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Comparable Worth and the Maryland ERA

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Comments

COMPARABLE WORTH AND THE MARYLAND ERA

Comparable worth is a remedy for eliminating wage disparities that are based on sex or race. Advocates see it as an appropriate and expeditious, if only partial, solution to the continuing gap in wages between women and men. Opponents see it as an unworkable and expensive intervention into the market-based wage-setting process. In fact, it is neither a panacea for wage discrimination nor a threat to the economic structure of the labor market. As with other ideas that have challenged accepted premises, however, it has aroused controversy since its inception. Because it requires a reexamination of the traditional methods of job evaluation within discrete employment systems in order to remove latent discriminatory influences in the wage-setting process, it has met resistance from those quarters of government and commerce that view the change as unnecessary and costly.

Maryland is no exception. Responsible authorities have consistently rejected the concept of comparable worth. The remedy not only urges intervention into the market to establish wages on a more equitable basis, but also seeks to abolish actual sex-based wage discrimination. Under the Maryland Equal Rights Amendment (ERA), this is a legal duty.

This comment premises that the State's failure to remedy gender-based wage disparities documented in a recent study of the merit system violates the Maryland ERA. Part I discusses the theory of comparable worth and the extent to which it has been implemented in states and municipalities across the United States. Part II analyzes the 1985 comparable worth study of the Maryland merit system, evaluates its conclusions and reviews state action on its recommendations following the study. Part III discusses state courts as alternate forums for litigation of sex-based wage discrimination cases. Part IV reviews the history of the Maryland ERA, including the latest standard of review by Maryland courts, and proposes arguments for applying the protection of the ERA to the victims of the state's sex-based wage discrimination.

I. COMPARABLE WORTH—BACKGROUND

A. The Wage Gap and Pink Collar Ghettos

The wage gap between women and men is well known: on the average, women who work year-round, full-time jobs earn approximately sixty-four cents for every dollar paid men, regardless of the level of education or work experience.[1] The wage gap has persisted for a number of reasons. Before passage of the federal Equal Pay Act of 1963 (EPA),[2] discrimination in pay between women and men who performed the same jobs was legal. The EPA addressed the issue, mandating equal pay for equal work. Because the majority of working women do not hold the same categories of jobs as men,[3] however, the protection gained from pay comparisons with equal jobs envisioned by the EPA did not reach them.

This occupational segregation has been blamed for the thirty-five to forty percent wage gap between women and men.[4] The fact that women historically have been clustered in "pink collar ghettos"[5] has perpetuated depressed wages for working women.[6] As a

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1. National Comm. on Pay Equity, Briefing Paper on the Wage Gap 3 (Sept. 18, 1987) (citing United States Dep't of Commerce, Census Bureau, Current Population Reports, Consumer Income, Series P-60, Nos. 150, 154 & 157 (1984, 1985 & 1986, respectively) (No. 157 noting statistics for 1986)). The wage gap has hovered around 60% since 1955, going as low as 57% in 1973 and 1974, and as high as 64% in 1955 and 1957 and in 1983 and 1984. *Id.* at 2.

In the federal government, full-time, year-round working women earn 63 cents for every dollar paid men; in state and local governments, they earn 71 cents for every dollar earned by men; and in the private sector, full-time, year-round working women earn 56 cents for every dollar earned by men. NATIONAL COMM. ON PAY EQUITY, THE WAGE GAP: MYTHS AND FACTS 2 (1983) (citing UNITED STATES CENSUS BUREAU, CURRENT POPULATION REPORTS, SERIES P-60, No. 132, TABLE 58 (1981) [hereinafter MYTHS AND FACTS] (relying on 1980 statistics)).

2. 29 U.S.C. § 206(d) (1982) [hereinafter EPA].

3. Fifty-two percent of working women work in two of the Department of Labor's twelve categories of major occupations: clerical work and service work other than private household workers. Myths and Facts, *supra* note 1, at 5. Of the 427 subcategories of the 12 major occupations, half of all working women are concentrated in only 20. More than half of all working women worked in jobs which were 75% female in 1982; 22% worked in jobs which were 95% female. *Id.*

4. *See generally*, Blumrosen, *Wage Discrimination, Job Segregation, and Title VII of the Civil Rights Act of 1964*, 12 U. MICH. J.L. REF. 397 (1979); COMMITTEE ON OCCUPATIONAL CLASSIFICATION & ANALYSIS, NAT'L RESEARCH COUNCIL, WOMEN, WORK, AND WAGES: EQUAL PAY FOR JOBS OF EQUAL VALUE (1981) [hereinafter NAS STUDY]; H. AARON & C. LOUGY, THE COMPARABLE WORTH CONTROVERSY (1986). *Cf.* NATIONAL RESEARCH COUNCIL, WOMEN'S WORK, MEN'S WORK—SEX SEGREGATION ON THE JOB (1985), *reported in* Daily Lab. Rep. (BNA), No. 293, at A-7, A-8 (Dec. 12, 1985) [hereinafter SEX SEGREGATION ON THE JOB] ("persistent" wage gap is the most serious consequence of occupational segregation); MYTHS AND FACTS, *supra* note 1.

5. This term denotes the limited range of jobs where women traditionally have

result, jobs largely held by women tend to be underpaid.[7] The use of gender and gender-based characteristics must be eliminated in the job evaluation process to remedy the existing pay inequities.

B. Job Evaluation and Undervaluation

Comparable worth theory assumes that undervaluation of female-dominated jobs is the product of job evaluation processes that rely on gender as a factor in evaluating jobs for purposes of setting pay. Thus, jobs that usually are held by men are evaluated more highly for skills and effort and, consequently, are assigned higher pay. In the same evaluation process, jobs that usually are held by women are evaluated less highly and are assigned lower pay. For example, job evaluation systems tend to recognize physical effort more readily in male-dominated occupational classes than in female-dominated jobs. More weight is assigned to physical effort than to back or eye strain from extended work in front of a video display terminal. Consequently, the male-dominated job classes are rated

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been concentrated, jobs that are generally lowpaid and offer little, if any, opportunity for advancement.

6. Blumrosen, *supra* note 4, at 415-57; NAS STUDY, *supra* note 4, at 56-66; AARON & LOUGY, *supra* note 4, at 42. It is in the labor market, according to comparable worth advocates and other observers, where the undervaluation of women's work is perpetuated. In an ideal market, the depressed wages of women's jobs, it would seem, should discourage women from seeking and accepting low-paying jobs; that is the central argument of opponents of comparable worth. *See, e.g., Pay Equity Bill: Hearing on H.B. 1067 Before the House Appropriations Comm.*, 1987 Sess. (Mar. 9, 1987) (testimony of the Chamber of Commerce); COMPARABLE WORTH: ISSUES AND ALTERNATIVES (R. Livernash ed. 1980). But that is not what happens in the real world. In the real world, women are consigned to pink collar ghetto jobs, more often than not for reasons other than their own preference. Sex Segregation on the Job, *supra* note 4, at A-7. According to the National Research Council, hiring and training practices (such as recruitment systems based on worker referrals or on male-dominated settings such as vocational education schools or the military, requirements for nonessential training or credentials that women often lack, and veterans' preferences), plus social stereotypes (such as what jobs are appropriate for women and for men, and stereotypical characteristics of women and men) constitute barriers which limit women's opportunities to a narrow set of alternatives. *Id.* at A-7 to -8.

7. NAS STUDY, *supra* note 4, at 93 ("[I]t is also true in many instances that jobs held mainly by women and minorities pay less at least in part *because* they are held mainly by women and minorities. First, the differentials in average pay for jobs held mainly by women and those held mainly by men persist when the characteristics of jobs thought to affect their value and the characteristics of workers thought to affect their productivity are held constant. Second, prior to the legislation of the last two decades, differentials in pay for men and women and for minorities and non-minorities were often acceptable and were, in fact, prevalent. The tradition embodied in such practices was built into wage structures, and its effects continue to influence these structures. Finally, at the level of the specific firm, several studies show that women's jobs are paid less on the average than men's jobs with the same scores derived from job evaluation plans.").

more highly and their pay set at higher levels. In other instances, manual dexterity or person-to-person contact may be underrated in traditionally female-dominated jobs, resulting in lower pay.

Gender can be eliminated as a factor in the job evaluation process by evaluating jobs based on their value to the employer. The point factor evaluation system is one method of job evaluation under comparable worth. This methodology rates each job within a discrete employment system (*i.e.*, each employer adopts its own comparable worth evaluation system) by first assigning points (or values) to job factors. Points usually are assigned to skill, effort, responsibility and working conditions. The point values of the job are totalled and compared with the total point ratings for other jobs. All jobs whose values are equal should then receive the same rate of pay. Thus, jobs are evaluated according to those factors the employer values, and rates of pay are set according to the job values, rather than the sex of the particular person holding the job or the gender usually associated with the job.

Of course, the rate of pay that is established for the jobs that are evaluated equally is decided by the employer—a decision that is independent of the comparable worth theory and the point factor evaluation methodology. Thus, the employer may wish to set a low level of pay for all jobs rated at a certain level (*i.e.*, all clericals and all maintenance engineers, if their jobs are rated equally in point value) so long as the rate of pay is the same for all the equally rated jobs. It may be an economically unwise decision if the market rate is higher, or it may reflect a low estimation of the status of the job, but the decision itself would not be based on gender discrimination per se if the evaluation process excludes gender as a factor.

Also, this comparable worth job evaluation process would take place within discrete employer systems. Comparable worth does not contemplate a national wage-setting job evaluation mechanism. In fact, to conduct a comparable worth job evaluation, the employer first must determine what criteria and values it wants for all of its own jobs. This determination is unique to each employer. The criteria and values then become the basis for comparison among all the jobs. Advocates believe that using comparable worth in job evaluations will help achieve pay equity in the myriad of unique employment systems in the country.[8]

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8. Pay equity and comparable worth frequently are used interchangeably in this context, although in reality comparable worth is a strategy—one of several, including equal pay for equal work and efforts to encourage women to enter nontraditional jobs—which is designed to achieve pay equity.

Typically, the process of implementing comparable worth begins with a study of an employment system. Such a study may survey selected jobs, rate the jobs according to a set of factors selected by the employer, adapt salaries for the jobs according to a scale of values and corresponding salaries selected by the employer, and then compare the salaries of the surveyed jobs with their existing salaries. The gap in the salaries determines the extent of undervaluation. Not surprisingly, the female-dominated jobs usually are undervalued as compared to the male-dominated jobs.

Action then should be taken to remedy the documented undervaluation. Some jurisdictions have instituted comparable worth pay increases.[9] Other jurisdictions have begun with pay equity policies, following policymaking with a gradual introduction of comparable worth job evaluation of the entire system. Pay equity increases can be implemented in one-time dramatic raises or in gradual fashion. Re-evaluation of jobs can be accomplished through point factor methods or through a number of other methods available in the field of personnel systems.

C. Extent of Implementation of Comparable Worth Nationwide

Because women work in the public sector in disproportionate numbers,[10] it is logical and appropriate to address comparable worth in that sector first. Ten states have pay equity or comparable worth policies which, either through legislation, executive order, administrative policy or other pronouncement, explicitly state a compensation goal of equal pay for work of comparable worth or value for state employees.[11] Twenty states have statutes which include some kind of comparable worth language.[12]

Fourteen states have implemented comparable worth pay increases for their state employees to address pay inequities in female-dominated or race-dominated job classifications.[13] Twenty states

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9. *See infra* note 13 and accompanying text.

10. In 1984, 51% of publicsector jobs were filled by women. AARON & LOUGY, *supra* note 4, at 38-39.

11. These states include Hawaii, Iowa, Maine, Michigan, Minnesota, Montana, Ohio, Oregon, Washington, and Wisconsin. UNITED STATES GEN. ACCOUNTING OFFICE, BRIEFING REPORT, PAY EQUITY: STATUS OF STATE ACTIVITIES 15 (Sept. 1986) [hereinafter GAO REPORT] (compiling responses by 48 of 50 states—Alabama and Pennsylvania did not respond—to GAO questionnaires on pay equity).

12. BUREAU OF NATIONAL AFFAIRS, PAY EQUITY AND COMPARABLE WORTH 1 (1984) [hereinafter BNA SPECIAL REPORT].

13. The states are Connecticut, Florida, Idaho, Iowa, Michigan, Minnesota, New Jersey, New Mexico, New York, Oklahoma, South Dakota, Vermont, Washington, and Wisconsin. NATIONAL COMM. ON PAY EQUITY, STATE UPDATE (Apr. 1986) [hereinafter

conducted a comparable worth job evaluation study—a study of the state civil service classification and compensation system that evaluates all job classes using comparable worth methodology and determines, once the job values are thus held constant, the extent of wage disparities between male-dominated and female-dominated classes.[14] Eight additional states have collected data on gender-based pay differences and/or occupational segregation among state employees.[15]

Thirty-seven municipalities have acted under comparable worth considerations as of December 1987.[16] In 1981 city workers in San Jose, California, and Colorado Springs, Colorado, negotiated contracts which included comparable worth pay increases.[17] In April 1985, over then-Mayor Diane Feinstein's veto, the San Francisco Board of Supervisors appropriated funds for one-time comparable worth pay increases for city employees in undervalued female-dominated and minority-dominated jobs.[18] The voters of San Francisco then institutionalized comparable worth by authorizing pay equity wage increases after annual surveys of female-dominated and minority-dominated job classes in a city charter amendment vote in November 1986.[19] Twenty-one cities and counties in California

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STATE UPDATE] (listing 12 states); NATIONAL COMM. ON PAY EQUITY, PAY EQUITY NEWS NOTES, at 1, 6 (Summer 1986) [hereinafter PAY EQUITY NEWS NOTES] (adding Florida and Vermont to the April count).

There are many varieties of comparable worth pay increases: for example, the undervalued (usually female-dominated) jobs can be upgraded in pay up to their counterpart (usually male-dominated) jobs of equal value; the undervalued jobs can be brought up to a mean between all male-dominated and all female-dominated jobs; or the pay increase can split the difference between the means of the two categories. The National Committee for Pay Equity defines implementation of increases as action taken by the state legislature or the governor's office to appropriate funds. *See* STATE UPDATE, *supra*, at 1. *See also* GAO REPORT, *supra* note 11, at 23, 26 (summarizing states' responses to questionnaire on comparable worth research and implementation).

14. The states are Arizona, Illinois, Indiana, Iowa, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, New Jersey, New York, Ohio, Oregon, Rhode Island, Vermont, Washington, West Virginia, Wisconsin, and Wyoming. GAO REPORT, *supra* note 11, at 15 (listing under study "2" those states that have implemented "a job content pay equity study"). The pay equity studies compared the pay of male and female job classes with comparable job evaluation scores.

15. The states are California, Hawaii, Kansas, Kentucky, Louisiana, Nebraska, New Mexico, and North Carolina. *Id.* (listing those states under study "1" of the chart).

16. NATIONAL COMM. ON PAY EQUITY, SURVEY OF LOCAL PAY EQUITY ACTIVITY (Dec. 1987) [hereinafter SURVEY] (listing counties, cities, and school districts involved in pay equity activities).

17. BUREAU OF NAT'L AFFAIRS, THE COMPARABLE WORTH ISSUE 34-37 (Oct. 30, 1981).

18. Daily Lab. Rep. (BNA) No. 82, at A-4 (Apr. 29, 1985).

19. The mayor has authority to veto any pay equity wage adjustment, either in its entirety or in part. Daily Lab. Rep. (BNA) No. 216, at A-7 (Nov. 7, 1986).

have made pay equity adjustments for their employees.[20] Minnesota requires pay equity implementation at the state and local level, and seventy-nine percent of the cities and eighty percent of the counties in that state have adjusted employees' salaries accordingly.[21] The City of Chicago in 1986 negotiated a comparable worth raise in return for a withdrawal of charges of discrimination filed by the city employees union.[22] In Washington, Oregon, and Delaware employee unions have negotiated pay equity increases for municipal and county employees.[23] In addition, cities and counties in Connecticut, Iowa, Michigan, Pennsylvania, Vermont, Virginia, and Wisconsin have implemented pay equity increases for their employees.[24]

II. COMPARABLE WORTH ACTIVITIES IN MARYLAND

A. Comparable Worth Study of the Maryland Merit System

The State of Maryland first addressed the issue of comparable worth in a study of its merit classification system. Booz-Allen & Hamilton, Inc. and Hallcrest-Craver Associates, Inc. commenced the Maryland Comparable Worth Study (the Study) in August 1984. Booz-Allen & Hamilton presented its draft report to the Governor's Commission on Compensation and Personnel Policies (Governor's Commission) on November 25, 1985.[25] The final report was presented on February 26, 1986.[26] The Study was the outgrowth of a two-year effort by a number of advocates for pay equity, led by the Maryland Commission for Women, to convince the Governor's Commission to consider comparable worth as a principal component of internal equity within the state merit classification system.[27]

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20. SURVEY, *supra* note 16.

21. *Id.*

22. 24 Gov't Empl. Rel. Rep. (BNA) No. 1158, at 478 (Apr. 7, 1986).

23. SURVEY, *supra* note 16.

24. *Id.*

25. *See* Booz-Allen & Hamilton, Inc. & Hallcrest-Craver Assoc., Draft Report to the Governor's Comm'n on Compensation and Personnel Policies, The State of Maryland Comparable Worth Study (Nov. 8, 1985) [hereinafter Draft Report].

26. BOOZ-ALLEN & HAMILTON, INC. & HALLCREST-CRAVER ASSOC., FINAL REPORT TO THE GOVERNOR'S COMM'N ON COMPENSATION AND PERSONNEL POLICIES, THE STATE OF MARYLAND COMPARABLE WORTH STUDY (Feb. 26, 1986) [hereinafter Study].

