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## Women's Right to Equal pay in the International Workplace: Is the United States a Poor Leader and a Poor Follower?

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**WOMEN'S RIGHT TO EQUAL PAY IN THE INTERNATIONAL  
WORKPLACE: IS THE UNITED STATES A POOR LEADER  
AND A POOR FOLLOWER?**

*Cynthia Reddick-Martin*\*\*\*

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Women in both Europe and the United States have the benefit of legislation designed to ensure equal pay. European women have the legislative protection of Article 119 of the European Economic Community (EEC) Treaty<sup>1</sup> and Council Directive 75/115 (the Equal Pay Directive).<sup>2</sup> Women in the United States have the legislative protection of the Equal Pay Act<sup>3</sup> and Title VII of the Civil Rights Act of 1964.<sup>4</sup> Such legislation is

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\* *Editor's Note:* This note was selected as the best note for Fall, 1995.

\*\* This note is dedicated to my family, especially my husband, Stepfan, and my mother and father.

1. TREATY ESTABLISHING THE EUROPEAN ECONOMIC COMMUNITY [EEC TREATY], Mar. 25, 1957, art. 119, 298 U.N.T.S. 11, 62 (as amended 1987).

2. Council Directive 75/117, art. 1, 1975 O.J. (L 45/19) [hereinafter Equal Pay Directive].

3. Pub. L. No. 88-38, 77 Stat. 56 (codified at 29 U.S.C. § 206 (1994)).

4. Pub. L. No. 88-352, 78 Stat. 241 (codified at 42 U.S.C. § 2000 (1994)).

required, because despite the fact that women comprise one-third of the world's work force, they are not paid on an equal basis with men.<sup>5</sup> In 1962, women earned sixty cents for every one dollar earned by men. By 1992, women in the United States earned seventy-one cents for every one dollar earned by men.<sup>6</sup> Despite regulation, the past thirty years has realized only a twelve-cent gain for women.<sup>7</sup> The primary reason for this discrepancy is the persistent under-valuation of jobs held predominantly by women.<sup>8</sup> The under-valuation arises because the majority of women work in traditional jobs where 75% or more of those who work in that same job are women.<sup>9</sup> While it is true that women in the United States find some protection for equal pay, unfortunately, this protection often is narrow, illusory, and insufficient. In spite of such striking statistics of unequal pay, the United States has not been compelled to expand the scope of either the Equal Pay Act or Title VII to include a "comparable worth" cause of action.<sup>10</sup>

On the other hand, European women enjoy the fruits of aggressive legislation aimed at gaining comparable pay.<sup>11</sup> They are governed by the European Union (EU), which advocates a "Social Europe."<sup>12</sup> The EU has made a commitment to serve both societal and economic concerns. The EU has mandated in Article 119 of the EEC Treaty, equal pay for men and women for equal work.<sup>13</sup> Originally, this provision was included in the treaty to address economic concerns.<sup>14</sup> The European Court of Justice (ECJ), however, interpreted Article 119 from a human rights perspective,<sup>15</sup> describing the right of equal pay as "fundamental."<sup>16</sup> By interpreting this

5. Lariold M. Street, *International Commercial and Labor Migration Requirements as a Bar to Discriminatory Employment Practices*, 31 HOW. L.J. 497, 509 (1988).

6. See U.S. BUREAU OF THE CENSUS, CURRENT POPULATION REP., SERIES P60-184, MONEY INCOME OF HOUSEHOLDS, FAMILIES, AND PERSONS IN THE UNITED STATES: 1992 (1993).

7. See *id.*

8. Sandra J. Libeson, *Reviving the Comparable Worth Debate in the United States: A Look Toward the European Community*, 16 COMP. LAB. L.J. 358, 359 (1995).

9. *Fair Pay Act of 1994: Hearings on H.R. 4803 Before the House Subcomm. on Select Education and Civil Rights and Subcomm. on Compensation and Employee Benefits*, 103rd Cong., 2d Sess., 50, 56-67 (1994) (testimony of Michele Leber, Treasurer, Nat'l Comm. on Pay Equity).

10. Libeson, *supra* note 8, at 359.

11. EEC TREATY art. 119; Equal Pay Directive, *supra* note 2.

12. See generally Donald C. Dowling, Jr., *Worker Rights in the Post-1992 European Communities: What "Social Europe" Means to United States-Based Multinational Employers*, 11 NW. J. INT'L L. & BUS. 564 (1991).

13. EEC TREATY art. 119.

14. Libeson, *supra* note 8, at 376.

15. *Id.* at 377.

16. Jill Andrews, *National and International Sources of Women's Right to Equal Employment Opportunities: Equality in Law Versus Equality in Fact*, 14 NW. J. INT'L L. & BUS. 413, 422 (1994).

provision broadly, the court has given European women both a shield and a sword.<sup>17</sup>

This note addresses the comparative positions of women in the United States and in Europe in the area of equal pay and comparable worth. Part one describes legislation in the United States, including the legislative histories of the Equal Pay Act and Title VII. Part two discusses the U.S. Supreme Court's interpretation of the Equal Pay Act and Title VII. Part three describes the legislation in the EU, including the legislative histories of Article 119 and Equal Pay Directive 75/115. Part four discusses the ECJ's interpretation of Article 119 and the Equal Pay Directive. Part five addresses how the United States might improve the plight of women in the area of equal pay.

