting practices and differentials.⁴⁵⁹ S. 5 would ensure that employers *not* utilizing such techniques will be subject to an indefensible position with their employees and, possibly, the courts.

Finally and most significant for its reach into the private sector, S. 5 would require all federal contractors to identify and eliminate discriminatory wage-setting practices and differentials.⁴⁶⁰ Federal contractors would be required to submit written affirmative action plans identifying

453. 133 CONG. REC., S173 (daily ed., Jan. 6, 1987).

454. S. 5, 100th Cong., 1st Sess. § 1. See generally 131 CONG. REC. S595 (daily ed. Jan. 24, 1985) for an extensive discussion of the EEOC's failure to enforce Title VII under the Reagan Administration.

455. S. 5, 100th Cong., 1st Sess. § 2(a). S. 5 specifies that these discriminatory practices "prevent[] full utilization of the talents, skills, experience, and potential contributions [of female workers] and result in the exploitation of those workers." *Id.* § 2(a)(5).

456. *Id.* § 2(a)(9), -(b)(1).

457. *Id.*

458. *Id.* §§ 2(b)(2)-(3), 4. To ensure EEOC compliance, Congress would require the EEOC to report to the President and Congress on its activities for achieving the purposes of the proposed Act. *Id.* § 4(c).

459. *Id.* § 2(b)(2)-(3), § 4.

460. *Id.* § 5(a)(1).

their discriminatory wage-setting practices and a plan of action to correct such discrimination.⁴⁶¹ The potential impact of this provision parallels that of Executive Order 11,246;⁴⁶² it could bring comparable worth theory into the private sector. If enacted, S. 5 would establish explicit congressional support for comparable worth theory.⁴⁶³

3. Arguments for and against federal study legislation

H.R. 387 and its Senate counterpart S. 552 (the legislation) propose a pay equity study of federal job classifications.⁴⁶⁴ Among those who oppose the proposed legislation, Senator Orrin Hatch acknowledges the residual disparity between male and female wages. He argues, however, that the remedy of a pay equity study would create dire consequences:

[P]ay rates for these jobs would not relate to their value in the labor market. Instead, the rates would be determined by a court or a bureaucratic pay board.

There are obvious problems with this approach. First, it would perpetuate the notion that there are male jobs and female jobs. One of the objectives of our civil rights laws is to eliminate the inflexible stereotype of "women's work." Second, it would treat the employer's reliance on the market as discriminatory, even though the courts have uniformly endorsed this practice. And third, it would eliminate the ability of employers or the collective bargaining process to control wage determinations. Instead, responsibility for wage assignments would ultimately lie with the government.

. . . .

The federal government should not be in the business of assigning wage rates or choosing evaluation systems. Nor should the government be penalizing employers because of the occupational choices of employees.⁴⁶⁵

Senator Jesse Helms urged his colleagues to vote against the "comparable worth legislation."

The studies required by this bill *cannot* demonstrate the

461. *Id.* § 5(a)(1)(B).

462. *See supra* text accompanying note 353.

463. S. 5 was referred to the Committee on Governmental Affairs. S. 5, 100th Cong., 1st Sess. § 1.

464. S. 5 also proposes a study of federal jobs. *See supra* text accompanying note 452.

465. Letter from Sen. Orrin Hatch to Gail Kaplan (Aug. 13, 1987) (available at Loyola of Los Angeles Law School library).

existence of discrimination. Nevertheless, the bill will misuse the comparable worth concept for just such a purpose.

. . . .

[T]he bill creates a house of cards: a subjective job study that cannot define the worth of a job and an economic analysis which cannot explain all of the reasons for differences in pay between two allegedly "comparable" jobs.

. . . .

The bill establishes far more than an "advisory" study. . . . [A]ny federal judge can admit these studies into evidence in a class-action lawsuit if the judge chooses to do so. No "advisory" language in the bill can govern the co-equal judicial branch.

. . . .

The bill, as described, makes selective reference to federal pay principles to support its misguided approach to paysetting. . . . [I]f these studies "find" pay discrepancies—as they are calculated to do—their misuse by plaintiffs in class-action lawsuits seeking back-pay under Title VII of the Civil Rights Act raises the very real spectre of a massive recovery, as occurred at the District Court level in the *Washington State* case.⁴⁶⁶

Opponents argue that "[a]lthough the legislation ask[s] for merely a 'study,' studies have consistently been used as triggers for litigation in the states and localities which have begun them."⁴⁶⁷ Consequently, they fear that the courts will use the study to subject the federal government to liability for discrimination.⁴⁶⁸ Opponents thus contend that while the

466. Letter from Sen. Jesse Helms to "Colleagues" (Oct. 2, 1986) (arguing against S. 519). Sen. Helms also opposed expansion of the proposed study to race and ethnicity.

