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SEX-BASED WAGE DISCRIMINATION: A MANAGEMENT VIEW

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INTRODUCTION

"Comparable worth" has been described as a legal theory, an economic theory, the looniest idea since "Looney Tunes," as difficult to define as love, creeping socialism, certain communism, and as a lively topic for discussion at a dinner party. The most frustrating element in any discussion of "comparable worth" is that there seems to be as many definitions of "comparable worth" as there are people discussing it. Thus confusion has become the rule of the day. The debate began in 1962-63 when Congress was considering the passage of what is now known as the Equal Pay Act[1] which, as originally proposed, included a provision mandating payment of equal pay for comparable worth. When Congress decided that there was no way to define "comparable worth" the legislation was amended to read "equal pay for equal work." In 1979, Professor Ruth G. Blumrosen, a consultant to the U.S. Equal Employment Opportunity Commission and a professor at Rutgers University, published an article in which she contended that men and women often do different jobs and that the wage marketplace is infected with sex discrimination resulting in lower earings for women.[2] The remedy she proposed was to have the court appraise the "worth" of jobs and then compel employers to pay wages comparable to such "worth."

This article is an attempt to describe the "comparable worth" or "pay equity" debate as it has evolved over the past twenty-three years both in the courts and in the legislatures, both state and federal, as they responded to disparity between the wages of men and the wages of women.

The presence of wage disparities, on average, between male and female employees in the United States is an indisputable fact.[3] Propo-

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1. Equal Pay Act of 1963, enacted as § 6(d) of the Fair Labor Standards Act, 29 U.S.C. § 206(d) (1982).

2. Blumrosen, *Wage Discrimination, Job Segregation, and Title VII of the Civil Rights Act of 1964*, 12 U. MICH. J.L. REF. 399 (1979).

3. The type of statistics most often cited by proponents of comparable worth is: "full-time working women earn 61 cents for every dollar earned by males." *See, e.g.*, NATIONAL COMMITTEE ON PAY EQUITY, THE WAGE GAP: MYTHS AND FACTS (1983). This figure varies depending upon the source used. For example, the Equal Employment Opportunity Commission ("EEOC") commissioned a study by the National Academy of Sciences which stated that women of "all races" earned 55.3% of the earnings of white men in 1978. This figure included full-time civilian workers 18 years old and over. NATIONAL

nents of the theory of "pay equity" or "comparable worth" believe, in essence, that men and women must be paid equally for jobs of "comparable worth" to the employer.[4] Despite the failure of comparable worth theorists to consistently and rationally define the concept which they vociferously propound,[5] their objectives have been: expansion of Title VII[6] and Equal Pay Act concepts to include intentional sex discrimination based upon an employer's failure to pay equal rates for jobs of comparable worth to the employer's operation,[7] and introduction of legislative initiatives[8] which mandate the application of comparable worth to the operations of public and private employers.

The linchpin of comparable worth theory is the oft-cited earnings gap between the wages of men and women. The theory is based on the existence of discrimination which underlies this earning gap.[9] Proponents of "comparable worth" or "pay equity" argue that wage disparities should be eliminated through enforcement or adoption of antidiscriminating legislation.[10] It is, however, not necessarily true that all wage disparities within an employer's workforce are the result of sex-

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RESEARCH COUNCIL, WOMEN, WORK AND WAGES: EQUAL PAY FOR JOBS OF EQUAL VALUE 13 (1981) [hereinafter cited as WOMEN, WORK AND WAGES]. For the final quarter of 1983, the average female worker earned approximately 66.2% of the earnings of the average male. R. WILLIAMS AND L. KESSLER, A CLOSER LOOK AT COMPARABLE WORTH 6 (1984). *See* discussion *infra* notes 14-22.

4. The Supreme Court expressly declined to consider comparable worth in County of Washington v. Gunther, 452 U.S. 161 (1981). The Court did, however, describe comparable worth as the "controversial 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." *Id.* at 166 (footnote omitted).

5. This shortcoming has been criticized in many quarters. *See* LIVERNASH, AN OVERVIEW, IN COMPARABLE WORTH: ISSUES AND ALTERNATIVES 8 (ed. 1980) [hereinafter cited as COMPARABLE WORTH: ISSUES AND ALIENATIONS] ("comparable worth has not been operationally defined by its supporters").

6. Title VII of the Civil Rights Action 1964, 42 U.S.C. § 2000e (1982). The Civil Rights Act of 1871, 42 U.S.C. § 1983 (1982), is available for suits against governmental agencies. *See* Stathos v. Bowden, 728 F.2d 15 (1st Cir. 1984) (Municipal Lighting Commission failed to upgrade salary of female manager and her assistant despite adoption of a report rating plaintiff's position as either equal or similar to managerial positions held by men).

7. This approach has been consistently rejected by the courts. For a complete discussion of the applicability of Title VII to cases involving comparisons of dissimilar jobs, see *infra* notes 76-128 and accompanying text.

8. See discussion of current legislation initiatives *infra* notes 63-75 and accompanying text.

9. The conclusion of the National Academy of Sciences study commissioned by the EEOC, *see supra* note 3, was: " . . . [D]iscrimination, as the term is used in this report, does not imply intent but refers only to outcome. Wage discrimination exists insofar as workers of one sex, race, or ethnic group are paid less than workers of another sex, race or ethnic group for doing work that is of 'comparable,' that is, equal, worth to their employer." WOMEN, WORK AND WAGES, *supra* note 3, at 91. *See also* Blumrosen, *supra* note 2, at 400. ("[T]he low rates of pay associated with such segregated jobs constitute the major explanation for the 'earnings gap' between minority and female workers on the one hand and white males on the other. This gap has long been considered a major benchmark as to the extent of employment discrimination"). *Id.* at 400 (footnote omitted).

10. *Statements on Pay Equity: Hearings Before the Joint Economic Committee*, 98th Cong., 2d Sess. 1 *reprinted in* DAILY LAB. REPORT. (BNA) No. 70, at G-4, 6-9 (May 11, 1984) [hereinafter cited as *Hearings*] (statement of Brian Turner on behalf of National Committee on Pay Equity) ("[w]ithout Congressional insistence on the appointment of officials strongly com-

based discrimination in compensation or in personnel policies. If the relative and established values of employee positions are reflected in a nondiscriminatory fashion, by an employer's pay structure, then the alteration of that pay structure under the guise of "equal pay for comparable worth" would be merely a pretext for other objectives. Under present law, a strictly legal analysis would not conclude that an employer must alter its pay structure to equalize pay rates.[11] Employers are not legally responsible for historical discrimination against women in employment, nor are they responsible for societal attitudes which may have resulted in a devaluation of occupations traditionally dominated by women. Indeed, it is widely held, the comparison of dissimilar jobs cannot form a basis for a successful suit for discrimination based on sex.

The supporters of comparable worth, however, do not rely upon a strictly legal analysis, but also propound an economic approach: a system of values must be applied to each of an employer's job functions so as to establish a ranking of jobs on an "objective" basis. Such a ranking system is purported to be a more equitable manner of establishing pay rates and would result in the elimination or reduction of the wage disparities between men and women.[12] In understanding this economic approach, it is necessary to realize that the legal aspects of comparable worth center upon employer discrimination while the economic aspects center upon the elimination of wage disparities. It is also necessary to realize that the vehicles used by proponents of comparable worth, for the elimination of wage disparities, are the current and proposed employment antidiscrimination laws.

This article does not suggest that the narrowing and ultimate disappearance of the wage gap between men and women is not an appropriate goal but, rather, that employment discrimination laws are an inappropriate vehicle for the achievement of that goal. Federal and state employment discrimination laws are designed to eliminate discrimination on the basis of race, color, national origin, religion, sex, age, handicap, and veteran status. The laws mandate equality of treatment of all employees through the elimination of nonmerit criteria from the personnel and compensation decision-making process. The emphasis advocated under a system of comparable worth, in the application of employment anti-discrimination laws, would shift the focus from the individual and the equal treatment of individuals[13] to a focus upon equal

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mitted to upholding the law, *the wage gap will continue to exist*, and, in fact, may worsen") (emphasis added).