## I. THE U.S. LEGISLATIVE PROCESS

### A. The Equal Pay Act

The Equal Pay Act was not the first attempt in the United States to mandate that men and women be paid equally. Initially, the War Labor Board adopted a policy authorizing equal pay for comparable work in 1942.<sup>18</sup> However, this policy did not result in bringing about equal pay.<sup>19</sup> Subsequently, the Equal Pay Act was adopted.<sup>20</sup> Congress adopted the Equal Pay Act to be narrow in scope.<sup>21</sup> The Act states:

(1) 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

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17. Case 61/81, *Commission v. United Kingdom*, 1982 E.C.R. 2601 (1982) (authorizing experts to pilot job evaluations in order to determine if women were receiving comparable pay).

18. Deborah L. Rhode, *Occupational Inequality*, 1988 DUKE L.J. 1202, 1227.

19. *Id.*

20. 29 U.S.C. § 206(d).

21. *County of Washington v. Gunther*, 452 U.S. 161, 184-88 (1981) (Rehnquist, J., dissenting). According to Justice Rehnquist, the legislative history of the Equal Pay Act was limited only to "equal pay for equal work." *Id.* at 184. He wrote, "Congress carefully considered and ultimately rejected the 'equal pay for comparable worth' standard . . . ." *Id.*

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.<sup>22</sup>

The statute has three main elements: an equal pay for equal rate standard, four employer affirmative defenses, and limitations on available remedies.<sup>23</sup> The equal pay standard does not require that a man and woman be in exactly the same job but has been interpreted to mean a job that is "substantially equal."<sup>24</sup> Further, the men and women must work in the same establishment.<sup>25</sup> Thus, women have no claim under the Act, if, for example, their employer employs only women stock clerks and the factory next door employs men stock clerks at a higher rate of pay.<sup>26</sup>

[T]he legislative history of the . . . Equal Pay Act . . . reflects an often forgotten yet similar desire on the part of some of the bill's supporters to preserve jobs for men by mandating equal pay for women, and to prevent "unfair competition" through payment of substandard wages to women for performing "men's work."<sup>27</sup>

In essence, this statute was designed not only to preclude discrimination against women, but also to prevent males from suffering in the process.<sup>28</sup> Further, "[t]he statute provides that denials of equal pay on the basis of sex may only be remedied by raising women's wages to the level of men's, never by lowering the men to the women's level, nor by equalizing somewhere in the middle."<sup>29</sup>

The difference between equal pay and comparable worth is important to this discussion. The substantially equal theory requires employers pay equal wages to employees of both sexes for equal work on jobs where the performance requires equal skill, effort, and responsibility, and where they are performed under similar working conditions.<sup>30</sup> In determining the skill requirement, courts look at experience, training, education, and ability.<sup>31</sup>

22. 29 U.S.C. § 206(d).

23. Libeson, *supra* note 8, at 365.

24. 29 U.S.C. § 206(d).

25. Libeson, *supra* note 8, at 365.

26. *Id.*

27. Marley S. Weiss, *The Impact of the European Community on Labor Law: Some American Comparisons*, 68 CHL.-KENT L. REV. 1427, 1447 (1993) (citation omitted).

28. *Id.* at 1465.

29. *Id.*

30. *Corning Glass Works v. Brennan*, 471 U.S. 188, 195 (1974).

31. *Pearce v. Wichita County*, 590 F.2d 128, 133 (5th Cir. 1979).

The element of responsibility is determined based on the degree of accountability required to do the job.<sup>32</sup> The controlling factor is not the title of the job but the duties of the job.<sup>33</sup> In contrast, the comparable worth theory requires that jobs in which women historically have worked and that have comparable value to jobs in which men historically have worked should have the same pay as those of the men.<sup>34</sup> Under the comparable worth standard, equal pay means pay "for the same work or for work to which equal value is attributed, the elimination of all discrimination on grounds of sex with regard to all aspects and conditions of remuneration."<sup>35</sup> Hence, the comparable worth standard sets forth an equal pay for equal value standard as compared to an equal pay for equal work standard.

The origin of the Equal Pay Act presented a standard that resembled something more akin to the comparable worth standard rather than the substantially equal standard. A 1961 bill proposed in the U.S. House of Representatives would have covered work of comparable value.<sup>36</sup> The bill would have required an employer to pay wages to members of the opposite sex based on the comparable character of work that required comparable skills, except in instances where a difference in pay could be attributed to seniority or merit not connected to the employee's sex.<sup>37</sup> In 1963, another proposed bill tried to create a comparable standard by prohibiting employers from paying wages at a lesser rate to women in jobs that required skills equal to those of men.<sup>38</sup> Instead, Congress enacted the current version of the Equal Pay Act, which only sets forth a substantially equal standard.<sup>39</sup> Hence, the limited scope of the Equal Pay Act reaches only the most onerous offenses.<sup>40</sup>

## B. Title VII

In instances where the work performed exceeds the substantially equal standard and where a woman is being discriminated against on the basis of her sex, her cause of action requires broader legislation than the Equal Pay Act. In these instances, Title VII is the only remedy for U.S. women. Similar to the Equal Pay Act, Title VII's prohibition against sex discrimination also had ironic beginnings. The prohibition against sex

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32. *Id.*

33. *Id.*

34. Stephen A. Mazurak, *Comparative Labor and Employment Law and the American Labor Lawyer*, 70 U. DET. MERCY L. REV. 531, 538-39 (1993).

