Beyond Equal Pay for Equal Work: Recent Developments in the United States, Great Britain, and Canada

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I. INTRODUCTION

Eleanor Holmes Norton, former Chairwoman of the U.S. Equal Employment Opportunity Commission, astutely predicted in April 1980 that "[w]age discrimination is likely to be one of the central legal and industrial relations issues of the 1980s." This prophecy is proving true not only in the United States, but in Great Britain and Canada as well. The earnings of women trail behind those of men in all three countries, despite laws that promise pay equality. The earnings gap is reinforced by job segregation which locks women into traditionally low-paying occupations. As a result, progress toward realizing sexual equality in employment has been slow.

The persistence of wage discrimination has given rise to efforts aimed at broadening the scope of existing equal pay legislation. This Comment focuses upon these recent developments in the United States, Great Britain and Canada.

Each country has experienced an unprecedented entry of women into its full-time work force. In 1950 women comprised 33.9 percent of the labor force in the United States as compared to 53 percent in 1982. In 1969 50.5 percent of women in Great Britain and 42.7 percent of women in Canada participated in the labor force; by 1980 the rates had increased to 57.6 percent and 57.3 percent respectively. In response to this trend, the three countries have adopted legislation aimed at securing sexual equality in wages and employment opportunity. In the United States the

3. See infra notes 12-17 and accompanying text.

Despite these remedial measures, however, significant earnings differentials remain in all three countries. The differential is widest in the United States, where full-time women workers, who in 1955 earned 63.9 percent of what men earned, today earn only 59 percent of the male median. British female workers earned 75.5 percent of male hourly earnings in 1977 but only 73.5 percent in 1980. Canada has made progress recently in narrowing its wage gap. Between 1973 and 1979 female earnings increased from 55.8 percent to 63.3 percent of male earnings.

Even after taking into account non-discriminatory reasons for such differentials, international studies confirm that a significant part of the earnings gap is due to wage and job discrimination. Authorities agree that the segregation of women into

12. See Perspectives on Working Women, supra note 4, at 52.
13. See Norwood, supra note 4, at 53.
low-wage "female-intensive" occupations helps to explain this pay disparity. However, the degree to which these segregated jobs are "undervalued" and thus a source of wage discrimination remains a controversial issue. Some argue that wages in "female" job categories, such as service, sales, and clerical occupations, have been intentionally depressed through years of legal inequality. Others contend that low earnings in such jobs reflect "objective" market factors, such as lower levels of skill and increased supply of labor.

While estimates may differ on the extent to which discrimination widens the earnings gap, the question remains whether equal pay for equal work provides a sufficient remedy for the discrimination that does exist. Legal commentators in the countries examined suggest that the narrow, individualistic focus of an "equal work" standard ignores the significant discrimination produced by job segregation and undervalued female labor. As an alternative, the standard of comparable worth — or equal pay for work of equal value — has been

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21. In Washington v. Gunther, 452 U.S. 161, 166 (1981), the U.S. Supreme Court defined comparable worth as a theory upon which "plaintiffs might claim increased compensation on the basis of a comparison of the intrinsic worth or difficulty of their job with that of other jobs in the same organization or community." Even the definition of "comparable worth" is the subject of considerable debate.

Although there are many definitions of comparable worth, the quintessential element common to all is that discrimination exists when workers of one sex in one job category are paid less than workers of the other sex in another job category and both categories are performing work that is not the same in content, but is of the "comparable worth" to the employer in terms of value and necessity.


Theories of comparable worth differ in the scope of the job comparisons proposed. Under a "pure" comparative worth doctrine, women in one job category may prove wage discrimination by showing their work is equal in value to higher-paid male workers in entirely different job categories or places of employment. The worth of the jobs is to be measured by job evaluation methods. BUREAU OF NATIONAL AFFAIRS, THE COMPARABLE WORTH ISSUE 1 (1981) [hereinafter cited as COMPARABLE WORTH]. United States cases that have unsuccessfully proceeded on a pure comparable worth theory include Gerlach v. Michigan Bell, 501 F. Supp. 1300, 1302 (E.D. Mich. 1980) (female engineering clerks claimed their jobs were comparable to males in craft classifications) and Lemons v. Denver, 620 F.2d 228 (10th Cir. 1980), cert. denied, 449 U.S. 888 (1980) (Nurses sought comparisons to non-nursing jobs in the community).
proposed in the United States and Great Britain and has been adopted by the Canadian federal government.

In the United States, the Supreme Court left open the issue of comparable worth when it ruled that wage claims under Title VII are not confined to an "equal pay for equal work" standard. In Great Britain, advocates of equal pay for work of equal value are trying to stretch the scope of the British Equal Pay Act. The primary vehicle for their efforts has been Article 119, the equal pay provision of the European Economic Community's Treaty of Rome. A recent


The concept of comparable worth predates the recent influx of women into the labor force and the accompanying growth of women's rights movements. During World War II, the U.S. National War Labor Board, whose job it was to monitor and restrain wage increases, sanctioned raises for female workers who performed a comparable quantity and quality of work to higher-paid male co-workers. The ILO's position has influenced advocates of comparable worth in the United States, Great Britain, and Canada. See Hearings on H.R. 8898 Before the Select Subcomm. on Labor of the House Committee on Education and Labor, 87th Cong., 2d Sess. 112, 172 (1962); 795 Parl. Deb. H.C. (5th Ser.) 915-16, 1003, 1032 (1970); Marsden, supra note 20, at 243, 251.

Today the concept of comparable worth is known as equal pay for work of equal value in Great Britain and Canada. This Comment employs the terminology used in each country. 22 Support for Comparable Worth, 111 Lab. Rel. Rep. (BNA) 65 (Sept. 27, 1982) [hereinafter cited as Support for Comparable Worth].


decision in which the European Court of Justice found that Britain's law fails to comply with the requirements of Article 119 underscores the broader protection offered by the Treaty. Canadian tribunals face a different challenge from their British and American counterparts. Under the Canadian Human Rights Act of 1977, they are charged with implementing the principle of equal pay for work of equal value in federal employment.

This Comment compares the experiences of the United States, Great Britain, and Canada in order to identify their common problems in remedying wage discrimination and weigh the success of the different approaches adopted. Such international comparisons demonstrate that the time has come to move beyond an equal pay for equal work standard to one which more successfully counteracts the discriminatory effects of job segregation. The proper standard for the 1980s is one which allows courts and administrative agencies to evaluate comparable yet different male and female jobs for the purpose of uncovering wage discrimination. Other methods of proving discrimination, whether by indirect statistical evidence or by direct evidence of illegal intent, should be available to plaintiffs as well. The problem of wage discrimination is too deeply rooted and widespread to permit only one means of securing legal relief. While comparable worth laws must take into account national differences, the Canadian Human Rights Act provides useful guidance for the development and implementation of this new legal standard.

II. THE UNITED STATES: WAGE DISCRIMINATION BEFORE AND AFTER GUNTER

A. Legislative Origins of the Equal Pay Act

The 1963 Equal Pay Act mandates equal pay for:

Equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex.

"Equal pay for equal work" was not the standard which the Kennedy administration initially proposed in 1962. Rather, the proposed bill prohibited payment

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29. 29 U.S.C. 206(d) (1976). The state equal pay laws of Alaska, Arkansas, Georgia, Idaho, Kentucky, Maine, Massachusetts, Minnesota, North Dakota, Oklahoma, South Dakota, Tennessee, and West Virginia all contain "comparable worth" or "comparable character" language. For excerpts from these laws, see COMPARABLE WORTH, supra note 21, at 115-19 (1981).
of a lower wage to "any employee of the opposite sex for work of comparable character on jobs the performance of which requires comparable skills."30 Sponsors of the bill cited the earlier experience of the National War Labor Board in implementing a "comparable work" wage standard.31

Union and business representatives testified before Congress regarding the proposed comparable work criteria. Union representatives spoke in support of "equal pay for equal worth," a standard which allowed for comparisons where "men and women work in different types of jobs."32 They praised the bill for embracing the principle of the International Labour Organization's "Equal Remuneration" Convention.33 Business representatives, on the other hand, opposed the comparable work standard as "so general and vague as to give an administrator a grant of power which could destroy the sound wage structure which many industrial companies have worked for years to perfect."34 If equal pay legislation was to be enacted at all, they favored the narrower comparative standard of "identical work or equal work."35

The arguments of the business community prevailed in Congress. An amendment to the proposed legislation by Representative Katherine St. George substituted "equal work" for "work of a comparable character."36 Congress then defined "equal work" to mean equal skill, effort, responsibility and working conditions, thereby accommodating the wishes of employers who used the same criteria to perform job evaluations and set wage scales.37 Representative Charles

32. Id. at 112 (statement of Mort Furay, Restaurant Employees and Bartenders International Union);
Id. at 172 (statement of James B. Carey, Secretary-Treasurer of the AFL-CIO Industrial Union Department and President of International Union of Electrical, Radio, and Machine Workers).
33. See supra note 24.
34. See Hearings on H.R. 8898, supra note 30, at 166 (statement of the National Association of Manufacturers).
35. Id.
If, in fact, we want to establish equal pay for equal work, then we ought to say so and not permit the trooping around all over the country by employees of the Labor Department harassing business with their various interpretations of the term "comparable" when "equal" is capable of the same definition throughout the United States.
In response, Rep. Herbert Zelenko read into the record a statement by the Secretary of Labor:
The language as so changed, in our opinion, could spell defeat for the bill's purpose. "Equal" may be interpreted to have such a rigid connotation such as "exact uniformity," "of the same measure," and so on - incompatible with an effective equal pay law which necessarily must be applied on the basis of similarity between one job in relation to another job but not the exactness of the two jobs.
Id.
Goodell, one of the bill's sponsors, explained the impact of these legislative changes:

We went from "comparable" to "equal" meaning that the jobs involved should be virtually identical, that is, they would be very much alike or closely related to each other. We do not expect the Labor Department people to go into an establishment and attempt to rate jobs that are not equal. We do not want to hear the Department say, "Well, they amount to the same thing," and evaluate them so they come up to the same skill or point.38

The change in the wording of the Equal Pay Act was not, therefore, a mere matter of semantics. The language of "comparable work" opened up the possibility of greater scrutiny of wage-setting practices. Job evaluation systems, which are used to compare dissimilar jobs for the purpose of placing them within a common wage hierarchy, might have become admissible evidence of wage discrimination. Instead, business representatives succeeded in maintaining the inviolability of these practices by narrowing the scope of wage equality to work performed on the same jobs. The prolonged debate in Congress, however, influenced the interpretation of the final version of the Equal Pay Act by those courts and agencies charged with its enforcement.

Job evaluations are methods of determining the value or worth of jobs for the purpose of setting wages. While introduced more than 100 years ago, the practice first became widespread in the private sector during World War II as a result of the National War Labor Board's policies. Its use today is widespread in both the public and private sectors although no definitive estimate exists of the number of workers covered by evaluations.

There are various types of job evaluations, although all share a common methodology. The first step is preparing a job description through observations and interviews. This may be performed by skilled analysts or by employees without special expertise but familiar with the jobs. At the second stage, jobs are evaluated with regard to worth and hierarchically ranked. This may be done by the same persons who developed the job description or by union-management committees or other consultants. This step of the procedure varies depending upon what particular evaluation method is employed: ranking, classification, factor comparison, or point methods. The final step utilizes these results to establish wage rates. Some employers, especially in the public sector, simply translate the results into wage levels. For others, the ratings are only one factor in wage setting supplemented by market rates, company policies, and union demands. D. TREIMAN, JOB EVALUATION: AN ANALYTIC REVIEW. INTERIM REPORT TO THE EEOC 1-2 (1979).

While today employers generally oppose the use of job evaluations to measure comparable worth, these same evaluation methods were promoted at the time of the Act's hearings as "the only fair and proper method of paying wages." Hearings on H.R. 8898, supra note 30, at 164 (statement of National Association of Manufacturers).