The Evans/Cranston comparable worth study adds race and ethnicity to sex as criteria by which to compare jobs. These "analyses," of course, can no more show race and ethnic discrimination in pay than they can show sex discrimination in pay. These additional criteria, however, are sure to increase the ultimate cost of this concept to the taxpayer.

Id.

467. Chamber of Commerce handout on S. 519 (available at Loyola of Los Angeles Law School library).

468. *Id.* See also Letter from Sen. Jesse Helms to "Colleagues" (Oct. 2, 1986) (arguing against S. 519); V. LAMP, COMPARABLE WORTH IS NOT ABOUT PAY EQUITY 2 (Cong. Action Special Rep. May 10, 1985) [hereinafter V. LAMP, COMPARABLE WORTH]. "General Accounting Office . . . report . . . suggests that an employer who commissions a pay-equity study for informational purposes may be legally bound by the results, even if the employer lacks confidence in the study's methodology." S. KONDRATAS, H.R. 3008: MISLEADING ADVERTISING FOR COMPARABLE WORTH (The Heritage Found. Issue Bull. No. 117, July 25, 1985) [hereinafter S. KONDRATAS].

bills are limited to a comparable worth study of the *public* sector, the implications for the *private* sector have not been fully appreciated.⁴⁶⁹

Opponents argue further that proponents of comparable worth legislation make three faulty assumptions: "(a) that wage gaps can be equivalent to gender discrimination; (b) that each job has a measurable economic worth which can be determined free of bias; and (c) that different jobs can be objectively compared."⁴⁷⁰ In essence, opponents argue that while the study may provide evidence that the existing pay system is not consistent with one consultant's assessment of comparable worth, such a finding cannot establish that the existing system is discriminatory.⁴⁷¹ Further, they contend a study cannot override the legitimate market forces of supply and demand.⁴⁷² Opponents argue that job evaluation is an imprecise art and no scientific or objective means exist to evaluate job worth except the free market.⁴⁷³ Furthermore, they claim that job evaluation was never intended for use outside of or apart from market considerations, and such an application could result in job losses from the increased labor costs to marginal businesses.⁴⁷⁴ Opponents claim implementation of the proposed legislation would be granting the comparable worth theory official congressional approval.⁴⁷⁵ They state that the study of federal job classifications could result in enormous costs to taxpayers.⁴⁷⁶ Opponents also fear that legislatures will use study re-

469. See *id.* at 1, 5-6; V. LAMP, *COMPARABLE WORTH*, *supra* note 468, at 1-2.

470. Chamber of Commerce handout on S. 519 (available at Loyola of Los Angeles Law School library).

471. L. KESSLER & J. MCGUINNESS, LABOR POLICY ASSOCIATION, INC. ON S. 519, 1-2 (Apr. 9, 1986) (available at Loyola of Los Angeles Law School library) [hereinafter LABOR ASSOCIATION]. See also Letter from Albert D. Bourland, Vice President of Congressional Relations of the Chamber of Commerce to Senators who voted "yes" on Comparable Worth (Sept. 18, 1986) (available at Loyola of Los Angeles Law School library).

472. LABOR ASSOCIATION, *supra* note 471, at 3.

473. 10 AMERICAN LEGIS. EXCHANGE COUNCIL, *COMPARABLE WORTH: "WOMEN'S ISSUE" OR WAGE CONTROLS?*, No. 5 at 9 [hereinafter EXCHANGE COUNCIL].

474. V. LAMP, *COMPARABLE WORTH*, *supra* note 468, at 4.

475. *Federal Employee Compensation Equity Act of 1987: Hearings on S. 552 Before the Subcomm. on Federal Services, Post Office, and Civil Service Senate Committee on Governmental Affairs*, 100th Cong., 1st Sess. (April 22, 1987) (statement of Bobbi Thompson, President, Aviation Sales, accompanied by Virginia Lamp, Labor Relations Attorney for the United States Chamber of Commerce) (available at Loyola of Los Angeles Law School library).