11. A prima facie violation of Title VII does not exist where men and women receive different compensation for different skills when these skills do not command an equal rate in the labor market but may be, at least subjectively, of equal value to the employer. Christensen v. Iowa, 563 F.2d 353, 356 (8th Cir. 1977). For a full discussion of Title VII and comparable worth theory, see *infra* notes 76-130 and accompanying text.

12. The NRC Study concluded, "[i]n our judgment job evaluation plans provide measures of job worth that, under certain circumstances, may be used to discover and reduce wage discrimination for persons covered by a given plan." WOMEN, WORK AND WAGES, *supra* note 3, at 95.

13. The Supreme Court has reiterated that the emphasis in Title VII is upon the individual. *See* Connecticut v. Teal, 457 U.S. 440, 453-54 (1982) ("The principal focus of the

rates for all classes. When equality of opportunity for individuals is replaced with equality of achievement for groups, employers are no longer being enjoined from discriminatory practices, but become instruments through which social change is implemented. This is precisely the position in which the acceptance of the comparable worth theory would place employers: the wage rates of jobs in which women predominate would be raised where the employer is paying men a higher rate for doing work of "comparable value." Eradicating sex discrimination will be replaced with the social goal of eradicating widespread pay disparities.

This article analyzes the proposed use of the comparable worth theory, within the framework of federal employment discrimination law, as the basis for eliminating pay disparities between men and women. First, the various economic and sociological arguments propounded by both comparable worth proponents and opponents are summarized. Second, the proposed legislative initiatives, on both the state and federal levels, are set forth. Third, the eradication of sex-based wage discrimination through utilization of current law is discussed, along with the viability of comparable worth under Title VII and availability of a marketplace defense. Finally, some practical steps for employers are outlined which could help to avoid potential liability under the expansion of anti-discrimination laws.

I. ECONOMIC AND SOCIOLOGICAL ARGUMENTS

A. *Job Segregation and Differentials in Pay*

The labor force in the United States is in large part still segregated by race and by sex. Women predominate the clerical and service occupations and men predominate the craft and laboring occupations.[14] According to 1970 Census Bureau figures, of 553 occupations, 310 have at least 80% male incumbents, and 50 have at least 80% female incumbents.[15] Over half (54%) of working women are in occupations dominated by women; 70% of working men are in occupations dominated by men.[16] Sex segregation by occupation has decreased over the past several decades.[17] The increases of the number of women in certain jobs has been dramatic: female lawyers and judges (124% increase)[18], physi-

statute is on the protection of the individual employee, rather than the protection of the . . . group as a whole.")

14. WOMEN, WORK AND WAGES, *supra* note 3, at 25.

15. *Id.* at 28.

16. *Id.* The National Committee on Pay Equity has cited more recent figures. "In 1982, more than half of all employed women worked in occupations which are 75% female, and 22% of employed women were in jobs that are more than 85% female." *Hearings, supra* note 10, DAILY LAB. REP. (BNA) No. 70, at G-4 (May 11, 1984).

17. *See generally* Lloyd, *The Division of Labor Between the Sexes: A Review*, in SEX, DISCRIMINATION, AND THE DIVISION OF LABOR 1 (C. Lloyd ed. 1975); Cohen, *Sex Differences in Compensation*, 6 J. HUMAN RESOURCES 434 (1971). *See also* Hedges & Bemis, *Sex Stereotyping: Its Decline in Skilled Trades*, MONTHLY LAB. REV. (BNA), at 14 (May 1974).

18. Nelson, Opton and Wilson, *Wage Discrimination and the "Comparable Worth" Theory in Perspective*, 13 U. MICH. J.L. REF. 233 n.2 (1980). The number of female lawyers and judges

cians and osteopaths (97% increase),[19] and bank officials and financial managers (111% increase).[20] Between 1970 and 1979, for each increase of ten in the number of females in clerical positions, the number of women in managerial positions increased by four.[21] Occupational segregation by sex, however, has "barely decreased at all among whites over the past several decades."[22]

The indisputable facts remains that occupational segregation by sex remains a steady, albeit shifting, trend in the United States. Furthermore, women tend to work in occupations which pay less on the average than occupations dominated by men.

A recent Rand Corporation study concluded that the average wage of all women has increased much faster than the average wage of men during the last 60 years.[23] Since 1980, women's hourly wages have risen, on average, from 60% to 64% of those of men: the largest gain in this century.[24] Between 1980 and 1984, the average hourly wages of women, adjusted for inflation, rose 3.3 percent whereas the wages of men declined by three percent.[25] The average wage gains of younger women during this short period are more striking: in 1980, women 20 to 24 years old earned 78% as much as men in the same age category and by 1983 this proportion had risen to 86%.[26] Additionally, the hourly wages of black women have increased 47% more rapidly than those of white men, narrowing the proportion of wages earned from one-third to 57%.[27] For the remainder of the century, wages of women will accelerate relative to those of men—by the year 2000, relative wages of women who entered the labor market in the 1970's should rise roughly 15% faster than those of similarly situated male workers.[28] The Rand Corporation study conservatively estimates that the overall average wages of working women will be at least 74% of the overall wages of working men by the year 2000.[29]

Proponents of comparable worth argue that the presence of job segregation based on sex and the concomitant wage differentials are the result of discrimination.[30] The wage gap, however, has never been proved to be the result of discrimination. This debate continues, and

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rose from 13,000 1982 in 1970 to over 60,000 in 1979. COMPARABLE WORTH: ISSUES AND ALTERNATIVES, *supra* note 5, at 20.

19. Nelson, Opton & Wilson, *supra* note 18, at 233 n.2.

20. *Id.*

21. COMPARABLE WORTH: ISSUES AND ALTERNATIVES, *supra* note 5, at 20.

22. WOMEN, WORK AND WAGES, *supra* note 3, at 25.

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

24. *Id.* at ix.

25. *Id.*

26. *Id.* at 26.

27. *Id.* at ix.

28. *Id.* at 75. This estimate is probably too conservative insofar as it assumes a constant commitment to the labor market which is expected to expand for that group over the next several decades. *Id.* at 75-76.

29. *Id.* at 82.

30. "Jobs traditionally held by women—in so-called women's work—pay less, *regardless of the skills and expertise required.*" *Hearings, supra* note 10, *reprinted in* DAILY LAB. REP. (BNA)

the studies cited vary in conclusions depending upon the which side of the "comparable worth debate" the source stands. Wage differentials between men and women are not clearly related to segregation patterns, and thus the question can be put more precisely: are the lower wages paid for jobs dominated by women lower because women occupy the positions? The studies are inconclusive. It is clear, however, that numerous factors must be taken into account when an attempt is made to determine the origins of the pay disparities between men and women. Critical considerations include: employee qualifications (seniority and experience, skills and abilities, education and training); employee work behaviors (performance, absenteeism, turnover, hours worked, *i.e.*, part-time or full-time and hours per week); union membership; specific tasks and behaviors required as part of an occupational category; the size, profitability and wage policy of particular employers and industries; detailed aspects of labor market conditions and regional differentials; marital status, family background, history of relocation and age.[31] Such considerations are not generally taken into account by most studies of the origins and causes of the "wage gap."

Another often neglected factor is that of the risk of accident or injury within a particular job classification. The element of risk is taken into account in the establishment of pay rates, and men, to a much greater extent than women, are in jobs which have a higher risk of accident or injury. This risk factor alone may account for as much as six percent of the "wage gap."[32]

It is an elementary statistical observation that "statistical correlations, such as that between salary and sex, do not imply causal inferences, such as the inference of discrimination."[33] Indeed, although comparable worth proponents often cite studies comparing segregated job groups, this may not be a valid approach to measuring discrimination. Discrimination should be studied by comparing similarly situated men and women, rather than attempting to devise an analysis of discrimination practices by comparing segregated occupations and pay levels.[34]

Since most statistical studies attempt to compare "segregated" occupations, it should be noted that such studies never have been able to isolate the extent to which wage disparities are the result of discrimina-

No. 70, at G-5 (statement of Brian Turner on behalf of the National Committee on Pay Equity).

