Vanderbilt Journal of Transnational Law

Volume 21
Issue 4 *Issue 4 - 1988*

Article 1

1988

Equal Pay Acts: A Survey of Experience Under the British and American Statutes

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Vanderbilt Journal of Transnational Law

VOLUME 21 1988 NUMBER 4

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I. INTRODUCTION

A. *Scope of the Survey*

The United States Congress passed the Equal Pay Act[1] in 1963 as an amendment to the Fair Labor Standards Act. Its British parallel, the Equal Pay Act 1970[2], took effect at the very end of 1975 and was much amended by the Sex Discrimination Act 1975.[3] The five year delay between enactment and enforcement provided time for employers and labor unions to adjust to the new requirements. The drafters of the British statute were aware of the United States statute, and United States cases interpreting that act were relied on quite early in United Kingdom litigation.[4] Now that the British statute has a decade of interpretation be-

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

2. 1970, ch. 41.

3. 1975, ch. 65, §§ 4, 8, 10, 53, 64, 71, 73, 77 & Sched. 1. The Equal Pay Act 1970 was further amended in 1983 by the Equal Pay (Amendment) Regulations, S.I. 1983, No. 1794. For a discussion of the history of the Act and its amendments, see B. HEPPLE, EQUAL PAY AND THE INDUSTRIAL TRIBUNALS at 1-3 (1984).

4. *See, e.g.*, E. Coomes (Holdings) Ltd. v. Shields, 7 INDUSTRIAL RELATIONS LAW REPORTS 263, 265 (C.A. 1978) [hereinafter I.R.L.R.] ("But it is apparent from internal evidence that the English legislation is based a good deal upon United States' experience"). In another opinion in the same case, Lord Justice Bridge cites a Third Circuit

hind it, a sufficient body of data permits a meaningful comparison of the experience under these two statutes.

This Article concentrates on the doctrinal development concerning conditions of employer liability and employer defenses under both the British and American interpretations of equal pay. The influence of Common Market law and other aspects of the environments in which these laws operate will emerge in that discussion. Since the European Community law structure will be unfamiliar to some readers, a brief overview is set out as the next portion of this introduction; it is compared in broad terms to the American federal structure. Because the "equal value" sections of the British law have thus far received only sketchy interpretation, that law is discussed in a separate section, following those dealing with comparisons between the United States statute and the pre-1984 British act.

B. *Fundamental Differences between the British and American Statutes*

Because this Article will analyze the respective interpretations of the British and American equal pay statutes, the more obvious differences between the two must be clearly delineated at the outset. These differences are:

(1) The British law sets out three circumstances in which a remedy is required: like work, work rated as equal, and—since the end of 1983—work of equal value. United States law lists only one: equal work;
(2) The defenses available to employers under the British law are based—in the case of like work and of work rated as equal—on proof of a difference between "his case and hers," the so-called "personal equation." The United States statute does not restrict defenses to that equation.[5]
(3) The British Equal Pay Act and Sex Discrimination Act[6] have been drafted so as to be mutually exclusive and complementary.[7] The United States Equal Pay Act and Title VII of the Civil Rights Act of 1964[8] over-

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opinion. *Id.* at 269. The same familiarity with United States precedent and with its arguable relevance is evident in other antidiscrimination statutes. *See, e.g.,* Meeks v. National Union of Agricultural & Allied Workers, 5 I.R.L.R. 198, 201 (Indus. Trib. 1976) (Sex Discrimination Act 1975; three United States cases cited).

5. The "equal value" section of the British statute likewise does not restrict defenses to the "personal equation."

6. *See, e.g.,* Sex Discrimination Act, 1975, ch. 65, §§ 6(5), 6(6).

7. This does not mean the "fit" between the two is a neat one. For a summary of major points of interaction between the two, see B. HEPPLE, *supra* note 3, at 7-8.

8. 42 U.S.C. § 2000e (1982). Title VII prohibits employment discrimination on the basis of "race, color, religion, sex, or national origin . . . ." *Id.* § 2000e-2(a).

lap substantially.

(4) The British statutes are set in a context of European Common Market law, including article 119 of the Treaty of Rome[9] (requiring equal pay for equal work) and two directives of the Council of Europe, one concerning equal pay,[10] and the other equal treatment.[11] The United States statute is interpreted and applied in the context of a written national constitution.

(5) The British law operates by revising the terms of the applicant's individual contract of employment and contemplates individual enforcement through breach of contract actions in the industrial tribunals. The United States law makes failure to meet the equal pay standard a statutory tort, and provides for either private enforcement (through an individual or a class action) or government agency enforcement.

C. *Structure of European Community Law Applicable to the United Kingdom*

The basic organic document of the European Community (Community) is the Treaty of Rome. The United Kingdom acceded to its provisions by enacting the European Communities Act 1972.[12] That statute provides that any domestic legislation passed in the United Kingdom is subject both to the European Communities Act and to the principle that Community law is supreme, such that it "take[s] priority over anything in our English statute on equal pay . . . ."[13] Most provisions of the Treaty of Rome concern relations among the constituent states, or with

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9. Treaty Establishing the European Economic Community, Nov. 25, 1957, art. 119, 298 U.N.T.S. 11 [hereinafter Treaty of Rome]. Article 119 provides:

Each Member State shall in the course of the first stage ensure and subsequently maintain the application of the principle of equal remuneration for equal work as between men and women workers.

For the purpose of this Article, remuneration shall mean the ordinary basic or minimum wage or salary and any additional emoluments whatsoever payable, directly or indirectly, whether in cash or in kind, by the employer to the worker and arising out of the worker's employment.