476. One United States Chamber of Commerce official termed the measure "an outrageous waste of taxpayers' money, capable of costing up to \$8 billion and inevitably triggering litigation." United States Chamber of Commerce, Press Release No. 85-242, House Passage of Comparable Worth Study Assailed by U.S. Chamber Official (Oct. 10, 1985) (available at Loyola of Los Angeles Law School library). See also V. LAMP, *COMPARABLE WORTH*, *supra* note 468, at 1 (stating that the minimal cost to taxpayers would be \$6.6 billion). Further, opponents argue that while the statute governing federal job classifications—title 5 of the United States Code—does not allow potential plaintiffs the remedy of backpay for a period of

sults to determine pay increases.⁴⁷⁷ Nonetheless, an employer coalition proffers that:

[T]he public interest in sound employment programs demand a rejection of the rationale that any job evaluation study which suggests a different scheme of values must be implemented. [E]qual opportunity and affirmative action programs are well served by a continued willingness on the part of employers to examine new approaches and new ideas. Inherent in such a process, however, is that while some new approaches may be adopted, others necessarily are going to be rejected. Not every "study" can be expected to produce alternatives that are better than existing practices.⁴⁷⁸

Senator Evans stated that S. 552 was not designed to implicate Title VII but to determine whether the federal pay system is achieving title 5 objectives—equal pay for different work valued equal and proportionate pay for work that differs in value.⁴⁷⁹ In response to adversaries' opposition to job evaluation, Senator Evans argues that:

Job evaluation was born in the private sector and has been used there for years. Today, it is not surprising that many companies have incorporated the concept of pay equity within their job evaluation systems and find it easily done.

wrongful classification, this fact does not eliminate the federal government's potential exposure to backpay litigation. *See supra* note 435.

Opponents also argue that these studies will change existing law without legislating the change directly. "Comparable worth is not existing law. Equal opportunity is the law. Equal pay for equal work is the law." V. LAMP, COMPARABLE WORTH, *supra* note 468, at 1. *See also* S. KONDRATAS, *supra* note 468. "[T]his bill seeks to change existing law While seemingly calling for an innocent 'study,' it significantly redefines discrimination and alters the evidence needed to prove discrimination. The new definitions are based squarely on the theory of comparable worth . . ." *Id.* at 1; "Comparable worth legislation proposes to change sharply the law . . . by eliminating the need for proof of intentional discrimination and by declaring that discrimination can be demonstrated by merely showing the existence of a difference in pay." V. Lamp, Statement of the United States Chamber of Commerce to the Subcommittee on Post Office, Civil Service and General Services of the Senate Governmental Affairs Comm., at 9 (May 22, 1985) (emphasis deleted). Conversely, substantial evidence suggests that title 5 as applied to federal employee job classifications supports a contrary position. *See supra* note 435 and accompanying text.

477. V. LAMP, COMPARABLE WORTH, *supra* note 468, at 2.

478. Brief Amicus Curiae of the Equal Employment Advisory Council at 19, *American Nurse's Ass'n v. State of Illinois*, 783 F.2d 716 (7th Cir. 1986) (No. 85-1766). The Council's membership includes individual employers as well as national trade and industry associations which have hundreds of employer members. *Id.* at 1-2.

479. *Federal Employee Compensation Equity Act of 1987: Hearings on S. 552 Before the Subcomm. on Federal Services, Post Office, and Civil Service Senate Committee on Governmental Affairs*, 100th Cong., 1st Sess. (April 22, 1987) (statement of Sen. Evans).

According to these skeptics, job evaluation is also subjective; therefore, inherently unreliable. This characterization is misleading at best. GAO found that job content analysis could be used responsibly and effectively as a measuring stick of the relative worth of various jobs. It went on to make some constructive suggestions on how to use this method most fairly. . . .

Economic analysis can be valid in exposing some of the abnormalities and distortions present in the external marketplace which may account for some of the wage differential between occupations. The internal alignments of the some 7,000 job types within the federal classification system, however, can best be examined by using job-content analysis.⁴⁸⁰

The senator added that the proposed study of the federal workforce does not start with the conclusion that discrimination exists but would be conducted to ascertain if a problem exists.⁴⁸¹ He noted that even if misclassifications are found, the federal government could not be held liable for discrimination under existing law for two reasons: no federal court has allowed the results of an employer study alone to establish a prima facie case of discrimination and backpay is not an available remedy.⁴⁸²

Senator Cranston, a co-sponsor of S. 552, stated that its purpose is to study the federal classification, grading and pay-setting practices "to determine whether the wages paid in positions in which women or minorities are disproportionately represented are lower than the responsibilities, duties, difficulty or qualification requirements of the work performed."⁴⁸³ He noted that the scope of the study and the methodologies utilized, both a job content and an economic analysis, "can provide a clearer understanding of how federal wages are set and would be less susceptible to charges that important explanatory variables have been ignored."⁴⁸⁴

Proponents of public sector initiatives agree with opponents that the pay equity study of federal jobs is a springboard for implementing equitable wage-setting practices in the private sector. One proponent testified before Congress' Joint Economic Committee that many public and private employers model their wage practices on the federal government⁴⁸⁵

480. *Id.*

481. *Id.*

482. *Id.*

483. *Id.* (statement of Sen. Cranston).