27. Maryland Comm'n for Women, Fact Sheet, Pay Equity Activities in Maryland (Oct. 22, 1985) (unpublished). The Comparable Worth Committee of the Maryland Commission for Women (the Committee) first convened in January 1982, chaired by Barbara O. Kreamer, Delegate to the Maryland General Assembly. Pay equity advocates who joined the Commissioners of the Maryland Commission for Women on the Committee included representatives of the National Organization for Women (Maryland

1. Study Methodology.—The Study attempted to provide information on the extent of undervaluation of female-dominated classes in the State's current job classification system, proposed a classification system, and recommended alternatives to correct any undervaluation found.[28] In addition, the Study addressed the concentration of women in low-paying jobs and the usefulness of incorporating labor market data into the State's pay-setting process.[29]

In order to examine the extent of undervaluation of female-dominated classes, the Study first compared the state classification system with other job evaluation systems[30] and discussed job value assessment through a literature review.[31] The Study then compared jobs in selected female-dominated and male-dominated classes.[32] The consultants analyzed the current and proposed compensation systems under two separate factor evaluation systems,[33] and then

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Chapter), the American Association of University Women (Maryland Chapter), the Women's Law Center, Inc., the Maryland Commission on Human Relations, the American Federation of State, County and Municipal Employees, the Maryland Classified Employees Association (MCEA), the Baltimore 9-to-5 Organization, the League of Women Voters, and the Maryland Nurses Association. The Committee presented testimony before the Governor's Commission on Compensation and Personnel Policies (Governor's Commission) and advocated consideration of comparable worth in the Commission's review of the merit pay system. While considering a new compensation and classification system (the proposed system) presented to it by a consulting firm, the Commission, in response to a request by the Committee, decided to conduct a comparable worth study of both the existing state system and the proposed system. The decision was announced at the March 31, 1983 meeting of the Commission. *Id.*

28. Study, *supra* note 26, at I-3. As of June 30, 1986, there were approximately 90,000 positions in the merit system, but only 54,623 positions budgeted in the state workforce were under Department of Personnel (DOP) salary-setting control. Eleven thousand seven hundred thirty-five positions were budgeted under the University of Maryland, which has independent salary-setting control. Another approximately 24,000 positions were categorized under other independent salary-setting agencies (*e.g.*, temporary and contractual employees, Maryland Automobile Insurance Fund employees) not budgeted under the DOP. SPECIAL OVERSIGHT SUBCOMM. ON PERSONNEL, APPROPRIATIONS COMM., QUESTIONS TO BE ADDRESSED BY THE DEP'T OF PERSONNEL, 1987 Sess. (Interim), at Att. 1 (Sept. 1, 1987) [hereinafter DOP RESPONSE].

29. Study, *supra* note 26, at I-3.

30. The Study developed background information on the comparable worth experiences of Connecticut, Idaho, Maine, Minnesota, New Jersey, New York, and Washington and described the job evaluation systems of Maryland's counties and major cities. *Id.* at II-3 to -32.

31. *See infra* text accompanying notes 57-61 for a discussion of the shortcomings of this review.

32. Study, *supra* note 26, at IV-9. The sample of classes included 241 male-dominated classes and 144 female-dominated classes. Most (63%) had 20 or more incumbents. In the classes with fewer than 20 incumbents, the male-dominated classes outnumbered the female-dominated classes by about 2-1/2 to 1, indicating a proliferation of small classes of jobs for male employees. *Id.*

33. *Id.* at IV-9 to -10. A total of 385 gender-dominated job classes were analyzed,

analyzed the effects of adjustments in pay schedules as a result of a targeted pay increase by the State. Disparities in pay between female-dominated and male-dominated jobs were documented. The consultants then modified their results by adjusting salaries according to weekly work hours.[34] The consultants also conducted a random sample poll of women occupying lower-paying positions in an attempt to survey the reasons why female employees applied for, accepted, and stayed in jobs that were concentrated in the lower ranks of the merit system.[35]

2. Study Conclusions.—After nineteen months of reviewing activities in other jurisdictions, developing methodology, gathering data and analyzing the results, the Study reached the following five conclusions:

> — Based upon the job-content measures of the [two] factor evaluation systems, and using actual pay levels, the State of Maryland's *current* pay practices undervalue female-dominated classes compared to male-dominated classes.
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> — The Annual Salary Review (ASR) process for Fiscal Year (FY) 1986 appears to have narrowed the difference between male and female pay lines for the current system but has not eliminated it.
>
> — When current salary levels are adjusted to standardize the length of the work-week for all classes, analyses show slight if any statistically significant difference between salaries of male- and female-dominated classes.

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comprising approximately 59% of state employees. *Id.* at IV-9. Gender-dominated classes were defined as those whose incumbents were 70% or more female or male. *Id.* at D-1.

The two evaluation systems used to analyze the classes were the Quantitative Evaluation System and the Jacobs System. *Id.* at IV-5. Both systems are point factor systems that evaluate job classes on the basis of work content only; they are well established, have been used by governmental organizations, and have produced results acceptable to both managers and employees in previous studies.

The Quantitative Evaluation System was modified to incorporate the job values reflected in a cross-section of state jobs. The job values were determined by consensus between representatives of state agencies, two employee associations, the Maryland Commission on Women, and the Maryland Commission on Human Relations. Definitions of levels were worked out and point scales were set to correspond to the established values. The modified system was renamed the Maryland Quantitative Evaluation System (MQES). The MQES "represent[ed] the combined views of this group on what the State considers important to value in its jobs, and how much weight or points should be attached to each factor." *Id.* at IV-6.

34. Study, *supra* note 26, at IV-1 to -49.

35. Questionnaires were sent to 200 women and 200 men who were randomly selected from categories of jobs paying $15,000 or less per annum. *Id.* at VI-4.

> — The analysis of the *proposed* system also yields results indicating undervaluation of female-dominated classes compared to male-dominated classes.
>
> — The current pay practices are only indirectly related to work content value of the classes (at least as measured by the [two] systems), resulting in considerable dispersion and under- and overvaluation of individual classes.[36]

a. Undervaluation of Female-Dominated Jobs.—The State's current compensation system uses four primary job evaluation systems to set pay for most of its classified jobs.[37] The job classes were selected from all job categories of the current classification system because the sole criterion for selection was that the incumbents in the class be seventy percent or more female or male.[38] The classes within the current and proposed evaluation systems were tested by evaluating them anew under the Study's two separate point factor evaluation systems.[39] This provided the raw data for the consultant's analysis.

The Study applied the statistical tools of scatter diagrams and regression lines to plot the dispersion of the newly evaluated positions in terms of their evaluation points and salaries. The Study showed graphically the difference between the mean salary line of female-dominated classes and the mean salary line of male-dominated classes.

The Study concluded that when the two evaluation systems

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36. *Id.* at IV-47 (emphasis in original).

37. Completed Questionnaire Submitted by the State of Maryland in Response to the U.S. Gen. Accounting Office Survey of States' Pay Equity Activities 2-3 (1986) [hereinafter Questionnaire]. Jobs described as executive within the classified system, or 3% of all classified positions, are compared by ranking them in terms of difficulty and rank-ordering them in a hierarchy. The same system is used for physicians. Administrative, managerial, professional, and technical jobs in the State's classification system, 52% of all classified positions, are evaluated under the factor comparison system. This system first ranks certain key jobs ("whole jobs") on the basis of selected factors and then determines the value of all the other jobs by their relation to the key jobs. As to clerical and secretarial positions, or 22% of all classified positions, it is not clear which system is used. *Id.* The Study stated that *all* jobs under the current classification system are evaluated by the "whole job technique." Study, *supra* note 26, at V-6, -22. The State's response to the GAO survey of state pay equity activities, however, stated that a point factor system is used for clerical and secretarial positions. Questionnaire at 2. *Cf.* GAO REPORT, *supra* note 11. Giving preference to the consultants' determinations, it will be presumed that clerical and secretarial positions are evaluated under the factor comparison method using the whole job technique.

38. Study, *supra* note 26, at IV-8.

39. *Id.* at IV-1 to -49.

were applied to the selected classes in order to eliminate gender as a factor in the setting of pay, the resulting charts demonstrated a "consistent pattern of undervaluation of female-dominated classes."[40] The Study concluded that the extent of undervaluation of female-dominated classes in the current and proposed pay systems ranged from three percent to twenty percent.[41]

b. Use of Market Data.—Labor market data is used by the State both in making periodic across-the-board salary adjustments and in regrading individual classes (usually because of recruitment and retention problems) in the Annual Salary Review (ASR) process.[42] The Study concluded that the State inevitably changes the relative internal worth of job classes based on the influences of the market when it utilizes the ASR process to integrate market data into the pay system.[43] The market influences tend to undervalue female-dominated work. Because the ASR process is used currently to regrade individual classes, "the potential for pay equity problems increases."[44] Similarly, when labor market considerations are relied upon for periodic structural adjustments of Maryland's "Standard Salary Schedule," salary levels tend to vary for jobs of equal value based on a work content evaluation system.[45] Indeed, the Study warned that the use of separate pay plans for different categories of employees also can lead to further undervaluation of female-dominated jobs because salary rates in the labor market for female-dominated work sometimes are lower than for male dominated work of

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40. *Id.* at IV-32. The proposed system, which has not been adopted, showed after re-evaluation that female-dominated classes "would be paid significantly less than the male-dominated classes at the lower end of the job evaluation scores, while at the upper end of the scale there would be less difference in pay treatment." *Id.* at IV-45.

41. The consultants concluded that the extent of disparity in the current system ranged from 0% to 9%, *id.* at IV-47, but the source of these figures is not clear. Presumably, the percentages are the range of differences between the female and male regression lines under the two evaluation systems. Yet the table which supports the consultants' textual conclusion shows, instead of a range of from 0% to 9%, a range of from 3% to 20% in 1985. *Id.* at IV-48. To be sure, at the bottom of the same page, when discussing undervaluation of female-dominated jobs under the proposed system, the consultants indicate a range of undervaluation of from 2% to 12%, and that is indeed the range shown on the table supporting the text. *Id.* Therefore, one can presume that the consultants mistakenly referred to 0% to 9%, when they should have used 3% to 20% as the correct range of disparity. The consultants discovered a 0% to 18% undervaluation range for 1986. The validity of this later finding, however, is critiqued herein.

42. Study, *supra* note 26, at V-7.

43. *Id.* at V-1.

44. *Id.*

45. *Id.* at V-17.

equivalent job content value.[46]

c. Job Segregation.—The Study concluded that women are disproportionally concentrated in the low-paying positions of the state compensation system. Seventy percent of the State's employees in jobs in the $0 to $15,000 salary range are women. In all, 44.3 percent of all salaried female employees earn less than $15,000 per year.[47] By contrast, the State's male employees are concentrated in the high-paying positions, that is, sixty-five percent of the salaried employees in the $21,100 or more range are male.[48] Low-paying positions dominated by women include the office/clerical, health care, human services, and housekeeping categories.[49]

Although the consultants recognized important limitations on their ability to deduce the causes for job segregation of women in the current state classification system, the Study nevertheless concluded that one major cause for the concentration is that women apply for and accept low-paid, dead-end positions in higher percentages than men.[50] The Study showed that experience requirements had the largest effect (sixty-four percent) on the disqualification of women applicants. For men, on the other hand, the disqualification most often was based on licensing or certification requirements (forty percent) or education (thirty percent).[51] Finally, the Study showed that lack of time in the workforce and career interruptions were not factors in explaining the concentration of women in low-paying jobs.[52]

The consultants tested for a correlation between the concentration of women in low-paying job classifications in the merit system and the undervaluation of female-dominated job classifications by testing for female concentration in jobs before and after re-evaluation under two comparable worth evaluation systems used in the Study.[53] They found that the concentration of women in the lowest-paying third of the merit system job classifications persisted after the re-evaluation of the jobs on the basis of job content value.[54] The Study concluded that "the concentration of females in lower-

46. Study, *supra* note 26, at V-13.
47. *Id.* at VI-6.
48. *Id.*
49. *Id.* at VI-13 (Exh. VI-3).
50. Study, *supra* note 26, at VI-19.
51. *Id.* at VI-24.
52. *Id.* at VI-31, V-33.
53. *Id.* at VI-33 to -37.
54. Study, *supra* note 26, at VI-35.

paying jobs is not to any large extent due to undervaluation of the work itself."[55]

3. Analysis of the Study.—The Comparable Worth Study documented existing gender-based wage discrepancies in the merit system that ranged from three percent to twenty percent. The consultants attempted to temper the effect of the Study's conclusions by giving prominence to a seemingly moderating effect of a salary increase in 1986 targeted at undervalued female-dominated jobs and to the impact of an adjustment in calculations by conforming weekly work hours among job classifications. In the final analysis, however, the gender-based wage discrepancies are neither mitigated nor offset by the pay raise or the adjusted workweek. This comment will argue that the State has failed to remedy the gender-based discrimination in wages that is evidenced by the Study's findings, thus violating Maryland's ERA.[56]

The Study also recognized that reliance on the market by the State to restructure and reclassify several classifications imports wage discrepancies into the reclassification process. The State may not rely on a market which imports gender-based discrepancies as an excuse for retaining the existing evaluation systems. Such reliance becomes evidence of intent to perpetuate documented existing gender-based wage discrepancies. The Study's random survey of women employees in the low-paying jobs of the merit system concluded that the women had merely chosen their own segregation. This conclusion, however, did not analyze important factors that influence women's decisions in selecting jobs.

Before analyzing the Study's conclusions, however, a discussion is merited on the review conducted by the consultants of various job evaluation methodologies, a review that help set the stage for its evaluation of salary data.

a. Survey of Job Evaluation Methodologies.—Jobs held predominantly by women often are evaluated under the shadow of unconscious bias or under the lingering effect of discriminatory market wage patterns that were set when discrimination was not illegal.[57] Unconscious bias can make male-dominated or nonminority-domi-

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55. *Id.* at VI-37.

56. This topic is covered more fully in Part IV of this comment.

57. Blumrosen, *supra* note 4, at 434-57; NAS STUDY, *supra* note 4, at 56-66; AARON & LOUGY, *supra* note 4, at 15, 42. The following discussion of unconscious or intentional bias in the job evaluation process is based primarily on the Blumrosen article and the NAS Study.

nated jobs seem more difficult or can underestimate the difficulty of jobs predominantly held by women or blacks. Stereotypes can influence job qualifications regarding education or prior experience. Education and training may be defined to include only formal programs; skills learned in nonpaid work or at home often are disregarded. When selecting what factors in the job are to be compensated, conscious or intentional bias can again enter the job evaluation process. Skills involved in typically women's work often are ignored. The choice of factors to compensate and the weight given each factor also affect the relative ranking of jobs and the pay they receive. For instance, "physical effort" usually will include lifting, but may not include manual dexterity; it also may emphasize strength, but ignore fatigue factors such as repetitive work or strain from prolonged dealings with the public. Also, negotiating (usually thought of as a man's job) may be rated more highly than counseling (usually associated with women). The importance of the factors also are subject to the perceptions of job evaluators who may disdain "women's work" or "black jobs." Indeed, in the Study the consultants noted that physical effort was overemphasized in certain job classifications, but because small weight was given these factors in the merit system, its influence on the ultimate evaluation was limited.[58]

Moreover, many jobs were designed in an age when discrimination against women and blacks, in terms of the type of work they were permitted to do, still was legal. For example, women were not allowed to work overtime or do jobs requiring the lifting of weights. Thus, they were confined to jobs labeled "women's jobs" which were undervalued as such. "Emphasis on 'male' factors such as physical labor, strength, gross manual operations, or even routine operations, rather than on manual dexterity, visual acuity, stress, and fatigue characteristics of the light assembly or high speed press operations—tasks assigned to women—would result in higher rates for 'male' jobs."[59] In setting pay for the jobs, prior discriminatory wage patterns, which were established and commonly used prior to passage of the EPA and Title VII,[60] may be merged into and perpetuated by current pay patterns.

The State's most frequently used evaluation system, a factor ranking system based on evaluation of a "key job," also may perpetuate bias in job evaluation. This evaluation method selects a "key

58. Study, *supra* note 26, at IV-6.
59. Blumrosen, *supra* note 4, at 438 (footnote omitted).
60. *See supra* note 28.

job" for evaluation within a category of jobs, and then ranks other jobs in relation to that key job. When women's jobs are compared only to other women's jobs, and men's jobs are compared only to other men's jobs, the same factors may be rated differently. This system also transmits any undervaluation or overvaluation of the key job to the other jobs which have been "keyed" to it. Also, the key jobs used are often male jobs, thus setting the pattern for factors and factor weights associated with male jobs to be valued at similar levels. Another evaluation system, simple rank ordering, is fraught with the potential pitfalls enumerated above.

A discussion of these sources of conscious or unconscious bias in the job evaluation and pay-setting process would have provided relevant background for the Study. A discussion of the potential for similar bias in the merit system would have appropriately qualified the Study's conclusions, and, moreover, would have highlighted the Study's conclusion that reliance on the market by the State to set periodic pay increases is a process which itself incorporates apparent wage discrimination.[61]

b. Undervaluation of Female-Dominated Jobs.—The pay disparity between female-dominated and male-dominated jobs was found by the Study to range from three percent to twenty percent in 1985 and zero to eighteen percent in 1986.[62] These results evidence[63] that employees in female-dominated job classes of the state merit system are "being paid less than would be predicted."[64] Furthermore, this adverse effect is simply a result of the employees being in female-dominated classes.[65]

(1) Targeted pay increase did not mitigate gender-based wage discrepancies.—The consultants took pains to emphasize the apparent reduction in wage disparity caused by a Fiscal Year (FY) 1986 pay increase targeted to undervalued, female-dominated job classifica-

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61. *See supra* note 46 and accompanying text.