31. *See* Milkovich, *The Emerging Debate*, in COMPARABLE WORTH: ISSUES AND ALTERNATIVES, *supra* note 5, at 45. (In his paper, the *Emerging Debate*, Professor Milkovich assembled the possible determinants of pay differences between men and women into a table in order to discuss the complexities of wage comparison.).

32. Finn, *The Earnings Gap and Economic Choices*, in EQUAL PAY FOR UNEQUAL WORK 101, 110 (P. Schafly ed. 1984).

33. Roberts, *Statistical Biases in the Measurement of Employment Discrimination*, in COMPARABLE WORTH: ISSUES AND ALTERNATIVES, *supra* note 5, at 178.

34. *Id.* at 195. *See also* R. WILLIAMS & L. KESSLER, *Looking Behind the Day Gap Statistics*, in A CLOSER LOOK AT COMPARABLE WORTH 15-25 (1984) (documenting deficiencies in various statistical studies of the (pay gap)); Blumrosen, *supra* note 2, at 445 ("[O]ne's choice of variables, in fact, can eliminate discrimination completely.").

tion or of other factors.[35] Although the extent of the "pay gap" cited by commentators varies widely,[36] much of the "pay gap" can be accounted for on the basis of nondiscriminatory factors.

Studies have not significantly taken into account a central and hardly quantifiable factor: employee choice. Certainly women will tend to be over-represented in lower paying jobs as a result of choices made within numerous societal constraints; however, employers are not legally responsible under anti-discrimination laws for those constraints. Advocates of comparable worth have noted the difficulty in assessing "the relative importance of the choices women make in the labor market and of the factors affecting their choices."[37] Although it would be spuri-

35. Nelson, Opton and Wilson, *supra* note 18, 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 from wage discrimination."); *Hearings, supra* note 10, DAILY LAB. REP. (BNA) No. 70, at G-2 (wages of single men compared with wages of single women demonstrated a wage disparity but the disparity was justified) (testimony of Cotton M. Lindsay).

36. Indeed, the studies of the wage gap have reached different conclusions. As one commentator summarized: "[e]ven the gross wage gap—the hourly earnings differential before adjusting for diverse characteristics—varies from study to study, ranging from 45 to 47 percent depending on the type of population considered. Studies based upon national samples covering the full age range tend to show a gross wage gap of 35 to 40 percent. Studies based on more homogenous groups, such as holders of advanced degrees or those in specific professions, have found considerably smaller gross wage gaps." O'Neill, *An Argument Against Comparable Worth*, in JUDICIAL WAGE DETERMINATION . . . A VOLATILE SPECTRE 29 (1984).

37. WOMEN, WORK AND WAGES, *supra* note 3, at 53. The description contained in this study of the determinants of female choice in the decision to take a type of job is noteworthy:

> It is sometimes asserted that women choose to work at certain types of jobs despite the fact that such jobs have relatively low pay rates. A variety of reasons has been offered. First, women may be socialized to believe that some types of jobs are appropriate and that others are inappropriate for women; socialization may be so effective for some women that it never even occurs to them to consider other types of jobs. Second, women may have pursued courses of study they thought particularly appropriate to women and in consequence may not have the education or training that would suit them for other available jobs. Third, women may lack information about other available jobs, their pay rates, working conditions, and access to them. Fourth, women may be aware of alternatives, but because of actual or expected family obligations may structure their labor force participation in particular ways. For example, they may be unwilling to invest a great deal of time, effort, or money in preparing for jobs because they do not expect to remain in the labor force after marriage or childbearing. They may be willing to accept low paying jobs, or jobs with limited opportunities for advancement, and hold them until they marry and begin to raise children. Or, in expectation of returning to work after their children are in school or grown, they may choose jobs that are easy to leave and re-enter, jobs that do not require the continuous accumulation of skills and consequently do not lead to significant increases in earnings with experience (citation omitted). To accommodate the dual demands of work and family responsibilities, women may choose jobs with limited demands—restricted hours, no overtime work, no travel requirements, etc. Or they may defer to the demands of their husbands' career advancement, moving with their husbands from place to place, etc. (citations omitted). Some of these family related factors may influence women's willingness to pursue advancement in their jobs. Fifth, women may be aware of alternative types of jobs but believe them to be unavailable or unpleasant because of discrimination; their labor market preparation and behavior may be affected in many ways by this perception: the course of study they take; the time, money and effort invested in training; their willingness to accept promotion, etc.

ous to argue that the factor of employee choice is the determinant factor in the creation and maintenance of a work force which contains segregated job patterns, it represents a major factor unaccounted for in the comparable worth proponents' presumption that the much heralded "wage gap" is predominantely a result of discrimination by employers in the setting of wages.

In sum, supporters of comparable worth have not proved an underlying and basic premise of their argument, *viz*, that the wage gap is a product of employer discrimination in the setting of wages and must therefore be remedied by anti-discrimination laws.[38]

B. *The Role of the Marketplace*

Proponents of comparable worth would replace marketplace determinations of wages with job evaluation studies which evaluate different jobs according to an "objective" set of standards. A standard for job evaluation studies will necessarily have to be created so that there will be uniformity in the results of those studies. One of the underlying problems with the comparable worth theory is the enormous practical problem it creates in terms of implementation. An equitable pay setting system, according to proponents of the theory, would exist if a mechanism is utilized which would evaluate the "worth" of jobs to employers without regard to sex or the marketplace. Indeed, the market place is seen as perpetuating the effects of past discrimination and therefore as an invalid measure of job worth.[39] Another rationale for ignoring the marketplace function for the setting of wage rates is the observation that market forces are not "pure" in wage setting, particularly in the area of collectively-bargained wage rates.[40] Proponents of comparable worth by definition assume that either the marketplace is perpetuating the effects of past discrimination[41] or that all wage differentials derived from

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Id.

38. The district court in Briggs v. City of Madison, 536 F. Supp. 435 (W.D. Wis. 1982) summarized the above argument as follows:

> I find unpersuasive the basic premise that Blumrosen [*supra* note 2] or any one possesses the intellectual tools and data base that would enable them to identify the extent to which the factor of discrimination has contributed to, or created, sex-segregated jobs, and to separate that factor from the myriad of nondiscriminatory factors that may have contributed to the same result.

Id. at 444. The court noted:

> Among others, these contributory factors would include familial and peer expectations, desire for part-time work or work with flexible hours, reluctance to pioneer in non-traditional fields, the absence of 'role models' in non-traditional jobs, and lack of information about higher paying jobs.

Id. at 444 n.6. *See* O'Neill, *An Argument Against Comparable Worth*, in COMPARABLE WORTH: ISSUES FOR THE 80's (A Consultation for the U.S. Commission on Civil Rights) 179-83 (1984).

39. *See Hearings, supra* note 10, *reprinted in* DAILY LAB. REP. (BNA) No. 70, at G-7 (paying market rates "does not reflect the value of the job relative to other jobs in the same firm and may well reflect prior discrimination by other employers or by society as a whole") (statement by Brian Turner on behalf of the National Committee on Pay Equity).

40. *Id.*

41. *Id.*

the market arise from wage discrimination.[42]

Implicit in the proponent's theory is the assumption that the marketplace determines wage rates based on noncompetitive factors,[43] or that even if competition is present, the wages of women in predominantly female job classifications will be kept at a lower level precisely because of the sex of the incumbents, i.e., women have been and continue to be discriminatorily barred from other positions and therefore there is an oversupply of labor for female dominated job classifications.[44] It is further assumed that wage differentials become customary and are reproduced throughout a given labor market (whether regional or national).[45]

One basic problem with any theory which emphasizes that the "worth" of a job classification should be set by an evaluation system and not by market rates is that the market system already recognizes the relative worth of various job classifications. Indeed, proponents of comparable worth assume that there is an objective hierarchy of job worth, but that women in female dominated job classifications are not paid on the basis of this objective hierarchy.[46] Clearly "institutional" factors influence wage rates without a direct connection to the labor market. Such factors include policies of promoting from within and collective bargaining agreements.[47] The present market system determines wages by relating particular talents of employees and potential employees to the demands of business and consumers.[48] Although the market system is inperfect according to classical economic theory, the valuation of job "worth" (defined basically by the assigned wage) clearly takes into account the basic values which a comparable worth system would, such as skills, education, experience and working conditions. The present wage system has the additional advantage of flexibility in changed conditions, whether in the supply of, or the demand for, particular skills. An administrative approach, such as that envisioned by proponents of comparable worth, would lack such flexibility, aside from the issue of whether it is

42. G. Hildebrand, *The Market System*, in COMPARABLE WORTH: ISSUES AND ALTERNATIVES, *supra* note 5, at 101.

43. *Id.* at 82.