484. *Id.*

485. EXCHANGE COUNCIL, *supra* note 473, at 2 (testimony by Winn Newman, attorney

and industry will have to respond in the marketplace.

Proponents explain that the United States Code requires that federal job classifications and wages be based on comparable worth and a pay equity study would determine whether this purpose is being achieved, or whether predominantly female and minority occupations are undervalued.⁴⁸⁶ They contend that the proposed legislation makes no assumptions about the existence of discrimination in federal compensation and a study of the federal pay system should provide information about the causes of the pay gap.⁴⁸⁷ Proponents argue that if unexplained differences in compensation exist, those differences are not unreasonably assumed the result of unlawful discrimination. This discrimination, proponents state, has persisted since 1923 when the federal compensation system was established on the assumptions that women would not work or work only temporarily, and that women need not be paid the same as men.⁴⁸⁸

The national pay equity coalition commissioned a national poll to assess public opinion on pay equity.⁴⁸⁹ The results showed that 69% of workers in the United States think women are not paid as fairly as men for the work they do and the most frequent reason cited for this by those polled was sex discrimination.⁴⁹⁰ Citing discrimination as the primary cause of the wage gap, 83% believe the gap is a serious problem which should be corrected.⁴⁹¹

While its passage and subsequent impact are yet to be determined, a federal pay equity study portends five likely effects: (1) the states and private sector employers will be forced to match federal wage adjustments, if they occur, to remain competitive in attracting and retaining qualified personnel; (2) wage-setting through job evaluation based on both *job content* and *economic analyses* will be perceived by the government, the general public, and public and private sector employers and employees as the requisite evaluation technique to help eliminate discriminatory wage-setting practices and differentials; (3) federal and state judges can admit the federal study into evidence as a standard to evaluate

who represented AFSCME in the landmark Washington case, *AFSCME v. Washington*, 578 F. Supp. 846 (W.D. Wash. 1983), *rev'd* 770 F.2d 1401 (9th Cir. 1985)).

486. *Federal Employee Compensation Equity Act of 1987: Hearings on S. 552 Before the Subcomm. on Federal Services, Post Office, and Civil Service Senate Committee on Governmental Affairs*, 100th Cong., 1st Sess. (1987) (testimony by Eileen Stein, Chair, National Committee on Pay Equity).

487. *Id.*

488. *Id.*

489. *Id.*

490. *Id.*

491. *Id.*

the sufficiency of challenges and defenses to the employer's job classification and wage-setting methodology; (4) the employer's system would be subject to a comparison with the federal classification and pay system whether or not the employer has a formal job evaluation program; and (5) on the basis of public policy as expressed by Congress regarding job evaluation, the federal and state judiciaries can find comparable worth theory a viable basis for a prima facie case of gender, ethnic or minority based wage discrimination under Title VII, FEP and EPA laws. Alternatively, the courts could continue to strike down comparable worth as a cognizable claim until Congress establishes more explicit support for the theory.

While the proposed federal legislation is not a panacea for equalizing women's with men's wages, the bills would provide a step toward pay equity. Encouraging employers to use equitable, objective job evaluation methods for wage-setting would ensure that some women receive pay commensurate with the value of their work. Simultaneously, some job classifications will continue to be undervalued because of societal values and unidentified biases in job evaluation techniques.

B. A State Model for Future State and Federal Legislation

Techniques exist in addition to those in the proposed federal legislation to bolster pay equity for women. Many states already have enacted statutes which provide a substantial basis for furthering equal pay for women and minorities. As illustration, Washington State statutes require state agencies to comply with detailed methods and documentation for administering equitable pay practices.⁴⁹² In 1983, the Washington Legislature added a comparable worth statute to its already detailed compensation program for state employees.⁴⁹³ The statute requires salary and compensation plans to reflect similar salaries for aggregate equivalent responsibilities, judgment, knowledge, skills and working conditions.⁴⁹⁴ Annual salary adjustments to rectify inequities are to be implemented until pay equity is met, but no later than 1993.⁴⁹⁵

The Washington program specifies the bases and procedures for job classifications, wage-setting and salary range increases.⁴⁹⁶ It requires af-

492. See Appendix.

493. WASH. REV. CODE ANN. § 41.06.155 (1986). Legislation passed after a series of job evaluation studies beginning in 1973 and after AFSCME filed an \$800 million suit affecting 15,000 employees. *AFSCME v. Washington*, 770 F.2d 1401, 1403 (9th Cir. 1985).

494. WASH. REV. CODE ANN. §§ 41.06.150, -.155; 28B.16.116 (1986).

495. *Id.* § 41.06.155.