62. *See supra* notes 40-41 and accompanying text.

63. The Study used the phrase "strong indication." Study, *supra* note 26, at IV-24.

64. *Id.*

65. The finding that female-dominated classes were undervalued from 3% to 20% in 1985 and 0% to 18% in 1986 less than male-dominated classes as a whole does not exclude the possibility of dispersion among each of the gender-dominated classes. That is, there are some female-dominated classes that share the same point value yet differ in pay grade, sometimes to a remarkable degree. The same is true for male-dominated classes. While this manifests the lack of coherence and logic of the State's current compensation system, it does not render nugatory the fundamental evidentiary finding of undervaluation of female-dominated classes.

tions under the ASR program. The Study incorporated the 1986 raise into calculations to revise the range of wage disparity downward, but noted that the wage disparity remained statistically significant.[66]

The FY 1986 ASR pay increase was the first in what was later described as a three-year program to upgrade salaries across the board and provide additional raises to targeted positions.[67] On the surface, the program seemed designed to address the imbalance in wages between female- and male-dominated classes in the merit system: sixty-five percent of the jobs selected for special wage increases were secretarial and clerical positions, "for which State salaries have lagged in the market place."[68] After the Study was presented to the Governor, however, the modest amelioration in relative earnings achieved by the 1986 ASR was virtually wiped out by FY 1987 and FY 1988 ASRs. In the FY 1987 and FY 1988 ASRs, pay increases were given to a number of other job classifications ranging from food administration personnel to attorneys and agency deputy secretaries, in addition to across-the-board pay increases.[69] In fact, the number of employee positions which received

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66. The consultants calculated that although the Fiscal Year (FY) 1986 pay increase did narrow the disparity (the new range was 0% to 18% instead of 3% to 20%), the difference in wages between female-dominated and male-dominated classifications was not eliminated. Study, *supra* note 26, at IV-48.

The ASR increased the aggregate earnings ratio of women to men in the state compensation system. Whereas before the pay increase working women in Maryland earned 77 cents for every dollar working men earned, after the ASR working women in Maryland earn 78 cents for every working man's dollar. *Id.*, app. at J-1 to -2.

67. Budget Message to the Gen. Assembly of Maryland and the Budget in Brief (FY 1987), Annapolis, at 72 (Jan. 15, 1986) [hereinafter Budget in Brief (FY 1987)]; Budget Message to the Gen. Assembly of Maryland and the Budget in Brief (FY 1988), Annapolis, at 74 (Jan. 23, 1987) [hereinafter Budget in Brief (FY 1988)]. The FY 1986 Budget Message did not refer to the three-year program. Budget Message to the Gen. Assembly of Maryland and the Budget in Brief (FY 1986), Annapolis, at 74-75 (Jan. 16, 1985) [hereinafter Budget in Brief (FY 1986)].

68. Budget in Brief (FY 1986), *supra* note 67, at 75. There was no other indication of an intent to provide relief to female-dominated job classifications generally. The FY 1986 Budget in Brief made no mention that this was the first of a three-year program.

Out of 17,224 jobs that received increases that fiscal year, 11,000 were secretarial and clerical positions; 3,500 were health professionals, including physicians, nurses and licensed practical nurses. *Id.* In addition to the targeted increases, there was a 4% across-the-board salary increase for classified state employees.

69. Budget in Brief (FY 1987) & Budget in Brief (FY 1988), *supra* note 67. The FY 1987 salary adjustment included a 3.5% across-the-board increase and an ASR raise to 18,375 employees, including data processing, fiscal and revenue support, social work, counseling, corrections, law enforcement, food administration, investigation, and property appraisal personnel. Budget in Brief (FY 1987), *supra* note 67, at 72. The FY 1988 salary adjustment included a 2.5% across-the-board increase and an ASR raise to 17,385 employees, including engineers, skilled tradespeople, institutional laborers, attorneys,

ASR increases approached the total number of positions on the state payroll.[70] Therefore, the pay equity improvement of the 1986 ASR—if it was a pay equity improvement at all[71]—was erased by the nondedicated 1987 and 1988 ASRs. As a result, the range of wage disparity between female-dominated and male-dominated jobs was once again from three percent to twenty percent in 1987.

In the absence of plans to adopt a pay equity policy[72] or any real effort to begin addressing the problems documented in the Study, the advisability of using ASRs for relief deserves mention. The State utilizes ASRs to target specific job classes that demonstrate recruitment and retention difficulties.[73] The ASR process may be utilized to target undervalued jobs for salary increases in order to remedy the disparities documented in the Study. This use of ASRs may seem better than none at all. Because the process necessarily excludes classes that may be deserving of equitable raises, but are not included in the targeted pay increase plan, it is by definition nonsystematic. In addition, if job classes that are not undervalued receive pay increases in order to achieve other goals (*e.g.*, provide recruitment incentives, respond to political pressures), the adjustment may increase the imbalance in internal equity even further.

The ASR process also is subject to political pressures. For example, the FY 1988 ASR targeted 17,385 employees as introduced by the Governor.[74] In an effort to prevent the state budget from exceeding spending limits imposed by the legislature, the General

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hearing officers, nurses, physicians, social workers, deputy secretaries, supply and services supervisors, and other laborers. Budget in Brief (FY 1988), at 74-75, *supra* note 67.

70. More than 52,760 positions received ASR raises in FYs 1986, 1987 and 1988. Budget in Brief (FY 1986), Budget in Brief (FY 1987), & Budget in Brief (FY 1988), *supra* note 67. The total number of positions on the state payroll, including classified and unclassified, full- and part-time, was 55,300. Questionnaire, *supra* note 37, at 1.

71. The words of Delegate Kreamer before the House Appropriations Committee when testifying about her comparable worth bill were prophetic:

> The happy coincidence of the FY 1986 salary package giving 11 percent raises to many female- and minority-dominated classes is undermined when placed in the context of a three-year plan which will upgrade most state employees' pay, since most state employers [sic] are underpaid when pay for their jobs is compared to pay for the same jobs in the private sector. The net effect of the overall upgrading does not solve the pay equity problem.

Hearing on H.B. 1461 Before the House Appropriations Comm., 1986 Sess. (Mar. 17, 1986) (testimony of Delegate Barbara O. Kreamer).

72. Questionnaire, *supra* note 37, at 4.

73. Study, *supra* note 26, at V-7.

74. Budget in Brief (FY 1988), *supra* note 67, at 74. There were approximately 55,300 total positions in the merit system at the time. *See also supra* note 69.

Assembly delayed the special salary increase by one month.[75]

(2) Adjustment of workweek hours does not deflect evidence of gender-based wage discrimination.—The initial results of the Study were based on a comparison of annual salaries. After the first draft of the Study was presented,[76] the Commission requested the consultants to conduct the same analysis by conforming workweek hours, *i.e.*, some employees work 35.5 hours per week while others work forty hours per week.[77]

On the second run, the consultants adjusted the annual salaries to conform workweek hours. The Study misses the mark, however, by projecting the actual annual salaries of gender-dominated classes to supposed comparable hourly figures. First, there is no reason to assume that the actual number of hours worked per week is related to the annual salary established for the job class.[78] Second, the State already has demonstrated that weekly work hours are fungible factors in relation to annual salaries.[79] Third, because employees may not choose one or the other workweek, this factor simply becomes part of the working conditions for the job and should be treated as such in the consultants' analysis rather than as a separate variable.[80]

Moreover, instead of conforming the workweek hours of the FY 1985 salary figures, the consultants conducted their amended statis-

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75. Telephone interview with John Donaldson, Principal Analyst, Budget Review Div., State Dep't of Fiscal Servs. (Apr. 20, 1987); *see also* The Sun (Baltimore), Mar. 7, 1987, at A-8, col. 2.

76. Draft Report, *supra* note 25.

77. Letter from the Commission on Compensation and Personnel Policies to Governor Harry Hughes (Mar. 25, 1986) (enclosing a copy of the Study).

78. The workweek of full-time employees was defined as consisting of "5 working days, and not fewer than 35½ hours or more than 40 hours." MD. REGS. CODE tit. 6, § 06.01.01.01 (repealed). There was no requirement of either 35.5 or 40 hours; these totals were instead offered as a range, depending on the preferences of the various departments and agencies.

Furthermore, annual salaries include factors such as actual hours worked, paid versus unpaid lunch periods, and compensatory time expected. Projected hourly figures fail to compensate for these factors. A 40-hour per week job with paid lunch periods may correspond to a 35.5-hour per week job with unpaid lunch periods in terms of actual hours worked. Letter from the Maryland Commission for Women to the Governor's Commission (Feb. 5, 1986).

79. A scan of the list of class salaries and adjusted salaries in appendix E of the Study shows a mix of work hours within similar categories: communications clerks, correctional officers, engineering technicians, maintenance engineers/supervisors, natural resources police/managers, supply clerks/officers, food service workers, and nurses. Study, *supra* note 26, at app. E.

80. It is interesting to note, as did the Study, that 86% of the female-dominated

tical analysis on the FY 1986 salaries—the year in which many female-dominated job classifications received their temporary upgrading in relation to male-dominated jobs in the first of a three-year program.[81] Because the temporary upgrading was to be eliminated in the ASR programs of the succeeding two years, and the State presumably knew that such was the plan,[82] it was statistically inappropriate and misleading to base the workweek adjustment analysis on that year's salaries. Nevertheless, on the basis of the temporarily upgraded FY 1986 salaries, the consultants concluded that, after adjustment for workweek hours, the statistical difference between the female-dominated and male-dominated classes narrowed to "slight if any statistically significant difference."[83] The temporary amelioration in the figures was to disappear the following year when the remaining job classes received their ASR pay increase.

The consultants acknowledged doubts about the workweek analysis by admitting that "the circumstances surrounding the number of hours in the workweek diminishes the value of this analysis."[84] Therefore, the rerun of the Study under adjusted workweek hours does not refute, mitigate or invalidate the findings of undervaluation of female-dominated classes.[85]

c. Use of Market Data.—The labor market data used by the State in restructuring and regrading its several classification systems is de-

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classes were on restricted work schedules, while only 56% of the male-dominated classes worked a 35.5 hour workweek. Study, *supra* note 26, at IV-15.

Also, there is no consideration of whether the difference in hours worked also affects the pension benefits of the employees on the restricted schedules.

81. *See supra* notes 63-68 and accompanying text.

82. Interestingly, in announcing the FY 1986 ASR in the Budget, the State did not indicate that the increases were part of a three-year program, so that it would have been impossible to know that an inappropriate base was being used. The FY 1987 and 1988 Budget Messages did refer to the three-year program. Budget in Brief (FY 1987), *supra* note 67, at 72; Budget in Brief (FY 1988), *supra* note 67, at 74.

83. Study, *supra* note 26, at IV-47. In fact, however, the wage disparity after adjustment for workweek hours, even when conducted on the wrong set of salary figures, ranged from 0% to 9% in the current system and from 2% to 12% in the proposed system. Those ranges are not statistically insignificant, despite their perfunctory dismissal by the consultants. Plus, if the temporary effect of the FY 1986 ASR had been removed by basing the adjusted analysis on FY 1985 salaries, the range of wage disparity would have been more than 0% to 9% (and 2% to 12% in the proposed system)—significantly more in statistical terms.

84. *Id.* at 3.

85. Nevertheless, in its response to the General Accounting Office survey of state activities on pay equity, the State replied that the Study did not conclude that sex-based wage difference existed after controlling for job evaluation scores. Questionnaire, *supra* note 37, at 11.

rived from published wage and salary surveys. The Study demonstrated that the use of at least one local wage survey can import wage discrepancies *not* based on job content (*i.e.*, gender-based discrepancies) from the market into the state pay system.[86] The market wage survey that the consultants tested,[87] one of several regularly used by the State in determining benchmark classes for revision of salary schedules, covers forty percent of the occupational categories in the state classification system.[88] The Study found that, when sample jobs were selected from the wage survey[89] and ranked according to job content point factor evaluation, the male-dominated jobs in the sample had 6.8 percent higher market salaries than the *combined* male and female jobs in the sample. Unfortunately, the consultants did not report how the salaries of the female-dominated jobs compared to the male-dominated jobs. In any event, the regression line of the female-dominated job salaries must lie below that of the combined male and female jobs, so one can infer that they were *at least* 6.8 percent below the male-dominated job salaries.[90]

Thus, the Study demonstrates how documented gender-based wage discrepancies are knowingly imported into the state merit system.

d. Job Segregation.—As pointed out above, job segregation has been found to be directly related to undervaluation of female-dominated jobs.[91] This has been attributed in a number of disciplines to the fact that people of both sexes tend to rate characteristics, values and activities of men more highly than those of women, that sex-based stereotypes persist in attitudes toward women's productivity, absenteeism and labor cost, and that attitudes shaped when wage discrimination in female-dominated jobs was legal linger into the present.[92] Maryland is no exception to the rule of segregation of

86. Study, *supra* note 26, at V-15 to -17.

87. *Id.* at V-15 (relying on BUREAU OF LABOR STATISTICS, AREA WAGE SURVEYS OF THE BALTIMORE METROPOLITAN AREA).

88. *Id.* at V-10, Exh. V-3. It is not indicated how many job classes are within each occupational category. The State at present has 4,150 job classifications for 47,450 classified positions (there are 55,300 total positions) and uses four primary job evaluation systems to set pay for most of the classified jobs. Questionnaire, *supra* note 37, at 1.

89. Sample jobs included in the Baltimore Area Wage Survey were file clerk II, typist I, payroll clerk, secretary III, guard I, tractor-trailer truck driver, automotive mechanic, and maintenance electrician. *Id.* at V-15.

90. Study, *supra* note 26, at V-16.

91. *See supra* note 4 and accompanying text.

92. Blumrosen, *supra* note 4, at 415-28; NAS STUDY, *supra* note 4, at 56-62; COMPARABLE WORTH: ISSUES AND ALTERNATIVES, *supra* note 6, at 96-102.

women into low-paying jobs. Seventy percent of the state employees holding jobs paying $0 to $15,000 per year are women.[93] In an attempt to determine the reasons for segregation of women into the low-paying merit system jobs, the consultants concluded that women apply for and accept low-paying, dead-end jobs more than men.[94] The Study gave short shrift, however, to the societal influences at play in women's choices. Noted experts have shown that job segregation is not solely the result of free choice as the Study consultants interpreted the survey to mean.[95] A recent study noted the following barriers among the variety of legal, institutional and informal barriers which limit women's access to male-dominated jobs:

> — Recruitment systems that depend on worker referals [sic] or on male-dominated pre-employment settings such as vocational education classes or the military;
>
> — Employer-imposed requirements for nonessential training or credentials that women often lack;
>
> — Veterans' preference policies;
>
> — Promotion and transfer rules, which may count a job applicant's seniority in a male-dominated department more heavily than overall seniority in an entire plant;
>
> — Pre-employment barriers to job training, such as age restrictions for apprenticeships.[96]

Although more difficult to measure, the recent study noted that employer and co-worker attitudes about appropriate jobs for women and men "lead some to discriminate—to consider gender in hiring workers and assigning them to jobs."[97] As to the hard questions concerning societal influences affecting job decisions, the consultants recognized their inability to detect and analyze the long-term, subtle effects of deliberate tracking through the limited survey.[98]

The consultants concluded that the concentration of women in the lowest-paying third of the merit system job classifications was not due to the undervaluation of the jobs. That is, women would predominate in those low-paying jobs even if their jobs were evaluated by a comparable worth job evaluation system.[99] The consul-

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93. *See supra* note 47 and accompanying text.

94. Study, *supra* note 26, at VI-20.

95. Blumrosen, *supra* note 4, at 401-10; NAS STUDY, *supra* note 4, at 52-56; SEX SEGREGATION ON THE JOB, *supra* note 4.

96. SEX SEGREGATION ON THE JOB, *supra* note 4, at A-8.

97. *Id.*

98. Study, *supra* note 26, at VI-20 to -21.

99. *Id.* at VI-37.

tants seem to have conducted this test on the premise that women may prefer those jobs *because* the jobs are low-paid.[100] The results should not be surprising: concentration persists whether jobs are undervalued or are comparably valued. Jobs are undervalued because women hold them; women do not hold those jobs because they are undervalued. This part of the survey, it would seem, contributes nothing to the analysis of the causes for concentration.

The consultants presented the final results of their Study to the Governor's Commission on February 26, 1986.

4. Recommendations of the Governor's Commission.—The Governor's Commission submitted its report to the Governor on March 25, 1986, enclosing a copy of the Study and recommending to the Governor that:

> 1. The state should adopt a goal of attaining and maintaining both competitiveness in the marketplace and internal equity in its compensation system.
>
> 2. The state should adopt a point factor job evaluation methodology as a guide in establishing compensation levels.
>
> 3. The state should continue to use the Annual Salary Review process to attain and maintain competitiveness and internal equity in its compensation system.
>
> 4. The state should minimize gender domination in its classifications. Means to this end should include removal of artificial barriers to employment, examination of recruitment procedures, use of training and individual development programs, and such other means as may be effective.[101]

The first recommendation urges adoption of a policy rather than action to be taken to remedy the gender-based wage disparities detected by the Study. Nevertheless, if the State adopts a policy of maintaining internal equity—as long as internal equity is defined to include the elimination of gender as a factor in the job evaluation and pay-setting process—it would be a tiny but appropriate step in the right direction. Maintaining competitiveness in the marketplace is not in itself an objectionable policy if, in fact, the state compensa-

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100. "To test for possible effects on female concentration in lower-paying jobs *due to* job content value of the work, two analyses were conducted. . . . What [the results] do indicate is that while undervaluation exists, it is not sufficient to explain the concentration of females in lower-paying positions." *Id.* at VI-35 to -37 (emphasis added).