It is not intended that the Secretary of Labor or the courts will substitute their judgment for the judgment of the employer and his experts who have established and applied a bona fide job rating system. It is not the business of the Secretary of Labor to write job evaluations or judge the merits of job evaluation systems. This sole obligation is to uncover and prosecute cases where a pattern of job differentials in pay is permeated by sex discrimination.
B. Judicial and Administrative Interpretation of the Equal Pay Act

While the Equal Pay Act's legislative history reveals a decisive rejection of a comparable worth wage standard, it is far less clear in providing a definition of the Act's "equal work" standard. The congressional proceedings "contain ammunition both for those who would insist on a very narrow reading of 'equality,' and for those who would urge a more expansive understanding of the term."39

The Supreme Court and the federal circuit courts have steered a "middle course," requiring that plaintiffs demonstrate "substantial equality" between the jobs being compared.40 Male and female jobs need not be the same so long as the differences between them — whether in skill, effort, responsibility, or working conditions — are not so substantial as to render the jobs "unequal." Thus male and female industrial inspectors perform equal work despite the fact that men may work under different conditions, such as those inherent in the night shift.41 The work of female airline stewardesses is substantially equal to that of male stewards despite some differences in job duties.42 The jobs of male and female sales clerks are equal under the law even though they involve sales of different products in different departments.43 Extra tasks performed by male selector-packers do not make their work substantially different from females on the same job where the extra tasks are infrequently required and may not be performed by women in exchange for higher pay.44 Some courts have stretched the substantially equal work requirement even further to include jobs performed on different machines or with different equipment.45

Such federal court decisions are consistent with the administrative interpretation of the Act, first by the Labor Department's Wage and Hour Administrator,46 and now by its successor, the Equal Employment Opportunity Commission

39. Thompson, 678 F.2d at 271.
40. Id. at 271-72. According to the Thompson court, every circuit except for the First Circuit, which has not yet decided the question, holds to a "substantial equality" wage standard. See cases cited in Thompson, 678 F.2d at 272 n.12.
41. Corning Glass, 417 U.S. 188.
46. The Department's official interpretations of the Act, found at 29 C.F.R. § 800.100-166 (1982), are entitled to deference as the agency charged by Congress with enforcing the Equal Pay Act. See Laffey, 567 F.2d at 449; Thompson, 678 F.2d at 273 n.14. However, the Department of Labor was not given rule-making authority under the Equal Pay Act. See 109 Cong. Rec. 9208-9209 (1963) (remarks of Rep. Goodell).
[EEOC]. According to these administrative guidelines, differences in jobs are substantial only if they are actually significant in wage setting. An employer cannot create differences by adding duties simply as a pretext to evade the Act.

The courts and agencies have thus avoided defining "equal work" so narrowly as to deprive the Act of all remedial power. At least one commentator, however, has noted that as a matter of initial interpretation an even more flexible standard of comparison was possible. As the law stands today, plaintiffs must demonstrate that jobs are substantially equal in four respects: skill, effort, responsibility, and working conditions. Yet the job evaluation practices which initially inspired the legislators require only that the cumulative total of points under these four headings be the same.

C. Affirmative Defenses to the Equal Pay Act

In bringing suit under the Equal Pay Act, the plaintiff establishes her prima facie case by showing that she earns a lower wage than a male who performs equal work within the same establishment. The burden of proof then shifts to the employer-defendant to show that the pay differential is justified by one of


The Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (1976) provides the enforcement mechanism for the Equal Pay Act. The EEOC may initiate litigation or, if the Commission does not file suit, an aggrieved individual may sue to enforce the Act. 29 U.S.C. § 216(b). The employee must bring suit within two years after the cause of action accrued or three years in the case of wilful violations. 29 U.S.C. § 216(b), § 255(a). The employer may be liable for an equal award in liquidated damages unless he can establish good faith compliance with the Act. 29 U.S.C. § 260.


50. See Blumrosen, supra note 18, at 476-77.

51. 29 C.F.R. § 800.122.

52. See Blumrosen, supra note 18, at 476-77.

Job evaluation practice, which was incorporated into the E.P.A., permits the cumulation of point values for the four areas of skill, effort, responsibility, and working conditions in order to identify total point values as a basis for comparing jobs to determine compensation. Jobs which have different levels of skill, effort, and responsibility would be considered equal for compensation purposes if the total point values for the four elements were the same. Under job evaluation practice, it is not the "job" which must be the same, but rather the evaluation totals. In short, job evaluation practice permits a comparison of jobs which involve different work. By contrast, both the administrator's interpretation of the E.P.A. and the interpretation of that Act by most courts subsequent to the adoption of Title VII have adopted a narrower interpretation of the statute by requiring that the work be the same, i.e., that the skill levels, effort levels, responsibility levels, and working conditions each be the same in the jobs being compared and, moreover, that the jobs "look alike."

Id.


the Act's four exceptions. A pay differential is permissible if based upon "(i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex." No factor provides a valid defense if based, either expressly or by implication, on elements of sex discrimination.

The Act's administrative guidelines construe these affirmative defenses strictly. According to the EEOC, the system or test serving as a defense must be uniformly applied to male and female employees; and must be the genuine basis for the pay differential. In addition, the system, even if neutral on its face, must not have an adverse impact on members of one sex unless its use is justified by its relation to job performance. Finally, employers may fail to prove an exception to the Act if they are unable to show a reasonable relationship between the amount of the wage differential and the weight reasonably attributed to the "factor other than sex." Consequently, a trainee program from which women are excluded cannot be claimed as the basis for a wage differential between men and women performing the same work. Higher pay to heads of households bears no relation to job performance and may adversely affect women workers. Therefore, such a basis for a pay differential does not qualify as a "factor other than sex." "Red circle" rates, which allow employers to pay workers on temporary assignments their regular wage rates, cannot justify pay differentials where the reassignment is actually permanent. Nor can employers pay women lower compensation by claiming that the cost of employing them is higher. Where female part-time workers are paid less than male full-time workers, the difference in their wages must be no greater than justified by the difference in their work weeks.

59. 29 C.F.R. § 800.143 (1982).
64. 29 C.F.R. § 800.143 (1982).
Strict construction of the defenses under the Equal Pay Act provides plaintiffs with considerable protection where they are able to meet their burden of establishing equal work. However, unless an amendment extends its coverage to comparable work as well, the Act provides no relief to plaintiffs who contend their work is equal in value to higher-paid male labor. Their only recourse, aside from pursuing a remedy under state equal pay laws, is to prove a violation of Title VII of the Civil Rights Act. Congress did not set an equal work standard for defining wage discrimination under Title VII. As a result, the federal courts have inherited the controversial task of determining the contours of Title VII's coverage.

D. Title VII: An Absence of Legislative Intent

After passage of the Equal Pay Act, the 88th Congress enacted Title VII of the Civil Rights Act of 1964. Title VII contains a comprehensive prohibition of sex discrimination in employment, guaranteeing equal treatment to women in hiring, promotion, training, working conditions, benefits, and discharge. A section of the law specifically addresses the issue of wage discrimination:

It shall be an unlawful employment practice for an employer — (1) to fail or to refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment, because of such individual's race, color, religion, sex, or national origin; . . .

65. Hodgson v. Security Nat. Bank of Sioux City, 460 F.2d 57, 60 (8th Cir. 1972) (Participation in training program, which never accepted female employees, does not justify wage differential among bank tellers); Feltier v. City of Fargo, 533 F.2d 374, 379 (8th Cir. 1976) (Special skills possessed by male workers do not qualify as affirmative defense where duties actually performed by male and female workers are the same); Hodgson v. Behrens Drug Co., 475 F.2d 1041, 1047-48 (5th Cir. 1973), cert. denied, 414 U.S. 822 (1973) (Discriminatory training program is not a bona fide defense); Cayce v. Adams, 439 F. Supp. 606, 608 (D.C. 1977) (Civil Service classification system which is not applied in sex-neutral fashion does not qualify as exemption).

66. Senator Edward Kennedy of Massachusetts has announced his intention to introduce legislation amending the Equal Pay Act in order to extend its coverage to jobs of comparable worth. See Hearings on Pay Equity, supra note 4, at 22.

67. See supra note 29.


Title VII covers any employer whose business affects commerce and who employs 25 or more persons. 42 U.S.C. § 2000e(b). An individual who wishes to challenge discriminatory practices under Title VII must file her charge with the EEOC within 180 days of the alleged violation. 42 U.S.C. § 2000e-5(e). The charge must be filed with or referred to a state or local agency when (1) a state or local law proscribes the act alleged, and (2) a state or local agency has civil or criminal enforcement powers. 42 U.S.C. § 2000e-5(c). The EEOC may assume jurisdiction if the state/local agency takes no action within 60 days. 42 U.S.C. § 2000e-5(d). The EEOC then investigates the complaint and determines whether reasonable cause exists to believe the charge is true. If the EEOC finds reasonable cause, the
The statute, however, is silent as to what constitutes discrimination in compensation. As a result, the relationship between Title VII and the Equal Pay Act has been the subject of ongoing debate. Fueling this controversy is the fact that Congress barely considered this question in its deliberations over Title VII.\textsuperscript{70} As originally proposed, Title VII barred only discrimination based on race, color, religion, or natural origin.\textsuperscript{71} Late in the House debate, Representative Howard Smith proposed an amendment adding sex as a prohibited category of employment discrimination.\textsuperscript{72} Although intended to defeat the bill, the Smith amendment was immediately adopted.\textsuperscript{73} The House had no time to discuss its overlapping jurisdiction with the Equal Pay Act.\textsuperscript{74} Aside from a brief memorandum addressing this question which Senator Clark inserted into the Congressional Record, the Senate ushered the bill through without additional clarification.\textsuperscript{75} Concern over this lack of attention led to the Senate’s “eleventh hour” passage of the Bennett Amendment with only the briefest discussion and without recorded vote.\textsuperscript{76} The amendment, which was uncontroversial at the time, provides:

\begin{quote}
It shall not be an unlawful employment practice under this chapter for any employer to differentiate upon the basis of sex in determin-
\end{quote}

agency attempts to reach a settlement through conference and conciliation. 42 U.S.C. § 2000e-5(b). Should conciliation fail, the EEOC may commence enforcement proceedings in federal court unless the defendant is the government, in which case the Attorney General must bring the action. 42 U.S.C. § 2000e-5(f)(1). If the EEOC dismisses the complainant’s charge or fails to commence action within 180 days of its filing, the aggrieved individual may file suit against her employer in the appropriate U.S. district court. 42 U.S.C. § 2000e-5(f)(1). Should the court find that the employer has committed an illegal practice, it may order reinstatement and back pay up to two years prior to filing the complaint. 42 U.S.C. § 2000e-5(g). The EEOC is also empowered to investigate employment practices and when necessary initiate conciliation proceedings or file suit. 42 U.S.C. § 2000e-5(b)-(e).

For a comparison to the Equal Pay Act, see supra note 47. As of 1980, approximately 75% of all Equal Pay Act complaints were filed concurrently under Title VII. EEOC, 15th Annual Report, in EMPL. PRAC. GUIDE (CCH) No. 166, at 4 (Apr. 21, 1982) [hereinafter cited as EEOC, 15th Annual Report].

71. Hearings on HR 405 Before the General Subcommittee on Labor of the Committee on Education and Labor, 88th Cong., 1st Sess. 4 (1963); Gunther, 452 U.S. at 172.
73. Id.
74. Gunther, 452 U.S. at 172.
75. Id.

Senator Clark’s memorandum took the form of a question and answer concerning the relationship between the Equal Pay Act and Title VII:

Objection: The sex antidiscrimination provisions of the bill duplicate the coverage of the Equal Pay Act of 1963. But more than this, they extend far beyond the scope and coverage of the Equal Pay Act. They do not include the limitations in that act with respect to equal work on jobs requiring equal skills in the same establishments, and thus, cut across different jobs.

Answer: The Equal Pay Act is a part of the wage hour law, with different coverage and with numerous exemptions unlike title VII. Furthermore, under title VII, jobs can no longer be classified as to sex, except where there is a rational basis for discrimination on the ground of bona fide occupational qualification. The standards in the Equal Pay Act for determining discrimination as to wages, of course, are applicable to the comparable situation under title VII.

110 CONG. REC. 7217 (1964).
76. Gunther, 452 U.S. at 173.
ing the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of [the Equal Pay Act].

Whether this wording was meant to incorporate the Equal Pay Act’s wage standard or only its affirmative defenses emerged as the threshold issue facing the courts in Title VII suits.

Lacking legislative guidance, courts interpreted the Bennett Amendment in different ways with significantly different repercussions for litigants. Initially, most courts considering wage discrimination claims under Title VII held that the Bennett Amendment required plaintiffs to meet the Equal Pay Act’s “equal work” standard. According to this theory, the plaintiff’s burden of proof is the same under either Act. Pursuing relief under Title VII based upon a theory of comparable worth is thus foreclosed.

In the late 1970’s, a few courts reconsidered this restrictive interpretation of the Bennett Amendment in light of Title VII’s otherwise expansive remedial scope. These courts held that the amendment was intended to incorporate only the Equal Pay Act’s affirmative defenses, not its “equal work” standard. They allowed wage discrimination claims to proceed under Title VII where plaintiffs offered proof of intentional discrimination on the part of their employers. However, even these decisions did not extend Title VII’s reach to claims of comparable worth.