496. *Id.* §§ 41.06.160, -.163, -.165.

firmative action goals and timetables.⁴⁹⁷ The program also requires public and private sector rates to be a factor in job classifications, salaries and fringe benefits ranges and includes specific criteria for decision-making, reports and recommendations to the governor and legislature.⁴⁹⁸ Significantly, deviations from salary and fringe benefits are discouraged, but where granted, are to be detailed with specificity for public disclosure.⁴⁹⁹ The program also requires detailed justifications for all criteria, reports and recommendations.⁵⁰⁰ Additionally, standardized performance appraisal, and training and career development programs justify salary differentials and job mobility.⁵⁰¹ The Washington statutes provide models for the private sector and for future state and federal legislation. The Washington statutes also can capably provide the courts with a standard from which to evaluate evidentiary sufficiency for establishing a prima facie case as well as defenses in a gender-based wage discrimination case.

A system like Washington's predictably would take many years for the federal government to implement, through legislation and through EEOC guidelines. Concurrently, the states may provide such greater protections of individual rights for their citizens. For government and the private sector, the Washington statutes provide the basic model in sound management techniques which could benefit both employer and employee. With an active comparable worth program, the employer would likely benefit from higher employee morale and productivity, a larger available employee talent bank and resultant competitive market advantage. Also, the employee could gain dignity, fair compensation and greater employment opportunities.

VII. CONCLUSION

At the present time, comparable worth is a social, political and judicial issue. As one commentator has stated, the goal of equal pay for work of comparable value is an especially sensitive social policy because it threatens to modify both the current and historical ordering of society.⁵⁰² To adjust women's wages to match men's wages for relatively equivalent work also would adjust women's power position relative to

497. *Id.* § 41.06.150.

498. *Id.* §§ 41.06.150, -.160, -.163, -.165.

499. *Id.* §§ 41.06.163, -.165.

500. *Id.* §§ 41.06.163, -.165.

501. *Id.* §§ 41.06.169, -.400, -.420, -.430.

502. Steinberg, *A Want of Harmony: Perspectives on Wage Discrimination and Comparable Worth*, in *COMPARABLE WORTH*, *supra* note 60, at 24.

men's—in the labor market, specifically and in society, generally.⁵⁰³ As wages serve as a proxy for power, wage reallocation among groups of employees changes their relative power position.⁵⁰⁴ Because of its prospective impact, the theory of comparable worth appears to cause discomfort to some men and women and this discomfort encourages resistance to its implementation.⁵⁰⁵

The decisions of the federal courts of appeal and state courts portend that comparable worth is not likely, by itself, to be recognized as a valid claim under Title VII, FEP or EPA laws even though these laws can justifiably encompass comparable worth. Federal courts refuse to uphold comparable worth even though the government and employers have recognized that since World War I employers compensate jobs performed by women less than comparable jobs performed by men. The courts rule against comparable worth while simultaneously acknowledging that employers compensate women less because they are women. Arguably, courts failing to equalize women's compensation with men's can point to a lack of congressional support for comparable worth. While congressional history clearly states a policy which opposes the recognized underpayment of women, it correspondingly fails to provide explicit support for comparable pay. State court decisions mirror those of the federal judiciary. State courts fail to require comparable worth even in those states with explicit public policies mandating comparable worth. Judicial interpretations, then, can defeat legitimate gender-based claims of wage discrimination.

Since 1982, the House has compiled voluminous testimony on the comparable worth issue and congressional representatives in both houses have introduced bills on the subject during every session. The trend of congressional support for comparable worth is evinced by the fact that bills requiring a comparable worth study of the federal workforce were introduced in the House and the Senate of the 100th Congress with forty-seven and twenty-three co-sponsors respectively. This legislation is likely to be debated and pass both houses in the near future. Consequently, Congress may explicitly establish the scope of its support for pay equity for women which could provide the judiciary the public policy necessary to support a finding of gender-based discrimination based on comparable worth.

With this newly established public policy, the courts would need to identify the requisite criteria for establishing a viable comparable worth

503. *Id.* at 25.

504. *Id.*

505. *Id.* at 24.

claim of gender-based wage discrimination under Title VII disparate treatment and disparate impact models. The disparate treatment approach should be invoked when the employer intentionally used subjective policies and procedures to *perpetuate* the undervaluation of women's comparable jobs. The courts should examine the employer's job classification and wage-setting policies and practices to determine whether they incorporate illegal biases for women but not men and whether the policies and practices are applied evenly to men and women. The disparate impact model should be employed when the employer's methods or procedures appear neutral on their face, but disproportionately affect women's job classifications and wages. The courts should scrutinize the employer's methods and procedures under the strict job relatedness standard. They also should strike down arguments that market forces are solely responsible for women's remuneration.