101. Letter from and recommendations of the Governor's Commission to Governor Harry Hughes (Mar. 25, 1986) (accompanying the Study).

tion system is sensitive to the marketplace at all, and if it does not import into the merit system unconstitutional gender-based wage discrimination.

In its second recommendation, the Governor's Commission selected a point factor job evaluation system over other methods of addressing inequities in compensation levels in the merit system.

The third recommendation that the State continue to use ASRs as a method of attaining and maintaining internal equity in the compensation system, if the ASRs in fact operate to eliminate the gender-based wage discrepancies evidenced in the Study, would be another step on the road to pay equity in Maryland. Comparable worth advocates urge the elimination of gender-based wage disparities regardless of methodology.

The fourth recommendation, elimination of gender domination in jobs, is important because the concentration of women in certain jobs and the undervaluation of those jobs are related, as the Study noted. It must be clear that reducing the concentration of women in certain jobs cannot be the *primary* effort of the State to cure gender-based wage discrimination. Desegregation of jobs by gender does not address the wage disparity experienced by women and men who hold those jobs. Gender domination in pink ghetto jobs is the product of a long history of legal and social traditions. It will take a long time and much social evolution to change that pattern. Encouraging women and men to follow different career patterns will help those workers avoid the low status that accompanies pink ghetto jobs. But employees who are proud of their work in those jobs and who have invested much of their time, effort and skills in performing those jobs should not be required to leave their jobs in order to avoid gender-based wage discrimination. It is the duty of the State to eliminate gender-based wage discrimination. Breaking up clusters of its victims is not the only, nor the most direct, remedy.

Implementation by the State of the combination of recommendations made by the Governor's Commission—if the recommendations are appropriately designed—would signal that the State has taken necessary steps to eliminate the gender-based wage disparity documented in the Study.

B. Executive Action to Implement Recommendations

As of July 1988 the recommendations of the Governor's Commission have not been acted upon by the executive branch of the

State of Maryland. House Joint Resolution 58,[102] which passed during the 1986 General Assembly session,[103] directed the Maryland Department of Personnel (DOP) to develop a plan of action to implement the recommendations of the Governor's Commission. The Governor directed DOP to submit a plan to implement three of the recommendations[104] by September 1, 1986. DOP's response to the joint resolution was criticized in a legislative analysis by the Department of Fiscal Services.[105]

In January 1987, a new administration took office in Annapolis. During the January-April General Assembly session, the administration took no action to implement the recommendations. Over the summer interim session, a Special Oversight Subcommittee on Personnel (Subcommittee) requested DOP to present a plan for complying with House Joint Resolution 58.[106] DOP had been granted a grace period by the Subcommittee so that the new administration could have some time to settle in and " 'clean house' prior to statutory intervention."[107] DOP in effect rejected the three Governor's Commission recommendations on the ground that they were "flawed."[108]

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102. H.J. Res. 58, 1986 Sess. *See also infra* note 130 and accompanying text.

103. The General Assembly session takes place each year for 90 days from approximately the middle of January to approximately the middle of April.

104. *See supra* note 101 and accompanying text for the four recommendations of the Commission. The first recommendation, adoption of a policy of attaining and maintaining competitiveness in the marketplace and internal equity in the compensation system, was not addressed by the Governor or the Special Oversight Subcommittee on Personnel.

105. *See* State Dep't of Fiscal Servs., Comments: The Department of Personnel Plan for Implementation [of] Recommendations of the Governor's Commission on Compensation and Personnel Policies (Oct. 1986) [hereinafter Comments]. Among the inadequacies cited by the Department of Fiscal Services of the General Assembly were: (a) failure to be "responsive to the spirit of what was intended when this report was requested"; (b) failure to conduct an in-depth review of the compensation system and develop a plan to improve it; (c) failure to set out planning mechanisms and criteria for ASRs, especially methods to determine reliably the impact of ASRs on the goal of minimizing gender discrimination; (d) failure to decide "what priorities the marketplace will have in improving state salaries and what the competing concerns are"; (e) failure to set out costs and a timetable for implementation of a point factor evaluation system; and (f) failure to develop a comprehensive state compensation policy. *Id.* at 2. The Department of Fiscal Services operates as the legislative reference service on bills and issues involving fiscal matters.

106. SPECIAL OVERSIGHT SUBCOMM. ON PERSONNEL, HOUSE APPROPRIATIONS COMM., INTERIM REPORT TO THE GEN. ASSEMBLY OF 1987, 1987 Sess. (Interim) [hereinafter INTERIM REPORT].

107. *Id.* at 95, Exh. 6.

108. *Id.* at 38. A more detailed report of the DOP's response is contained in DOP RESPONSE, *supra* note 28.

DOP criticized using ASRs to address compensation inequities as inherently unfair and ineffective.[109] The Subcommittee accepted DOP's characterization of the ASR process as "flawed" and made three recommendations: (1) DOP should develop an equitable and affordable compensation system that does not have any of the "identified 'flaws' " of the ASRs; (2) DOP should inform the Subcommittee on its recommendations for changes to the compensation system; and (3) DOP should identify to the Subcommittee those classifications that are targeted for change, continuation and/or termination in ASRs of subsequent fiscal years.[110]

Although not without their own logical inconsistency,[111] DOP's criticisms of the ASR process as a tool to remedy the gender-based

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109. The DOP asserted that using ASRs produces "inequities and special privileges." DOP RESPONSE, *supra* note 28, at 3. In particular, the DOP gave three reasons why it considers the use of ASRs to achieve internal equity inherently unfair: First, approximately 10% of the workforce received no pay increase in the annual ASR raises of FYs 1986, 1987, and 1988; therefore, using ASRs may exclude some employees. Second, the beneficiaries of the FY 1986 pay increases, the first of a three-year program of pay increases, were afforded "special privilege" by virtue of their being first. Third, the ASR pay increases were distributed on the basis of occupation rather than job classification, in a manner that the DOP labeled "disparate treatment" (*e.g.*, one occupation received 24% of the raises; three occupations received no raises). *Id.* at 3-4.

The DOP also maintained that the ASRs are not effective in creating and maintaining competitiveness with area jurisdictions in terms of cost-of-living compensation. The DOP also stated that ASRs should be used only to increase pay where there are specific "occupational or classification-specific problems" and only after an across-the-board pay raise for the entire workforce. Finally, the DOP characterized the process of requesting and getting approval for ASRs as being so lengthy that any real benefit is obscured; that is, the long lead time frustrates efforts to address small-scale compensation problems. *Id.* at 5-7.

110. INTERIM REPORT, *supra* note 106, at 40.

111. The DOP's argument that using ASRs creates inequities and special privileges overlooks the fundamental purpose of the ASR process: ASRs are utilized as a method of adjusting pay levels of specific classes of jobs. Frequently, ASRs are used to adjust the pay levels of job classes that experience recruitment and retention difficulties. ASRs also have been used to generally adjust the entire salary schedule. Routinely, annual across-the-board pay increases have been distributed through this process, and recently, the ASRs were used to target job classes that were undervalued relative to other job classes in the merit system. Targeting job classifications for raises through the ASR process, therefore, has been a matter of practice in Maryland since at least 1971.

By necessity, targeting excludes those job classifications that are determined either not to be undervalued or not to have recruitment and retention problems. The argument that pay increases targeted at undervalued jobs are inequitable and give a special privilege to the targeted job classes is counter-intuitive. Rather, it is inequitable *not* to select undervalued job classes for pay increases. It is those job classes that are not undervalued, and thus do not require pay raises to reach some level of parity, that are the specially privileged classes.

In addition, that ASRs have not been effective in maintaining cost-of-living competitiveness with area jurisdictions is an indictment of the method of calculating pay increases rather than a criticism of the system itself. Furthermore, the three-year program

wage disparity evidenced in the Study miss the point. An effective response to the recommendation would have included a presentation of alternative corrective mechanisms for curing the immediate problem of gender-based wage discrepancy in the merit system along with the description of the disadvantages of ASRs. As long as the mechanism is adequate and reliable in removing gender as a factor in the setting of pay levels for jobs in the state compensation system, the particular method chosen is unimportant. Utilization of ASRs as a method of remedying the discrepancies detected in the Study is one option available to the State, but it is not the only option.

DOP also criticized the recommendation that it develop and install a point factor evaluation system as a guide in establishing pay levels.[112] DOP asserted that a point factor evaluation system is "flawed" in two respects: (1) it is based on an erroneous assumption that there is an intrinsic value of jobs which can be measured, and (2) it excludes the use of prevailing marketplace salary rates to set wages.[113] First, DOP misconstrues the role that point factor evaluation systems play in the comparable worth process.[114] Second, DOP fails to distinguish between the job evaluation and pay-setting processes and misrepresents the importance of the market-

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around which the Study and the Interim Report focused included across-the-board salary adjustments in addition to these targeted pay increases.

Finally, criticism of the protracted process by which ASRs are requested and approved focuses on mechanics that can be improved rather than on the problem that needs to be addressed: gender-based wage disparity.

112. INTERIM REPORT, *supra* note 106, at 40-42.

113. *Id.* at 41.

114. The premise of comparable worth is that gender should not enter into the job evaluation process. Point factor evaluation systems impose discipline on this process. In a point factor evaluation system, a job is not held to any unique and absolute value. Instead, it is the standards against which a job is measured—the factors that make up the job's "worth" to the employer, such as skill, education, physical effort, working conditions, experience, and supervision—that are held constant, and the jobs are related or measured to those standards. The employer's standards may change with time and the employer may wish to revise them, and in so doing, revise the evaluation of the jobs.

Furthermore, each point factor evaluation system applies standards selected by and adapted to each employer's own preferences and needs. Thus, each system may achieve different results if the employers differ in preferences and in the factors they value in their employees' jobs.

In any event, regardless of job evaluation results as to the rating of one job relative to another, the goal of comparable worth is achieved—jobs are evaluated and rated without gender being used as a factor in the evaluation. Indeed, the "flaw" that the DOP criticized is, in fact, the advantage of a point factor evaluation system: Each system is appropriate and unique to each employer, to achieve the employer's own purposes, without importing gender discrimination into the process.

place to the state compensation system.[115] Again, however, the State's failure to remedy gender-based discrimination is not based so much on the particular method adopted to redress the disparity. The failure is based on the State's refusal to take any action on the problem. Thus, DOP's assertion that it intends to "overhaul" the existing classification system[116] will not be effective if the reclassification does not incorporate a method of eliminating gender-based wage discrepancies presently existing in the system.

The Subcommittee recommended that DOP take necessary steps to revise the classification system "for purposes of achieving an equitable/competitive system of public employment compensation."[117] The Subcommittee did not address the question of how DOP is to remedy gender-based wage discrepancies detected in the system by the Study. Thus, the Subcommittee avoided an opportunity to act on the Study.

In responding to the Governor's Commission's third recommendation to develop and implement a plan to minimize gender domination in the state classification system, DOP stated that removal of artificial barriers to employment that foster occupational segregation of women and minorities will be a part of its priority in revising the state classification plan.[118] Removing barriers to the entry of female and male applicants into non-traditional jobs where

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115. A point factor job evaluation system can be adopted to clarify and systematize the employers' own standards of evaluation, and at the same time to eliminate gender as a factor in the process. Once jobs are evaluated and rated in relation to each other, the levels of pay to be assigned to the rated jobs is set only by employers. The employer, however, may not assign different levels of pay for jobs rated equally under the system. Thus, the evaluation and the wage-setting are separate functions. The point factor system eliminates discriminatory factors in the evaluation process. If the employer chooses then to assign pay levels that prevail in the market to equally rated jobs, comparable worth is no barrier. The same pay levels, however, must apply to all equally rated jobs.

Further, comparable worth advocates understand the temporary and fluctuating effects of labor shortages and other events on recruitment and retention of employees. Temporary pay increases for discrete job classifications are not beyond the realm of comparable worth, provided the increases are indeed temporary and are available for both female-dominated and male-dominated jobs that experience recruitment difficulties. That is, both physicians *and* nurses should benefit.

Finally, the DOP itself recognizes the limited role that market rates perform in the state compensation system. The DOP's discussion of the impracticality of conducting wage surveys for over 2,900 job classifications, DOP RESPONSE, *supra* note 28, at 11, and the limited number of occupational categories covered by existing wage surveys, as well as the restricted sample of employers surveyed in the few annual surveys upon which the State presently relies, Study, *supra* note 26, at V-11, do not support a claim that prevailing market rates affect the merit system to any substantial degree.

116. DOP RESPONSE, *supra* note 28, at 13.

117. INTERIM REPORT, *supra* note 106, at 42.

118. DOP RESPONSE, *supra* note 28, at 14.

they have concentrated is one prong of an attack on the segregation of employees in the workforce.[119] Other personnel practices that lead to or encourage the concentration of women in particular jobs also require attention. The Study noted, for instance, that the State has no proactive program for informing job candidates of non-traditional job opportunities.[120]

DOP also commented that its efforts would not cure "social and cultural influences over which we have no control."[121] It is clear that DOP has no duty to cure the ills of society; it does have a duty, though, of curing the ills of the merit system. The fact that social and cultural bias exists in society relieves no employer from the duty to eliminate discrimination in its employment practices. The Study evidenced undervaluation of jobs where women are concentrated. As previously discussed, other studies show that concentration of women almost inevitably results in undervaluation of jobs.[122] DOP must take steps to eliminate the undervaluation of jobs where women are concentrated. It also should take steps to prevent the tracking of female employees into low-paying jobs where much of the discriminatory undervaluation takes place.

The Subcommittee recommended that DOP integrate systematic procedures to remove artificial employment barriers that may foster segregation into the revision of the state classification plan.[123] The Subcommittee also endorsed DOP's reliance on the *United States Government Dictionary of Occupational Titles (Dictionary)*[124] *to validate educational and experience qualification standards for state jobs. In its response DOP had referred to the Dictionary* as a standard on which it relies to establish educational and experience-based criteria for job applicants. DOP gave no indication, however, as to how a dictionary of titles for generic jobs can accurately guide qualification criteria for state jobs, how many state jobs are covered in the *Dictionary*, or whether the *Dictionary* itself is an appropriate and adequate resource upon which to rely. The federal government has not conducted a

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119. While a desegregation of the workforce by gender should apply to both sexes, the positive effects, to a large extent, would inure to the benefit of the female employees. Study results previously discussed detect an undervaluation in female-dominated jobs and a corresponding overvaluation in male-dominated jobs. *See supra* note 40 and accompanying text.

120. Study, *supra* note 26, at VI-22.

121. *Id.*

122. *See supra* notes 91-98 and accompanying text.

123. INTERIM REPORT, *supra* note 106, at 43.

124. UNITED STATES DEP'T OF LABOR, DICTIONARY OF OCCUPATIONAL TITLES (4th ed. 1978).

study of its own classification system, and there is nothing at all to support an inference that the federal government's guidelines are not themselves flawed.[125]

C. *Legislative Action to Implement Recommendations*

As of July 1988, the General Assembly of Maryland has failed to implement the recommendations of the Commission. Indeed, the relevant legislative subcommittee that deals with the issue of pay equity for state employees has expressly declined to implement the recommendations of the Commission.

1. 1986—House Bill 1461.—House Bill 1461,[126] the first comparable worth bill proposed in Maryland,[127] was introduced in January 1986. As originally drafted, it called for the adoption of a comparable worth policy and mandate, adoption of a point factor evaluation system, and the monitoring of annual evaluations by a pay equity committee. Despite the support of the majority of a large number of organizations testifying at the Appropriations Committee hearing, and despite testimony which highlighted the results of the Study,[128] the bill was amended to remove the comparable worth components and introduced a goal of balancing marketplace competitiveness with internal equity.[129] The DOP opposed the bill. The amended bill did not pass in that session.

2. 1986—House Joint Resolution 58.—House Joint Resolution 58,[130] which passed the General Assembly and was signed into law on May 13, 1986,[131] was originally directed to the problem of dead-

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125. DOP RESPONSE, *supra* note 28, at 14.

126. H.B. 1461, 1986 Sess.

127. H.J. Res. 60, which preceded the Study, urged the Commission to expedite its review of the job classification system and expressed a sense of the General Assembly that any revision of the state compensation system incorporate remedies for unequal pay for positions of comparable skill, effort, working conditions, duties, experience, responsibilities or authority, and that the General Assembly have an opportunity to approve the revision. H.J. Res. 60, 1984 Sess. H.J. Res. 60 was introduced on February 20, 1984, and passed the General Assembly on April 6, 1984.

128. *See Hearing on H.B. 1461 Before the House Appropriations Comm.*, 1986 Sess. (Mar. 17, 1986) (testimony of Delegate Barbara O. Kreamer and Eileen Stein, Commissioner, Maryland Commission for Women).

129. For an interpretation of the amended bill by the Office of the Attorney General, see Letter to Delegate Barbara O. Kreamer from Robert A. Zarnoch, Counsel to the General Assembly (Apr. 7, 1986).

130. H.J. Res. 58, 1986 Md. Laws 3566 (as amended and passed into law as J. Res. 29).

131. J. Res. 29, 1986 Md. Laws 3566.

end; female-dominated clerical positions.[132] The final version called for the DOP to develop a "plan of action" to implement the recommendations of the Governor's Commission. It required the DOP to submit a plan of implementation by December 1, 1986.