The conflict between the circuits over the correct interpretation of the Bennett Amendment and the intended scope of Title VII prompted the Supreme Court’s intervention in County of Washington v. Gunther. In deciding Gunther the Supreme Court resolved the controversy over the Bennett Amendment, but left the question of comparable worth unanswered.

E. The Gunther Decision

The plaintiffs in Gunther did not proceed on a pure comparable worth claim, a fact which both the Court’s majority and dissent were quick to emphasize. As female prison guards employed to oversee female inmates, the plaintiffs had been paid substantially less than male guards. Since the male guards supervised

79. See supra note 78.
81. See supra note 80.
82. Id.
84. Id. at 166, 203.
more inmates per guard, however, the lower courts held that the prison's guards did not perform equal work and hence plaintiffs were not entitled to relief under the Equal Pay Act. 85

The Ninth Circuit ruled that the plaintiffs could nonetheless proceed under Title VII to establish their claim that part of their pay differential was due to the County's intentional wage discrimination. 86 As proof, the plaintiffs cited the County's own job evaluations which, after taking into account outside markets, set the wage rate for female guards at 95 percent of that for male guards. Yet female guards were in fact paid only 70 percent of the male rate. This discrepancy was allegedly the direct result of sex discrimination. 87

The Supreme Court did not decide whether the plaintiffs had succeeded in establishing a prima facie case of wage discrimination under Title VII. The Court held only that their claim was not precluded by the language of the Bennett Amendment. 88 The effect of the Amendment, according to the five-justice majority, was to incorporate the Equal Pay Act's defenses, not its “equal work” pay standard. 89

In refusing to restrict Title VII claims to an equal work standard, the Court majority argued that nothing in the Act's sketchy legislative history supported such a limitation, asserting that the Court "must therefore avoid interpretations of Title VII that deprive victims of discrimination of a remedy without clear congressional mandate." 90

In Gunther the Court stopped short of finding that Title VII's broad remedial reach extends to comparable worth wage claims. The majority emphasized the "narrowness of the question before us in this case. Respondents' claim is not based on the controversial concept of 'comparable worth' . . . Rather, respondents seek to prove, by direct evidence, that their wages were depressed because of intentional sex discrimination." 91 In concluding its opinion, the Court majority sought to allay the fears of the petitioner County and the Court's own dissenters. In response to arguments that a decision for the plaintiff-respondents would jeopardize "the pay structure of virtually every employer and the entire economy" 92 and allow Title VII claimants to "draw any type of [job] comparison imaginable," 93 the majority replied:

... whatever the merit of petitioners' arguments in other contexts, they are inapplicable here. . . . [R]espondents' suit does not require a

85. Id. at 180-81.
86. Gunther, 602 F.2d at 891 (9th Cir. 1979), aff'd., 452 U.S. 161 (1981).
88. Id. at 178-80.
89. Id. at 168.
90. Id. at 178.
91. Id. at 166.
92. Id. at 180.
93. Id.
court to make its own subjective assessment of the value of the male and female guard jobs, or to attempt by statistical technique or other method to quantify the effect of sex discrimination on the wage rates.

We do not decide in this case the precise contours of lawsuits challenging sex discrimination in compensation under Title VII. It is sufficient to note that respondents' claims of discriminatory compensation are not barred...merely because [they] do not perform work equal to that of male jail guards.94

Thus, although the court resolved the meaning of the Bennett Amendment, it failed to provide any guidance regarding methods of proof available to Title VII litigants in wage discrimination cases.

Out-of-court settlements of Gunther and I.U.E. v. Westinghouse,95 an analogous Third Circuit case alleging wage discrimination based upon biased job evaluation practices, do little to clear up the confusion that remains over what burden plaintiffs must meet to establish a violation of Title VII.96 All that is clear from Gunther is that Title VII litigants need not meet the same burden of proof as plaintiffs proceeding under the Equal Pay Act. The federal courts are again left to decide for themselves what "wage discrimination" under Title VII encompasses. While the Supreme Court did not rule out comparable worth claims in Gunther, the majority was also very careful to avoid any indication of endorsing such methods of proof. Consequently, in the aftermath of Gunther very few courts have ventured onto this unexplored terrain.

F. Post-Gunther Decisions: Establishing Intentional Wage Discrimination

For the most part, the federal courts have interpreted Gunther as allowing wage discrimination claims under Title VII only where the plaintiff can prove intentional discrimination by methods other than "comparable worth" job com-

94. Id. at 180-81.
95. Westinghouse, 631 F.2d at 1097-98. In Westinghouse, female employees based their claim of intentional wage discrimination on the allegedly biased nature of the defendant's job evaluation system. That system set wages according to an earlier plan that had segregated jobs by sex and established pay grades for women that were lower than for men with the same rating. Gunther, 352 U.S. at 180-81 and Westinghouse, 631 F.2d at 1109, suggest that where plaintiffs can prove that their employer sets wages according to a job evaluation plan but they receive pay lower than their value rating, they have established a claim that may be recognized under Title VII. See also Conn. Employees Assn. v. Conn., 31 Fair Empl. Prac. Cas. (BNA) 191 (D. Conn. 1983) (claim that state pays females at lower rates for work that it has determined to be of comparable value to higher paid males is cognizable under Title VII).

However, neither case decided whether such prima facie evidence is sufficient proof of intentional discrimination nor whether a market defense could successfully rebut such a claim.

parisons. Gunther and subsequent decisions have not specified the alternative methods which would satisfy Title VII. In one court's view the "advancement of women and minorities will not be assured until employers pay all persons according to their value to the enterprise." Yet that same court dismissed a comparable worth claim on the ground that Title VII does not authorize courts "to undertake an evaluation and determination of the relative worth of employees."

Alternative theories for establishing intentional wage discrimination under Title VII rely upon inferences drawn from the existence of low-paying, sex-segregated job categories. Professor Ruth Blumrosen, a long-time EEOC advisor, suggests a prima facie case based upon the correlation between job segregation and wage discrimination. According to her theory, a plaintiff who has established that she works in a low-paying predominantly female job classification has created an inference of discrimination which should shift the burden of proof to the employer-defendant. Professor Blumrosen argues that Title VII does not require the plaintiff to prove intentional discrimination where she can show that her employer's practices produce a discriminatory impact on female wages and cannot be justified by job-relatedness. In contrast Mr. Winn Newman, former general counsel of the International Union of Electrical, Radio, and Machine Workers, a union which has filed several suits alleging wage discrimination, proposes a somewhat different prima facie burden. He suggests that a plaintiff makes out a prima facie case by showing significant over-representation

97. Power, 539 F. Supp. at 726-27 (female prison matrons do not state cause of action under Title VII by claiming their jobs are of comparable worth to male correction officers); Gerlach v. Michigan Bell, 501 F. Supp. 1300, 1320 (E.D. Mich. 1980) (female engineering clerks who claim their sex-segregated jobs are of equal value to males in craft classifications fail to state Title VII claim); Lemons, 620 F.2d at 229 (nurses seeking job comparison to comparable non-nursing jobs in the community do not have a Title VII claim); Briggs v. City of Madison, 536 F. Supp. 435, 444-45 (W.D. Wisc. 1982) (nurses claiming their sex-segregated jobs are comparable to higher-paid male sanitaritians have not created an inference of discrimination under Title VII); Melanson v. Rantoul, 536 F. Supp. 271, 286-87 (D. R.I. 1982) (courts will not engage in job rating in sex discrimination suits brought under Title VII and the Equal Pay Act).

An exception to this trend is AFSCME v. State of Washington, 82-465 (D. Wash. 1983), a case in which damages were awarded to female state employees on the basis of their comparable worth wage claims. See, Lauter, Pay Bias Enters a New Age, 6 Nat'l. L. J. No. 17 (January 6, 1984).


99. According to Gerlach, "Congress has, thus far, seen fit to limit an employer's wage rate evaluations only by the preclusions against discrimination in wages and by the requirements of equal pay for objectively defined equal or substantially equal work."

100. See Blumrosen, supra note 18, at 468.


103. See EEOC Hearings, supra note 1, at 35 (testimony of Mr. Winn Newman).
of women in lower-paid jobs and a job content that does not justify existing wage differentials.104

Only a few courts have allowed recoveries based upon such evidence of intentional discrimination. In Taylor v. Charley Bros.,105 a Pennsylvania District Court held that wage discrimination had been established through evidence of job segregation, lower compensation for "female" jobs, and job evaluations commissioned by both plaintiff and defendant.106 At least one other court has allowed a plaintiff class of female employees to prove wage discrimination by a statistical showing of extensive job segregation and overall lower earnings.107

If courts do not allow Title VII claimants to proceed under theories of comparable worth or to establish intentional discrimination by proof of job segregation and depressed wages, then the Gunther decision will have opened only the slimmest exception to the Equal Pay Act's standards. It is highly unlikely that many victims of wage discrimination will be supplied with the direct evidence of unlawful intent which the plaintiffs had in Gunther and Westinghouse.108

G. Criticism of Comparable Worth in the United States

Opposition to the theory of comparable worth generally relies upon three principal objections: (1) absence of legislative intent; (2) unreliability of job evaluations; and (3) the relationship between market forces and wage rates.109

First, critics of comparable worth argue that the legislative history of the Equal Pay Act demonstrates that Congress did not intend liability for wage discrimination to exceed the scope of "equal work."110 In Gunther, however, the Supreme Court refused to infer that the same Congressional intent was at work in designing Title VII.111 While the Court held that the legislative history of Title VII did not support restricting wage discrimination claims to an equal work standard, it did not discuss whether Congress intended the scope of the Act to encompass comparable worth claims.112

104. Id.
106. Id. at 612, 614. See EEOC v. Hay Associates, 545 F. Supp. 1064, 1085 (E.D. Pa. 1982) (Comparable worth claims are "cognizable under Title VII" but "the elements of such comparable work claims have yet to be defined.").
108. See supra note 95 and accompanying text.
109. For essays discussing these objections, see EQUAL EMPLOYMENT ADVISORY COUNCIL, COMPANABLE WORTH: ISSUES AND ALTERNATIVES (E.R. Livernash ed. 1980). The function of the Equal Employment Advisory Council is to present the views of employers regarding non-discriminatory employment practices. EEOC Hearings, supra note 1, at 725. (Testimony of Kenneth C. McGuiness, president of the EEAC). The chief alternative proposed in COMPAREABLE WORTH: ISSUES AND ALTERNATIVES is the promotion of women into management positions. Id. at 10, 20.
110. See Gunther, 452 U.S. at 188 (Rehnquist, Burger, Stewart, and Powell, dissenting); Williams & McDowell, The Legal Framework in Livernash, supra note 109, at 230; Nelson, supra note 19 at 288.
111. Gunther, 452 U.S. at 176.
112. Id.
A second source of opposition stems from the difficulty of measuring the value of dissimilar jobs and the unreliability of current job evaluation methods.113 Supporters of comparable worth are also critical of job evaluation techniques because of their subjectivity, reliance upon market standards, perpetuation of job stereotyping, and underestimation of the worth of “female” jobs.114 Despite these shortcomings, however, unions have made progress using job evaluations as a means of exposing and remediing wage discrimination through collective bargaining.115 At the same time, judges have shown that courts are capable of interpreting and applying job evaluation data in deciding Equal Pay Act and Title VII claims.116

Finally, critics of comparable worth argue that the labor market dictates wages and that employers cannot be held liable for forces beyond their control.117 According to this theory, the wage differential between men and women reflects the market pressures of supply and demand and not simply the relative value of comparable jobs to the employer.118 In Gunther the Court’s dissenters argued that for courts to interfere with the free operation of the market in determining comparable worth “would result in a major restructuring of the American economy.”119

Those who promote the market as a defense to wage discrimination claims seem unwilling to pierce the market’s veil and probe into the discriminatory factors affecting the supply and demand of labor and the economic status quo.120


114. See Blumrosen, supra note 18, at 429-41; Letter from Lane Kirkland, President AFL-CIO, to the EEOC (Aug. 2, 1980) in COMPARABLE WORTH, supra note 21, at 130; TREIMAN, supra note 37, at 50-48; EEOC Hearings, supra note 1, at 728 (testimony of David Thompson, Director, Compensation Institute) (job evaluations retain and create discriminatory pay practices).