This Comment has analyzed overt and subtle biases in job evaluation methodologies and their application to Title VII, EPA and FEP litigation. It urges Congress and state legislators to prohibit public and private employers from perpetuating gender-based wage discrimination in comparable jobs. It urges judges to embrace a new public policy that employers who perpetuate prior discrimination are culpable. It also urges the state and federal judiciaries to evaluate allegations of gender-based wage discrimination and employer defenses on the basis of the proposed federal legislation, including job content *and* economic analyses and affirmative action. This Comment further suggests the Washington State statutes on compensation administration as an additional threshold standard by which the courts determine non-discrimination. A uniform national public policy on comparable worth is necessary to the establishment of women's economic equality.

*Gail C. Kaplan**

* The author dedicates this Comment to the memory of Samuel Koirth who honored and advanced individual and political dignity, rights and liberties.

APPENDIX

EXEMPLARY COMPENSATION LEGISLATION

The following pertinent portions of Washington State statutes are relevant to a comparable worth program and litigation.

*Salaries—Implementation of changes to achieve comparable worth*¹

Salary changes necessary to achieve *comparable worth* shall be implemented during the 1983-85 biennium under a schedule developed by the department in cooperation with the higher education personnel board. Increases in salaries and compensation solely for the purpose of achieving *comparable worth* shall be made at least annually. *Comparable worth* for the jobs of all employees under this chapter shall be fully achieved not later than June 30, 1993.

*Rules of Board—Mandatory Subjects—Veterans' preference*²

. . . personnel administration, regarding the basis and procedures to be allowed for:

(15) Adoption and revision of a comprehensive classification plan for all positions in the classified service, based on investigation and analysis of the duties and responsibilities of each such position;

(16) Allocation and reallocation of positions within the classification plan;

(17) Adoption and revision of a state salary schedule to reflect the prevailing rates in the Washington state private industries and other governmental units but the rates in the salary schedules or plans shall be increased if necessary to attain *comparable worth* under an implementation plan under RCW 41.06.155, such adoption and revision subject to approval by the director of financial management in accordance with the provisions of chapter 43.88 RCW;

(18) Increment or merit increases within the series of steps for each pay grade;

. . . .

(21) Affirmative action in appointment, promotion, transfer, recruitment, training, and career development; development and implementation of affirmative action goals and timetables; and monitoring of progress against those goals and timetables.

1. WASH. REV. CODE ANN. § 41.06.155 (1986).

2. *Id.* § 41.06.150.

The board shall consult with the human rights commission in the development of rules pertaining to affirmative action. The department of personnel shall transmit a report annually to the human rights commission which states the progress each state agency has made in meeting affirmative action goals and timetables.

*Classification and salary schedules to consider rates in other public and private employment—Wage and fringe benefits surveys—Recommendations to governor, standing committees on appropriations to the legislature, and the director of financial management—Data required*³

In preparing classification and salary schedules as set forth in RCW 41.06.150 as now or hereafter amended the department of personnel shall give full consideration to prevailing rates in other public employment and in private employment in this state. For this purpose this department shall undertake comprehensive salary and fringe benefit surveys to be planned and conducted on a joint basis with the higher education personnel board, with such surveys to be conducted in the year prior to the convening of every other one hundred five day regular session of the state legislature. In the year prior to the convening of every other one hundred five day regular session during which a comprehensive salary and fringe benefit survey is not conducted, the department shall plan and conduct on a joint basis with the higher education personnel board a trend salary and fringe benefit survey. This survey shall measure average salary and fringe benefit movement for broad occupational groups which have occurred since the last comprehensive salary and fringe benefit survey was conducted. The results of each comprehensive and trend salary and fringe benefit survey shall be completed and forwarded by September 30 with a recommended state salary schedule to the governor and director of financial management for their use in preparing budgets to be submitted to the succeeding legislature. A copy of the data and supporting documentation shall be furnished by the department of personnel to the standing committees for appropriations of the senate and house of representatives.

In the case of comprehensive salary and fringe benefit surveys, the department shall furnish the following supplementary data in support of its recommended salary schedule:

(1) A total dollar increase which reflects the recommended increase or decrease in state salaries as a direct result of the specific salary and fringe benefit survey that has been conducted and which is catego-

3. *Id.* § 41.06.160.

rized to indicate what portion of the increase or decrease is represented by salary survey data and what portion is represented by fringe benefit data;

(2) An additional total dollar figure which reflects the impact of recommended increases or decreases to state salaries based on other factors rather than directly on prevailing rate data obtained through the survey process and which is categorized to indicate the sources of the requests for deviation from prevailing rates and the reasons for the changes;

(3) A list of class codes and titles indicating recommended monthly salary ranges for all state classes under the control of the department of personnel with:

(a) Those salary ranges which do not substantially conform to the prevailing rates developed from the salary and fringe benefit survey distinctly marked and an explanation of the reason for the deviation included; and

(b) Those department of personnel classes which are substantially the same as classes being used by the higher education personnel board clearly marked to show the commonality of the classes between the two jurisdictions;

(4) A supplemental salary schedule which indicates the additional salary to be paid state employees for hazardous duties or other considerations requiring extra compensation under specific circumstances. Additional compensation for these circumstances shall not be included in the basic salary schedule but shall be maintained as a separate pay schedule for purposes of full disclosure and visibility; and

(5) A supplemental salary schedule which indicates those cases where the board determines that prevailing rates do not provide similar salaries for positions that require or impose similar responsibilities, judgment, knowledge, skills, and working conditions. This supplementary salary schedule shall contain proposed salary adjustments necessary to eliminate any such dissimilarities in compensation. Additional compensation needed to eliminate such salary dissimilarities shall not be included in the basic salary schedule but shall be maintained as a separate salary schedule for purposes of full disclosure and visibility.

It is the intention of the legislature that requests for funds to support recommendations for salary deviations from the prevailing rate survey data shall be kept to a minimum, and that the requests be fully documented when forwarded by the department of personnel. Further, it is the intention of the legislature that the department of personnel and the higher education personnel board jointly determine job classes which are

substantially common to both jurisdictions and the basic salaries for these job classes shall be equal based on salary and fringe benefit survey findings.

Salary and fringe benefit survey information collected from private employers which identifies a specific employer with the salary and fringe benefit rates which that employer pays to its employees shall not be subject to public disclosure under chapter 42.17 RCW.

The first comprehensive salary and fringe benefit survey required by this section shall be completed and forwarded to the governor and the director of financial management by September 30, 1988.

Comprehensive salary and fringe benefit survey plan required— Contents⁴

(1) In the conduct of salary and fringe benefit surveys under RCW 41.06.160 as now or hereafter amended, it is the intention of the legislature that the surveys be undertaken in a manner consistent with statistically accurate sampling techniques. For this purpose, a comprehensive salary and fringe benefit survey plan shall be submitted to the director of financial management, employee organizations, the standing committees for appropriations of the senate and house of representatives, and to each legislative budget committee six months before the beginning of each periodic survey required before regular legislative sessions. This comprehensive plan shall include but not be limited to the following:

(a) A complete explanation of the technical, statistical process to be used in the salary and fringe benefit survey including the percentage of accuracy expected from the planned statistical sample chosen for the survey and a definition of the term "prevailing rates" which is to be used in the planned survey;

(b) A comprehensive salary and fringe benefit survey model based on scientific statistical principles which:

(i) Encompasses the interrelationships among the various elements of the survey sample including sources of salary and fringe benefit data by organization type, size, and regional location;

(ii) Is representative of private and public employment in this state;

(iii) Ensures that, wherever practical, data from smaller, private firms are included and proportionally weighted in the survey sample; and

4. *Id.* § 41.06.163.

(iv) Indicates the methodology to be used in application of survey data to job classes used by state government;

(c) A prediction of the increase or decrease in total funding requirements expected to result from the pending salary and fringe benefit survey based on consumer price index information and other available trend data pertaining to Washington state salaries and fringe benefits.

(2) Every comprehensive survey plan shall fully consider fringe benefits as an element of compensation in addition to basic salary data. . . .

(3) Interim or special surveys conducted under RCW 41.06.160 as now or hereafter amended shall conform when possible to the statistical techniques and principles developed for regular periodic surveys under this section. . . .

(4) The term "fringe benefits" as used in this section and in conjunction with salary surveys shall include but not be limited to compensation for:

(a) Leave time, including vacation, holiday, civil, and personal leave;

(b) Employer retirement contributions;

(c) Health and insurance payments, including life, accident, and health insurance, workmen's compensation, and sick leave; and

(d) Stock options, bonuses, and purchase discounts where appropriate.

*Salary surveys—Criteria*⁵

Salary surveys shall be conducted according to the following criteria in addition to any other provisions under this chapter:

(1) Adjustments of state salaries to prevailing rates in Washington state private industries and other governmental units shall be determined by comparisons of weighted averages of salaries, including weighted averages of salaries from out-of-state sources when necessary to obtain statistically valid salary surveys; and

(2) Determination of state salaries changes from prevailing rate data collected in salary surveys shall be based on occupational group averages containing related job classes where appropriate rather than on comparisons of survey data to individual state job classes.

5. *Id.* § 41.06.165.