35. *Id.* at 540.

36. Weiss, *supra* note 27, at 1467 n.89 (citation omitted).

37. *Id.*

38. H.R. 3861, 88th Cong., 1st Sess. 4(a) (1963); Weiss, *supra* note 27, at 1467 n.89.

39. 29 U.S.C. § 206(d).

40. Libeson, *supra* note 8, at 366.

discrimination was introduced on the floor of the House as a political gimmick.<sup>41</sup> In an effort to prevent Title VII from passing, Rep. Howard Smith suggested including sex as a protectable characteristic, expecting such a suggestion to immediately sink the chances of the bill.<sup>42</sup> However, Title VII passed, and as a result, the legislative history of the purpose and scope of this provision is sketchy and unclear.<sup>43</sup> This sketchiness has resulted in varied and multiple interpretations of how the Equal Pay Act and Title VII are related.<sup>44</sup> To prevent conflict between these two Acts, Senator Bennett introduced an amendment to Title VII.<sup>45</sup> This amendment, known as the Bennett Amendment, was added at section 703(h) and provides that “[i]t shall not be an unlawful employment practice under [Title VII] for any employer to differentiate upon the basis of sex in determining the amount of wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by [the (Equal Pay Act)].”<sup>46</sup>

The Bennett Amendment delineates four affirmative defenses that permit the Equal Pay Act to be violated. Employers may differentiate in pay on the basis of seniority, merit, quantity or quality of production (in piecework), and any factor other than sex.<sup>47</sup> However, instead of ending the confusion, the Bennett Amendment heightened it. Legal commentators pondered whether the amendment was meant to incorporate the “equal work” standard of the Equal Pay Act into Title VII, mandate that sex-based wage discrimination claims should fail absent a violation of the equal work standard, or incorporate the Equal Pay affirmative defenses.<sup>48</sup> Those against comparable worth wanted the courts to interpret the amendment strictly so that comparable worth claims could not succeed under Title VII. Congress, on the other hand, wholly rejected the idea of the courts making determinations on the issue of comparable worth.<sup>49</sup>

This question was settled by the Supreme Court’s decision in *County of Washington v. Gunther*,<sup>50</sup> when the court squarely addressed the relationship between Title VII and the Equal Pay Act. In *Gunther*, female guards brought

41. Robert E. Williams & Thomas R. Bagby, *The Legal Framework, in* COMPARABLE WORTH: ISSUES AND ALTERNATIVES 197, 205 (E. Robert Livernash ed., 2d ed. 1984) (citing 110 CONG. REC. 2577 (1964)).

42. *Id.*

43. Libeson, *supra* note 8, at 367.

44. *Id.*

45. 110 CONG. REC. 13,647 (1964).

46. Bennett Amendment, Pub. L. No. 88-352, 78 Stat. 241, Title VII § 703(h) (codified at 42 U.S.C. § 2000e-2 (1994)).

47. 29 U.S.C. § 206(d).

48. Libeson, *supra* note 8, at 367-68.

49. *Id.* at 368.

50. 452 U.S. 161 (1981).

a class action suit asserting that they were paid less than their male counterparts.<sup>51</sup> The County of Washington used job evaluation surveys to determine wages.<sup>52</sup> According to the Plaintiffs, the County was not following the survey guidelines.<sup>53</sup> The Plaintiffs claimed that if the County had followed its own guidelines, the female prison guards would have been paid ninety-five percent as much as their male counterparts.<sup>54</sup> They alleged sex discrimination because they were actually paid seventy percent of what the male guards were paid.<sup>55</sup> The lower court held that the work of male and female bodyguards were not substantially equal, so that a cause of action under the Equal Pay Act could not survive.<sup>56</sup> The Ninth Circuit Court of Appeals reversed.<sup>57</sup> The court disagreed with the lower court and held that a sex-based claim could be brought under Title VII even if it did not satisfy the equal work standard of the Equal Pay Act.<sup>58</sup> The Plaintiffs argued and the court of appeals agreed that

claims for sex-based wage discrimination [could] be brought under Title VII even [when] no member of the opposite sex holds an equal but higher paying job provided that the challenged wage rate is not based on seniority, merit, quantity or quality of production, or any other factor other than sex.<sup>59</sup>

The Supreme Court affirmed, reasoning that “persons alleging sex discrimination are not precluded from suing under Title VII to protest . . . discriminatory employment practice merely because their jobs were not equal to higher paying jobs held by members of the opposite sex.”<sup>60</sup> The Court characterized the Bennett Amendment as only a listing of defenses available to employers.<sup>61</sup> However, at the same time, the Court emphasized the narrowness of its holding<sup>62</sup> and explicitly avoided ruling on the issue of comparable worth.<sup>63</sup>

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51. *Id.* at 164.