44. *Id.* at 87. The "exclusion" theory is further amplified in WOMEN, WORK AND WAGES, *supra* note 3, at 55.

45. WOMEN, WORK AND WAGES, *supra* note 3, at 61. "By use of the 'going wage' as a standard to set pay rates, the wages of a (nondiscriminating) firm will be biased by the discrimination of other firms in the market."

46. WOMEN, WORK AND WAGES, *supra* note 3, at 118 (minority report by Ernest J. McCormick).

47. The writers of the National Research Council study added "the segmentation of labor markets into noncompeting groups, largely on the basis of the sex, race and ethnicity of workers" is an additional institutional constraint. WOMEN, WORK AND WAGES, *supra* note 3, at 45.

48. *See* O'Neill, *supra* note 36, at 28-29. The labor market has been defined as "the generic term for a value system rooted in the hierarchy of skills, effort, responsibility, and work activities (and to some extent working conditions) that comprise jobs, and the supply and demand forces that operate as organizations and workers compete in our economy." WOMEN, WORK AND WAGES, *supra* note 3, at 118 (minority report). The labor market already takes into consideration the "objective" factors purported to be the basis of the grand job evaluation scheme envisioned by comparable worth proponents.

proper for the government to administer a wage-rate setting program designed to ignore market forces.[49]

C. *Job Evaluation Studies*

A serious problem involved with the implementation of job evaluation studies on a grand scale is that any company which does not set pay levels which are closely aligned with the prevailing conditions in the external labor market and the product market is going to be unable to compete.[50] Job evaluation studies if performed under a comparable worth mandate would ignore such considerations.

The orientation of job evaluations is internal by definition and under a comparable worth approach would deliberately avoid the market as a determinant of wages. Basically, job evaluation is "a procedure that makes judgments about jobs based on content or the demands made on job incumbents."[51] After job descriptions are produced pursuant to a job analysis, a list of "compensable factors" is chosen which represents values which an organization chooses to reward. The job descriptions are evaluated in terms of the extent of compensable factors present within that job classification, and a pecuniary hierarchy of jobs is established.[52] As this description demonstrates, the employer conducting a job evaluation presently has a scale of values which it wishes to implement and uses a job evaluation study to establish a pecuniary hierarchy in terms of those values. Adjustments are then made according to *external labor market rates*.[53] The values underlying the job evaluation system are dictated by the particular business needs of the employer, and are therefore also subject to change.[54] Presently these value scales are set by the employer if comparable worth is mandated, then such values must be legislatively derived and applied to different types of employers with different strategies with respect to recruitment and retention of employees. Even proponents of comparable worth admit that the values are subjectively derived.[55] In practice, the comparable worth theory would require that "worth" be established to a legal certainty[56] and would require either a comprehensive legislative mandate establishing the national economic importance of a value or an ad hoc judicial determination of this value.

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49. *See* Williams and Kessler, *supra* note 34, at 40-41.

50. G. Hildebrand, *The Market System*, in COMPARABLE WORTH: ISSUES AND ALTERNATIVES, *supra* note 5, at 95.

51. Schwab, *Job Evaluation and Pay Setting: Concepts and Practices*, in COMPARABLE WORTH: ISSUES AND ALTERNATIVES, *supra* note 5, at 57.

52. *Id.* at 58.

53. Address by Robert E. Williams to the American Arbitration Association (Jan. 23, 1984), *reprinted in* DAILY LAB. REP. (BNA) No. 16, at F-1 (Jan. 25, 1984).

54. *Id.*

55. *See* WOMEN, WORK AND WAGES, *supra* note 3, at 96. ("[T]here are no definitive tests of the 'fairness' of the choice of compensable factors and the relative weights given to them. The process is inherently judgmental and its success in generating a wage structure that is deemed equitable depends on achieving a consensus about factors and their weights among employers and employees").

56. *See supra* note 53, at F-2.

Additionally, job evaluations are inherently subjective procedures requiring discretion and judgment in their implementation.[57] This raises the problem of the reliability of the job evaluations with respect to two areas. First, the job description which forms the basis of the job evaluation varies depending on the person conducting the analysis, in part because most job analyses are narrative verbal descriptions.[58] Second, the actual numerical rating process is so inherently subjective that different raters will often produce different evaluations.[59] The subjectivity of the job evaluations system militates against its application by way of a legal mandate. Again, the worth of a job would have to be established to a legal certainty and under current methods of job evaluation this cannot be achieved.[60] Corporate consultants who are charged with the task of performing corporation-wide job evaluation studies have stated that such studies emphasize the differences among jobs, and that no job evaluation system has been established which could implement a comparable worth mandate, which emphasizes the similarities between disparate jobs.[61]

The adoption of such a subjective system of wage setting would necessarily fail to meet the purported purpose of a system of comparable worth. It may narrow or even eliminate the wage gap existing in an individual employer's workforce but it would not establish the same rates of pay between different employers because the economic condition of each employer must, by necessity, dictate how much capital is available for payment of wages.

II. LEGISLATION: CURRENT AND PROPOSED

A. *State Developments*

The concept of comparable worth as a legislative mandate is not new: twenty states[62] currently have statutes prohibiting unequal com-

57. Schwab, *Job Evaluation and Pay Setting: Concepts and Practices*, in COMPARABLE WORTH: ISSUES AND ALTERNATIVES, *supra* note 5, at 59-60.

58. *Id.*

59. *Id.* at 60-61.

60. *See* Nelson, Opton and Wilson, *supra* note 18, at 255. ("Job evaluation systems are basically methods for systematizing and recording subjective judgment, and at each stage in the process—job analysis, job description, selection of compensable factors, weighting of compensable factors, and the selection of the breadth of jobs to which a particular system will be applied—the necessarily subjective judgments inevitably incorporate individual and societal biases.").

61. *See, e.g.*, BUREAU OF NAT'L AFFAIRS, PAY EQUITY AND COMPARABLE WORTH 82-83 (1984) (description of job evaluation program utilized by Control Data Business Advisors, Inc.) [hereinafter cited as PAY EQUITY AND COMPARABLE WORTH].

62. These states include Alaska, Arkansas, Georgia, Hawaii, Idaho, Iowa, Kentucky, Maine, Minnesota, Maryland, Massachusetts, Montana, Nebraska, North Dakota, Oklahoma, Oregon, South Dakota, Tennessee, Washington and West Virginia. PAY EQUITY AND COMPARABLE WORTH, *supra* note 61, at 55-56. For example, the Idaho statute provides: "No employer shall discriminate between or among employees in the same establishment on the basis of sex, by paying wages to any employee in any occupation in this state at a rate less than the rate at which he pays any employee of the opposite sex for comparable work on jobs which have comparable requirements relating to skill, effort and responsibility." IDAHO CODE § 44-1702(1) (1977).

pensation for "comparable work" or work of "comparable character" which cover employees both in the private and public sectors,[63] or mandate studies of the feasibility of comparable worth in government jobs.[64] Indeed, approximately thirty states have set up task forces, special commissions or other procedures to evaluate jobs or recommend specific actions to state governments.[65] For example, a 1982 Minnesota statute provides for "equitable compensation relationships between female-dominated, male-dominated, and balanced classes of employees in the executive branch."[66] The Commissioner of Employee Relations is charged with biannually compiling a list of those state civil service units within the different municipalities where compensation inequities exist based on comparability of the value of the work. An estimate of the appropriation necessary for providing comparability adjustments will also be prepared and a commission on employee relations shall review and submit a list of comparability adjustment areas and a recommended appropriation.[67] In Minnesota, 9000 employees were determined to have been eligible for comparability adjustments totaling $26 million, or approximately 4 percent of the state payroll.[68]

Twenty-one state legislatures considered some form of comparable worth legislation in 1983 and 1984, mostly pertaining to the public sector.[69]

B. *Federal Developments*

Numerous comparable worth initiatives were propsed in the House and Senate in 1983-1984, and although none were enacted, it is certain that these proposals foreshadow statutes on the legislative horizon. Therefore, a brief look at some of these proposals is necessary.