*[Standardized employee performance evaluation procedures and forms required to be developed]*⁶

After consultation with state agency heads, employee organizations, and other interested parties, the state personnel director shall develop standardized employee performance evaluation procedures and forms which shall be used by state agencies for the appraisal of employee job performance at least annually. These procedures shall include means whereby individual agencies may supplement the standardized evaluation process with special performance factors peculiar to specific organizational needs. Performance evaluation procedures shall place primary emphasis on recording how well the employee has contributed to efficiency, effectiveness, and economy in fulfilling state agency and job objectives.

*Training and career development programs—Powers and duties of director*⁷

(1) In addition to other powers and duties specified in this chapter, the board shall, by rule, prescribe the purpose and minimum standards for training and career development programs and, in doing so, regularly consult with and consider the needs of individual agencies and employees.

(2) In addition to other powers and duties specified in this chapter, the director shall:

(a) Provide for the evaluation of training and career development programs and plans of agencies based on minimum standards established by the board. The director shall report the results of such evaluations to the agency which is the subject of the evaluation;

(b) Provide training and career development programs which may be conducted more efficiently and economically on an interagency basis;

(c) Promote interagency sharing of resources for training and career development;

(d) Monitor and review the impact of training and career development programs to ensure that the responsibilities of the state to provide equal employment opportunities are diligently carried out. The director shall report to the board the impact of training and career development programs on the fulfillment of such responsibilities.

(3) At an agency's request, the director may provide training and

6. *Id.* § 41.06.169.

7. *Id.* § 41.06.400.

career development programs for an agency's internal use which may be conducted more efficiently and economically by the department of personnel.

*Training and career development programs—Agency plan—Report—Budget*⁸

Each agency subject to the provisions of this chapter shall:

(1) Prepare an employee training and career development plan which shall at least meet minimum standards established by the board. A copy of such plan shall be submitted to the director for purposes of administering the provisions of RCW 41.06.400(2);

(2) Provide for training and career development for its employees in accordance with the agency plan;

(3) Report on its training and career development program operations and costs to the director in accordance with reporting procedures adopted by the board;

(4) Budget for training and career development in accordance with procedures of the office of financial management.

*Entry level management training course—Requirements—Suspension—Waiver—Designation of supervisory or management positions*⁹

(1) The board, by rule, shall prescribe the conditions under which an employee appointed to a supervisory or management position after June 12, 1980, shall be required to successfully complete an entry-level management training course prior to the employee's appointment which is, in the judgment of the director, at least equivalent to the entry-level course required by this section.

(2) The board, by rule, shall establish procedures for the suspension of the entry-level training requirement in cases where the ability of an agency to perform its responsibilities is adversely affected, or for the waiver of this requirement in cases where a person has demonstrated substitute training.

(3) Agencies subject to the provisions of this chapter, in accordance with rules prescribed by the board, shall designate individual positions, or groups of positions, as being "supervisory" or "management" positions. Such designations shall be subject to review by the director as

8. *Id.* § 41.06.410.

9. *Id.* § 41.06.420.

part of the director's evaluation of training and career development programs prescribed by RCW 41.06.400(2).

*Career executive program—Development—Policies and standards—Duties of board and director*¹⁰

(1) The board, by rule, shall develop a career executive program which recognizes the profession of management and recognizes excellence in managerial skills in order to (a) identify, attract, and retain highly qualified executive candidates, (b) provide outstanding employees a broad opportunity for career development, and (c) provide for the mobility of such employees among agencies, it being to the advantage of the state to make the most beneficial use of individual managerial skills.

(2) To accomplish the purposes of subsection (1) of this section, the board, notwithstanding any other provision of this chapter, may provide policies and standards for recruitment, appointment, examination, training, probation, employment register control, certification, classification, salary, administration, transfer, promotion, reemployment, conditions of employment, and separation separate from procedures established for other employment.

(3) The director, in consultation with affected agencies, shall recommend to the board the classified positions which may be filled by participants in the career executive program. Upon the request of an agency, management positions that are exempt from the state civil service law pursuant to RCW 41.06.070 may be included in all or any part of the career executive program: *Provided*, That an agency may at any time, after providing written notice to the board, withdraw an exempt position from the career executive program. No employee may be placed in the career executive program without the employee's consent.

(4) The number of employees participating in the career executive program shall not exceed one percent of the employees subject to the provisions of this chapter.

(5) The director shall monitor and review the impact of the career executive program to ensure that the responsibilities of the state to provide equal employment opportunities are diligently carried out. The director shall report to the board the impact of the career executive program on the fulfillment of such responsibilities.

(6) Any classified state employee, upon entering a position in the career executive program, shall be entitled subsequently to revert to any

10. *Id.* § 41.06.430.

class or position previously held with permanent status, or, if such position is not available, revert to a position similar in nature and salary to the position previously held.