3. 1987—House Bill 1067.—House Bill 1067[133] was introduced on February 9, 1987. The bill mandated equal pay for work of equal value, established a pay equity committee to advise the Secretary of Personnel on a point factor evaluation system to be adopted and implemented by the Secretary and required an annual pay equity ASR appropriation to meet the requirements of the bill. A hearing on the bill was held March 9, 1987, before the Appropriations Committee. Again, testimony highlighted the need for a bill to remedy the wage discrepancies revealed in the Study, and again, the DOP opposed the session's pay equity bill.[134] On March 24, 1987, the Appropriations Committee unanimously voted down House Bill 1067.[135]

4. 1988—House Bill 530.—On January 27, 1988, House Bill 530[136] was introduced in the General Assembly. Similar to its predecessors, House Bills 1461 and 1067,[137] House Bill 530 required that all positions in the merit system of equal value to the State be paid equally. It established a pay equity review committee to advise the Secretary of Personnel on a point factor evaluation system to be adopted and implemented by the Secretary of Personnel. Further, it required an annual pay equity ASR appropriation to meet the pay equity requirements of the bill. On February 29, 1988, the Appropriations Committee held a hearing on the bill. Once again, pay equity advocates urged the Appropriations Committee to enact mandatory pay equity requirements, and once again, the DOP opposed the session's pay equity bill.[138] The Secretary of Personnel

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132. The joint resolution was amended to delete the original description of the positions intended to be covered—"dead-ended positions . . . generally office and clerical classifications that are traditionally staffed by women and pay an average of 20 percent less than positions traditionally staffed by men."

133. H.B. 1067, 1987 Sess.

134. *See Hearing on H.B. 1067 Before the House Appropriations Comm.*, 1987 Sess. (Mar. 9, 1987) (position of DOP on the proposed legislation).

135. H.B. 1067 was one of a number of bills which were aggregated into one vote (a "Consent Calendar" vote), the group being unanimously voted down. Interview with Delegate Barbara O. Kreamer, Baltimore, Md. (Apr. 22, 1987).

136. H.B. 530, 1988 Sess.

137. *See supra* notes 126 & 133 and accompanying text.

138. *Hearing on H.B. 530 Before the House Appropriations Comm.*, 1988 Sess. (Feb. 29, 1988) (testimony of Hilda E. Ford, Secretary of Personnel).

indicated her desire to overhaul the state classification of salary plans and narrow the gap in pay rates between the merit system and the labor market before considering implementation of any "objective job evaluation system."[139] The Appropriations Committee unanimously voted down House Bill 530 on March 25, 1988.

D. Other Comparable Worth Activities in Maryland

In March 1983 the Montgomery County Council appointed a Compensation Task Force (Task Force) to study compensation issues, including equal pay for work of equal value (comparable worth).[140] In January 1985 the Task Force voted not to conduct a job evaluation study of the county compensation system. In its final report of July 1985 the Task Force recommended rejection of comparable worth in favor of determination of salary levels according to the market. A three-month study of the county's evaluation system recommended redefinition of physical demands, hazards, supervisory factors, and credit for public service, all of which would significantly affect female-dominated jobs.[141] The study recommended a revision of the evaluation factors in the county's job evaluation system.[142] For example, public service assistance was added to the "skill" factor; the definition of "knowledge" was expanded to include knowledge acquired by formal study, by self-study, and by experience; "scope and effect" of job responsibility was broadened to include recognition of supervision of fewer than three workers and supervision of contractors; physical dexterity, fine finger movement and continued staring into a video display terminal were added to the "physical demand" evaluation factor. The county's consultants applied the proposed revised evaluation system to the county job classes. In that process, the majority of female-dominated classes and seventeen male-dominated classes were advanced at least one grade. Two hundred eighty-nine classes remained at the same grade. If not for the evaluation process, sixty-six classes would have

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139. Letter from Hilda E. Ford, Secretary of Personnel, to Delegate Barbara O. Kreamer (Mar. 28, 1988). In her response to Secretary Ford's letter, Delegate Kreamer noted the inconsistency of the Secretary's position: a point factor evaluation system *is* "a reliable format for the kind of overhauling that our classification and pay system needs." Letter from Delegate Barbara O. Kreamer to Hilda E. Ford, Secretary of Personnel (Apr. 6, 1988).

140. Study, *supra* note 26, at II-30. Montgomery County Commission for Women, Chronology of Comparable Worth in Montgomery County Government (Nov. 1985).

141. PAY EQUITY NEWS NOTES, *supra* note 13, at 5.

142. Telephone interview with Judith Vaughn Prather, Executive Director, Montgomery County Commission for Women (May 4, 1988).

lost one grade or more.[143] The draft report of the consultants was circulated for comment among county employees, pay equity advocates, unions, and the county Department of Personnel.[144] The total cost of implementing the pay equity revisions is expected to be about $3.5 million, or three percent of the county payroll. This amount already has been set aside for this purpose from a designated surplus by the Montgomery County Council. When implemented, the revised evaluation system will affect 490 classes of jobs among 5740 county employees.

In June 1984 the local Council (Maryland state employees) of the American Federation of State, County and Municipal Employees (AFSCME)[145] filed a charge of discrimination with the Equal Employment Opportunity Commission on behalf of the clerical workers at the University of Maryland.[146] The complaint charged that the University maintains a sex-segregated work force and a wage-setting system that has adverse impact on its employees in female-dominated jobs.

In February 1986 ten female faculty members of the University of Maryland filed a class action suit in United States District Court charging intentional wage discrimination on the basis of sex.[147]

III. LITIGATION IN STATE COURT AS ALTERNATIVE STRATEGY

The wage disparity persists in Maryland despite efforts to convince the State to take steps to remedy the gender-based wage disparity. Neither the executive nor legislative branches have seriously attempted to resolve the documented discrimination. Inevitably, the judicial branch may be called upon to remedy the unfairness.

Because direct channels for addressing wage discrimination were first established at the federal level, victims of wage discrimination historically have applied to federal courts for relief. The federal route to remedies for sex-based wage discrimination, however,

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143. *Id.*

144. Update of the status of Montgomery County's pay equity review was provided by William P. Garrett, Director of Personnel, Montgomery County, Maryland. Telephone interview with William P. Garrett, Director of Personnel, Montgomery County, Md. (July 14, 1988).

145. The two major employee associations representing state employees have supported comparable worth activities from the first. Both AFSCME and the MCEA participated in the Comparable Worth Committee, *supra* note 27, and supported comparable worth legislation.

146. Maryland Comm'n for Women, *supra* note 27.

147. The Sun (Baltimore), Apr. 14, 1987, at B-2, col. 2.

is riddled with obstacles.[148] The state courts are a natural alternative. State constitutions and state courts are the oldest American safeguards of civil rights.[149] Moreover, the protections of the fourteenth amendment and federal statutes do not preclude a quest for relief in the state courts.[150] State courts, in fact, may offer advantages not available in federal courts for bringing gender-based wage discrimination suits.

A. State Laws Offer Alternate, Independent Standards for Gender-Based Wage Discrimination Lawsuits

State courts have final authority to decide issues arising under their own constitutions; they need not and should not automatically adopt federal interpretations. Federalist principles invite, indeed compel, independent analysis of state constitutional provisions.[151] It is incumbent on advocates who choose to litigate in state courts to craft arguments based on independent analysis of the state constitutional provisions. State history and traditions, legislative histories,

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148. Generally, under the EPA, 29 U.S.C. § 206(d) (1976), comparable worth suits have been precluded by an interpretation of the Act that limits its coverage to jobs that are equal or substantially equal. *See, e.g.*, Corning Glass Works v. Brennan, 417 U.S. 188, 203 n.24 (1974).

Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment on the basis of sex, race, religion, or national origin. 42 U.S.C. § 2000e-2(a)(1), (2) (1982). Under the disparate treatment theory of litigating Title VII cases, comparable worth has become entangled in the courts' interpretation of what kind of inference will support the requirement of intentional discrimination. Under the disparate impact theory of litigation, comparable worth has faced with difficulty the defense that reliance on the market for determining wages is a legitimate business necessity.

As a litigation theory per se, some lower federal courts have accepted comparable worth. *See, e.g.*, Briggs v. City of Madison, 536 F. Supp. 435, 449-50 (W.D. Wis. 1982) (plaintiffs failed to show that city's actions were motivated by discriminatory intent and therefore could not show a violation of the equal protection clause). The circuit courts of appeal, however, are reluctant to make determinations on the relative value of jobs with different duties and responsibilities. *See, e.g.*, American Nurses' Ass'n v. Illinois, 783 F.2d 716, 720 (7th Cir. 1986) ("the issue of comparable worth . . . is not of the sort that judges are well equipped to resolve intelligently"); Spaulding v. University of Washington, 740 F.2d 686, 700 (9th Cir.), *cert. denied*, 469 U.S. 1036 (1984) (disparate compensation for work of differing skills is not a prima facie violation of Title VII); Plemer v. Parsons-Gilbane, 713 F.2d 1127, 1134 (5th Cir. 1983) (it is not the province of the court to value the relative worth of different duties and responsibilities); Power v. Barry County, 539 F. Supp. 721, 726 (W.D. Mich. 1982) (intentional discrimination may well signal the outer limit of Title VII; comparable worth not encompassed).

149. Note, *Sex Discrimination and State Constitutions: State Pathways Through Federal Roadblocks*, 13 N.Y.U. REV. L. & SOC. CHANGE 115, 116 (1984-85) [hereinafter *State Pathways*]. Indeed, the Bill of Rights was modeled after the then 13 state constitutions. *Id.*

150. Linde, *First Things First: Rediscovering the States' Bill of Rights*, 9 U. BALT. L. REV. 379, 381-82 (1980).

151. *State Pathways*, *supra* note 149, at 142.

and records of constitutional debates are available to bolster the arguments.[152] Using this tactic, plaintiffs in gender-based wage discrimination lawsuits may find protection in provisions of state constitutions that the federal constitution—as recently interpreted in federal courts—avoids.

As a matter of judicial practice, decisions of the Supreme Court and the circuit courts of appeal on provisions of the United States Constitution are merely persuasive authority, not controlling precedent, on the interpretation of a comparable or identical state constitutional provision.[153] When a state constitution includes a provision that is absent in the federal constitution, such as an equal rights amendment, there is no *pari materia* upon which to base a construction that may reach even the level of persuasive authority. Therefore, state courts are free, as with a *tabula rasa*, to set their own standards and apply their own analysis.

B. State ERAs Offer More Potent Protection than the United States Constitution in the Case of Gender-Based Wage Discrimination

An ERA to a state constitution expresses the high value placed on the protection of equal rights for women by the citizens of the state.[154] It is directed to a specific area of equality "out of which a special body of new law can be created."[155] It is an indicator of a desire to provide additional protection to state residents.[156] The civil rights of blacks and the equal rights of women arose out of different historical contexts and legal frameworks.[157] For example, in Maryland the ERA was adopted upon a direct popular vote.[158] These considerations compel a standard of judicial review for interpretation of ERAs in state courts that reflects this special mandate for equality. Thus, the standard applied by the Supreme Court in cases involving sex discrimination under equal protection analysis is

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152. *See* Note, *Rediscovering the New Jersey E.R.A.: The Key to Successful Sex Discrimination Litigation*, 17 RUTGERS L.J. 253, 259 (1986) [hereinafter *Key to Successful Sex Discrimination Litigation*].

153. *See* Andrews v. State, 291 Md. 622, 436 A.2d 1315 (1981); Smith v. State, 276 Md. 521, 350 A.2d 628 (1976).

154. Sixteen states have ERAs in their constitutions—Alaska, Colorado, Connecticut, Hawaii, Illinois, Maryland, Massachusetts, Montana, New Hampshire, New Mexico, Pennsylvania, Texas, Utah, Virginia, Washington, and Wyoming. *State Pathways*, *supra* note 149, at 121.

155. Brown, Emerson, Falk & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871, 885 (1971).

156. *State Pathways*, *supra* note 149, at 141.

157. Brown, Emerson, Falk & Freedman, *supra* note 155.

158. *See infra* note 163.

less stringent than that applied by a number of state courts interpreting their state ERAs, including Maryland.[159] The Supreme Court's equal protection analysis need not apply at all to ERA analysis in state courts because the context of a state ERA significantly alters the basis for adjudicating sex discrimination cases. State constitutions, therefore, may provide more potent protection than that available under the United States Constitution in the area of sex discrimination.

IV. THE MARYLAND ERA

Because passage of the Maryland ERA[160] represents a consensus among the citizens of Maryland that a special value on the equal rights for women deserves a place in the state constitution, it provides a special history upon which the court can rely in molding appropriate and independent standards of review.

A. Maryland ERA Legislative History

The bill proposing an equal rights amendment to the Declaration of Rights of the Constitution of Maryland was introduced for the first time in the House of Delegates of the General Assembly on February 14, 1972.[161] It generated little debate on the legal impli-

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159. *See State Pathways*, *supra* note 149, at 133; Linde, *supra* note 150, at 391; Rees, *State Constitutional Law for Maryland Lawyers: Individual Civil Rights*, 7 U. BALT. L. REV. 299, 301 (1978).

In Frontiero v. Richardson, 411 U.S. 677, 682 (1973), a plurality of four Supreme Court justices put gender in the category of a suspect classification requiring strict scrutiny. The *Frontiero* standard has not been applied to gender discrimination since it was first announced. In Craig v. Boren, 429 U.S. 190, 197 (1976), the Supreme Court referred to an intermediate standard ("substantially related to an important governmental objective") to be used in sex discrimination cases brought under the equal protection clause. Since its recent decisions on the subject have not found an "important" enough or "legitimate" enough objective in a sex-based classification, however, the Court has not addressed directly the standard of scrutiny to apply to sex discrimination once such an objective is found. *See* Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 731 (1982).

Standards of review adopted by state courts in interpreting their state ERAs range from rational basis (classification based on sex will be upheld if it is rationally related to a government interest) to the *Craig* intermediate level, to a strict scrutiny analysis, to an absolute prohibition on the use of gender as a classification.

See infra notes 202-207 and accompanying text for a discussion of the present standard of review in Maryland.

160. MD. CONST. DECL. OF RTS. art. 46. The text of Maryland's ERA is: "Equality of rights under the law shall not be abridged or denied because of sex."

161. H.B. 687, 1972 Md. Laws 366.

Legislative history in Maryland dates back only to 1975, the date when committee files were first retained as part of the record by the State Department of Legislative

cations of the constitutional amendment[162] and passed both Houses easily on April 4, 1972.[163]

The passage of the ERA signalled support for the general concept of equal rights for women in Maryland at a time when the federal ERA had not yet passed the Congress.[164] It made sex discrimination the only type of discrimination expressly banned in the Constitution.[165] It was designed to reform the market to end gender bias.[166] Indeed, passage of the Maryland ERA paved the way for Maryland's ratification of the federal ERA.[167] After passage

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Reference. As a result, no official legislative history is available on the ERA. The primary sponsor of the bill, Charles Blumenthal, graciously agreed to be interviewed on February 25, 1987, and provided an oral history on the process leading to passage of the Bills discussed in the text.

The proposed ERA stated, "Equality of rights under the law shall not be abridged or denied because of sex." In drafting the Maryland ERA, Mr. Blumenthal modeled his bill on the federal ERA, changing only the phrase "on account of" in the federal ERA to "because of" in its Maryland counterpart. Interview with Charles Blumenthal, former delegate to the General Assembly, in Annapolis, Md. (Feb. 25, 1987) [hereinafter Interview].

162. At the invitation of Delegate Blumenthal, 97 delegates, including all 9 women delegates, co-sponsored the bill. The bill was assigned to the Constitutional and Administrative Law Committee after its first reading (introduction) on February 14, 1972. A large public hearing was held which was well covered by the media. Questions and testimony centered around sensational concerns emphasized in the media at that time, including anxiety over unisex toilets, the military draft of women, the loss of maternity benefits, and the passing of a perceived era of chivalry. Those who testified on behalf of the bill were members of the local chapters of the National Organization for Women (NOW) from Annapolis, Montgomery County and Prince George's County and other local activists. At the Committee vote, only one delegate opposed the bill. There were no women on the Constitutional and Administrative Law Committee. When the bill came up for a floor vote (second reading) in the House on March 15, 1972, there was a minor technical amendment, but no floor debate. In the third reading and final floor vote on March 22, 1972, the same questions and comments regarding unisex toilets and the drafting of women into the military were made, but no legal questions were raised. The House passed the bill by a vote of 120 to 1, with some abstentions. In the Senate, the House bill took only one week to pass on a unanimous vote. Interview, *supra* note 161; 1972 JOURNAL OF PROCEEDINGS OF THE HOUSE OF DELEGATES at 374, 1054-55, 1281-82; 1972 JOURNAL OF PROCEEDINGS OF THE SENATE at 1151, 1806, 1899.

163. *See* 1972 JOURNAL OF PROCEEDINGS OF THE HOUSE OF DELEGATES at 2070. The ERA was ratified in the general election on November 7, 1972, by a vote of 697,107 to 236,007. Garrett County was the only county to fail to ratify the ERA, by a narrow margin. 1972 MD. MANUAL at 573. It was signed into law on December 5, 1972. 1972 Md. Laws 366.

164. Maryland did not waiver: subsequent efforts to repeal the ERA and the House and Senate joint resolutions ratifying the federal ERA failed. *See* H.J. Res. 96, 1973 Sess.; H.J. Res. 5, 1974 Sess.; H.B. 125, 1974 Sess.

165. Other types of discrimination are prohibited by the protections of MD. CONST. DECL. OF RTS. art. 24. Burning Tree Club, Inc. v. Bainum, 305 Md. 53, 99 n.10, 501 A.2d 817, 840 n.10 (1985).