115. In 1981 striking city workers in San Jose, California, won a $4.8 million wage offer from the city that included $1.45 million in raises for several hundred female employees who were paid less than men employed in “comparable positions.” COMPARABLE WORTH, supra note 21, at 3. District 1199, a union of hospital workers, negotiated a contract for state employees in Connecticut which established a pay equity fund to rectify wage inequities. Id. at 33. Criticism of biased job evaluations by female employees of the city of Colorado Springs led to the negotiation of a new job evaluation plan and raises for female job categories. Id. at 36-37. The International Union of Electrical Workers has grieved several “comparable worth” pay issues and reached agreements with both General Electric and Westinghouse upgrading female job classifications. Id. at 92-93.

116. See supra notes 41-45 and accompanying text.


118. See supra note 117.

119. Gunther, 452 U.S. at 188 (Rehnquist, Burger, Stewart, Powell dissenting).

120. See supra note 117 and infra note 122. For a criticism of the objectivity of the marketplace, see Blumrosen, supra note 18, at 445-57; EEOC Hearings, supra note 1, at 332 (testimony of Eve Johnson, Coordinator of Women’s Activities, American Federation of State, County, and Municipal Employees) (despite shortage of nurses and clerical workers, these largely female professions remain low paid); Support For Comparable Worth, 111 LAB. REL. REP. (BNA) 65, 66-67 (Sept. 27, 1982) (discriminatory job segregation and low rates of unionization among women have depressed female wages).
The refusal to inquire into widely held business premises, like the refusal to sanction independent evaluations of comparable jobs, reflects the continuing tension in Congress and the courts over pursuing the antidiscrimination policy of the Equal Pay Act and Title VII while avoiding further government interference into the marketplace.

H. The "Market" Defense to Claims of Wage Discrimination

Courts have upheld defenses based on market considerations in denying comparable worth claims under Title VII. They have held that even where jobs are arguably of equal value, employers are entitled to pay a wage differential that reflects market pressures. According to these decisions, the demands of the market provide a valid defense under the Bennett Amendment — "a differential based on any other factor other than sex."

In considering this same defense to the Equal Pay Act, however, courts have recognized that relying upon market rates is not a neutral wage setting practice but one that can perpetuate wage discrimination. The U.S. Supreme Court noted the labor market's bias in its leading decision interpreting the Equal Pay Act:

The whole purpose of the Act was to require that these depressed wages be raised, in part as a matter of simple justice to the employees themselves, but also as a matter of market economics, since Congress recognized as well that discrimination in wages on the basis of sex "constitutes an unfair method of competition."

Courts have since held that determining wages by reference to past salary levels is a discriminatory employment practice where it results in a pay differential between men and women performing equal work.

The most thorough treatment of this issue is found in the case of *Kouba v.*

121. See supra notes 36-37, 92-99 and accompanying text.
122. Christensen v. Iowa, 563 F.2d 353, 356 (8th Cir. 1977) (employer entitled to pay female clerical workers less than comparable male plant workers where latter command higher wages in the labor market); Briggs, 536 F. Supp. at 447 (even if jobs of female nurses and male saniticians are substantially equal, employer has established a defense of higher market worth for male jobs).
123. See supra note 122.
125. Corning Glass, 417 U.S. at 205, 207 (1974); Brennan v. City Stores, 479 F.2d 235, 241 n.12 (5th Cir. 1973); Hodgson v. Brookhaven General Hospital, 436 F.2d 719, 726 (5th Cir. 1970); Brennan v. Victoria Bank and Trust Co., 493 F.2d 896, 902 (5th Cir. 1974); Hodgson v. Maison Miramon, 344 F. Supp. 843 (E.D. La. 1972). But see Horner v. Mary Institute, 613 F.2d 706, 714 (8th Cir. 1980) (an employer may consider the marketplace value of an individual's skills in determining his or her salary level).
126. Corning Glass, 417 U.S. at 207.
Allstate Insurance. The plaintiffs in Kouba were female insurance agents who were paid less than their male counterparts because their employer calculated salaries according to pay received in previous jobs. The court held that "[a] resort to a so-called 'market rate' where the market rate is itself a reflection of the historical discrimination against women will not be considered as a sufficient justification under the Equal Pay Act." The court concluded that once the plaintiff has produced evidence of the "historic disparity" between male and female wages, the defendant must show that the previous salary used to calculate wages "was itself based upon factors other than sex."

On appeal, however, the Ninth Circuit reversed. It held that the lower court had gone too far in proscribing the use of a market defense. The court proposed "a pragmatic standard" instead of an "extreme" interpretation of the Act. According to this standard, as long as employers show an "acceptable business reason" for using prior salaries or any other market factor — and the factor is used "reasonably" in light of this purpose — their defense should be allowed. While granting the danger of purely pretextual business reasons, the court concluded that "the Equal Pay Act entrusts employers not judges, with making the often uncertain decision of how to accomplish business objectives." The Kouba decision marks a departure from the relatively consistent line of Equal Pay Act cases rejecting defenses based upon the lower "market value" of female labor. In breaking ranks the court echoed many of the business concerns that shaped the Act in Congress.

Courts faced with wage discrimination claims under Title VII have been even less willing to scrutinize market defenses. They have held that where comparable, not equal, jobs are involved, an employer is entitled to pay males a higher wage reflecting their higher "market worth." These decisions, however, do not explain why the market is any more objective or reliable in assessing the worth of comparable jobs than it has been in measuring the value of jobs requiring equal work.

In 1945 the National War Labor Board was confronted with a similar employer defense to its comparable worth pay policy — the so-called "community

130. Id. at 162-63.
131. Kouba, 30 Fair Empl. Prac. Cas. (BNA) 57, 59 (9th Cir. 1982).
132. Id.
133. Id.
134. Id.
135. See supra notes 34-37 and accompanying text.
136. See supra note 122.
137. See supra note 122.
138. Id.
139. See supra note 21.
practice" of placing lower values on traditionally female jobs. The logic of the Board's response would seem equally applicable to market defenses today:

If this contention were sound, it would follow that no exploitation of any group could be ended (save by voluntary action) if it constituted the common practice of the employers in the locality. The real question is whether any exploitation exists. If it does exist, as we believe that it does in this case, it should be ended, and the fact that others practice it ought not to stand as a bar.

The same policy considerations explain the market controls Congress and the courts imposed under the Equal Pay Act and Title VII to prohibit cost-saving devices which deny employees equal rights. Such cost-saving devices have historically included the segregation of women into low-paying occupations and the establishment of lower job classifications for women performing the same work as men. If the legacy of these practices provides a valid "market" defense to laws which ban the same forms of discrimination today, little progress will be realized in equalizing employment opportunities.

III. GREAT BRITAIN: EQUAL WORK V. WORK OF EQUAL VALUE

The United States is not alone in confronting the issues of comparable worth and the labor market defense. Despite differences in sex discrimination laws, Great Britain is also experiencing a debate over these questions which mirrors many of the concerns expressed in the United States.

The British Equal Pay Act of 1970 shares a common purpose with its U.S. counterpart — "to eliminate the depressing effects on living standards of reduced wages for female workers and the economic and social consequences which flow from it." The British Act provides for equal treatment "as regards terms and conditions of employment to men and to women." The bill's equal pay mandate is construed broadly to cover any difference in compensation as

141. Id.
145. 795 Parl. Deb. H.C. (5th ser.) 920 (1970) (testimony of B. Castle, Secretary of State for Employment and Productivity) ("We mean that women must get equal treatment, not only in rates of pay, but in sickness and holiday schemes, payments in kind and any type of bonus rates.").
is true of the U.S. Equal Pay Act. However, claimants in Great Britain are not restricted to job comparisons within the same business establishment.\textsuperscript{146}

In 1975, the same year in which the Equal Pay Act became effective, Parliament enacted an extensive Sex Discrimination Act.\textsuperscript{147} Similar in scope to Title VII in the United States, the Sex Discrimination Act prohibits discrimination in hiring, job training, employment conditions, promotion, and discharge.\textsuperscript{148} Parliament established an Equal Opportunities Commission to oversee the implementation of both the Sex Discrimination Act and the Equal Pay Act.\textsuperscript{149}

A distinguishing feature of the British Equal Pay Act is its creation of "equality clauses" in women's employment contracts.\textsuperscript{150} The equality clause automatically modifies a woman's contract to include any benefit granted to a man performing the same or equivalent work.\textsuperscript{151} The Equal Opportunities Commission is empowered to issue non-discrimination notices, enforceable by court injunction, against employers who have breached their employees' equality clauses.\textsuperscript{152}

The major difference between the British Equal Pay Act and the U.S. Act is that the former provides two different standards of comparison between male and female jobs: equal work, and work of equal value. The proper standard to apply is determined by whether or not the employer has carried out a job evaluation measuring the worth of the jobs to be compared. If a woman's employer has not adopted a job evaluation scheme, she is entitled to the same pay as a higher-paid male only if they perform "like work," defined as work of the same or of a broadly similar nature.\textsuperscript{153} The plaintiff bears the burden of proving that there are no differences between the jobs "of practical importance in relation to terms and conditions of employment."\textsuperscript{154} To this extent, the Act parallels U.S. law. However, where an employer's job evaluation has rated a woman's work as "equivalent with that of a man in the same employment" — i.e., "her job and their job have been given an equal value" — she is also entitled to equal pay under British law.\textsuperscript{155}

This difference in standards for comparing male and female jobs is the product of a compromise in Parliament between advocates of a consistent "equal value" standard and those who either sought to restrict the law's protection to

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\textsuperscript{146} Equal Pay Act, ch. 41 § 1(2). The "same employment" is defined as "the same establishment or at establishments in Great Britain which include that one and at which common terms and conditions of employment are observed either generally or for employees of the relevant classes."

\textsuperscript{147} Sex Discrimination Act, 1975, ch. 65.

\textsuperscript{148} Id. § 6. Unlike Title VII, the British Act also prohibits discrimination on the basis of marital status. Id. § 3.

\textsuperscript{149} Id. § 53.

\textsuperscript{150} Equal Pay Act, ch. 41, § 1(1)-(3).

\textsuperscript{151} Id.

\textsuperscript{152} Sex Discrimination Act, ch. 65, §§ 67, 72.

\textsuperscript{153} Equal Pay Act, ch. 41, § 1(4)-(5).

\textsuperscript{154} Id. In determining whether differences are of "practical importance," attention is paid to the frequency with which they occur as well as their nature. Shields, [1979] 1 All E.R. at 463.

\textsuperscript{155} Equal Pay Act, ch. 41, §§ 1(2)(b), 1(5).
equal work or favored leaving the decision to private negotiation.\textsuperscript{156} While the latter forces did not prevail, the resulting compromise restricts comparisons between dissimilar jobs to job evaluations made by the employer.\textsuperscript{157} The Act defines equivalent work in terms of the total demand made upon the workers, taking into account such factors as skill, effort, and decision making.\textsuperscript{158} Jobs are also considered "equivalent" where they "would have been given an equal value" if the evaluation had been carried out in a nondiscriminatory manner.\textsuperscript{159} In this way British law extends further protection to female workers by requiring employers to pay the wages suggested by their job evaluations or those that would have been suggested absent discrimination in carrying out the evaluation. In the United States only a few courts have admitted inconsistencies in job evaluations as evidence of intentional wage discrimination.\textsuperscript{160}

A. \textit{Defenses to the British Equal Pay Act}

The treatment of defenses to equal pay claims in Great Britain more closely follows the U.S. pattern. Thus, even if a plaintiff establishes "like" or "equivalent" work, her equal pay claim will fail if "the employer proves that the variation in pay is genuinely due to a material difference (other than the difference of sex) between her case and his [the male worker's]."\textsuperscript{161} Material differences are defined as personal differences between the male and female worker, such as length of service, special skills and qualifications, or higher productivity.\textsuperscript{162} The


\textsuperscript{157} At the time of the Act's passage, job evaluations covered approximately 30\% of the workforce. 795 \textit{Parl. Deb. H.C.} (5th ser.) 916 (1970). The issue of when a job evaluation can be claimed as evidence of work of equal value has been a source of contention since Parliamentary hearings on the bill. An amendment to the Act requiring trade union participation in evaluations was introduced, debated, and withdrawn after the Labour Government guaranteed that trade union consultation and agreement was implicit in the Act. 800 \textit{Parl. Deb. H.C.} (5th ser.) 548-71 (1970).

In O'Brien v. Sim-Chem, [1980] 3 All E.R. 132, the House of Lords reversed a decision of the Court of Appeal in holding that a job evaluation need not be implemented to trigger the Act's protection. Rather, the Act is effective "at the moment when the evaluation study and exercise has made available a comparison which can show discrimination." \textit{Id.} at 137. The recent case of Arnold v. Beecham Group Ltd., [1982] I.C.R. 744, 751 (E.A.T.), held that before the Equal Pay Act applies there must be a "complete" job evaluation requiring the approval of the parties, employer, and union, who had agreed to carry out the study.