Senate Bill 1900 ("The Pay Equity Act of 1983") was introduced in 1983 by Senator Alan Cranston of California. The EEOC would have been charged with the task of publishing guidelines aimed at "discriminatory wage setting practices," i.e., compensation practices where female dominated jobs are paid less than male dominated jobs "although the work performed requires comparable education, training, skills, experience, effort and responsibility, and is performed under comparable working conditions. . . ." The EEOC would also have had to study "equitable job evaluation techniques and aid employers" in utilizing

63. PAY EQUITY AND COMPARABLE WORTH, *supra* note 61, at 55.

64. The California statute, for example, states that: "it is the intent of the legislature . . . to establish a state policy of setting salaries for female-dominated jobs on the basis of comparability of the value of the work." The Department of Personnel Administration is charged with reviewing and analyzing "existing information, including those studies from other jurisdictions relevant to the setting of salaries, for female-dominated jobs." CAL. GOV'T. CODE § 19827.2(b) (West Supp. 1984).

65. Chi, *Comparable Worth in State Governments*, 27 STATE GOVERNMENT NEWS 4 (November, 1984).

66. MINN. STAT. ANN. § 43A.01(3) (West Supp. 1984).

67. *Id.*

68. PAY EQUITY AND COMPARABLE WORTH, *supra* note 61, at 59.

69. *Id.* at 61-68.

such techniques. The EEOC would also have had to study the federal employment system to determine whether it is equitable. Furthermore, federal contractors would have been required to identify "discriminatory wage-setting practices and differentials" and include proposals for their elimination in the contractor's affirmative action plan. Compliance review would have be undertaken where a contract had not utilized "equitable job evaluation techniques."

The Federal Pay Equity and Management Improvement Act of 1984 passed the House of Representatives in June of 1984, but was not acted upon in the Senate before the end of the 98th Congress. This proposal would apply comparable worth theory to federal employees.[70] The Bill defines a "discriminatory wage-setting practice" as one where the pay rates for predominantly female positions are lower than those for predominantly male positions, although "the work performed . . . involves comparable duties, responsibilities, and qualification requirements and is performed under comparable working conditions."[71] The elimination of "discriminatory wage differentials" would occur through "equitable job evaluation techniques," i.e., a job evaluation system which establishes a numerical point value for each job.[72]

The president of the Marine Engineer's Beneficial Association[73] opposed this proposal, saying it would replace collectively bargained wage rates for blue collar workers with a combination white collar-blue collar evaluation. He opposed any system which would ultimately have the effect of lowering blue collar wages.[74]

III. CURRENT LAW

A. County of Washington v. Gunther

In *County of Washington v. Gunther*,[75] the Supreme Court held that the standard of "equal or substantially equal" work as set forth in the Equal Pay Act[76] need not be met where a claim of sex-based wage discrimination is brought under Title VII.[77] The case involved direct proof of in-

70. H.R. 5680, 98th Cong., 2d Sess. (1984), *reprinted in* PAY EQUITY AND COMPARABLE WORTH, *supra* note 61, at 139.

71. H.R. 5680, 98th Cong., 2d Sess. § 101(4) (1984).

72. H.R. 5680, 98th Cong., 2d Sess. § 101(6) (1984).

73. Jesse M. Calhoon, President, Marine Engineers Beneficial Association, AFL-CIO.

74. *See* Calhoon, *Comparable Worth and the Role of Collective Bargaining*, in JUDICIAL WAGE DETERMINATION . . . A VOLATILE SPECTRE, *supra* note 36, at 42. ("What this all boils down to is that collective bargaining in the Federal sector will soon cease to have any meaning. Once comparable worth policies are implemented, and Federal employees are all covered under a so-called 'objective' system, there will be no room for negotiation over salaries. One way, and only one way, will be the 'right' way to compensate employees. We will be substituting the opinion of 'expert' evaluators for the hard-won victories of collective bargaining.").

75. 452 U.S. 161 (1981).

76. Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (1963) (codified at 29 U.S.C. § 206(d) (1982)).

77. Title VII of the Civil Rights Act of 1964, U.S.C. § 2000(e) (1982). Section 703(h) of Title VII (the Bennett Amendment), provides that it not unlawful to differentiate upon

tentional sex discriminations. The County of Washington, Oregon had paid substantially lower wages to female correction officers in the female section of the county jail than it had paid to male correction officers in the male section of the jail. Four female correction officers brought suit alleging that the County had intentionally discriminated against the female officers by setting the pay scale for female officers, but not for male officers, at a lower rate than was warranted by the County's own survey of outside markets and the worth of the jobs. The Court specifically stated that the claim by the female guards was "not based on the controversial concept of 'comparable worth.' "[78] The study conducted by the County had determined that the female officers should be paid approximately 95 percent as much as the male officers, whereas the female officers were thereafter paid 70 percent. This intentional discrimination suit, the Court stated, "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."[79] In *Gunther*, therefore, the door was opened for sex-based wage discrimination suits which compared the compensation levels of dissimilar jobs; however, the Court by no means endorsed comparable worth as a viable theory under Title VII.

B. *Reliance Upon the Marketplace as a Title VII Defense*

Employers, when faced with a Title VII sex-based wage discrimination suit, may assert the defense established by the Equal Pay Act that the pay differentials are based "on any factor other than sex."[80] A critical issue is whether reliance upon the marketplace in the setting of wages constitutes a defense under Title VII.[81] In *Spaulding v. University of Washington*,[82] members of a predominantly female nursing faculty alleged sex discrimination in the setting of salaries for the various academic departments.[83] At the outset, the Ninth Circuit considered the plaintiff's claims under the disparate treatment model of sex discrimina-

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the basis of sex in determining wages if such differentiation is "authorized" by the Equal Pay Act. The employer's position in *Gunther* was that the Bennett Amendment incorporates into Title VII only the affirmative defenses of the Equal Pay Act, and not the equal pay for equal work standard.

78. 452 U.S. at 166.

79. *Id.* at 181. *See also* Heagney v. University of Washington, 642 F.2d 1157, 1165 (9th Cir. 1981) (an in-depth analysis of salaries paid to exempt employees indicating that more female than male exempt employees were underpaid should have been admitted into evidence by district court).

80. *See* 29 U.S.C. § 206(d)(i) (1982).

81. *See generally* Brief Amicus Curiae of the Eagle Forum Education and Legal Defense Fund at 15-22, AFSCME v. Washington, No. 84-3569 (9th Cir.) (extensive discussion of marketplace defense).

82. 740 F.2d 686 (9th Cir.), *cert. denied*, 105 S. Ct. 511 (1984).