166. Interview, *supra* note 161.

167. *See* Interview, *supra* note 161. Mr. Blumenthal was also the primary sponsor of

of the ERA, a number of statutes were enacted that conformed existing employment rights law to the new principle and signalled legislative affirmation of the values now incorporated in the Declaration of Rights.[168]

This special history of the Maryland ERA separates Maryland jurisprudence from federal jurisprudence, where such a policy consensus has yet to be reached, and compels an independent analysis of issues involving gender discrimination arising under the Maryland ERA.

B. Standard of Review under the Maryland ERA

"When are the ladies coming?" asked a Maryland Court of Appeals judge to the delegate who sponsored the ERA bill.[169] Some

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the House joint resolution to ratify the proposed federal ERA. H.J. Res. 102, 1972 Sess., was introduced on March 23, 1972, the day after the federal ERA passed the Congress. By suspension of rules, the joint resolution passed the House on the same day within 20 minutes, although by a narrower margin of votes (86 to 32) than the state ERA had passed. The Senate passed it unanimously on April 1, 1972. Interview, *supra* note 161. An identical Senate joint resolution ratifying the federal ERA passed the Senate unanimously, crossed paths with the House joint resolution, and eventually passed both Houses on April 8, 1972. S.J. Res. 80, 1972 Sess. 1972 JOURNAL OF PROCEEDINGS OF THE HOUSE OF DELEGATES at 1330-31, 1499; 1972 JOURNAL OF PROCEEDINGS OF THE SENATE at 1900-01, 2457.

168. Sections in the Maryland Code regulating the hours of labor for women were repealed. 1972 Md. Laws 211 (repealing MD. ANN. CODE art. 100, § 52-55). The State's Fair Employment Practices Act, MD. ANN. CODE art. 49B (1986), was revised to prohibit the limitation, segregation or classification of state employees on the basis of sex so as to deprive the employees of employment opportunities. 1973 Md. Laws 493 (codified at MD. ANN. CODE art. 49B, § 16(a)(2) (1986)). Sex was prohibited as a basis for determining qualification for state employment competitive examinations. 1975 Md. Laws 272 (codified at MD. ANN. CODE art. 64A, § 18(c) (1983)). Veterans' preference was extended to the disabled or surviving spouses of female veterans. *Id.* State employees were protected from denial of promotion opportunities because they are on sick or maternity leave. 1974 Md. Laws 698 (codified at MD. ANN. CODE art. 100, § 77A (1985)). Provisions for part-time employment were added to the state merit system. 1975 Md. Laws 701 (codified at MD. ANN. CODE art. 64A, § 51 (1983 & Supp. 1986)). Domestic workers were included under the Worker's Compensation, 1975 Md. Laws 686 (codified at MD. ANN. CODE art. 101, § 21(b)(9) (1985)), and minimum wage laws, 1973 Md. Laws 123 (repealing MD. ANN. CODE art. 100, § 82(e) (1985)). Unemployed women were extended the right to claim dependent's allowances for children wholly or partially supported by them. 1974 Md. Laws 708 (codified at MD. ANN. CODE art. 95A, § 3(c) (1985 & Supp. 1986)) (thereby removing the presumption that the father was the sole supporter). Unemployment benefits were extended to pregnant women who, though physically able, lost employment through no fault of their own. 1973 Md. Laws 652 (codified at MD. ANN. CODE art. 95A, § 6 (1985 & Supp. 1986)). Disability due to pregnancy or childbirth was included under temporary disabilities for all job-related purposes, and differential treatment on the basis of pregnancy or childbirth in policies and practices was prohibited. 1977 Md. Laws 907 (codified at MD. ANN. CODE art. 49B, § 17 (1986)).

169. Interview, *supra* note 161.

months had passed and no litigants had raised issues on appeal under the ERA. *Maryland State Board of Barber Examiners v. Kuhn*[170] provided the court its first opportunity to consider the ERA. The case, however, was not decided under the ERA because the court found that the challenged statute did not on its face differentiate on the basis of sex.[171]

In 1977 the Maryland Court of Appeals reviewed a case involving a law that on its face imposed a classification based on sex. *Rand v. Rand*[172] addressed the constitutionality of the unilateral obligation of a father under common law to support his minor children. In an emphatic and unified opinion, the court projected Maryland into the ranks of states adopting an absolute standard of review for their ERAs.[173] Proceeding directly under the language of the constitutional amendment, the court found it "clear and unambiguous":[174] "This language mandating equality of rights can only mean that sex is not a factor."[175] The court underscored its determination to prohibit all classifications based on sex by deliberately selecting from among a wide-ranging array ("from absolute to permissive") of state interpretations of ERAs an absolute standard.[176] The now familiar language used by the court reads as follows:

> [W]e believe that the "broad, sweeping, mandatory language" of the amendment is cogent evidence that the people of Maryland are fully committed to equal rights for men and women. The adoption of the E.R.A. in this state was intended to, and did, drastically alter traditional views of the validity of sex-based classifications.[177]

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170. 270 Md. 496, 312 A.2d 216 (1973).

171. The statutory scheme restricted cosmetologists, a female-dominated profession, to cutting women's hair. Barbers, who were mostly men, were authorized to cut both women's and men's hair. The plaintiffs attacked the statute under the ERA and the fourteenth amendment. Even though the two relevant statutes patently divided the hair-cutting profession into two segments that were differentiated by sex, the court found no sex-based classification by concluding that the provision limiting cosmetologists applied to both female and male cosmetologists. Therefore it was "not a case of discrimination based on sex under the Fourteenth Amendment or Art. 46 [of the Maryland Declaration of Rights]." *Id.* at 506-07, 312 A.2d at 222.

172. 280 Md. 508, 374 A.2d 900 (1977).

173. Note, *The Maryland Equal Rights Amendment: Eight Years of Application*, 9 U. BALT. L. REV. 342 (1980) [hereinafter *Eight Years of Application*]; NATIONAL ORGANIZATION FOR WOMEN LEGAL DEFENSE AND EDUCATION FUND AND WOMEN'S LAW PROJECT, MARYLAND STATE ERA EXPERIENCE, ERA IMPACT PROJECT (1981) [hereinafter ERA IMPACT PROJECT].

174. 280 Md. at 511-12, 374 A.2d at 902-03.

175. *Id.* at 512, 374 A.2d at 903.

176. *Id.* at 515, 374 A.2d at 904-05.

177. *Id.* at 515-16, 374 A.2d at 905.

The Maryland Court of Appeals applied the *Rand* absolute standard to subsequent cases involving facial discrimination brought under the Maryland ERA.[178] Classifications based on sex were repeatedly struck down as violative of the ERA.[179]

1. Burning Tree Club, Inc. v. Bainum.—Until *Burning Tree Club, Inc. v. Bainum*[180] the court had no occasion to review a state action

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178. *See* Elza v. Elza, 300 Md. 51, 54 n.1, 475 A.2d 1180, 1181 n.1 (1984) (in dictum); Turner v. State, 299 Md. 565, 576, 474 A.2d 1297, 1300 (1981) (law prohibiting "sitters" in bars may not be applied only to women); Condore v. Prince George's County, 289 Md. 516, 532-33, 425 A.2d 1011, 1019 (1981) (common-law doctrine of necessaries may not be applied only to men); Kline v. Ansell, 287 Md. 585, 593, 414 A.2d 929, 933 (1980) (common-law cause of action for criminal conversation no longer available only to men); Kerr v. Kerr, 287 Md. 363, 369, 412 A.2d 1001, 1004-05 (1980) (criminal liability for nonsupport of wife violates ERA).

The Maryland Court of Special Appeals also applied the new absolute standard. *See* Peppin v. Woodside Delicatessen, 67 Md. App. 39, 48, 506 A.2d 263, 267 (1986) (no balancing of interests permitted when adjudication of restaurant's skirt-and-gown-night promotion finds discriminatory effect); Stern v. Stern, 58 Md. App. 280, 296, 473 A.2d 56, 64 (1984) (duty of child support extends to both parents); McClellan v. McClellan, 52 Md. App. 525, 531, 451 A.2d 334, 338-39 (1982) (presumption of husband's dominance in a marriage is not permitted under the ERA); Hofmann v. Hofmann, 50 Md. App. 240, 244, 437 A.2d 247, 249 (1981) (husband may also claim alimony); Tidler v. Tidler, 50 Md. App. 1, 10, 435 A.2d 489, 495 (1981) (counsel fees may be awarded against either spouse); Eckstein v. Eckstein, 38 Md. App. 506, 511, 379 A.2d 757, 761 (1978) (presumption of male dominance in marriage cannot stand); Bell v. Bell, 38 Md. App. 10, 14, 379 A.2d 419, 421 (1977), *cert. denied*, 282 Md. 729 (1978) (same); Coleman v. State, 37 Md. App. 322, 327-28, 329, 377 A.2d 553, 556-57 (1977) (criminal liability for desertion and nonsupport may not be imposed only on men). *But cf.* Lucado v. State, 40 Md. App. 25, 40, 389 A.2d 398, 406-07 (1978) (character evidence of chastity does not include nonhomosexuality).

179. *See Key to Successful Sex Discrimination Litigation*, *supra* note 152, at 257; *State Pathways*, *supra* note 149, at 135; *Eight Years of Application*, *supra* note 173, at 353; ERA IMPACT PROJECT, *supra* note 173, at 3; *cf.* Linde, *supra* note 150, at 391 (Maryland ERA mandates more strict analysis than federal equal protection clause); Rees, *supra* note 159, at 318 (Maryland ERA requires strict equality between the sexes in classifications).

There was some difference of opinion among members of the court regarding remedies for the constitutional violation. The majority consistently limited itself to striking down provisions that violated the ERA. In dealing with a law that unconstitutionally favored one sex over the other, however, at least one member of the court would have extended the benefits to the disfavored sex, rather than striking down the provision reflexively. In *Condore*, 289 Md. 516, 425 A.2d 1011, Judge Rodowsky dissented from the court's holding which struck down the common-law doctrine of necessaries as applied against husbands, rather than extend its benefits to wives. *Id.* at 533, 425 A.2d at 1019. He would have extended the doctrine of necessaries to credit-worthy women. *Id.* at 543, 425 A.2d at 1024-25. The court of special appeals also would apply the option of extending the "benefits" to the disfavored sex in the case of common-law alimony. *See Hofmann*, 50 Md. App. at 244, 437 A.2d at 249 (common-law alimony, when ordered by the court, was not eliminated with regard to the husband with the advent of the ERA; instead, the duty was added to the wife).

180. 305 Md. 53, 501 A.2d 817 (1985).

or law which, though facially neutral, produced discriminatory effects. In *Burning Tree* the court was faced with a statutory provision enacted to prohibit discrimination on the basis of sex, but which exempted private, single-sex clubs from its protection. In a split decision, the court of appeals held that the country club exemption violated the Maryland ERA and struck down the entire statute because the exemption was not severable.

Burning Tree involved the challenge of a 1965 statute that authorized the State to enter into agreements with private country clubs for the purpose of granting tax deferrals in return for guarantees that open spaces on club property would be preserved for ten years.[181] In 1974 an anti-discrimination provision to the statute was enacted, with a saving clause which exempted application of the anti-discrimination requirement from any club whose primary purpose was to serve or benefit members of a particular sex.[182] As a result, the all-male Burning Tree Club (Burning Tree) was the only club in Maryland to benefit from the tax advantage while discriminating against women. The tax advantage to Burning Tree in 1981 involved a savings of approximately $130,000.00. There were no all-female clubs in Maryland that could take advantage of the statute's preferential tax treatment. The court below held that the primary purpose provision of the statute violated the Maryland ERA. By granting favorable tax treatment to a club that discriminated against one sex, the statute defeated the purpose and spirit of the ERA, necessarily disfavored the sex excluded from club membership, and " 'impermissibly made gender a distinguishing characteristic.' "[183]

Skirting around the *Rand* absolute standard against sex-based

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181. MD. ANN. CODE art. 81, § 19(e)(4) (1980).

182. The anti-discrimination amendment and the primary purpose provision, as it has become known, read in pertinent part:

> In order to qualify under this section, the club may not practice or allow to be practiced any form of discrimination in granting membership or guest privileges based upon the race, color, creed, sex, or national origin of any person or persons. The determination as to whether or not any club practices discrimination shall be made by the Office of the Attorney General after affording a hearing to the club. *The provisions of this section with respect to discrimination in sex do not apply to any club whose facilities are operated with the primary purpose, as determined by the Attorney General, to serve or benefit members of a particular sex, nor to the clubs which exclude certain sexes only on certain days and at certain times.* If the Attorney General determines that a pattern of discrimination is evident in any club, he shall negotiate a consent agreement with that club to cease such discrimination.

MD. ANN. CODE art. 81, § 19(e)(4)(i) (1980) (emphasis of primary purpose provision added).

183. *Burning Tree*, 305 Md. at 61, 501 A.2d at 821.

classifications, the court split into two factions on its interpretation of the Maryland ERA. The faction led by Chief Judge Murphy would apply the Maryland ERA prohibition against classifications based on sex only if the effects of the law would result in unequal rights between women and men.[184] Thus, a classification based on gender per se would not trigger the protection of the ERA unless "all forms of privileges, immunities, benefits and responsibilities of citizens" were apportioned unequally between the sexes.[185] In such instances, Chief Judge Murphy would apply the *Rand* absolute standard.

The faction led by Judge Eldridge, on the other hand, would scrutinize gender-based classifications per se under ERA analysis.[186] A gender-neutral law whose effects differentiate between women and men also would trigger constitutional scrutiny.[187] Instead of the *Rand* absolute standard, however, Judge Eldridge would apply an "at least strict scrutiny" standard, both to gender-based classifications and to gender-neutral laws having effects that differentiate between women and men.[188]

Chief Judge Murphy, joined by Judges Orth and Smith, was in the minority in upholding the constitutionality of the primary purpose provision. The minority found that the statute in *Burning Tree* was facially neutral because the preferential tax treatment was available to both all-male and all-female clubs. Chief Judge Murphy held that there was no unequal treatment in the classification.[189] In analyzing whether the facially neutral statute produced unconstitutional discriminatory effects, Chief Judge Murphy held that, contrary to the claims of the appellees, the preferential tax scheme did not constitute encouragement, support or financial aid to the discriminatory

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184. *Id.* at 70-71, 501 A.2d at 825-26. The court in Rand v. Rand, 280 Md. 508, 512, 374 A.2d 900, 903 (1977), had adopted an absolute bar on the use of sex-based classifications per se.

185. *Burning Tree*, 305 Md. at 70-71, 501 A.2d at 825-26.

186. *Id.* at 95-96, 501 A.2d at 838-39.

187. *Id.* at 100-02, 501 A.2d at 841-42.

188. *Id.* at 96, 98, 501 A.2d at 839, 840. Interestingly, in support of his "at least strict scrutiny" standard in cases involving discriminatory classifications under the ERA, Judge Eldridge relied on Maryland State Bd. of Barber Examiners v. Kuhn, 270 Md. 496, 312 A.2d 216 (1973) and Rand v. Rand, 280 Md. 508, 374 A.2d 900 (1977). In effect, he combined the suggestion in *Kuhn* that a strict scrutiny standard should apply to discrimination based on sex, 270 Md. at 506-07, 312 A.2d at 222, with the *Rand* holding that classifications based on sex violate the ERA, 280 Md. at 512, 374 A.2d at 903. Yet *Kuhn*, which came four years before *Rand*, never reached the ERA issue; and the holding in *Rand* was based directly on the ERA, but adopted an absolute standard.

189. *Burning Tree*, 305 Md. at 70-71, 501 A.2d at 826.

policies of Burning Tree.[190] He observed that claims of sex discrimination under the ERA must be based generally on state action and that the discriminatory policies of Burning Tree were not attributable to the State.[191] He concluded that at worst the State by its acquiescence was indifferent to Burning Tree's discriminatory policies.[192] In any event, the fact that there were no all-female country clubs to benefit from the statute's provisions was not attributable to a statutory purpose.[193]

Judge Eldridge, joined by Judges Cole and Bloom, concurred in the majority holding that the primary purpose provision violates the Maryland ERA and dissented from Chief Judge Murphy's entire analysis.[194] The statute was enacted to prohibit discrimination, but exempted sex discrimination when it is the primary purpose of a club. Thus, Judge Eldridge found that the statute expressly drew a classification based on gender. The classification, and the enforcement machinery established by the statute, sufficiently involved the State in the Burning Tree's discriminatory practices.[195] Judge Eldridge refused to limit the protection of the ERA to classifications that produced discriminatory effects, as Chief Judge Murphy would

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190. In support of his conclusion, Chief Judge Murphy noted that the State did not initiate or cause the discriminatory policy of Burning Tree, the purpose of the statute, *i.e.*, to preserve open spaces, had no relation to sex discrimination, and Burning Tree's tax benefit would not be lost if it chose to admit women as members. *Id.* at 75-76, 501 A.2d at 828. As Judge Eldridge noted in his dissent, however, the statutory provision being challenged in *Burning Tree* was not the open space/tax preference provision but the anti-discrimination exemption provision. *Id.* at 102, 501 A.2d at 842.

191. *See* discussion on a state action requirement, *infra* p. .

192. 305 Md. at 76, 501 A.2d at 828.