52. *Id.* at 165.

53. *Id.*

54. *Id.* at 180.

55. *Id.* at 180-81.

56. *Id.* at 165.

57. *Gunther v. County of Washington*, 623 F.2d 1303 (9th Cir. 1979), *aff'd*, 452 U.S. 161 (1981).

58. 452 U.S. at 165.

59. *Id.* at 168 (citing *Gunther*, 623 F.2d at 1311) (citation omitted).

60. *Id.* at 181.

61. Libeson, *supra* note 8, at 369.

62. *Gunther*, 452 U.S. at 166.

63. *Id.* “Respondent’s claim is not based in the controversial concept of comparable worth.” *Id.*



## II. INTERPRETATION OF WOMEN'S RIGHT TO EQUAL PAY BY THE U.S. SUPREME COURT

### A. *Standards of Review and Current Remedies*

In its contorted effort to narrow its decision as much as possible, the Supreme Court has not set out a clear analysis for lower courts to follow in pay-based, sex discrimination claims. The Court has interpreted Title VII to reach those claims that employees intentionally discriminated against women or where the employer's practice had a discriminatory effect on women.<sup>64</sup> Hence, women can bring a claim under disparate treatment and disparate impact theories. Disparate treatment theory requires that the employer have an intent to discriminate against women.<sup>65</sup>

In the case of equal pay, the prima facie case is even more difficult to prove because the courts have explicitly held that it is not a prima facie case of intentional discrimination for a woman to show the employer systematically undervalued jobs held predominantly by females.<sup>66</sup> The courts also have rejected as proof of a prima facie case instances where the employer's lowest paid jobs are filled entirely or predominantly by women.<sup>67</sup> Hence, the courts' interpretations under this theory have rendered wage-based sex discrimination claims brought under the disparate treatment theory untenable. This leaves plaintiffs with disparate impact causes of action.

Disparate impact theory requires only that a plaintiff show the employer's facially-neutral practice disproportionately impacts a protected class and thus, requires no proof of intent.<sup>68</sup> In order to establish a prima facie case, a plaintiff must show that an inequitable wage difference exists between the male and female employees.<sup>69</sup> To demonstrate an inequitable wage difference, a plaintiff must establish that the employer pays women at a lower rate than men, the women and men work in the same establishment, and the men and women are engaged in the same or substantially similar work.<sup>70</sup> Once the plaintiff has established the existence of inequitable pay differences, the burden shifts to the employer to prove that the employer's

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64. 452 U.S. at 166. The Court stated that Title VII reached not only "overt discrimination" but also "practices" that were "discriminatory in operation." *Id.* at 170.

65. *Wards Cove Packing Co. v. Atonio*, 409 U.S. 642, 645-46 (1989).

66. Libeson *supra* note 8, at 370 (citing Janice R. Bellace, *Comparable Worth in the United States: Policy Directions in the 1990s*, WHARTON REFERENCE DEPT. LEGAL STUD., REF. NO. 122, Oct. 20, 1988, at 8).

67. Libeson, *supra* note 8, at 370-71.

68. *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971).

69. *Id.*

70. Libeson, *supra* note 8, at 365.

practices of wage setting are not discriminatory.<sup>71</sup>

### B. *Reach of Title VII*

Title VII does not apply extraterritorially,<sup>72</sup> even though "Title VII prohibits employment discrimination by employers 'engaged in an industry affecting commerce.'"<sup>73</sup> Commerce includes "trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof."<sup>74</sup> Based on the plain reading of the statute, its reach, and its scope, Title VII would seem to protect U.S. women working for U.S. companies in foreign countries. However, this is not the case. In *Equal Employment Opportunity Commission v. Arabian American Oil Co.*,<sup>75</sup> the Supreme Court held that Title VII did not apply to U.S. employers engaged in commerce outside of the United States,<sup>76</sup> because there was no clear congressional intent to apply Title VII extraterritorially.<sup>77</sup> To hold otherwise, according to the Court, would be to ascribe to Congress a policy that would cause a conflict with international laws.<sup>78</sup> The Court further stated that if Congress intended to apply Title VII extraterritorially, it would have addressed the issue of conflict with foreign laws and procedures.<sup>79</sup>

Legal scholars have heavily criticized the Court's decision. Many say that the analysis is flawed because Title VII excludes all non U.S. citizens outside of the United States from coverage, and hence, it does not create a conflict of laws.<sup>80</sup> The Equal Employment Opportunity Commission (EEOC) concluded that because only aliens were exempted from Title VII's protection and not all individuals, the intent of Congress must have been to

71. *Id.*

72. See Conly J. Schulte, *Americans Employed Abroad by United States Firms Are Denied Protection Under Title VII: EEOC v. Arabian American Oil Co.*, 25 CREIGHTON L. REV. 351, 364 (1991).

73. *Id.* at 364 (quoting 42 U.S.C. §2000e(b)).

74. 42 U.S.C. § 2000e(g).

75. 499 U.S. 244 (1991).