83. Plaintiffs in *Spaulding* asserted claims under 42 U.S.C. § 1983, the Equal Pay Act, and Title VII. The Ninth Circuit found the district court lacking in jurisdiction over § 1983 since the University of Washington is a state agency. With respect to the Equal Pay Act claims, the Ninth Circuit upheld the lower court's findings as to the lack of substantial equality of job content. *Id.* at 694, 699.

tion.[84] Recognizing that under this model plaintiffs must ultimately prove intent to discriminate, the court stated that *Gunther* did not require an inference of such intent where wage differences exist between similar jobs.[85] But the court did find that the comparibility of jobs can be relevant in determining whether a court can infer discriminatory animus.[86] The court rejected plaintiffs' attempt to support a prima facie case of disparate treatment by an asserted failure by the University to cooperate in the investigation of the initial discrimination charge, its asserted failure to appoint experienced women's rights advocates, the all-male composition of the budget committee,[87] an alleged disdain for women's issues,[88] and faulty gross comparisons of wages in other departments.[89] The plaintiffs also claimed that the disparate impact model applies to sex-based wage discrimination claims,[90] and that the University could not rely upon a "competitive marketplace" defense.[91]

The Ninth Circuit, following two circuit court opinions discussed below, *Lemons v. City and County of Denver*[92] and *Christensen v. State of Iowa*,[93] held that disparate impact analysis is not appliable to a comparable worth claim,[94] and, therefore a prima facie violation of Title VII may not be made out by utilizing disparate impact analysis.[95] The disparate impact model "was developed to handle specific employment practices not obviously job-related"[96] and is not "the appropriate vehicle from which to launch a wide ranging attack on the cumulative effect of a company's employment practices."[97] The plaintiffs sought to establish the University's policy of relying on the market to set its wages as the facially neutral policy which had a discriminationory impact upon the nursing faculty. The court found however that the University's reliance upon the market was not the type of employer policy which is appropriate for disparate impact analysis.[98] Employers "deal with the market as a 'given,' and do not meaningfully have a 'policy' about it in the relevant

84. 740 F.2d at 700.

85. The "nursing faculty must show 'proof of actions taken by the employer from which we infer discriminatory animus . . .,' " 740 F.2d at 700 (quoting Furnco Constr. Co. v. Waters, 438 U.S. 567, 579-80 (1978)).

86. 740 F.2d at 700-01.

87. *Id.* at 701-02.

88. *Id.* at 702.

89. *Id.* at 704.

90. The applicability of disparate impact theory to sex-based wage discrimination claims is discussed more fully in notes 92-99 *infra*.

91. 740 F.2d at 692.

92. 620 F.2d 228 (10th Cir.), *cert. denied*, 449 U.S. 888 (1980).

93. 563 F.2d 353 (8th Cir. 1977).

94. 740 F.2d at 708. ("We cannot manageably apply the impact model when the kernel of the plaintiff's theory is comparable worth.").

95. 740 F.2d at 707.

96. *Id.* Namely, employer's intelligence tests and height and weight tests. *See, e.g.*, Dothard v. Rawlinson, 433 U.S. 321 (1977), Gerdom v. Continental Airlines, 692 F.2d 602 (9th Cir. 1982) (en banc), *cert. dismissed*, 460 U.S. 1074 (1983).

97. *Id.* (quoting Pouncy v. Prudential Ins. Co. of America, 668 F.2d 795, 800 (5th Cir. 1982)).

98. 740 F.2d at 708.

Title VII sense."[99]

An earlier Eighth Circuit case cited by the Ninth Circuit in *Spaulding*, *Christen v. State of Iowa*,[100] involved a class of female clerical employees at the University of Northern Iowa who contended that clerical workers, all of whom were female, were discriminated against on the basis of sex since the predominantly male physical plant workers were paid more. Wages were determined at the University under a job evaluation scheme which referred to the market only after a point-rating system had placed jobs in particular "labor grades." The local job market paid higher wages for physical plant jobs than starting pay under the job evaluation scheme, so starting pay for physical plant employees had been adjusted upwards.[101] Plaintiffs argued that the University's reliance upon local wage rates to establish the higher starting pay perpetuated sex discrimination in the marketplace.[102] The court logically rejected this finding and held that Title VII does not require employers to "ignore the market in setting wage rates for genuinely different work classifications."[103]

In *Lemons v. City and County of Denver*,[104] the Tenth Circuit was faced with a comparable worth claim brought by nurses employed by the City of Denver. Wage rates were set according to a method which placed city nurses on a pay parity with other nurses in the community.[105] Plaintiffs argued that the City should not mirror the prevailing market condition of underpaying nurses. The nurses sought wage comparison with other jobs alleged to be of equal worth to the employer. The Tenth Circuit, following *Christensen*, stated that current law did not require the City to "reassess the worth of services in each position in relation to all others . . . ."[106] The court added that such a reassessment would not be tolerated when made in total disregard of conditions in the community.[107] In essense, employers are not required under Title VII to ignore the marketplace in the establishment of wage rates.

In *Briggs v. City of Madison*,[108] plaintiffs were female public health

99. *Id. See also* Note, *Sex-Based Wage Discrimination Under the Title VII Disparate Impact Doctrine*, 34 STAN. L. REV. 1083 (1982) (discussion of comparable worth and disparate impact analysis).

100. 563 F.2d 353, 354 (8th Cir. 1977).

101. *Id.*

102. *Id.* at 356.

103. *Id. See also* Wilkins v. University of Houston, 654 F.2d 388 (5th Cir. 1981), *cert. denied*, 459 U.S. 822 (1982) (recognizing legitimacy of marketplace-based differentials in the context of comparisons of salaries of faculty members in different professional schools); Keyes v. Lenoir Rhyne College, 15 Fair. Empl. Prac. Cas. (BNA) 914 (W.D.N.C. 1976), *aff'd*, 552 F.2d 579 (4th Cir.), *cert. denied*, 434 U.S. 904 (1977) (marketplace considerations constitute "legitimate factors"); County Employees Ass'n. v. Health Dep't., 18 Fair. Empl. Prac. Cas. (BNA) 1538 (Wash. Ct. App. 1978) (pattern of historical discrimination does not justify comparable worth claim under state anti-discrimination law where employer adopted the wage scales of the marketplace).

104. 620 F.2d 228 (10th Cir.), *cert. denied*, 449 U.S. 888 (1980).

105. *Id.* at 229.

106. *Id.* The Tenth Circuit's rationale was buttressed by the Ninth Circuit's emphasis in *Spaulding* that "[c]ourts are not competent to engage in a sweeping revision of market wage rates." 740 F.2d 686, 706 n.11.

107. 620 F.2d at 229.

108. 536 F. Supp. 435 (W.D. Wis. 1982).

nurses employed by the City of Madison who claimed sex discrimination under the disparate treatment theory. The plaintiffs alleged that they were discriminated against by the City's practice of paying lower salaries to female public health nurses than to male public health sanitarians. Plaintiffs contended that much of the pay disparity could be traced to an historical devaluation of the worth of female dominated jobs.[109] Plaintiffs further contended that the worth of nurses and sanitarians was substantially similar in skill, effort, and responsibility. The plaintiffs sought a wage comparison even though the two jobs did not involve performance of the same or equal work.[110] In finding that the plaintiffs failed to demonstrate intentional illegal discrimination, the court stated that nothing in Title VII "indicates that the employer's liability extends to conditions of the marketplace which it did not create."[111]

In sum, the courts recognize that an employer's reliance upon the marketplace in the setting of wage rates is not indicative of an intent to discriminate on the basis of sex and is a factor "other than sex," constituting a defense to a disparate treatment claim. Furthermore, it is inappropriate to use disparate impact theory to establish a prima facie Title VII case by wholesale assaults on employer wage-setting policies.

C. AFSCME v. State of Washington

In *AFSCME v. State of Washington*,[112] the State of Washington conducted job evaluation studies with the intent of examining, on the basis of job worth, the salary differences between predominantly male and female job classes. Four such studies were conducted between 1974 and 1980. Job classes were assessed on the basis of the four components of "knowledge and skills," "mental demands," "accountability," and "working conditions." The final point value of each class was the total of the value of these four components.[113] The studies did not, therefore, reflect market forces, although a state statute provides that wages of public employees are to reflect prevailing rates in the public and private sectors.[114] The district court found that the State of Washington had discriminated against females on the basis of sex under disparate

109. *Id.* at 437.

110. *Id.* at 442.

111. *Id.* at 447. "That there may be an abundance of applicants qualified for some jobs and a dearth of skilled applicants for other jobs is not a condition for which a particular employer bears responsibility." *Id. See* Horner v. Mary Institute, 613 F.2d 706, 714 (8th Cir. 1980) (part of differential in pay between male and female physical education instructors due to marketplace considerations constituting a factor other than sex under the Equal Pay Act). *See also* Craik v. Minnesota State Univ. Bd., 731 F.2d 465, 480 (8th Cir. 1984) (upholding finding that market factor increases given by University to faculty members in five traditionally all male disciplines was necessary to maintain a strong faculty in those disciplines despite discriminatory impact of the awards); Schulte v. State of New York, 533 F. Supp. 31 (E.D.N.Y. 1981) (same); Mosely v. Kellwood Co., 27 Empl. Prac. Dec. (CCH) ¶ 32, 348 (E.D. Mo. 1981) (recognizing importance of the role of the market in setting of wages).