193. *Id.* at 78-79, 501 A.2d at 830. Chief Judge Murphy referred to Personnel Adm'r v. Feeney, 442 U.S. 256 (1979), to point out that a discriminatory effect of the *Burning Tree* statute—that only all-male Burning Tree benefited from the statute—was not a purpose of the statute. *Feeney* involved a challenge to a Massachusetts veterans' preference statute which, it was alleged, had a disproportionate adverse effect on women; only men benefited from its provisions. The Supreme Court held that, under equal protection analysis, a facially neutral statute that adversely affects women must be shown to have such an adverse effect as its purpose. That is, it must be shown that the state action (a statute that has disparate impact on women) is taken "at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Id.* at 279. In *Feeney*, the fact that the vast majority of veterans were men was not due to the preference statute, Judge Murphy noted, and so the statute was not unconstitutional under the fourteenth amendment. 305 Md. at 78-79, 501 A.2d at 830. In *Burning Tree*, the disparity between all-female and all-male clubs also evolved independently of the statute's provisions, in the Chief Judge's analysis. *Id.*

194. Finding the primary purpose provision of the statute not severable, Judge Eldridge's faction would have upheld the statute and struck down only the country club exemption. 305 Md. at 91, 501 A.2d at 836.

195. *Id.* at 92-93, 501 A.2d at 837.

hold. Instead, as in *Rand*, he would invoke ERA review whenever gender is used as a classification factor, whether per se or through the classification's effects.

Judge Eldridge, however, adopted an "at least strict scrutiny" standard to test gender-based classifications under the ERA.[196] Under this standard, a classification based on sex is not absolutely prohibited. Such a classification could be justified if designed to meet a compelling state interest.[197] Under certain circumstances, therefore, sex-based classifications could survive ERA strict scrutiny. For example, as Judge Eldridge noted, inherent differences between the sexes might justify separate restroom or locker room facilities.[198] Because Burning Tree offered no evidence or justification of a compelling state interest in maintaining the gender-based classification of the primary purpose provision, the provision failed strict scrutiny. Judge Eldridge found that the purpose and effect of the primary purpose provision of the statute was to permit Burning Tree to maintain a discriminatory policy while receiving a substantial state subsidy.[199]

Judge Rodowsky concurred with the majority, holding that the statute was unconstitutionally discriminatory on its face.[200] He found that enactment of the primary purpose provision constituted sufficient state action to trigger ERA protection. He reasoned that even though the statute did not specify which sex was to be accorded different burdens or benefits, the terms of the statute always would apply to a particular sex, the one excluded by a single-sex club. Thus, the statute differentiated in its anti-discrimination protections on the basis of gender. Judge Rodowsky did not specify whether he would apply an absolute or a strict scrutiny standard to his finding. He concluded, however, that the ERA "prevents the General Assembly from conferring lesser benefits on persons who

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196. *Id.*

197. *Id.* at 96, 501 A.2d at 839.

198. 305 Md. at 98, 501 A.2d at 840.

199. *Id.* at 101, 501 A.2d at 841. Judge Eldridge found that the primary purpose provision, not the entire statute, was directed only at Burning Tree and therefore was enacted with the sole purpose of benefiting that club. He observed that, unlike the *Burning Tree* primary purpose provision, the purpose of the statute in *Feeney* was not to sanction discrimination against women, and the sole beneficiaries there were not only men. *Id.* at 100-01, 501 A.2d at 841.

200. Because he held that the provision was not severable from the rest of the statute, Judge Rodowsky was a part of the two separate majorities in the case: one holding the primary purpose provision unconstitutional and the other holding the provision not severable from the statute. *Id.* at 85-88, 501 A.2d at 833-35.

are objects of sex-based discrimination."[201]

2. Standard of Review After Burning Tree.—The majority in *Burning Tree* would hold that a statute or other state action which, on its face or in its effects, differentiates on the basis of sex in the distribution of its benefits or burdens, irrespective of whether one or the other sex is specified, violates the Maryland ERA. One faction of the court would apply an absolute prohibition to such a situation, and another faction would apply an "at least strict scrutiny" standard. The swing vote, Judge Rodowsky, has not specified which standard he would apply.

Under Judge Eldridge's "at least strict scrutiny" standard, a statute or other state action would undergo a scrutiny that would, as in cases of racial discrimination, permit the use of gender as a differentiating classification to meet a compelling state interest.[202] The deviation from an absolute standard to a strict scrutiny standard is not warranted. The premise of an ERA is that "sex is not a permissible factor in determining the legal rights of women, or of men."[203] Because of the danger of over- or underinclusiveness of individuals when classifications are based on sex, and because there are dangers in applying so-called objective bases upon which to differentiate in establishing rights and responsibilities between women and men, the court should retain the absolute standard in cases of sex discrimination brought under the ERA. Of course, laws based on physical characteristics would survive analysis under an absolute standard because the basis for differentiating would not be the sex of the individual, but a physical characteristic possessed by only one sex.[204]

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201. *Id.* at 88, 501 A.2d at 834.

202. 305 Md. at 98, 102, 501 A.2d at 840, 842.

203. Brown, Emerson, Falk & Freedman, *supra* note 155, at 889.

204. The court in *Burning Tree* recognized this. Chief Judge Murphy noted that disparate treatment under the terms of a law is permissible when on account of physical characteristics unique to one sex. 305 Md. at 64 n.3, 501 A.2d at 822 n.3. Under Judge Eldridge's analysis some very few classifications may survive strict scrutiny—classifications based on "the inherent differences between the sexes." *Id.* at 98, 501 A.2d at 840. Separate restroom or locker room facilities are cited by the Judge as examples of such permissible classifications. While Chief Judge Murphy's exception is limited to physical characteristics, Judge Eldridge's exception for "inherent differences" opens the door to existing and potential stereotyping that are couched in terms of "inherent differences." Therefore, any exception to the absolute protection of equal rights for women and men should be strictly limited to exceptions based on physical differences rather than sociological or other theoretical bases. The exceptions for physical differences are more limited than many may think. For example, Judge Eldridge's cited examples perhaps would be more appropriate for exception under the right of privacy than the perceived inherent differences between the sexes. In cases of sexual offenses, the incorporation of an element of genital contact rather than vaginal intercourse would make the crime applica-

It is not clear whether the majority would require that the discriminatory effects of the statute or other state action be purposeful. Chief Judge Murphy and Judge Eldridge addressed the issue in *Burning Tree*, but each arrived at different conclusions. Chief Judge Murphy would require a "causal connection between the state action and the discrimination."[205] Judge Eldridge responded to the Chief Judge's finding without expressly adopting the causation requirement. On the other hand, he found that it would be appropriate to "determine the existence of a discriminatory purpose and impact."[206] It would seem, therefore, that the court might require a showing that a statute have a discriminatory effect as its purpose.[207] An additional requirement of a showing of purposeful discrimination, however, is neither appropriate nor necessary under an ERA analysis.

The implications created by a popular amendment to the state constitution do not support the requirement of purposeful discrimination. In adopting an ERA to the state constitution, and also in ratifying the ERA to the United States Constitution, the citizens and legislators of Maryland embraced a profound value, namely, that the equal rights of women and men should receive the supreme protection of both Constitutions. This elevates the equal rights policy beyond the level of comparability with other rights available under statute or common law. It is a recognition that equal rights between women and men permit no excuse or justification for their abridgement or denial. The court should adopt standards for state action consistent with the line of cases interpreting the court's standard of review under the ERA. "[T]he E.R.A. flatly prohibits gender-based classifications . . . in the allocation of benefits, burdens, rights and responsibilities as between men and women."[208]

An additional reason why purposeful discrimination is not necessary under ERA analysis is because of the special position the ERA holds relative to federal decisions on the subject. A state court, in interpreting its constitution, is not obligated to adopt federal constitutional standards or principles, especially when the state constitution is unique in its provision and still undergoing primary analyses

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ble to both sexes, thereby eliminating another exception for physical difference from the law.

205. *Id.* at 78, 501 A.2d at 829.

206. *Id.* at 100, 501 A.2d at 841.

207. Whether the discriminatory effect must be a sole purpose or one of several purposes of the statute or other state action remains an open question.

208. 305 Md. at 64, 501 A.2d at 822.

of the court. By adopting the ERA, the citizens of Maryland expressed an intent to surpass the protections of the United States Constitution in the realm of equal rights for women and men. If the purposeful discrimination requirement applied by federal courts in equal protection analysis[209] were applied by the state court, the goal of the ERA would be hindered. By importing principles that apply to dissimilar federal constitutional provisions, the essence and intent of the ERA are weakened.

C. State Action

The court seems unanimous in imposing a state action requirement for ERA analysis. It is not self-evident, however, that the Maryland ERA requires state action for its application. The ERA refers to "[e]quality of rights under the law." There is nothing in that language that necessitates a state action requirement. The phrase "under the law" means no more than that a right or claim is derived from a constitution, statutes or decisional laws, or is claimed as a result of long usage. Rights derived from the law include private rights between private individuals, such as the right not to be defrauded or not to be libeled. Therefore, logic dictates that the phrase "under the law" is intended to mean equality of rights *available* under the law.

The proposed federal ERA requires state action by its terms: the federal ERA commands that equality of rights shall not be abridged or denied "by the United States or by any state." No such qualification appears in the Maryland ERA.

Although the Attorney General has "consistently viewed the words 'under the law' as indicating that the constitutional prohibition applies only to (i) governmental entities and (ii) private organizations affected by 'state action,' "[210] those opinions have been based on nothing more than a 1978 Attorney General's opinion which concluded without discussion or legal foundation that such was the case.[211] There is no Maryland legal analysis that supports a requirement of state action under the Maryland ERA.[212]

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209. *See* Personnel Adm'r v. Feeney, 442 U.S. 256 (1979); Washington v. Davis, 426 U.S. 229 (1976).

210. 68 Op. Att'y Gen. (Md.) 173, 177 (1983).

211. 63 Op. Att'y Gen. (Md.) 246, 250 (1978).

212. For a discussion of state action requirements in other jurisdictions, see *Key to Successful Sex Discrimination Litigation*, *supra* note 152, at 261-62; *State Pathways*, *supra* note 149, at 122-26.

V. COMPARABLE WORTH UNDER THE MARYLAND ERA

A comparable worth, gender-based wage discrimination suit can be brought in Maryland under Maryland's ERA.

A. Gender-Based Wage Discrimination

The state compensation system, known as the merit system, is established by statute[213] and is administered by the Secretary of Personnel, who "shall . . . make such rules as he deems necessary or proper" to implement the pay plan.[214] Under the rules promulgated by the Secretary, the various job classifications in the merit system, including the female- and male-dominated job classes, are evaluated and assigned rates of pay.

On its face, this classification and compensation scheme, along with the evaluation systems used to implement and maintain it, is neutral. The merit system statute requires the Secretary of Personnel "to prepare and recommend . . . a pay plan for all classes of positions" without indication that gender is to be a factor in the process.[215] While the statute does not explicitly require that men and women be classified and compensated differently, it does discriminate against female-dominated job classes by undervaluing their jobs.

The Governor's Commission studied the current job evaluation and ranking systems used by the State.[216] In analyzing the current evaluation system, the Study compared the rates of pay of selected female-dominated job classes with the rates of pay of selected male-dominated job classes under the current system. The consultants

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213. MD. ANN. CODE art. 64A, § 27 (1983 & Supp. 1986). The pertinent section regulating compensation states:

> (a) Establishing and recommending pay plan.—After consultation with appointing authorities, the Secretary of Personnel shall prepare and recommend to the Governor a pay plan for all classes of positions in both the classified and unclassified service to the end that all positions in the service involving comparable duties, experience, responsibilities and authority shall be paid comparable salaries in accordance with the relative value of the service to be performed. In establishing rates of pay, the Secretary shall give consideration to experience, the prevailing rates of pay for the services performed, and for comparable services in public and private employment, living costs, maintenance or other benefits received by employees, and the state's financial condition and policies. The pay plan shall take effect and shall have the force and effect of law after approval by the Governor.

Id. § 27(a).

214. *Id.* § 11.

215. *See supra* note 213.

216. *See* Study, *supra* note 26.

re-evaluated the current classes under an evaluation system that removes gender as a possible variable and restricts the valuation process to factors grouped under the categories of skill, effort, working conditions, and responsibility.[217]

When the consultants eliminated gender from consideration in the evaluation process, the pay levels for jobs of equal skill, effort, working conditions and responsibility, as measured by assigned point values rating the major factors, should have been equal. The Study found that such was not the case. When gender was eliminated and other variables remained equal, the rates of pay of female-dominated job classes were from three percent to twenty percent lower than the rates of pay of male-dominated job classes.[218] Gender was the variable which determined the difference in rates of pay. Thus, the Study indicated that compensation under the merit system differentiated according to the gender of the employees being paid.

The gender-based wage discrimination in the state compensation scheme, as detected by the results of the Study, has not changed since the Study was conducted. The effect of a one-time pay raise directed at undervalued, female-dominated job classifications was erased the following two years when the remainder of job classifications in the system received comparable pay increases. No steps have been taken to revise the compensation scheme in order to eliminate the gender-based wage disparities.

The differential in pay under the current pay plan imposes burdens and benefits unequally on the basis of sex.[219] The female-dominated classes of state employees receive from three percent to twenty percent less pay than the male-dominated classes for work that is comparable on the basis of recognized evaluation factors.[220] Adjustment of the discrepancy for workweek hours, especially when based upon a salary scale that reflected a one-time wage increase that was erased the following year, does not mitigate or justify the

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217. *See supra* notes 37-41 and accompanying text.

218. *See supra* note 41 and accompanying text.

219. There is dispersion within each of the gender-dominated classes. Within the female-dominated and male-dominated job categories, individual job classes that shared the same point value had pay rates that varied from $0 to $6,259. Study, *supra* note 26, at IV-49. That is, within the female-dominated classes and the male-dominated classes, some jobs are undervalued to a greater extent than others. The dispersion does not diminish the impact of the documented disparity between female-dominated and male-dominated job classifications. It highlights the irrationality of the current job evaluation system.

220. *See supra* note 41 and accompanying text.

wage disparity.[221] Under the more restrictive court of appeals interpretation, a facially neutral classification scheme that imposes different burdens and benefits on the basis of sex constitutes gender-based discrimination which triggers review under the Maryland ERA.[222]

B. Subjective and Discriminatory Job Evaluation System

The present job evaluation system was established in 1971. Evaluation of jobs in the classification system is conducted by means of a "whole job" factor comparison ranking technique.[223] Evaluation under this method begins by selecting certain key jobs, evaluating them according to selected factors, then rank ordering the remaining jobs in relation to the key jobs. However, if the key jobs that are utilized are only male-dominated jobs, and the factors making up the job content are those occurring most frequently in male-dominated jobs, then female-dominated jobs will be comparatively undervalued because they lack the qualities male-dominated jobs are perceived to possess. In addition, if the key jobs are themselves overvalued, the valuation of female-dominated jobs in comparison may be lower to an even greater proportion.

This system, according to the Study, "tends to rely extensively on subjective judgments."[224] When jobs are evaluated subjectively, bias and stereotypes have free rein. The discriminatory results evidence the systemic undervaluation of female-dominated jobs documented by the Study.

As noted by the Study, when systemic undervaluation of jobs is found, one way to address the problem is to examine the job evaluation system.[225] The consultants suggested that in order to address the subjectivity of the current evaluation system—which the Study considers a single system—a committee be formed to make the comparisons of the key jobs, making sure that women members be on the committee, and that the average of their ratings be used.[226] There are no indications that the State has implemented this suggestion to remedy the subjective evaluation system.

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221. *See supra* notes 76-85 and accompanying text.
222. *See supra* notes 180-201 and accompanying text.
223. *See supra* note 37 and accompanying text.
224. Study, *supra* note 26, at V-22.
225. *Id.*
226. *Id.*

C. *Knowing Utilization of Discriminatory Market Wage*

When demonstrated to have an adverse effect on female-dominated jobs, failure to correct disparities that are related to the State's reliance on the market for wage-setting data unconstitutionally violates the equal rights of the women and men in those job classes. The statute governing the pay plan for job classes in the state personnel system[227] requires the Secretary to "give consideration to experience, *the prevailing rates of pay* for the services performed, and for comparable services in public and private employment . . . ."[228] When the State relies on the market for data upon which to base salary schedules, however, the discriminatory bias of the market is imported into the state compensation system.[229]

This absorption of market wage bias was highlighted in the Study.[230] A wage survey that is regularly used by the State to determine benchmark classes for revision of salary schedules was tested against a system that evaluates jobs solely on the basis of content (*i.e.*, not using gender as a factor) and was shown to import a gender-based wage disparity of 6.8 percent. The results of the test demonstrated that reliance upon the market introduces into the state compensation system discriminatory pay levels for jobs valued equally by work content. Knowing that such reliance adversely influences female-dominated job classes, the State is implicated in a practice that is discriminatory to female-dominated job classes.

Reliance on the market by the State is unwarranted. The state compensation system, to a certain extent, operates as an internal labor market, producing applicants and candidates from within for promotion into other pay classes. The State relies to a small extent on the external market for applicants. If internal job promotions have priority over external recruitment, and the percentage of jobs filled from within are significant, then reliance on the market is misplaced and unnecessary. In addition, the State dominates the entire market of certain job classes so that the State itself effectively determines the wages of those jobs.[231] If the State is the primary, if not the sole, employer of social workers or librarians, for example, it is hardly logical to rely on private market wage surveys for guidance on setting wage levels. The State controls the wages of more than

227. MD. ANN. CODE art. 64A, § 27(a) (1983 & Supp. 1986).
228. *Id.* (emphasis added).
229. *See* Blumrosen, *supra* note 4, at 442.
230. *See supra* notes 86-90 and accompanying text.
231. AARON & LOUGY, *supra* note 4, at 39.

55,000 individuals, 20,000 of whom are in the female-dominated office and clerical, health care and human services career fields.[232] There is a clear probability that the State dominates the market in those areas.