76. *Id.* at 258. In this case, a U.S. citizen, Ali Boureslan, worked for a subsidiary of Arabian American Oil Co. Initially, he worked at Arabian American Oil Co. headquarters in Houston, Texas. Later, he transferred to one of their offices in Saudi Arabia. It was in Saudi Arabia that Boureslan experienced race, religious, and national origin discrimination. Boureslan filed an employment discrimination claim against Arabian American Oil in the Southern District of the United States. The district court dismissed the claim for lack of subject matter jurisdiction. Boureslan appealed to the Fifth Circuit Court of Appeals. The Fifth Circuit Court affirmed the district court. Subsequently, the Supreme Court affirmed the Fifth Circuit. *Id.* at 247.

77. *Id.* at 249.

78. *Id.* at 256.

79. *Id.*

80. Schulte, *supra* note 72, at 365-66.

protect U.S. citizens at home and abroad.<sup>81</sup> Based on the EEOC's interpretation, it appears that the Court's interpretation is incorrect.<sup>82</sup>

The Supreme Court's ruling presents ironic consequences. Although Title VII provides protection to aliens employed within the United States, it does not provide protection to U.S. citizens employed by U.S. companies outside the United States.<sup>83</sup> Therefore, a woman who is an alien working in United States is protected from discrimination based on sex, while a woman who is a U.S. citizen working for an U.S. company overseas has no U.S. protection.<sup>84</sup> As it currently stands, an U.S. company that has discriminatory motives is able to send an employee overseas and discriminate against that employee without suffering any legal consequences.<sup>85</sup> As a result, women in the United States have no cause of action against discrimination if they work in an overseas office.<sup>86</sup>

### III. THE EUROPEAN UNION'S LEGISLATIVE PROCESS

#### A. *The European Union*

The EU, formally known as the European Community, has a population of 345 million compared with 220 million in the United States.<sup>87</sup> It is composed of fifteen countries: Belgium, Denmark, France, Germany, Greece, Ireland, Italy, Luxembourg, the Netherlands, Portugal, Spain, Austria, Sweden, Finland, and the United Kingdom.<sup>88</sup> On November 1, 1993, the Maastricht Treaty was ratified by eleven of its then twelve members.<sup>89</sup> The United Kingdom refused to ratify the Maastricht Treaty because it disagreed with many of its social aims.<sup>90</sup> The Maastricht Treaty amended the EEC Treaty.<sup>91</sup>

The purpose of the EU is "to lay foundations of an ever closer union among the peoples of Europe."<sup>92</sup> In order to achieve this, Article Three of the EEC Treaty set forth a measure to create a European Social Fund in order to improve the opportunities for the employment of workers and to enhance

81. Andrews, *supra* note 16, at 419.

82. Shulte, *supra* note 72, at 373.

83. See Espinoza v. Farah Mfg., 414 U.S. 86, 95 (1973).

84. Andrews, *supra* note 16, at 420-21.

85. *Id.* at 421.

86. *Id.*

87. *EC Institutions and the Decision Making Process*, Aug. 11, 1994, available in LEXIS, Intlaw library, EECOM file [hereinafter *EC Institutions*].

88. *Id.*

89. *Id.* at 1.

90. Michael H. Abbey & Nicholas Bromfield, *A Practitioner's Guide to the Maastricht Treaty*, 15 MICH. J. INT'L L. 1329, 1332 (1994).

91. *Id.* at 1329.

92. *EC Institutions*, *supra* note 87, at 2 (quoting The Treaty of Rome) (citation omitted).

workers' standards of living.<sup>93</sup> The most controversial provision of the Maastricht Treaty is the Agreement on Social Policy that was adopted by every member except the United Kingdom.<sup>94</sup> The United Kingdom is excluded from the legislative process because it did not ratify this provision.<sup>95</sup> The Treaty grants broad measures in the area of employment law.<sup>96</sup> Specifically, the Treaty authorizes gender equality of opportunity and treatment.<sup>97</sup>

Even before the Maastricht treaty, Article 119 of the treaty establishing the EEC more explicitly provided protection for women in the workplace.<sup>98</sup> Article 119 requires each Member State to ensure that men and women receive equal pay for equal work.<sup>99</sup> Later, the Equal Pay Directive was adopted to enforce and broaden the effect of Article 119.<sup>100</sup> The directive broadened the definition of equal pay to include "work to which equal value is attributed."<sup>101</sup> The European Court of Justice (ECJ) has been central in interpreting the Equal Pay Directive to support comparable worth claims.<sup>102</sup>

In order to fully understand the role of the ECJ and its impact on EU citizens, one first must have some knowledge of the political process in EU. There are seven administrative institutions within EU: The European Commission, The Council of the European Union, The European Parliament, The Court of Auditors of the European Union, The European Court of Justice, and The Court of First Instance (CFI).<sup>103</sup> It is important to understand where each fits into the political process.

The European Commission proposes and enforces EU legislation in keeping with the treaties.<sup>104</sup> The Commission acts as a guardian of the treaties checking and ensuring that directives are correctly implemented by members of EU.<sup>105</sup> The Council of the European Union<sup>106</sup> is the EU's legislative body and is responsible for making decisions on Commission proposals.<sup>107</sup> Ministers are appointed by their respective countries on the

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93. *Id.*

94. Abbey & Bromfield, *supra* note 90, at 1332.

95. *Id.*

96. *Id.* at 1333.