112. 578 F. Supp. 846 (W.D. Wash. 1983).

113. *Id.* at 865 n.9.

114. WASH. REV. CODE §§ 28B.16.110, 41.06.160 (1982).

impact theory, by utilizing its present system, and under disparate treatment theory by implementing and perpetuating the present system.[115] The case, according to the district court, concerned with implementation of a comparable worth compensation system, but did not require the court to make its own subjective assessment of the worth of particular jobs,[116] and therefore could be "more accurately characterized as a straightforward 'failure to pay' case."[117]

The district court analogized its "failure to pay" characterization of the case before it to *County of Washington v. Gunther*.[118] The differences however between the two cases were not recognized by the court. In *Gunther*, the narrow issue before the court was whether a claim of intentional discrimination could be brought and proved by direct evidence which proved that the wages of female correction officers, but not male officers, were intentionally set at a lower level than the State's own job survey warranted.[119] In *Gunther*, the Supreme Court decided that such an intentional failure to pay case could be brought under Title VII, but the Court provided that no standards were set forth for such cases.[120] The district court in *State of Washington* erred by relying upon *Gunther* for the proposition that a failure to implement a job evaluation study is itself a Title VII violation. Furthermore, the *Gunther* study took into account market factors, whereas the *State of Washington* study did not. Therefore, the defendant in *State of Washington* should have been able to assert reliance upon the marketplace as a defense. The district court, however, found that plaintiffs had established a prima facie case and precluded the State from demonstrating that no discrimination occurred, limiting defendants to such proof as would justify the discrimination "established" by the prima facie case.[121] The district court would not allow defendants to introduce evidence demonstrating the state's reliance on prevailing market wages.[122] Since reliance upon the marketplace constitutes "a factor other than sex" and therefore a defense to a sex-based wage discrimination claim,[123] the state was clearly prejudiced by the district court's refusal to admit such evidence.[124]

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115. 578 F. Supp. at 864.

116. *Id.* at 862.

117. *Id.* at 865.

118. 452 U.S. 161 (1981). *See supra* notes 76-82 and accompanying text.

119. *Id.* at 181 ("[W]e do not decide in this case the precise contours of lawsuits challenging sex discrimination in compensation under Title VII."). Courts have noted the limited holding in *Gunther*. The Fifth Circuit has stated that the Supreme Court in *Gunther* "was concerned with blatant cases of sex discrimination in which the only stumbling block to underpaid females' causes of action was the fact that the victimized women did not hold jobs similar to those held by men." Plemer v. Parsons-Gilbane, 713 F.2d 1127, 1133 (5th Cir. 1983).

120. *See* Brief Amicus Curiae of the Equal Employment Advisory Council at 34-38, Spaulding v. University of Washington, 740 F.2d 686 (9th Cir.), *cert. denied*, 105 S. Ct. 511 (1984).

121. 578 F.2d at 857.

122. *Id.* at 863.

123. *See supra* notes 81-110 and accompanying text.

124. The district court refusal to allow defendants to demonstrate that no discrimination had occurred, rather than merely to justify the discrimination "proved" by the prima facie case, led the court to exclude relevant evidence. "Included among the evidence not

The district court concluded that plaintiffs had established a prima facie case of disparate treatment by showing that the state had intentionally implemented and perpetuated a compensation system which resulted in unfavorable treatment of employees in predominantly female job classifications.[125] The "failure to pay," was only one factor relied upon by the court in finding the intentional discrimination necessary to establish disparate treatment. The factors cited by the court included the perpetuation of the disparity in salaries between female and male job classifications rated as having the same point value; statistical evidence, including an inverse correlation between the percentage of women in a classification and salary; subjective standards with a "disparate impact" on predominantly female jobs; admissions by the state officials of discriminatory wage setting practices; and the failure to pay the evaluated worth as established by the job evaluations.[126] In reaching a finding of disparate treatment, the court relied upon factors inextricably tied to the concept that discrimination exists in the failure to pay particular job classification wages commensurate with the job evaluation point values assigned to a particular job.[127] The "admissions" of state officials of disparate treatment[128] were actually recognitions of the disparity in pay between predominantly female and male jobs;[129] such a disparity, however, must be shown to be the result of intentional employer discrimination to be part of a cognizable legal claim under Title VII. Ultimately, the court held the State of Washington bound by the findings of the job evaluation studies that disparities existed between predominantly female and male wage rates. The court implicitly held that the state was bound for Title VII to implement the results of the job evaluation studies and to ignore the marketplace, although the setting of the wage rates in itself was not proved to have been motivated by discriminatory intent.[130]

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allowed were testimony and exhibits as to why the State did not implement the internal comparability studies; why the State felt it necessary and appropriate to rely on prevailing market rates; and the extensive affirmative action efforts undertaken by the State." Brief Amicus Curiae of the Equal Employment Advisory Council at 37, AFSCME v. Washington, 578 F. Supp. 846 (W.D. Wash. 1983), *appeal docketed* No. 84-3569 (9th Cir.). Despite these evidentiary rulings, the district court concluded: "Defendants failed to produce credible, admissible evidence raising a genuine issue of fact as to whether it discriminated against the Plaintiffs herein." *Id.* at 863. The court later stated: "[I]n fact, there is no credible evidence in the record that would support a finding that the State's practices and procedures were based on any factor other than sex." *Id.* at 866. But for the court's evidentiary rulings, the record would have reflected the State's reliance on several factors other than sex, including the arguably complete defense of reliance upon the marketplace.

125. 578 F. Supp. at 864.

126. *Id.*

127. "The evidence in the instant case is clear . . . that the State was on notice of the legal implications of conducting comparable worth studies without implementing a salary structure commensurate with the evaluated worth of jobs." *Id.* at 870.

128. "[R]ecognition of disparate treatment by responsible State officials" constitutes "perhaps [the] most telling" circumstantial evidence of intentional discrimination. *Id.* at 858.

129. Statements included: "There are clear indications of pay differences between classes predominately held by men and those predominately held by women within the State systems. Such differences are not due solely to job 'worth.'" *Id.* at 860-61.

130. "The State was entitled to conduct as many advisory studies as it wanted, but it

D. *Summary*

Intentional sex-based wage discrimination may be remedied currently under either Title VII or the Equal Pay Act.[131] Under neither statute may a claim of sex-based wage discrimination be brought, however, where plaintiffs assert than an employer is not paying the employees in a job classification the intrinsic "worth" of their jobs.[132] Moreover, employees should not be held to be legally bound to implement the results of a job evaluation study, as the employer would be under no duty to conduct such a study in the first place. Certainly, no employer should be held liable for a failure to implement a job evaluation scheme unless substantial evidence supports a finding of discriminatory intent.

IV. UNION LIABILITY FOR SEX-BASED WAGE DISCRIMINATION

Several unions in the public and private sectors support the comparable worth theory and intend to pursue "equity" increases at the bargaining table. Although the future of comparable worth rests in large part on the success of public and private sector unions at the bargaining table,[133] the potential liability of unions for successful claims against employers is barely acknowledged. Unions may be liable if it is found that a collective bargaining agreement contained discriminatorily set wage rates for predominantly female job classifications under present anti-discrimination laws and may also share responsibility with employers should comparable worth theory be legislatively mandated in the future.

Union liability stems from three federal statutes: Title VII, the National Labor Relations Act ("NLRA"),[134] and under section 1981.[135] Under Title VII and section 1981, the union may be held jointly liable for negotiating a collective bargaining agreement which contains dis-

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had no legal obligation to abandon its existing market-based pay system simply because some studies of internal comparability showed that a different method of valuing jobs would be more favorable to employees in predominantly female classifications. This is not a 'failure to pay' case, because the State had no obligation to pay employees in accordance with the [job evaluation] studies and there *is no evidence that the State ever failed to pay women based on the same criteria that it used in paying men.*" Brief Amicus Curiae of the Equal Employment Advisory Council at 9-10, AFSCME v. Washington, 578 F. Supp. 846 (W.D. Wash. 1983), *appeal docketed*, No. 84-3569 (9th Cir.) (emphasis supplied).