\textsuperscript{159} Equal Pay Act, ch. 41, § 1(5). \textit{See Eaton}, 1977 I.C.R. at 276-77 (a valid job evaluation study is one capable of impartial application); England v. Bromley London Borough Council, (1978) I.C.R. 1, 4 (E.A.T.) (employee may contest results of job evaluation only on the grounds that it was carried out in discriminatory manner).\textsuperscript{160} \textit{See supra} note 95.

\textsuperscript{161} Equal Pay Act, 1970 ch. 41, § 1(3).

\textsuperscript{162} \textit{Shields}, [1979] 1 All E.R. at 464; Clay Cross v. Fletcher, [1979] 1 All E.R. 474, 477 (C.A.). The range of material differences is similar to recognized exceptions to the U.S. Equal Pay Act such as seniority, merit pay, productivity differentials, and red-circle rates. \textit{See supra} notes 55-56 and accompanying text.
employer must demonstrate that such personal differences exist. 163

Whether differences in the market price of male and female labor provide an employer with a "material difference" defense is a question which British courts have also confronted. In the case of Clay Cross v. Fletcher, 164 the Court of Appeal narrowly construed "material differences" to exclude such "extrinsic" economic factors. According to the court, only differences in the "personal equation" of a man or woman justifies a wage differential between them when they are performing equal work. 165 Such personal differences might include seniority, superior skills, higher productivity, or any other traits which affect job performance. 166 How the market measures a worker's value, however, is not a proper component of this "personal equation" and therefore is not a valid defense to equal pay claims:

An employer cannot avoid his obligations under the 1970 Act by saying: "I paid him more because he asked for more," or "I paid her less because she was willing to come for less." If any such excuse were permitted, the Act would be a dead letter. Those were the very reasons why there was unequal pay before the statute. 167

In ruling out economic defenses that are unrelated to job qualifications, the Court of Appeal eased the way for equal pay claimants. The court defended its interpretation of the Equal Pay Act on the grounds that Article 119 of the European Economic Community's Treaty, 168 which directs member states to provide equal pay for equal work, would likewise exclude market defenses. 169 "In the labour market women have always been in a worse position than men. Under both Art. 119 and the Equal Pay Act that was no longer to be so." 170

The Clay Cross decision, reminiscent of early U.S. equal pay decisions upon which the British Court relied, 171 sought to apply the law's prohibition of wage discrimination in a consistent fashion. However the Lord Justices of the Court of Appeal proved mistaken about the approach the European Court of Justice [ECJ] would adopt. The ECJ, reviewing British equal pay cases under Article 119, has allowed greater leeway for economic defenses. 172

165. Id. at 477.
166. Id.
167. Id.
168. See EEC Treaty, supra note 26, at 44. "Each member state shall during the first stage ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work."
170. Id. at 481.
171. Id. at 478, 481. See supra notes 125-26 and accompanying text.
172. Macarthys Ltd. v. Smith, 1980 E. Comm. Ct. J. Rep. 1275, 1288-89, (1980) 2 Comm. Mkt. L. R. 205, 211, 213-14 (woman entitled to equal pay for performing the same work as her male predecessor unless employer can show a change in economic conditions during the lapse between their jobs); Jenkins
The extent to which these European decisions will cut into the strict interpretation of "material differences" found in Clay Cross remains unclear. Since British equal pay claimants may bring suit under both Treaty and national law and generally gain greater protection by doing so, the European Court's recognition of market defenses may reduce the significance of Clay Cross in future litigation.

B. Administration and Enforcement of the Equal Pay Act

When Parliament initially provided for enforcement of the Equal Pay Act through individual lawsuits, it adopted a strategy which was in marked contrast to that embodied in the Race Relations Bill of 1968. Parliament had given exclusive authority to a public Race Relations Board to bring suit in race discrimination cases. In creating the Equal Opportunities Commission (EOC) in 1975, the Labour Party government sought to steer a middle course between placing the burden of legal enforcement exclusively upon either individual complainants or upon an appointed public body. The primary function of the EOC is to conduct formal investigations of discriminatory practices, but the Commission retains the power to assist complainants where their cases raise important or unusually complex questions of law.

The complainant may initially seek her relief from an industrial tribunal composed of a lawyer chairperson and two lay members chosen by the Secretary


173. See infra notes 193-218 and accompanying text.


175. EQUALITY FOR WOMEN: WHITE PAPER PRESENTED TO PARLIAMENT, CMD. 5724 at 7 (1974) [hereinafter cited as EQUALITY FOR WOMEN].


178. See EQUALITY FOR WOMEN, supra note 175, at 7.

179. Id. The EOC has powers to conduct formal investigations and require the production of information. Sex Discrimination Act, 1975, ch. 65, §§ 57, 59. As a result of investigation, the EOC may make recommendations (§ 60) and issue non-discrimination notices (§ 67). The EOC is also empowered to apply for an injunction to restrain "persistent discriminators" from further unlawful practices. (§ 71).

180. SEX DISCRIMINATION ACT, ch. 65, § 75. See Nandy, Administering Anti-Discrimination Legislation in Great Britain in EQUAL EMPLOYMENT POLICY, supra note 20, at 152-53 (statistics of legal assistance granted under § 75 during 1976-77).
of State to represent both union and management. The proceedings of industrial tribunals are less formal than court proceedings and do not create binding precedents. The tribunal may award a complainant back pay and other compensation for the two-year period before she instituted proceedings. Decisions of the industrial tribunals may be appealed to Employment Appeal Tribunals whose decisions have precedent value.

Complaints made to an industrial tribunal go to conciliation officers of the Advisory Conciliation and Arbitration Service (ACAS) who attempt to assist the parties in reaching a settlement. Thus far these conciliation efforts do not seem to be very successful. Since 1975 complaints have been withdrawn in increasing numbers. While in 1976, 53 percent of complaints filed were withdrawn, in 1980 the number of withdrawals reached 71 percent. In some cases private unreported settlements are the reason for withdrawal, but in a majority the reason for withdrawal is unknown.

Difficulties confronting equal pay claimants include the impact of the economic depression on women's employment levels and wages, the lack of legal assistance for complainants, exemptions for pensions and retirement benefits, and the law's narrow "like work" wage standard. To the extent that Article 119 provides British claimants with broader protection against wage

181. Equal Pay Act, 1970, ch. 41 § 2(1). The Secretary of State may also refer claims to an industrial tribunal. ch. 41, § 2(1)(2). See Jowell, supra note 177, at 169.

When a case concerns the terms of a collective bargaining agreement, it is referred to the Central Arbitration Committee, established by the 1975 Employment Protection Act, ch. 71, to review the terms of such agreements upon the request of unions, employers, or the Secretary of State. The CAC is empowered to amend collective agreements in order to remove discriminatory provisions. Equal Pay Act, 1970, ch. 41, § 3(1). At mid-1976 there were about 8,000 collective agreements covering more than 100 employees each. The CAC approaches its tasks according to the principles of industrial arbitration. There is no machinery for appeals within the CAC; serious errors of fact or law may be appealed to the courts. According to the CAC's 1977 Annual Report, joint job evaluations are often an essential prerequisite to settlement. See Nandy, supra note 180, at 149-52.

182. 795 PARL. DEB. H.C. (5th ser.) 916 (1970); see Jowell, supra note 177, at 169.


184. See Equality for Women, supra note 175, at 20. This tribunal is composed of High Court and Court of Session judges as well as lay members appointed for their special knowledge of industrial relations. See Nandy, supra note 180, at 149.

185. Sex Discrimination Act, 1975, ch. 65, § 64. The conciliation officer acts as a mediator, meeting separately with each party to discuss the complaint and to clarify rights conferred by the law. If a settlement is reached, it is registered at the office of industrial tribunals which formally resolves the dispute. If one party refuses conciliation or settlement proves impossible, the ACAS withdraws and the case proceeds to a tribunal. See Jowell, supra note 177, at 170.

186. See Nandy, supra note 180, at 147-48.

187. See Cotterrell, supra note 14, at 471.

188. See Nandy, supra note 180, at 147-48; Cotterrell, supra note 14, at 471.


190. See Jowell, supra note 177, at 171.

191. Id. at 174.

192. See Cotterrell, supra note 14, at 475-76.
discrimination, it may prove an indispensable aid in realizing further progress toward employment equality.

C. Equal Pay in the European Community

Victims of wage discrimination in Great Britain are entitled to bring claims in British courts under Article 119. The ECJ recognized the "direct effects" of Article 119 in the famous Defrenne decision. This Belgian case was referred to the Court on the issue of whether Article 119 directly introduced its equal pay principle into the national laws of member states. The Court explained that the twin purposes of Article 119 — preventing unfair competition between Community members as a result of underpaying female labor and ensuring the Community's social and economic progress — formed "part of the foundations of the Community." In Defrenne the Court held that Article 119 is "directly applicable and may thus give rise to individual rights which the court must protect" in cases of "direct and overt discrimination." In Shields v. Coomes, the first case in which the British Court of Appeal considered the direct applicability of Article 119, Lord Denning reached the same conclusion. He held that Parliament's enactment of the European Communities Act represented acceptance of both the direct applicability of Treaty articles and the supremacy of Community law over inconsistent national law.

As a result of filing suit under both the Equal Pay Act and Article 119, British complainants have won a series of decisions from the ECJ that construe "equal pay for equal work" in Article 119 more broadly than British courts have construed the same language in the Equal Pay Act. The EOC, which is seeking

193. EEC Treaty, supra note 26. The EEC treaty provides "enforceable community rights" to British citizens through Britain's 1972 European Communities Act, 1972, ch. 68 § 2(1). Any court or tribunal may refer questions of treaty interpretation to the European Court of Justice. See EEC Treaty, supra note 26, art. 177. The responsibilities of the Court of Justice are set out in Section 4 of the EEC Treaty. Id. arts. 164-68. The Court is composed of seven judges. Id. art. 165. Two Advocates General assist the judges in arriving at their decisions by rendering reports on all disputes before the Court. Id. art. 166. Early British cases held that industrial tribunals could not enforce Article 119 rights. Snoxell v. Vauxhall Motors, (1977) I.C.R. 700, 701 (E.AT.); Amies v. Inner London Education Authority, [1977] 2 All E.R. 100, 101 (E.A.T.). However, the Court of Appeals conferred jurisdiction on the industrial tribunals in Shields, [1979] 1 All E.R. at 461.


196. Id. at 123-24, [1981] 1 All E.R. at 155.


198. Id. at 461.


In Jenkins, 1981 E. Comm. Ct. J. Rep. at 925, (1981) 2 Comm. Mkt. L. R. at 40, the ECJ held that part-time work is not necessarily "unequal" to full-time work and that a resulting pay differential must
to amend the British Act to bring it more into line with Community law, is currently pursuing a test case referral strategy. The most fundamental difference between Article 119 and the Equal Pay Act is revealed in EEC Directive 75/117. Responding to differences in the application of Article 119 among member states, the EEC Council issued this directive to explain the Article's meaning and the steps necessary for its implementation:

The principle of equal pay for men and women outlined in Article 119 of the Treaty, . . . means, for the same work or for work to which equal value is attributed, the elimination of all discrimination on grounds of sex with regard to all aspects and conditions of remuneration.

In particular, where a job classification system is used for determining pay, it must be based on the same criteria for both men and women and so drawn up as to exclude any discrimination on grounds of sex.

The ECJ then gave member states one year to comply with the directive and three years to report on the application of their implementing legislation. By failing to take measures to comply with the Community's directive, the British government prepared the stage for a confrontation over its treaty obligations.

be justified by objective economic factors. In its reconsideration of Jenkins the British Employment Appeal Tribunal held that the employer-defendant was required to prove that its pay differential was reasonably necessary to achieve an objective business purpose. (1981) I.C.R. 715, 726.