97. *Id.*

98. EEC TREATY art. 119.

99. *Id.*

100. *Id.*

101. Equal Pay Directive, *supra* note 2, art. 1; *see also* Libeson, *supra* note 8, at 360.

102. Libeson, *supra* note 8, at 360.

103. *EC Institutions*, *supra* note 87, at 3.1.

104. *Id.* at 3.2.

105. *Id.*

106. *Id.* at 3.3. Formerly the Council of Ministers. *Id.*

107. *Id.*

basis of the issues being discussed.<sup>108</sup> Ministers are required to answer only to their national governments and parliaments.<sup>109</sup> The Ministers defend individual national viewpoints and interests.<sup>110</sup> The Council may vote by unanimity, simple majority, or a more qualified majority, depending on the procedure prescribed in the Treaty.<sup>111</sup> The European Council is a EU institution that defines broad lines of policy and breaks deadlocks between Member states.<sup>112</sup> The European Council consists of the Heads of State or Government of the Member States.<sup>113</sup> The European Parliament consults with the Council on legislative proposals that it receives from the Commission.<sup>114</sup> Parliament must give an 'Opinion' on the legislative proposal.<sup>115</sup> The Council is not obligated to adopt the Opinion of Parliament, it is only required to consult with the Parliament.<sup>116</sup> Parliament is elected by a vote of member state constituents.<sup>117</sup> The Court of Auditors keeps a check on EU budget spending.<sup>118</sup>

The Court of First Instance (CFI) has jurisdiction to decide "staff cases" and disputes brought against the EU.<sup>119</sup> The CFI is the final court of appeals on questions of fact but may be appealed on questions of law.<sup>120</sup> The CFI was created to ease the burdensome caseload of the ECJ.<sup>121</sup> The ECJ's function is to ensure that the interpretation and application of the Treaties and the rules governing their implementation are observed.<sup>122</sup> ECJ's jurisdiction includes actions that originate before it and cases referred to it by National Courts or Tribunals.<sup>123</sup> The ECJ's rulings are final.<sup>124</sup> Private law suits are brought in National Courts and may be referred to ECJ to resolve unclear areas of law.<sup>125</sup> However, the ECJ does have original

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108. *EC Institutions*, *supra* note 87, at 3.3.

109. *Id.*

110. *Id.*

111. *Id.* Votes for a qualified majority are weighted, apportioning more votes to larger countries. *Id.*

112. *Id.*

113. *Id.* at 3.4.

114. *Id.* at 3.5.

115. *Id.* at 3.5. Parliament handles with these proposals in specialist committees. *Id.*

116. *Id.*

117. *Id.*

118. *Id.* at 3.6.

119. *Id.* at 3.8.

120. *Id.*

121. *Id.*

122. *Id.* at 3.7.

123. *Id.*

124. *Id.*

125. EEC TREATY arts. 118-119. These articles include a Social Provision Chapter with articles bearing on employment (art. 118) and equal enumeration for equal work by men (art. 119), as well as others. *Id.* Private parties cannot sue or be sued in the ECJ. *Id.* All causes of action must be brought in National courts, which may appeal to the ECJ. *Id.*

jurisdiction over causes of action to enforce Treaty obligations that are brought by the Commission or by a Member State.<sup>126</sup>

### B. Article 119

Under the EU's legislative process, an Article of a treaty is similar to a provision of the U.S. Constitution, in that it is considered law for all the Member states. Article 119 states:

Each Member State shall during the first stage ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work.

For the purpose of this Article, "pay" means the ordinary basic or minimum wage or salary and any other consideration, whether in cash or in kind, which the worker receives, directly or indirectly, in respect of his employment from him employer. Equal pay without discrimination based on sex means:

(a) that pay for the same work at piece rates shall be calculated on the basis of the same unit of measurement;

(b) that pay for work a time rates shall be the same for the same job.<sup>127</sup>

However, if a Member State is not implementing a particular Article of the Treaty in its country, the Commission may adopt a directive or a regulation to implement Union policies.<sup>128</sup> Regulations are binding over all Member States, akin to a U.S. federal law.<sup>129</sup> On the other hand, a directive is binding only on the Member States to which it is addressed.<sup>130</sup> Further, a directive permits the States to implement EU's law in their own form or method.<sup>131</sup> This allows the Member States themselves to address the policy differences that may exist between individual States and the EU, allowing the States to retain their own diverse legal traditions.<sup>132</sup>

### C. Equal Pay Directive

When Member States proved slow and inefficient in implementing Article 119, the Commission proposed legislation in the form of the Equal

126. *Id.* at arts. 169, 170, 173, 175, & 184.

127. *Id.* at art. 119.

128. *EC Institutions*, *supra* note 87, at 5.1.

129. *Id.*

130. *Id.*

131. *Id.*

132. *See Weiss*, *supra* note 27, at 1434.