131. *See, e.g.*, International Union of Elec. Workers v. Westinghouse Elec., 631 F.2d 1094 (3d. Cir. 1980), *cert. denied*, 452 U.S. 967 (1981) (employer allegedly set wage rates lower for any classification if the group covered within that category was predominantly female although jobs were evaluated as equivalent under employer's evaluation study).

132. Comparable worth theory has been rejected as a cognizable claim under Title VII by several district courts. *See e.g.*, Connecticut State Employees Ass'n v. Connecticut, 31 Empl. Prac. Dec. (CCH) ¶ 33, 528 (D. Conn. 1983); Power v. Barry County, 539 F. Supp. 721, 726-27 (W.D. Mich. 1982); Martin v. Frontier Federal Savings and Loan Ass'n, 510 F. Supp. 1062, 1067-68 (W.D. Okla. 1981); Gerlach v. Michigan Bell Tel. Co., 501 F. Supp. 1300, 1320 (E.D. Mich. 1980).

133. *See* PAY EQUITY AND COMPARABLE WORTH, *supra* note 61, at 91 (statement of Ronald Green).

134. 29 U.S.C. § 151 (1982).

135. Civil Rights Act of 1866, 42 U.S.C. § 1981 (1982).

criminatory wage rates or other policies and practices.[136] Under the NLRA, the union may have breached its of the duty of fair representation by invidiously discriminating against its members.[137]

A union may clearly be held to have violated Title VII by negotiating for, or acquiescing in, the setting of discriminatory wage rates.[138] Indeed, Title VII imposes an affirmative obligation on the part of international unions and other umbrella organizations to take reasonable steps to end discrimination, and an International may be held jointly liable with its Local for discriminatory practices.[139] In light of a union's potential liability under Title VII for sex-based wage discrimination claims, either under a "joint negotiator" theory or a "failure to take affirmative steps" theory, it is clear that the acceptance of the comparable worth doctrine either under present law or as a modification of present law has substantial negative economic implications for unions, thus militating against the acceptance of any broad-ranging support for comparable worth by the labor movement.

In addition, an aggrieved plaintiff asserting sex-based wage discrimination under Title VII or section 1981 could also simultaneously seek relief under the NLRA.[140] Such an aggrieved plaintiff could assert that the union has breached its duty of fair representation, a judically-created obligation under the NLRA prohibiting arbitrary, *discriminatory* or bad faith conduct by a union towards a member of the collective bargaining unit.[141] A charge could be brought to the National Labor Relations Board, or a suit instituted against the union, asserting a combination of theories, including breach of the duty of fair representation under the NLRA and causes of action under Title VII and section 1981.[142]

Although several unions, particularly in the public sector, are strong advocates of comparable worth theory, two important factors may tend to diminish broad-ranging support in the labor movement. First, unions would be potentially liable for any discrimination found. Second, if comparable worth theory were legislatively mandated, the freedom of unions to negotiate would be severely restricted and a major role in the wage-setting process now performed by unions would be-

136. *See* Note, *Union Liability For Employer Discrimination*, 93 HARV. L. REV. 702 (1980).

137. *Id. See also* Macklin v. Spector Freight Systems, Inc., 478 F.2d 979 (D.C. Cir. 1973) (union has duty to protect employees from employer discrimination by bargaining).

138. *See* Taylor v. Charley Bros. Co., 25 Fair. Empl. Prac. Cas. (BNA) 602 (W.D. Pa. 1981), wherein the union was held to have violated Title VII by agreeing to, and encouraging, the setting of discriminatory wage rates in negotiations in 1974 and 1977, and by acquiescing to the employer's proposals in 1980. *Id.* at 614.

139. Wheeler v. American Home Products Corp., 19 Fair Empl. Prac. Cas. (BNA) 143, 146 (N.D. Ga. 1979) (restriction of females to single job classification and failure to allow females to "bump" males with less senority during lay-off pursuant to provisions of collective bargaining agreement). *See also* Denicola v. G.C. Murphy Co., 562 F.2d 889 (3d Cir. 1977) (union local violated Title VII by refusing employer's offer to retroactively eliminate discriminatory pay differentials); Macklin v. Spector Freight Systems, Inc., 478 F.2d 979, 988-99 (D.C. Cir. 1973).

140. *Cf.* Alcantar v. Gardner-Denver Co., 415 U.S. 36 (1974).

141. Vaca v. Sipes, 386 U.S. 171 (1967).

142. *See generally* United Rubber Workers Local 12 v. NLRB, 368 F.2d 12, 24 (5th Cir. 1966), *cert. denied*, 389 U.S. 837 (1967).

come redundant due to extensive government involvement in the wage-setting process.

V. Conclusion—Methods of Avoiding Liability

Employers, both in the public and private sectors, are well-advised to implement policies and programs designed to avoid liability under comparable worth theory. Despite the fact that courts have not been receptive towards acceptance of the doctrine under current anti-discrimination laws, state and federal legislative developments indicate that those employers not presently subject to comparable worth statutes will be in the future.

A. *Self-Analysis*

Comparable worth statutes, in order to be implemented, are and will be administered by governmental fair employment agencies. Much as current equal employment opportunity laws depend upon employer self-analysis, (e.g. affirmative action programs), so too will employer self-analysis be the basis for governmental comparable worth efforts. Predominantly-female job classifications, (generally, where seventy-percent or more of the incumbents are female), are the targets of comparable worth advocates. Employers must establish whether predominantly female job classifications are present in the workforce. If such classifications exist, transfer and promotion procedures must be examined to determine whether female employees are encountering illegal barriers. Employers should actively encourage women in such job classifications to move into other positions. Any steps taken towards this end should be documented, including offers of transfer or promotion, so that a record of the employer's good faith efforts to remove obstacles to the transfer and promotion of women is established. Hiring procedures and recruitment methods must be examined to determine why the workforce has developed female or male dominated job classifications. To the extent the employer has the ability to discourage sex-based hiring patterns, it should do so. This may take the form, for example, of active recruitment of females for male-dominated job classifications.

B. *Wage-setting Policy*

The employer's wage-setting policy must be uniform and non-discriminatory. Ad hoc increases, either to individuals or for employees within a given job classification, should be carefully reviewed and documented. Certain inconsistencies in wage-setting policies will be unavoidable, such as where a portion of the workforce is part of a collective bargaining unit or where a true "merit" system applies. One of the most significant problems employers have in defining a "merit" system is when the salary increases given employees do not relate back to performance evaluations.

If there is any evidence of intentional discrimination either in setting wages by classifications or among individuals, the employee should consider appropriate action to remedy the bias. Such evidence may include a practice of basing starting salaries on the amount earned by applicants in prior employment instead of the *entry* salary set by company policy.

C. *Surveys*

The ultimate burden as to the conduct and implementation of any marketplace survey or job evaluation survey rests with the employer. Because of the very nature of such surveys there will be portions which will be subjective rather than objective. In constructing such a survey, the employer should take all steps possible to assure that the study is not affected by intentional employment discrimination. This can be done by selecting for review jobs which include both male and female employees wherever possible and in which the lines for job progression are such that movement to and from such jobs is not affected by factors which might indicate employment discrimination. One of the most crucial duties of employers is to closely monitor the conduct of the job evaluation or wage survey. It is folly to presume that those conducting such a survey do not make mistakes or are without bias. The role of counsel in this process is a crucial one in that the employers should be advised before, during and upon completion of a salary survey of the legal ramifications of the conduct of the survey and any decisions made as to implementation or non-implementation of any findings. The decision-making process as to any salary adjustments should be as extensively documented as possible both with respect to marketplace factors which would affect the salary levels paid for various positions as well as the economic condition of the company vis-a-vis its ability to pay increased salaries.

The above recommendations apply with equal force to job classifications dominated by any protected class. The comparable worth debate currently centers on women, although in practice, application of the theory will not be so limited in scope.