201. 18 O.J. EUR. COMM. (No. L 45) 19 (1975) (Council directive).
202. The Council of Ministers is composed of the representatives of the governments of all Member States. See EEC Treaty, supra note 26, art. 146. Under Article 189 of the EEC Treaty, the Council is empowered to issue regulations and directives. Regulations are binding and directly applicable in all Member States. Directives are also binding but are left to the discretion of national authorities as to their means of implementation.
203. 18 O.J. EUR. COMM. (No. L 45) 19 (1975) (Council directive).
204. Id. at 20. See infra note 225 for community enforcement powers.
D. European Communities v. United Kingdom

Directive 75/117 called into question Great Britain's implementation of Article 119 as defined by the EEC. Claimants under the British Act are entitled to make "equal value" job comparisons only when their employers have instituted job evaluations.205 Nothing in the Act obligates employers to carry out such evaluations.206 Parliament expressly rejected proposals to make the International Labour Organization's "equal pay for work of equal value" standard the law where employers have not instituted job evaluations.207 Yet it is this very standard that has inspired the EEC's interpretation of Article 119.208 By avoiding the complex question of the direct enforceability of Community directives, the ECJ avoided ruling on the clash between Directive 75/117 and Britain's dual-standard equal pay law.209

Rather than declare that Directive 75/117 provides British citizens with a cause of action against employers, the European Commission brought an action against the United Kingdom for its failure to implement the Directive through national legislation.210 In July 1982 these proceedings reached the European Court. In Commission of the European Communities v. United Kingdom of Great Britain and Northern Ireland,211 the ECJ held that the British Equal Pay Act does not conform to Community law.212 According to the Court, the critical weakness of the British Act is its failure to provide equal pay to all women performing work

206. Arnold, (1982) ICR at 752: "Unless and until Parliament introduces some form of compulsory job evaluation, a woman's right to equal pay is dependent upon the existence of a job evaluation."
209. Id. at 123. The ECJ distinguished between "direct and overt discrimination" and "indirect and disguised discrimination." The former may be remedied through direct application of Article 119. The latter, which can be identified only by reference to "explicit implementing provisions of a Community or national character," was considered outside the scope of Article 119's direct effects. In O'Brien v. Sim-Chem, [1980] 2 All E.R. 307, 318, the Court of Appeal relied on this distinction to find that Directive 75/117 did not provide British citizens with a direct cause of action. The issue was avoided on appeal to the House of Lords [1980] 3 All E.R. 132. For a discussion of the complex question of the direct applicability of directions, see Steiner, Direct Applicability in EEC Law: A Chameleon Concept, 98 L.Q. Rev. 229 (1982).

If the Commission considers that a member state has failed to fulfill an obligation under this Treaty, it shall deliver a reasoned opinion on the matter after giving the state concerned the opportunity to submit its observations.

If the state concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice.

of equal value to men. In its defense the United Kingdom argued that Directive 75/117 does not explicitly require the use of job evaluations in measuring work of equal value and that in their absence the British "broadly similar" work requirement accomplishes the same purpose. The United Kingdom also contended that directives depend on implementation by national means and that a system of mandatory evaluations would be unduly burdensome.

The ECJ rejected Britain's interpretation of the directive and stated that job evaluations are not intended to be a prerequisite for equal value comparisons. Nor does the directive require all member states to conduct job comparisons by means of job evaluation methods. The directive only obligates them to provide "necessary measures" for allowing female workers to show that two different jobs are of equal value. After reviewing the different means by which eight member states have applied the directive's mandate, the Court rejected the contention that "equal value" comparisons are too vague and impractical to implement.

The decision of the ECJ comes at a time of increased criticism of the Equal Pay Act in Great Britain. Statistics released in the EOC's 1980 Annual Report demonstrated a drastic decline in equal pay claims. Commentators attribute this trend to the Act's shortcomings and to the impact of the economic depression upon female wages and employment. As a result, in 1981 the EOC proposed a series of amendments, as yet unenacted, which would extend the Act's coverage and ease the claimant's burden in establishing her case at the tribunal level. High on the EOC's list of changes is the incorporation of the EEC's principle of "equal pay for work of equal value." Where there is difficulty in assessing jobs of equal value, the EOC suggests referrals to the Central Arbitration Committee for determination. The EOC's proposal extends even further than the

218. [1982] I.C.R. at 595-96. The Commission noted the following methods of implementation: In Belgium, France, Italy, Luxembourg, and Germany, problems are generally resolved by work inspectors. If a wage dispute reaches the courts, they are not bound by the results of job evaluations. The Netherlands relies upon job evaluations to determine jobs of equal value. Under Irish legislation, which the Commission proposed as a model for Great Britain, disputes are referred to equality officers for investigation and recommendation. Such recommendations are not legally binding so ultimately the courts must decide matters referred to them.
219. See Cotterrell, supra note 14, at 471. In 1975, the first year of the Act's operation, 2,517 claims were referred to the ACAS for conciliation. Those claims dwindled to 1,024 in 1978, 241 in 1979 and 81 in 1980. Of 91 tribunal cases completed in 1980, only four claims were upheld. In 22 cases the claims were dismissed. The remaining cases were withdrawn by the applicant.
220. Id.; Newell, supra note 174, at 362; Equal Opportunities, supra note 23, at 642.
221. Equal Opportunities, supra note 23, at 643.
222. Id.; Sex Discrimination, supra note 23, at 126-27.
223. See supra notes 181 and 222.
European Court's interpretation of Article 119 in allowing a woman to compare her work with that of a hypothetical male counterpart to show that her wages have been intentionally depressed. While the ECJ is not empowered to enforce its recent decision with sanctions against the United Kingdom, the Court's ruling may increase the pressure on Parliament for legislative changes.

IV. CANADA: MANDATING EQUAL PAY FOR WORK OF EQUAL VALUE

Before passage of the Canadian Human Rights Act of 1977, female employees under federal jurisdiction were entitled to equal pay for "the same or similar work on jobs requiring the same or similar skill, effort, and responsibility." The narrowness of this comparative standard became the subject of considerable debate. Critics charged that existing laws were ineffective in penetrating low-wage female job ghettos and closing the earnings gap. As early as 1970, the Royal Commission on the Status of Women issued a report recommending that both federal and provincial laws incorporate the International Labour Organization's "work of equal value" standard.

This sentiment led to the formation of the National Action Committee on the Status of Women, an umbrella organization of women's associations which was instrumental in lobbying for the principle of "equal pay for work of equal value." The campaign met with success at the federal level: in 1977 Parliament enacted the Canadian Human Rights Act effective March 1, 1978. Section 11 of this far-reaching anti-discrimination law reads: "It is a discriminatory practice for an employer to establish or maintain differences in wages between male and female employees employed in the same establishment who are performing work of equal value."

As the U.S. Act does, the Canadian law prohibits an


225. EEC Treaty, supra note 26, art. 171: "If the Court of Justice finds that a Member State has failed to fulfill an obligation under this Treaty, the State shall be required to take the necessary measures to comply with the judgment of the Court of Justice."

Judgments by the ECJ are enforceable only within the narrow limits laid down by the Treaty. Its decisions are only directly enforceable under Article 192 when they impose a pecuniary obligation on persons rather than states. A judgment under Article 169 does not allow for the imposition of economic sanctions. The only remedy for noncompliance, apart from political sanctions, is further recourse to proceedings under Article 169. See A. Farry & J. Dinnage, EEC Law 118, 134 (1981).

226. Female Employees Equal Pay Act, CAN. REV. STAT., 1970-1971, ch. 50, § 14A: "No employer shall establish or maintain differences in wages between male and female employees, employed in the same industrial establishment, who are performing, under the same or similar working conditions, the same or similar work on jobs requiring the same or similar skill, effort, and responsibility."

227. 30 HOUSE OF COMM. DEB. 2985 (2d Sess.) (Feb. 11, 1977) (remarks by MP Aideen Nicholson); Marsden, supra note 20, at 249.

228. See Marsden, supra note 20, at 243.

229. Id. at 242.

employer from reducing wages to comply with the law's equal pay mandate.231

The Human Rights Act established the Canadian Human Rights Commission (CHRC) to administer and enforce its provisions.232 As the first step in the enforcement process, an individual files a complaint with the CHRC.233 The Commission itself may initiate the complaint when it has reasonable grounds to believe a discriminatory practice exists.234 In either case, all expenses of investigation and litigation are borne by the CHRC.235 The Commission then appoints investigators who are authorized to enter business premises to make inquiries or to order the production of documents relevant to the complaint.236 Upon receipt of the investigator's report, the Commission determines whether the complaint has been substantiated or whether it should be dismissed.237 The CHRC may then appoint a conciliator to assist the parties in reaching a settlement.238 The terms of any settlement must be referred to the CHRC for approval.239

At any stage of the complaint process, the Commission may appoint a human rights tribunal.240 The tribunal may require the attendance of witnesses and the production of documents, and may at its discretion admit evidence not admissible in a court of law.241 If the tribunal finds for the plaintiff, it may order reinstatement, back pay, and other appropriate compensation, including damages for emotional distress.242 Any order of a tribunal is made a binding order of the federal court simply by filing it in the registry of the court.243 A party may appeal the decisions of the human rights tribunal to a review tribunal and then through the federal court system.244

A. Job Evaluations

The jurisdiction of the CHRC is limited to employees of "core federal undertakings" including the federal government, Crown corporations, and certain transportation and communication industries.245 As of 1977, only 11.6 percent

231. Id. § 11(5).
232. Id. at § 21(1).
233. Id. at § 32(1).
234. Id. at § 32(3).
237. Id. at § 36.
238. Id. at § 37.
239. Id. at § 38(1)(2).
240. Id. at § 39. The Commission may appoint a tribunal at any stage during the complaint process. One to three panel members are selected from a list established by the Governor in Council and, once established, the panel acts independently of the Commission.
241. Id. at § 40(3).
242. Id. at § 41(2)(3).
243. Id. at § 43(2).
244. Id. at § 42.1; Annual Report 1981, supra note 235, at 21.
of the employed labor force fell under federal jurisdiction and were therefore subject to the Human Rights Act. The rest of the work force is subject to provincial equal pay laws.

While the Act's jurisdiction is narrow, its scope is broader than equal pay laws in either the United States or Great Britain. Section 11 is aimed at remedying wage discrimination resulting from job segregation. When an individual complains that she is receiving lower pay for the same work as a male, rather than claiming that her job category has been undervalued, her case is treated as a sex discrimination complaint under section 7 of the Act. Section 11 complaints arise when an employee alleges that her employer has systematically undervalued a predominantly female job classification.

The Act provides for assessing the value of work according to standard job evaluation criteria. The criterion to be applied is "the composite of the skill, effort, and responsibility required in the performance of the work and the conditions under which the work is performed." The CHRC has further defined each of these evaluation factors to reduce the degree to which "female" job characteristics may be undervalued.

Aware of the dangers of bias and subjectivity in existing job evaluation techniques, the CHRC faced the choice of implementing the Act through developing entirely new comparative methods or monitoring, improving, and correcting existing systems. The Commission chose to "use the system in effect in companies and to develop parameters for measuring and assessing these systems and the way they are used." It is still too early to determine whether the CHRC's "pragmatic approach" to job evaluations will be successful. By making use of existing job evaluation practices while seeking to reduce their discriminatory features, the Commission has been able to take immediate steps toward fulfilling the Act's promise of equal pay for work of equal value.

B. Market Defense in Canada

The CHRC has also addressed the issue of the labor market defense and its impact on job comparisons and pay differentials. The Commission takes into


246. Tarnopolsky, supra note 245, at 46-47. Of employed females, 10.2% are within federal jurisdiction.

247. See id. at 2 and supra note 11.


250. CANADIAN HUMAN RIGHTS COMMISSION, THINK RIGHTS! [hereinafter cited as Think Rights!] (Available from Canadian Human Rights Commission, 257 Slater Street, Ottawa, Ontario).

251. Id.


254. METHODOLOGY, supra note 20, at 5.
account regional economic disparities through its interpretation of the Act’s “establishment” requirement. However, it is the Commission’s position that “the value of a job must be defined in terms of the value to the employer of the work accomplished, but not solely on the basis of labour market conditions.”

Since job qualifications have historically reflected stereotyped sex roles, according to the CHRC, the lower demand for female labor and its lower market price cannot be considered neutral or objective measurements of a job’s worth.

The Human Rights Act allows for “reasonable factors” upon which an employer may base pay differentials between jobs of equal value. These factors, which the CHRC has defined in a manner similar to the defenses provided under American and British law, include different performance ratings, seniority, red circling rates, rehabilitation assignments, and temporary training. Amendments to the CHRC’s Equal Wages Guidelines in 1981 added two additional defenses: labor shortages in a particular job classification and changes in job content resulting in re-classification at a lower wage level.

To avoid the danger that these latter open-ended exemptions might swallow the equal pay rule, the Commission has imposed a heavy burden of proof on employers. All “reasonable factor” defenses must be applied “consistently and equitably.” Where an employer claims to be paying a group of women less than comparable men because of a labor shortage or change in job content, he must show that a third type of work of equal value — performed predominantly by men — is also being paid at the lower rate.