Pay Directive<sup>133</sup> to assure that “for the same work or for work to *which equal value is attributed* . . . all discrimination on grounds of sex with regard to all aspects and conditions of remuneration would be eliminated.”<sup>134</sup>

There are several interesting aspects to the Equal Pay Directive. First, the principle enunciated in this directive embodies the U.S. definition of comparable worth.<sup>135</sup> Secondly, Article Two of the directive commands that job classification systems “be based on the same criteria for both men and women and so drawn to exclude any discrimination on the grounds of sex.”<sup>136</sup> Even this broad statement is not the exclusive measure of comparable worth.<sup>137</sup> Member States must provide avenues for redress to women who believe they have an equal pay claim, and in direct contrast with U.S. courts, the directive allows the use of independent job evaluation in equal pay claims.<sup>138</sup> Further, Member States must remove any national policy that is inapposite to the principle of equal pay.<sup>139</sup> Member States were given one year after the adoption of the directive to comply in all aspects.<sup>140</sup> Those States that do not comply have proceedings initiated against them by the Commission.<sup>141</sup>

#### IV. INTERPRETATION OF WOMEN’S RIGHT TO EQUAL PAY BY THE EUROPEAN COURT OF JUSTICE

##### A. *Standards of Review and Current Remedies*

Even though the language in Article 119 closely resembles that of the Equal Pay Act, the ECJ has granted much more protection to European women than the Supreme Court has granted to U.S. women. Both require that jobs performed under like conditions by men and women which require equal skill, effort and responsibility should be paid at the same rate unless the employer is able to assert a authorized defense.<sup>142</sup> The ECJ expanded its interpretation of Article 119 liberally, holding that the right to equal pay was a fundamental right.<sup>143</sup> This interpretation of Article 119 was expanded even further with the subsequent legislation of the Equal Pay Direc-

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133. Libeson, *supra* note 8, at 379.

134. Equal Pay Directive, *supra* note 2, art. 1 (emphasis added).

135. Libeson, *supra* note 8, at 379.

136. *Id.* at 379-80 (quoting the Equal Pay Directive, *supra* note 2, art. 1(2)).

137. *Id.* at 380.

138. *Id.*

139. *Id.*

140. *Id.*

141. *Id.*

142. See Mazurak, *supra* note 34, at 534-35.

143. Andrews, *supra* note 16, at 422.

tive.<sup>144</sup> The Equal Pay Directive set forth a standard of equal pay for equal value as the rule of law in the EU.<sup>145</sup> This is different than the U.S. standard of equal pay for equal work.<sup>146</sup> Under the U.S. equal pay standard, a woman may only bring a claim if she asserts that the employer is not paying equal wages to employees of both sexes for equal work on jobs that require equal skill, effort, and responsibility that are performed under similar working conditions.<sup>147</sup> Under the EU's comparable worth standard, a woman may assert a claim by contending that the job in which she works is one in which women have historically worked and that the job should pay the same as jobs in which men historically have worked if the value to the employer is the same.<sup>148</sup> Two cases exemplify ECJ's standard of review and the impact of Article 119 and the Equal Pay Directive. In *Defrenne v. Sabena*,<sup>149</sup> the ECJ held that "member countries were required to take measures necessary to give full effect to the principles of equal pay."<sup>150</sup> In effect, the ECJ imposed an affirmative duty on members states to act on behalf of women.<sup>151</sup> In a subsequent case, *Commission v. United Kingdom*,<sup>152</sup> the ECJ more clearly enunciated the standard for the Equal Pay Directive. At that time, the United Kingdom had a law that required an employer to equalize the pay if the employer conducted a job survey and found that jobs had equal value but not pay.<sup>153</sup> The United Kingdom took the position that its law met the threshold of Article 119 and the Equal Pay Directive.<sup>154</sup> The ECJ disagreed.<sup>155</sup> The ECJ held that United Kingdom's law did not go far enough in giving women the full effect of equal pay.<sup>156</sup> The ECJ stated that United Kingdom's law fell short because employers were not required to conduct the job survey in the first instance.<sup>157</sup> It held that in order for the United Kingdom to comply with the Directive, it must enact formal adjudicative procedures to handle the claims of individuals who perceived that they had been unfairly treated by

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144. Mazurak, *supra* note 34, at 539-40.

145. *Id.* at 540.

146. 29 U.S.C. § 206(d).

147. *Corning Glass Works v. Brennan*, 471 U.S. 188, 195 (1974).

148. Mazurak, *supra* note 34, at 538-39.

149. Case 43/75, 1976 E.C.R. 455 (1976).

150. Mazurak, *supra* note 34, at 540.

151. *Id.* Note, however, that the *Defrenne* case concerned equal pay for equal work, not equal pay for equal value. *Id.*

152. Case 61/81, 1982 E.C.R. 2601, 3 C.M.L.R. 284 (1982).

153. *See id.* at 286.

154. *Id.* at 298.

155. *Id.*

156. *Id.* at 298-99.

157. *Id.*



employers.<sup>158</sup>

The equal pay for work of equal value standard set forth by the ECJ assures European women that they will be paid on a basis comparable to men and not be saddled with sex-based pay differentials.<sup>159</sup> Instrumental in this regard has been ECJ's practice of commissioning outside experts to conduct job evaluations to determine comparable worth.<sup>160</sup> The Supreme Court and other courts in the United States have firmly refused to pursue this avenue as a means of redress for women.<sup>161</sup> Instead, the courts have steadfastly held that this was outside the province of the courts.<sup>162</sup> The United States should look to the EU and follow its lead in ending sex-based wage discrimination.