The State has failed to supplement the marketplace's shortcomings by augmenting the salaries of female-dominated classes to eliminate the market-based wage disparity. Further, cost is not a viable defense against supplementing the marketplace wage to remedy gender-based wage discrimination.[233] A priority on remedying wage disparities in female-dominated jobs would require a reordering of budgetary priorities *but not* a decrease in the pay of other state employees. More importantly, any amount necessary to remedy the gender-based wage disparities is simply evidence of the extent to which the State is being unjustly enriched. Cost savings at the expense of female-dominated job classes is hardly a sound policy rationale upon which to base a defense against gender-based wage discrimination.

D. Job Segregation

The Study showed that women working in the state employment system are concentrated in a few, low-paying job classifications.[234] While the process of hiring, classifying and paying female employees in the state employment system is supposed to be conducted on a basis which is not gender-based, it is clear that the process generates a separation of the sexes in jobs. Because not all women can be assumed to have chosen work in the lowest paying jobs of the state system, at least some element of the segregation may be evidence of action or actions on the part of the State—through the application, testing, interviewing, counseling and assignment processes—to direct women into those low-paying jobs.

The Study based its conclusion that some women choose low-paying jobs more than men upon a random sample survey. It did not integrate into its analysis the societal influences at play in women's choices. Furthermore, the consultants noted the limits of their ability to detect and analyze the long-term, subtle effects of deliberate tracking. In contrast, studies by noted experts show that job segregation is not necessarily the result of working women's free

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232. Study, *supra* note 26, at VI-13, -18.

233. Reliance on the "going market rate" has been rejected out of hand as a defense to cases brought under the EPA. *See* Brennan v. City Stores, Inc., 479 F.2d 235, 241 n.12 (5th Cir. 1973).

234. *See supra* notes 62-65 and accompanying text.

choice as the Study's limited survey would imply.[235] In any event, the fact that women will accept less pay is not a basis for continuing discrimination on the basis of sex. One cannot validly consent to be discriminated against.[236]

E. Undervaluation of Female-Dominated Jobs is Unconstitutional Under Either an Absolute or "At Least Strict Scrutiny" Standard

In scrutinizing the state action under an ERA analysis, the court may apply an absolute standard or a standard based on "at least strict scrutiny." Gender-based wage discrimination in the form of undervaluation of female-dominated classes in the state compensation scheme is unconstitutional under this standard. Under the absolute standard, the state compensation scheme that produces the documented gender-based wage discrimination is prohibited point blank. Under Judge Eldridge's "at least strict scrutiny" standard,[237] the compensation scheme that produces the gender-based wage disparity fails review because it cannot be justified under any compelling governmental interest. First, there is an easily available, less discriminatory alternative compensation scheme. This scheme involves a gender-neutral, point factor evaluation system which, when adopted and implemented, would eliminate gender as a factor in evaluation and would equalize pay scales for job classes dominated by either females or males that are evaluated equally. Second, the cost of implementing a system which does not differentiate on the basis of sex is not a sufficient compelling state interest to justify refusal to cure a known gender-based wage disparity.[238] Finally, there is no acceptable or justifiable compelling state policy which should permit gender-based wage disparities to be perpetuated by the State.

F. No Purposeful Discrimination Need be Shown

As discussed previously,[239] actions under the ERA should not require a showing of purposeful discrimination before the ERA pro-

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235. *See supra* notes 80-81 and accompanying text.

236. *See* Brennan v. City Stores, Inc., 479 F.2d 235, 241 n.12 (5th Cir. 1973).

237. *See supra* notes 188-190 and accompanying text.

238. *See* City of Los Angeles v. Manhart, 435 U.S. 702, 717 (1978) ("[N]either Congress nor the courts have recognized [a cost-justification] defense under Title VII."); Johnson v. Pike Corp. of America, 332 F. Supp. 490, 495 (C.D. Cal. 1971) ("The sole permissible reason for discriminating against actual or prospective employees involves the individual's capability to perform the job effectively. This approach leaves no room for arguments regarding inconvenience, annoyance or even expense to the employer.").

239. *See supra* notes 208-209 and accompanying text.

tections can apply. In *Personnel Administrator v. Feeney*,[240] discussed by Chief Judge Murphy in *Burning Tree*, a Massachusetts veteran preference statute was challenged as having a disproportionate adverse impact on women. Ninety-eight percent of the veterans who benefited from the preference in state employment were male. The Supreme Court upheld the statutory preference, finding that the legislative decision to confer a benefit on veterans was legitimate, even though it inevitably meant that nonveterans would be denied the benefit.[241] The fact that women were effectively blocked from competing for the jobs that veterans preferred was foreseeable, but the statute was not enacted in order to have that consequence. The state action implicated here—the undervaluation of female-dominated job classifications under the current compensation system—is known to produce the consequent gender-based wage disparity, as documented by the Study. The inevitable disparity resulting from the evaluation system is not legitimate. Conferring a comparative wage benefit on male-dominated job classes is not a legitimate state goal, such as might be the "perceived need to help . . . veterans."[242] The state compensation system is not innocent. The comparative benefit enjoyed by male-dominated classes is not a valid justification for requiring more proof, under the ERA, than that the consequences are apportioned unequally between the sexes.

The ERA, therefore, requires no more than a showing of discriminatory effect, the unequal distribution of burdens and benefits on the basis of sex. The ERA is unique to the State in comparison to the United States Constitution or other federal statutes. It focuses on a specific area of equal rights, rather than on general equality principles. The spirit and force of the ERA are vulnerable to erosion through the gradual limitation of its scope.

G. Purposeful Discrimination by the State of Maryland

Assuming *arguendo* that one must show intentionality or purpose to support a claim of gender-based wage discrimination under the ERA, there is nonetheless substantial evidence that the discriminatory wage disparity evidenced in the Study and perpetuated by the State's intentional failure to correct it, has "an unconstitutionally discriminatory purpose and effect."[243]

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240. 442 U.S. 256 (1979).

241. *Id.* at 275.

242. *Id.* at 280.

243. Burning Tree Club, Inc. v. Bainum, 305 Md. 53, 71, 501 A.2d 817, 826 (1985).

1. Failure to Remedy Discriminatory Wage Disparity.—The State continues to utilize the existing pay plan and evaluation system despite its demonstrated and known wage disparities between the female-dominated and male-dominated classes. As noted earlier, the consultants presented a copy of the results of the Study to the Governor's Commission which, in turn, presented a copy to the Governor.[244] The Governor's Commission recommended that the State adopt a point factor evaluation system because it "is a relatively objective and rational method . . . which assists in resolving a number of compensation issues in addition to 'comparable worth.' "[245]

The DOP, whose representative was a member of the Governor's Commission, was kept apprised of the results at all stages of the process. Since the February 1986 formal presentation of the results of the Study, legislation has been proposed and hearings have been held in an effort to prompt action to remedy the wage disparities. The DOP was called upon to present fiscal data on the cost of implementing a systemwide point factor evaluation system for legislation which was introduced in 1986 and 1987.[246] The DOP was cited for its failure to take any serious steps to implement the recommendations of the Governor's Commission.[247]

The General Assembly also has been kept apprised of the results of the Study. Several legislators were members of the Governor's Commission. Three bills aimed at implementing a point factor evaluation system—one of the Governor's Commission's four recommendations to the Governor—have had hearings and full discussion. Yet the General Assembly failed to take notice and pass the bills. The Subcommittee noted in its Interim Report that the 1986 ASR pay raises, discussed previously, "were made for the purpose of attempting an affordable resolution of *State salary inequities as evidenced by the findings/recommendations of the Sondheim Commission.*"[248]

The State has continued to discriminate on the basis of sex by undervaluing the female-dominated classes in its current compensation system despite all these warnings and opportunities.

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244. *See* Study, *supra* note 26 and accompanying text.

245. *See supra* note 77.

246. *See* Department of Personnel, Fiscal Note, H.B. 1461, 1986 Sess.; Department of Personnel, Fiscal Note, H.B. 1067, 1987 Sess.

247. *See* Comments, *supra* note 105.

248. INTERIM REPORT, *supra* note 106, at 39 (emphasis added).

2. Adjustment for Workweek Hours.—The manipulation of the results of the Study by adjusting workweek hours in order to diminish the impact of the wage disparity in female-dominated positions is neither justified nor appropriate. As discussed earlier,[249] the adjustment was based on an inappropriate salary level; the number of hours worked per week are not related to the salary established for a full-time job; workweek hours are fungible factors in relation to salaries; and finally, employees have no control over workweek hours, making it a working condition of the job rather than a variable for determination of wages. Thus, the State may not rely on the adjustment for workweek hours as counter-evidence that statistically insignificant wage disparities exist between female-dominated and male-dominated classifications in the state merit system. In addition, the State may not rely on this adjustment to justify a failure to remedy the documented gender-based wage disparities.

3. Job Segregation.—The results of the Study regarding job segregation prompted recommendations by both the consultants and the Governor's Commission to address the problem of female domination in low-paying job classifications. Steps in that direction have not been taken by the DOP.[250]

H. State Action Requirement

The logic and reasoning of the arguments of this comment regarding a state action requirement notwithstanding, in order to meet the Maryland Court of Appeals' requirement of state action,[251] two state actors clearly are responsible for the unconstitutional gender-based wage discrimination discussed herein: (1) the Secretary of Personnel, who is responsible for establishing and implementing the classification and compensation system and (2) the General Assembly, who is on notice as to the need to cure the known wage disparities.

VI. COMPARABLE WORTH CASES UNDER STATE LAW IN OTHER JURISDICTIONS

To date there have been only a few cases alleging gender-based wage discrimination on the basis of comparable worth that have been brought solely under provisions of state law. In *Alaska State*

249. *See supra* notes 76-85 and accompanying text.

250. *See supra* note 107 and accompanying text.

251. Burning Tree Club, Inc. v. Bainum, 305 Md. 53, 73, 86, 90 n.3, 501 A.2d 817, 827, 833-34, 836 n.3 (1985).

Commission for Human Rights v. State[252] the State Commission for Human Rights (CHR) ruled in favor of a class of public health nurses and granted them back pay in the first state agency-level ruling under a comparable worth equal pay act. The CHR held on November 15, 1985, that the state employment classification system violated Alaska's fair employment practices law which requires equal pay for "work of comparable character" performed by members of each sex because the predominantly female public health nurses were paid less than an all-male crew of physicians' assistants for work of comparable character.[253]

The CHR rejected the decision of the hearing examiner that work of comparable character is intended to cover only jobs that are the same or substantially similar. The CHR reversed the hearing examiner based on (1) its reading of personnel statutes to require that the state "achieve an equitable internal relationship" among employee salaries;[254] (2) construction of the language of title 18 of the state code so as not to render the "comparable character" phrase superfluous;[255] and (3) a "pronounced intention" of the legislature to remedy sex discrimination by passage of the state's ERA and imbuing a "strong remedial purpose" in the state's anti-discrimination law.[256] The CHR also noted that federal law authorizes states to enact broader standards prohibiting sex-based discrimina-

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252. No. D-79-0724 188-E-E (Nov. 15, 1985), *reported in* 23 Gov't Empl. Rel. Rep. (BNA) No. 1142, at 1737 (Dec. 9, 1985).

253. *Id.* Under the "Unlawful Employment Practices" section of the "Health and Safety" title, the state may not "discriminate in the payment of wages as between the sexes, or . . . employ a female in an occupation . . . at a salary or wage rate less than that paid to a male employee *for work of comparable character* or work in the same operation, business or type of work in the same locality." ALASKA STAT. § 18.80.220(a)(5) (1986) (emphasis added).

Alaska does have an ERA, ALASKA CONST. art. I, § 3, which prohibits the denial of civil rights on the basis of sex (among other things), but it was not a basis for the suit in this case.

254. It is not clear from the report to which personnel statutes the Commission for Human Rights (CHR) was referring. Title 39, "Public Officers and Employees," requires, under the Scope of the Rules Section, that the annual pay plan established by the director of personnel "provide for fair and reasonable compensation for services rendered, and reflect the principle of like pay for like work." ALASKA STAT. § 39.25.150 (1984). Under the Preparation and Submission of Pay Schedules Section, the director of personnel must establish an annual pay plan which takes into account "the statistics and reasonable internal pay relationships." ALASKA STAT. § 39.27.035 (1984). The CHR also may have relied on personnel regulations.

255. If "comparable character" were to apply only to the same or substantially similar jobs, the second half of the sentence prohibiting underpayment for "work in the same operation, business or type of work in the same locality" would be meaningless. 23 Gov't Empl. Rel. Rep. (BNA) No. 1142, at 1738.

256. *Id.*

tion than those used in the application of the federal EPA. Female employees must be paid equally for work "which is of comparable value to the employer in terms of the composite skill, responsibility, efforts, and working conditions of the positions."[257]

The CHR also refused the market defense to the wage disparities, finding that reliance on the market is "not appropriate" under the "broad remedial purpose" of title 18 which, when read in tandem with the state personnel statutes, requires evaluations to be conducted using a "nonmarket based approach."[258] Moreover, reliance on the market is particularly inappropriate in Alaska, where the state is the largest employer and can influence the market wages.[259] The state has appealed the ruling.[260]

Alaska's fair employment practices law approaches a true comparable worth statute: there is no qualification or condition in the language requiring equal pay for work of "comparable character." The key word is "comparable" which, as the court noted, permits comparison on the basis of the evaluated worth of jobs. Thus the court conducted its own comparable worth analysis of the two job classifications. Although the state's annual salary survey is supposed to reflect the competitive position of the state vis-á-vis the private sector and other governmental agencies in that and neighboring states,[261] the pay schedule itself must consider "reasonable internal pay relationships."[262] This would support the court's rejection of reliance on the market as the primary defense.

Service Employees' International Union v. County of Los Angeles[263] is a class action suit that was filed against Los Angeles County under the California Fair Employment and Housing Act.[264] Filed in June 1986, the plaintiff class alleged "rampant intentional discrimination on the basis of sex, race, and national origin in wages and promotions."[265] The first comparable worth suit filed under state law to charge sex- *and* race-based wage discrimination, the allegations are based upon information reported in a "preliminary report" con-

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257. *Id.*

258. *Id.*

259. 23 Gov't Empl. Rel. Rep. (BNA) No. 1142, at 1738.

260. *Reported in* Daily Lab. Rep. (BNA) No. 36, at A-6 (Feb. 24, 1986). The report did not specify on what basis the appeal was taken.

261. ALASKA STAT. § 39.27.030(a)(2) (1984).

262. *See supra* note 129.

263. No. 000985 (Super. Ct. filed June 13, 1986), *reported in* 24 Gov't Empl. Rel. Rep. (BNA) No. 1169, at 883 (June 23, 1986).

264. CAL. GOV'T CODE § 12940 (West 1980 & Supp. 1987).

265. *Id.*

ducted by the union in 1984.[266] The discrimination includes segregation of women and minorities in low-paying jobs, denial of equal opportunity in transfer and promotions, and undercompensation for "work actually performed," all of which "establish a pattern and practice of deliberate and overt discrimination" by the county.[267]

The Fair Employment and Housing Act, like Title VII, has language that prohibits discrimination in employment on the basis of sex (among other bases), and thus, the court may adopt federal Title VII principles in analyzing the case. California does not have an ERA, so that an alternative litigation route is not available.

In *Treva Bohm v. L.B. Hartz Wholesale Corp.*,[268] the Minnesota Supreme Court affirmed the lower court's dismissal of a comparable-worth suit brought under a state statute governing unfair discriminatory practices in employment.[269] The suit was brought by a female employee of a wholesale grocery plant alleging that the wages of female clerical workers were undervalued in relation to the wages of male workers in the physical plant. The state statute under which the suit was filed[270] tracks Title VII rather closely, and the Minnesota courts use principles established in decisions under Title VII to construe its application. Thus, the defense of reliance on the market wage proved effective.[271] Minnesota, like California, does not have an ERA, so litigation under that strategy was precluded.

VII. CONCLUSION

Comparable worth is alive and well and available under state law to remedy gender-based wage discrimination. It fills the gap where federal law and other state anti-discrimination laws fail to respond in claims of unequal pay for work of comparable value to the employer. The State of Maryland has documented substantial undervaluation of female-dominated jobs relative to male-dominated jobs in the state compensation system. Efforts to goad the State into action to remedy the wage disparity have failed thus far.

The Maryland ERA provides a unique and powerful tool with which to enforce pay equity rights. It reflects the superior value the

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266. *Id.*

267. In preparation for filing suit under Title VII of the Civil Rights Act, the plaintiffs filed a charge of discrimination with the Equal Employment Opportunity Commission in April 1985. *Reported in* Daily Lab. Rep. (BNA) No. 82, at A-3 (Apr. 29, 1985).

268. 370 N.W.2d 901 (Minn. 1985).

269. *Id.* at 908.

270. MINN. STAT. ANN. § 363.03, Subdiv. 1(2)(c) (West 1966 & Supp. 1987).

271. 370 N.W.2d at 908.

citizenry has placed on equal rights for women and men. It demands a standard of review independent of the legal analyses of the federal courts. It provides the courts with an intelligent and practical foundation upon which to rely in crafting a remedy to gender-based wage discrimination.

Under the latest interpretation of the ERA by the Maryland Court of Appeals, whether applying an absolute or a strict scrutiny standard of review, the gender-based wage discrimination evidenced by the Study violates the ERA. Although purposeful discrimination need not be proved under the ERA when there is proof that the benefits and burdens of state action are distributed differently between women and men, there is nevertheless substantial evidence that will support an inference of purposeful discrimination.

Wage discrimination based on gender need not continue in Maryland. The Maryland ERA prohibits paying persons who hold jobs in female-dominated classes less than persons who hold jobs in male-dominated classes when the jobs in both categories are comparable in value.

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* This comment earned the author the University of Maryland School of Law's Joseph Bernstein Prize in May 1988.