The CHRC favors conciliation and collective bargaining as the most effective means of enforcing the Act. Unions, as well as employers, are involved in the

255. Canadian Human Rights Commission, Equal Pay for Work of Equal Value: Interpretative Guide for Section 11 of the Canadian Human Rights Act 3 [hereinafter cited as Equal Pay for Work of Equal Value]. (Available from Canadian Human Rights Commission, 257 Slater Street, Ottawa, Ontario). An “establishment” for purposes of Section 11 encompasses all installations of an employer’s business within a municipality, metropolitan area, or county, whichever is largest, or such larger geographical limits as agreed to by employer and union.

256. Methodology, supra note 20, at 4.

257. Id.


259. See supra notes 55-56, 62 and accompanying text.

260. See supra notes 161-62 and accompanying text.


263. Factors in Wage Differentials, supra note 261, at para. 5197.


265. Id. at 1; Methodology, supra note 20, at 15; 30 House of Comm. Deb. 2986 (2d Sess.) (Feb. 11, 1977) (remarks of MP Nicholson). (“The bill’s emphasis on negotiation and settlement is best suited to the Canadian situation.”)

During 1981 the Commission ruled on 500 cases, 31% of which alleged sex discrimination. More than 400 of these cases were settled, dismissed or withdrawn. Sixty-six percent were dismissed, following investigation, 18% were settled, and 16% were either withdrawn or settled during investigation. See Annual Report 1981, supra note 235, at 20.
investigation and conciliation of complaints.\textsuperscript{266} Unions are also involved in the process of assessing job evaluations in order to implement the Act through collective bargaining.\textsuperscript{267}

C. Settlements in Equal Pay Cases

As a result of the CHRC's emphasis on conciliation, only one Section 11 complaint has reached a tribunal decision and that case was decided on jurisdictional grounds.\textsuperscript{268} The Commission has successfully reached settlements in a series of significant federal claims.\textsuperscript{269} In 1980 the Commission approved its first equal pay settlement awarding retroactive pay increases to nurses in federal penitentiaries who performed work equal in value to that of male hospital technicians.\textsuperscript{270} The technicians' job descriptions were more imposing, but investigation by CHRC comparing the descriptions to work actually performed found that the two job categories were substantially similar.\textsuperscript{271}

The Commission's first settlement of a complaint involving different types of work resulted in a $10,000 raise for a female nursing director who claimed her work was equal in value to that of higher-paid male directors.\textsuperscript{272} The evaluations of the directors' jobs by the Commission and the Treasury Board, the claimant's employer, established that her position as director of nursing was comparable to the higher-paid job of assistant director general. The CHRC concluded that this salary differential resulted from the fact that nursing is a predominantly female occupation.\textsuperscript{273} In addition to compensating the claimant, the Treasury Board agreed to review similar positions in other federal hospitals and make necessary adjustments.\textsuperscript{274} In both of these cases, the claimants had for years tried unsuccessfully to pursue their claims. Only the passage of the Human Rights Act secured their cause of action.\textsuperscript{275}

In December 1980 the CHRC approved a $2.3 million settlement between the Treasury Board and the Public Service Alliance which raised the wages of librarians, 66 percent of whom are women, to the same level as those of predom-
inantly male historical researchers.\textsuperscript{276} This complex case, brought by the librarians' union, involved more than 700 positions, eleven pay grades, two unions, and overlapping collective bargaining agreements.\textsuperscript{277} The CHRC conducted its investigation by evaluating sample positions at each pay level.\textsuperscript{278} The evaluations, based upon questionnaires and interviews, assigned points to each position on the basis of skill, effort, responsibility, and working conditions.\textsuperscript{279} The results demonstrated that librarians were being paid less for work of equal value.

In 1981 the CHRC appointed a tribunal to hear the equal pay claim of 3,000 female members of the federal government's General Services division.\textsuperscript{280} General Services workers were divided into seven subdivisions. The three lowest-paid categories — food, laundry, and personal services — were predominantly female. The Treasury Board conceded that all the jobs were of equal value but refused to equalize the wage rates.\textsuperscript{281} In turn, the CHRC refused to accept a settlement that would "dilute the principle of equal pay for work of equal value."\textsuperscript{282} The Board increased its settlement offer before the case reached a tribunal hearing. The accepted settlement established wage parity for women and for 1000 men within the predominantly female categories at a cost of approximately $17 million.\textsuperscript{283}

The Canadian Human Rights Act is young, largely untested, and narrow in jurisdiction.\textsuperscript{284} Despite these limitations, however, the Act provides welcome legislative recognition of the significant interrelationship between job segregation and wage discrimination and the remedial necessity of moving beyond an equal work standard.

V. THE UNITED STATES, GREAT BRITAIN, AND CANADA COMPARED

The United States, Great Britain, and Canada confront a common problem. Despite laws promising equality in pay and job opportunities, female workers in the three countries suffer from the combined effects of occupational segregation\textsuperscript{285} and wage discrimination.\textsuperscript{286} The legislative and judicial responses in the

\textsuperscript{276} Id. at 7.
\textsuperscript{277} Id.
\textsuperscript{278} Id. at 8.
\textsuperscript{279} Id.
\textsuperscript{280} Id. at 13.
\textsuperscript{281} Id.
\textsuperscript{282} Id. at 14.
\textsuperscript{283} Id. at 14-15.
\textsuperscript{284} See supra note 245.
\textsuperscript{285} For tables showing the occupational distribution of female workers in all three countries, see INTERNATIONAL LABOUR ORGANIZATION, YEARBOOK OF LABOUR STATISTICS, 1981, at 38-39 (Canada), 52 (U.S.), 84-85 (Great Britain). See also for the United States, PERSPECTIVES ON WORKING WOMEN, supra note 4, at 9 and for Canada: WOMEN'S BUREAU-LABOUR CANADA, 1978-79 WOMEN IN THE LABOUR FORCE 32-33 (1980).
\textsuperscript{286} See supra notes 12-16 and accompanying text.
countries examined show certain similarities as well as significant differences. In each country, a government agency has been established to administer equal pay and anti-discrimination laws. All are empowered to carry out investigations and to aid in, or initiate suits. The U.S. EEOC and Canadian CHRC also oversee conciliation efforts, while in Great Britain independent agencies are responsible for negotiating settlements in equal pay cases. The commissions generally perform similar functions, but are distinguished by their different emphases.

In recent years the U.S. EEOC has pursued Title VII violations largely through class action suits and conciliation agreements. Individual complainants face complex and time-consuming administrative prerequisites to filing suit under Title VII although the same exhaustion of administrative procedures is not required in suits under the Equal Pay Act. The British EOC, conceived of chiefly as an investigative agency, has been criticized for abandoning individual complainants and thereby contributing to the significant decline in Equal Pay Act complaints. The agency has been using its discretionary power to represent complainants in order to pursue a strategy of referring test cases to the ECJ. The Canadian CHRC, the youngest of the three agencies, enjoys the broadest powers, including the unique ability to appoint tribunals to hear human rights complaints. Due to the agency's emphasis upon conciliation, settlements have been reached thus far in almost all Section 11 complaints before the cases reached a tribunal hearing.

Significantly, the agencies charged with administering equal pay laws have often been the most outspoken critics of their limitations. In the United States, the EEOC changed its own administrative guidelines in 1972 so that Title VII wage complaints would no longer be restricted to an "equal pay for equal work" standard. The Commission has participated as amicus curiae in cases seeking

287. See supra notes 47, 69, 178-85, 232-44 and accompanying text.
288. See supra notes 69 and 238 and accompanying text.
289. See supra notes 181 and 185 and accompanying text.
291. See supra note 69.
293. See supra note 179 and accompanying text.
294. Jowell, supra note 177, at 171:
The individual complainant has little use for the Commission. Help may be forthcoming in complex or strategic cases, and some attempt at conciliation is provided in cases before industrial tribunals. By and large, however, the individual complainant is abandoned to the pursuit of his or her remedy through traditional legal channels.
295. See supra note 200 and accompanying text.
296. See supra notes 232-240 and accompanying text.
297. COMMISSION'S SUMMARY OF DECISIONS, supra note 269.
to demonstrate wage discrimination on the basis of comparable male and female work.\textsuperscript{299} While the EEOC has not taken a formal stand on the issue of comparable worth, it has held hearings addressing this subject\textsuperscript{300} and commissioned a study by the National Academy of Sciences concerning the potential use of job evaluations in wage discrimination suits.\textsuperscript{301} Recent appointees to the EEOC have, however, indicated their desire to curb the agency trend toward embracing comparable worth.\textsuperscript{302}

The British EOC is pressing for amendments to the Equal Pay Act which would ease the plaintiff's burden of proof, provide increased protection against indirect forms of wage discrimination, and, most important, adopt a uniform standard of equal pay for work of equal value.\textsuperscript{303} It is the Commission's position that "unless these Acts are strengthened . . . there is a real possibility of growing disenchantment with the relevance of legislation as such in eliminating sex discrimination and promoting equality of opportunity."\textsuperscript{304} In Canada, the educational role the CHRC has assumed in promoting equal pay for work of equal value may well have an impact upon more restrictive provincial equal pay laws.\textsuperscript{305}

The laws in all three countries limit job comparisons for purposes of wage complaints to work within the same business establishment or employment.\textsuperscript{306} No country's law would permit a "pure" comparable worth claim alleging pay discrimination based upon comparisons within the labor market at large. However, in Great Britain and Canada the establishment/employment requirement is more broadly defined than in the United States, allowing for comparisons within larger geographical regions and between affiliated employers.\textsuperscript{307}

A. U.S. Influence on Anti-Discrimination Law

"Equal work" under the U.S. Equal Pay Act\textsuperscript{308} and "like work" under the British Act\textsuperscript{309} are defined in the same manner. In the United States, the plaintiff

\textsuperscript{299} Id. at 178; Christensen v. Iowa, 563 F.2d 353 (8th Cir. 1977); I.U.E. v. Westinghouse, 631 F.2d 1094, 1095 (3rd Cir. 1980).

\textsuperscript{300} See Williams & McDowell, The Legal Framework, in Livernash, supra note 109, at 201 n.4.

\textsuperscript{301} EEOC HEARINGS, supra note 1.

\textsuperscript{302} See Treiman, supra note 37.

\textsuperscript{303} EEOC Chairman Thomas on Comparable Worth Policy, 111 LAB. REL. REP. (BNA) 101 (Oct. 11, 1982). Rules issued by the Office of Federal Contract Compliance Programs which had recognized comparable worth wage claims were withdrawn after President Reagan took office. COMPARABLE WORTH, supra note 21, at 24.

\textsuperscript{304} See Equal Opportunities, supra note 23, at 643.

\textsuperscript{305} See supra note 11.


\textsuperscript{307} Compare Proposed Equal Pay Act Guidelines, 46 Fed. Reg. 43,850 (1981) (to be codified at 29 C.F.R. § 1620.3 with supra notes 146, 155 and accompanying text (business establishments under the U.S. Act are defined more narrowly than in Great Britain or Canada).

\textsuperscript{308} 29 U.S.C. § 206(d) (1976).

\textsuperscript{309} Equal Pay Act, 1970, ch. 41, § 1(4).
must show that the jobs compared are substantially equal. A defendant-employer cannot evade its obligations by adding duties to male job descriptions which are rarely performed. In Great Britain, the U.S. guidelines have been influential in determining when job differences are of "practical importance" for the purpose of justifying different wage rates.

U.S. law has also influenced the development of British and EEC law by its treatment of indirect sex discrimination. In Griggs v. Duke Power, the U.S. Supreme Court held that a Title VII plaintiff need not establish discriminatory intent or treatment where a neutral employment practice, insufficiently related to job performance, can be shown to have an adverse impact on a protected class. The British Sex Discrimination Act incorporated the Griggs approach in its prohibition against indirect discrimination. While the same prohibition does not appear in either the Equal Pay Act or Article 119, both British courts and the ECJ have adopted the Griggs approach, holding that proof of discriminatory intent is not always a prima facie requirement.

The principle of the Griggs case is that requirements which operate in an indirectly discriminatory fashion have to be objectively justified as being required for some purpose other than a purpose linked to the sex of the person on whom the requirement is imposed. This again indicates that Section 1(3) [of the British Equal Pay Act] is not satisfied merely by the employer showing that he had no intention to discriminate.