### B. *Reach and Application of Article 119 and the Equal Pay Directive*

Citizens in the EU do not always have the same access to the courts as U.S. citizens. The EEC Treaty has delineated two distinct causes of action, horizontal direct effect and vertical direct effect.<sup>163</sup> Horizontal direct effect causes of action allow a citizen to sue another citizen, for example, an employee suing an employer.<sup>164</sup> Vertical direct effect causes of action allow a citizen to bring suit against Member State action, based on a EU provision, for example, a citizen suing Germany for not implementing an article of the Treaty.<sup>165</sup>

#### 1. Vertical Direct Effect

In the area of sex discrimination, vertical direct effect has been enforced in two ways.<sup>166</sup> When a Member State's law violates a directive, the Commission may bring a cause of action against it in the ECJ.<sup>167</sup> If the Commission prevails, then the ECJ will issue a declaration that requires the Member State to comply with the directive.<sup>168</sup> This remedy does not have the same direct effect to which U.S. citizens are accustomed. In this

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158. *Id.*

159. Libeson, *supra* note 8, at 360.

160. *Id.* at 360-61.

161. *Id.* at 380.

162. *Id.*

163. Weiss, *supra* note 27, at 1436-37.

164. *Id.*

165. *Id.*

166. Andrews, *supra* note 16, at 433.

167. *Id.*

168. *Id.*

instance, the sanction placed upon the offending Member State is a prospective international sanction.<sup>169</sup> No private remedy accrues to persons who may have suffered due to violations of the law.<sup>170</sup>

The second method of enforcement is by private parties. However, at least one of the two conditions must be met in order for citizens to pursue a private cause of action.<sup>171</sup> The first condition is that a Community provision must impose an enforceable obligation to individuals or public bodies or both.<sup>172</sup> The second condition is that the article or directive in question must have been sufficiently and precisely interpreted so that an enforceable obligation has accrued; if so, then an individual could invoke the Community provision.<sup>173</sup> However, directives against sex discrimination apply only to Member States not to the above mentioned entities.<sup>174</sup> This means that individual employers are excluded.<sup>175</sup> Hence, European women do not have a private cause of action against employers.<sup>176</sup>

## 2. Horizontal Direct Effect

A horizontal direct effect claim may be brought by a woman against an individual employer at the national courts level.<sup>177</sup> National courts are given wide discretion in interpreting social policy for their states.<sup>178</sup> However, if the national court fails to remedy the situation, a European woman may then challenge the national court's decision in the ECJ.<sup>179</sup>

In the United States, a comparable appeal would be from a state supreme court decision. In such a case the parties remain the same. However, before the EJC, the defendant would become the Member State and not the employer.<sup>180</sup> If the European woman prevails, she will be granted prospective relief in the sense that the national court must then modify its decision.<sup>181</sup> However, no personal relief in terms of damages or personal declaratory relief is available.<sup>182</sup>

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169. *Id.*

170. *Id.*

171. *Id.*

172. *Id.* at 433-34.

173. *Id.* at 434.

174. *Id.*

175. *Id.*

176. *Id.* at 433.

177. *Id.*

178. *Id.*

179. *Id.* at 435.

180. *Id.*

181. *Id.*

182. *Id.*

## V. CONCLUSION

In the United States, more attention should be paid to the European model of comparable worth. The European model of comparable worth assures equal pay for work of equal value.<sup>183</sup> The Equal Pay Directive requires the employer to base rates of pay on the same criteria, so that women will not be discriminated against on the basis of sex.<sup>184</sup> The ECJ has gone even further than the EU's legislature in declaring that women have a "fundamental" right to equal pay.<sup>185</sup> In its analysis, the ECJ takes into account the systematic undervaluation of jobs predominantly held by women. The most instructive portion of EU's model that should be adopted in the United States is the practice of commissioning outside experts to conduct job evaluations to determine comparable worth. The EU has shown that commissioning experts is within the province of the courts. Further, the EU's use of outside experts has not proven to be unwieldy.

Although some legal commentators have begun a dialogue on this subject, many legal practitioners have largely ignored the EU model. The primary reason for this is the belief that such a model is unworkable in the United States. Two main assumptions stifle the comparable worth effort in the United States. The first assumption is that comprehensive job evaluations are not feasible. The second assumption is that market conditions, not discrimination, contribute heavily to sex-based wage differentials. The first assumption is easily discounted once it is acknowledged that the EU has successfully implemented and carried out this task in an industrial society in only fifteen years. The second assumption is rebuttable in two ways. First, the courts already have accepted the basic premise that persons discriminate when given the opportunity. Second, the second assumption can only be disproved with the implementation of a comparable worth model. It is then that a statistical study can be done to determine the specific cause of sex-based wage differentials.

The United States could benefit from a study of the EU's handling of equal pay. A study of comparative law in this area would provide a path for the United States and a basis for a more reasoned discussion and evaluation of feasible theories. By looking to the EU system, perhaps the United States will realize that more can be done to create equality of pay for all its citizens.

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183. Equal Pay Directive, *supra* note 2, at 19.

184. Libeson, *supra* note 8, at 380.

185. Andrews, *supra* note 16, at 422.