310. See supra notes 40-49 and accompanying text.
311. See supra note 45 and accompanying text.
312. Shields, [1979], 1 All E.R. at 463-64. Lord Denning held that comparatively small differences in job content or mere differences in job description do not constitute differences of "practical importance" under the Act. He cited the U.S. case of Brennan v. Prince William Hospital, 503 F.2d 282 (4th Cir. 1974), in support of this proposition. He also cited Schultz v. American Can, 424 F.2d 356 (8th Cir. 1970), in ruling that differences in working hours do not justify differences in base pay under the Act. Lord Denning stated that American decisions are instructive in job comparisons because "it is apparent from internal evidence that the English legislation is based a good deal on the United States experience." Shields, [1979] 1 All E.R. at 462.
313. 401 U.S. 424 (1977). In Griggs, a case concerning racial discrimination, the Court held, "If an employment practice which operates to exclude Negroes cannot be shown to relate to job performance, the practice is prohibited." Id. at 446. The same standard has been applied in sex discrimination cases. See Dothard v. Rawlinson, 433 U.S. 321 (1977).
314. Sex Discrimination Act, 1975, ch. 65, § 1(1)(b); Nandy, supra note 180, at 145-46.
315. Jenkins, 1981 E. Comm. Ct. J. Rep. at 936 (1981) 2 Comm. Mkt. L. R. at 35 (Opinion of Advocate-General Warner); (1981) I.C.R. 715, 724-25 (E.A.T.). In Jenkins, the issue was a pay differential between full and part-time workers. The case was extremely significant because 90% of part-time workers in the European Community and 93% of the part-time workforce in the United Kingdom is female. 1981 E. Comm. Ct. J. Rep. at 930. British courts were bound by precedent to an earlier decision finding that part-time work constitutes a material difference defense. However, on referral to the ECJ, Advocate-General Warner, citing the common purpose shared by Title VII and Article 119, proposed that the Court adopt a Griggs approach. Id. at 936. The Court agreed and held that the disproportionate impact of this pay differential on women shifted the burden of proof to the employer to show an objective business reason for the differential. Id. at 925-26. On referral back to the E.A.T., the same decision was reached. (1981) ICR at 726.
The Canadian Human Rights Act includes a similar provision prohibiting indirect discrimination.\textsuperscript{317}

B. Comparison of Defenses

The general defenses available to an employer under each country's laws are also similar.\textsuperscript{318} Standard defenses include seniority, merit pay, differences in productivity, and red circle rates.\textsuperscript{319} A common source of controversy is the issue of market defenses to equal pay claims: whether an employer may pay a woman less than a man performing equal work or work of equal value because she can command less pay in the outside market. Legislative debates in the three countries reflected the inherent tension between enforcement of equal pay laws and fear of further government interference in the economy.\textsuperscript{320} In rejecting market defenses as "material differences" under their Equal Pay Act, British courts have sought support from American decisions interpreting the U.S. Act.\textsuperscript{321} However, a recent line of American cases accepting market defenses under both the Equal Pay Act and Title VII calls into question such reliance on U.S. precedents.\textsuperscript{322} The British position may be further undermined if the ECJ broadens its allowance for market defenses under Article 119.\textsuperscript{323} Article 119 has provided British workers with increased protection against wage discrimination through its "equal value" wage standard,\textsuperscript{324} but has not proven as restrictive as British law in treating market defenses.\textsuperscript{325}

The CHRC has adopted a position on this issue that aids complainants in exposing pretextual uses of the market defense.\textsuperscript{326} The Commission's view is that the historic undervaluation of female labor undermines the objectivity of market price as an accurate measurement of a job's worth.\textsuperscript{327} Therefore, when employers rely upon market factors, such as supply and demand, to defend pay differentials between comparable male and female workers, the CHRC requires them to show, where possible, that a third group of comparable workers, pre-

\textsuperscript{319} See supra note 318.
\textsuperscript{321} Clay Cross v. Fletcher, [1979] I All E.R. at 478, 480-81.
\textsuperscript{322} See Horner v. Mary Institute, 613 F.2d 706, 714 (8th Cir. 1980); Kouba v. Allstate Insurance, 30 Fair Emp. Prac. Cas. (BNA) 57, 59 (9th Cir. 1982); Christensen v. Iowa, 563 F.2d 353, 356 (8th Cir. 1977); Briggs v. Madison, 536 F. Supp. 435, 447 (W.D. Wisc. 1982).
\textsuperscript{323} See supra notes 172-74 and accompanying text.
\textsuperscript{324} See supra notes 199-218 and accompanying text.
\textsuperscript{325} See Wooldridge & Thomson, supra note 174, at 188-89.
\textsuperscript{326} METHODOLOGY, supra note 20, at 4.
\textsuperscript{327} Id.
dominantly male, is also being paid at the lower "female" rate.\textsuperscript{328} If defendants under the British and U.S. Acts carried the same burden of proof, plaintiffs would be provided with some protection against market defenses that perpetuate sex discrimination.

C. Differences in Equal Pay Standards

The U.S. and British laws have distinctly different standards of liability. U.S. law, historically a trend-setter in anti-discrimination legislation, provides the most limited protection against wage discrimination.\textsuperscript{329} At the same time, the earnings gap between men and women in the United States is the widest of the countries compared.\textsuperscript{330} The Gunther decision extended the reach of Title VII beyond equal pay for equal work.\textsuperscript{331} However, its holding was a narrow one which failed to resolve what prima facie evidence a plaintiff must present in order to establish a case of wage discrimination.\textsuperscript{332} Dicta in the case concerning theories of comparable worth may suggest that the Court is not favorably disposed toward such methods of proof.\textsuperscript{333} Certainly the record of lower court decisions, both before and after Gunther, indicates considerable resistance to comparable worth claims.\textsuperscript{334}

The state of British law is more contradictory. Women whose employers do not carry out job evaluations are in no better position than their U.S. counterparts. They must establish that they perform the same or similar work as a higher-paid male.\textsuperscript{335} In fact, their remedies under British law are even more restricted than in the United States where complainants may find broader relief under Title VII. But, where British employers carry out job evaluations, their employees may use the results to claim equal pay for work of equal value.\textsuperscript{336} This provides women with a remedy that extends beyond the combined protection of both U.S. acts.

A study undertaken by the British Department of Employment indicates that the section of the British law concerning job evaluations has had the greatest impact on businesses seeking to comply with the Equal Pay Act.\textsuperscript{337} The EOC and law review commentators argue that the Act can regain its effectiveness only by

\textsuperscript{328} See supra note 264 and accompanying text.
\textsuperscript{330} See supra notes 12, 13 and accompanying text.
\textsuperscript{331} See supra notes 84-94 and accompanying text.
\textsuperscript{332} See supra notes 91-94 and accompanying text.
\textsuperscript{333} Id.
\textsuperscript{334} See supra note 97 and accompanying text.
\textsuperscript{335} Equal Pay Act, as amended, 1970, ch. 41, § 1(4); see supra notes 153-154.
\textsuperscript{336} Equal Pay Act, as amended, 1970, ch. 41, § 1(5).
\textsuperscript{337} See, Implementing Equal Pay and Equal Opportunity Policy Inside Work Organizations, in Equal Employment Policy, supra note 20, at 272-73.
making the "equal value" standard obligatory for all employers.\textsuperscript{338} As the ECJ clearly indicated in its recent decision, only such legislative change will bring the Act into compliance with Article 119 of the EEC treaty.\textsuperscript{339}

British and American courts thus face a common challenge: whether their laws will recognize an "equal value" or comparable worth claim in the absence of an existing job evaluation that provides evidence of an employer's discriminatory intent. In both countries, courts generally will not commission job evaluations and agencies have not been empowered to do so. To a large extent this hesitation defers to legislative fears over interference with wage setting.\textsuperscript{340} It may also reflect a more generalized concern over the objectivity of job evaluations which have long been a source of contention in labor-management relations.\textsuperscript{341}

D. Canada's Alternative

While sensitive to the same problems, the Canadian federal government has taken a different course. Convinced that job segregation is the primary source of the male-female earnings gap, Parliament enacted the legal standard of equal pay for work of equal value.\textsuperscript{342} The CHRC uses existing job evaluations but is at the same time developing systems for reducing the subjectivity and bias built into these methods.\textsuperscript{343} The agency also monitors employers' job evaluations by involving unions in its investigations\textsuperscript{344} and by commissioning independent evaluations when necessary.\textsuperscript{345} British courts have also provided for checks upon job evaluations by ruling that a valid evaluation is one purged of discriminatory elements\textsuperscript{346} and agreed to by the plaintiff's union.\textsuperscript{347} Similarly, EEC Directive 75/117 requires that job evaluations be based upon the same criteria for both men and women and drawn up to exclude sexual bias.\textsuperscript{348} Administrative attention to discrimination in job evaluations will become increasingly important if equal pay for work of equal value becomes the law in Great Britain. Otherwise,

\begin{itemize}
\item \textsuperscript{338} See Newell, \textit{supra} note 174, at 643; Perrins, \textit{supra} note 20, at 1226; Bowers & Clarke, \textit{supra} note 20, at 304-05.
\item \textsuperscript{340} See \textit{supra} note 320.
\item \textsuperscript{341} See \textit{supra} notes 113-14 and accompanying text; Seear, \textit{supra} note 337, at 273.
\item \textsuperscript{343} See \textit{supra} notes 252-254 and accompanying text.
\item \textsuperscript{344} See \textit{Methodology}, \textit{supra} note 20, at 5.
\item \textsuperscript{345} See \textit{supra} notes 271-278 and accompanying text.
\item \textsuperscript{346} Eaton, (1977) I.R.C. at 277.
\item \textsuperscript{347} Arnold, (1982) I.C.R. at 751.
\item \textsuperscript{348} 18 O.J. EUR. COMM. (No. L 45) 19 (1975) (Council Directive).
\end{itemize}
unfair job evaluations may become an effective defense against wage discrimination claims.\textsuperscript{349}

Court or agency commissioned job evaluations, however, need not be the exclusive means for implementing a comparable worth standard. Where female workers are highly unionized,\textsuperscript{350} collective bargaining may provide an effective non-judicial remedy. In Sweden, where there are no equal pay laws, the earnings gap is among the lowest in the world.\textsuperscript{351} Progress in equalizing wages has been accomplished entirely through collective bargaining.\textsuperscript{352} Unions in the United States have also won important gains for their female members.\textsuperscript{353} Given increasing union support for the concept of comparable worth,\textsuperscript{354} the labor movement can play a key role in reducing wage discrimination through the bargaining process in the 1980s. In addition, decades of enforcement of sex and race discrimination laws have provided courts with experience in detecting and remediing employment discrimination without the assistance of formal job evaluations.

The means exist to ensure that U.S. wage discrimination laws serve their purpose. The issue is whether the legislatures and courts will move forward to fashioning a comparable worth remedy for the low earnings and job segregation that continue to plague the female workforce. The alternative is to remain within the rigid framework of “equal pay for equal work” and open the way to a market defense which could undermine the gains made, and those yet to be achieved.

VI. Conclusion

The passage of laws guaranteeing equal pay for equal work marked an important step forward in outlawing sex discrimination in employment. These laws are based upon a standard of individual fairness. A woman who performs the same work as a man is entitled to the same wage.

While still an effective remedy in individual cases, equal pay for equal work does not reach the broader social and historical problem of wage discrimination arising from job segregation. Equal pay for work of equal value or comparable worth is a standard better suited to remedying this international source of employment discrimination. The tools for implementing this standard are as yet


\textsuperscript{350} For statistics on female union membership, \textit{see Perspectives on Working Women}, supra note 4, at 94 (U.S.); Jain & Sloane, supra note 16, at 157-63 (Great Britain and Canada).


\textsuperscript{352} \textit{See supra} note 351.

\textsuperscript{353} \textit{See supra} note 115 and accompanying text.

imperfect. As the CHRC has realized, however, such tools will not be improved until the law sanctions comparisons between different jobs of equal value.

Implementing equal pay for work of equal value will prove a difficult challenge to courts, administrative agencies, employers, and unions. The same has been true for all employment discrimination laws that uproot traditional economic relationships. If the law were to retreat before such challenges, treating the existing labor market as sacrosanct, it would deprive victims of discrimination of equal opportunity where it counts the most — in earning one's livelihood.

Comparable worth is not an untested radical concept. During World War II, the U.S. War Labor Board, recognizing the common ground that exists between equal work and equal value wage standards, implemented both policies:

Actually, the slogan of equal pay for equal work, though generally applied in the past to the situation of women working on men's jobs, is based on the conviction that women ought not to be discriminated against on account of their sex, and this same conviction underlies the proposition that there should be no discrimination where two jobs, one performed customarily by women and the other by men, have the same content.355

The same understanding underlies laws providing equal pay for work of equal value in Canada, Great Britain, and the European Economic Community today. The United States can benefit from their experience in designing laws that incorporate this standard, whether by amendment to the Equal Pay Act or by extending the scope of Title VII. It is time that the United States, once an innovator in the field of employment discrimination, joins these countries in moving beyond equal pay for equal work.

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