Equal remuneration without discrimination based on sex means:

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

(*b*) that remuneration for work at time rates shall be the same for the same job.

Id.

10. Council Directive 75/117 of Feb. 10, 1975, 18 O. J. Eur. Comm. (No. L 45) 19 (1975) [hereinafter Council Directive 75/117].

11. Council Directive 76/207 of Feb. 9, 1976, 19 O.J. Eur. Comm. (No. L 39) 40 (1976).

12. 1972, ch. 68.

13. Macarthys Ltd. v. Smith, 9 I.R.L.R. 209, 210 (C.A. 1980).

the administrative structure of the Community. Article 119, the equal pay provision, is one of the few provisions that has been held to give rise to individual rights that can be asserted in the domestic courts of the member nations of the Community.[14] Thus, in *Worringham v. Lloyds Bank Ltd.*,[15] article 119 provided the legal basis upon which an employer was required to adjust the gross pay of female employees below the age of twenty-five so as to make it equal to that of men. The inequality resulted from differences in pension schemes for men and women under twenty-five, an inequality permitted under United Kingdom regulations.[16]

Article 119 applies only to overt direct pay discrimination "which may be identified solely with the aid of the criteria of equal work and equal pay referred to by the Article in question, without national or Community measures being required to define them with greater precision in order to permit of their application."[17] The European Court of Justice (ECJ) accordingly rejected an attempt to use article 119 as grounds for attacking indirect discrimination through a disparate impact approach in *Jenkins v. Kingsgate (Clothing Productions) Ltd.*[18] A more recent ECJ decision, *Bilka-Kaufhaus v. Weber von Hartz*[19], however, indicates that the court may now be receptive to a disparate impact argument.

Article 189 of the Treaty of Rome[20] provides for legislative decrees known as Community Directives, which require the constituent states of the Community to implement the principles of the Treaty in more or less specific ways. An individual in national courts may rely on an obligation imposed by a Directive against the state as employer, but only if the Directive is sufficiently precise and unconditional.[21] In *Pickstone v. Freemans PLC*,[22] an action involving a private employer, the British Court of Appeal struck down a limitation on entitlement to equal pay included

14. *See* Defrenne v. Société Anonyme Belge de Navigation Aérienne Sabena, 1976 Eur. Comm. Ct. Just. Rep. 455.

15. 10 I.R.L.R. 178 (Eur. Ct. Just. 1981).

16. Sex Discrimination Act, 1975, ch. 65, § 6(4).

17. *Worringham*, 10 I.R.L.R. at 187.

18. 10 I.R.L.R. 228 (Eur. Ct. Just. 1981). On remand, however, the Employment Appeal Tribunal (EAT) utilized something of a disparate impact approach under the United Kingdom statute. *See* Jenkins v. Kingsgate (Clothing Productions) Ltd., 10 I.R.L.R. 388 (Emp. App. Trib. 1981).

19. 15 I.R.L.R. 317 (Eur. Ct. Just. 1986).

20. Treaty of Rome, *supra* note 9, art. 189.

21. *See, e.g.*, Marshall v. Southampton and South-West Hampshire Area Health Authority, 15 I.R.L.R. 140 (Eur. Ct. Just. 1986).

22. 16 I.R.L.R. 218 (C.A. 1987), *aff'd*, 17 I.R.L.R. 357 (H.L. 1988).

in the 1983 amendments to the Equal Pay Act on the ground that the limitation is inconsistent with a Community Directive. The House of Lords avoided that issue on review, but reached the same outcome by applying a principle it had announced shortly before in *Duke v. GEC Reliance*:[23] legislation enacted in order to fulfill the purpose of a Community Directive is to be interpreted by the British courts to accomplish that purpose.[24]

The United States Constitution forbids direct,[25] but not indirect,[26] gender discrimination. Moreover, both the United States Constitution[27] and article 119[28] confer directly enforceable rights on individuals only as against the federal or state governments. United States federal legislation, however, can and does provide rights against both private individuals and governmental entities as employers.[29]

II. CONDITIONS OF LIABILITY PRIOR TO THE 1983 BRITISH AMENDMENTS

A. *"Like Work"—"Equal Work"*

The principal provisions defining conditions of liability for "like work" in the United Kingdom and "equal work" in the United States read very differently:

UNITED STATES EQUAL PAY ACT	UNITED KINGDOM EQUAL PAY ACT
No employer . . . shall discriminate, within any establishment in which	Section 1. (1) If the terms of a contract under which a woman is employed at an establish-

23. 17 I.R.L.R. 118 (H.L. 1988).

24. 17 I.R.L.R. at 363-64 (Lord Templeman); *see id.* at 359 (Lord Keith of Kinkel).

25. Miss. Univ. for Women v. Hogan, 480 U.S. 718 (1982) (exclusion of male from nursing education program at campus most convenient to him unlawful under equal protection clause of fourteenth amendment; state failed to show an "exceedingly persuasive justification" for this classification).

26. Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256 (1979) (veteran's preference in state employment practice not unlawful under equal protection clause, despite adverse impact on women; facially gender-neutral classification did not reflect covert purpose to discriminate).

27. U.S. CONST., amend. V ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .") (federal government); amend. XIV, § 1 ("nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws") (state government).

28. Treaty of Rome, *supra* note 9, art. 119.

29. United States v. Darby, 312 U.S. 100 (1941); Garcia v. San Antonio Metro. Transit Auth., 469 U.S 528 (1985).

such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex. *Provided*, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.[30]

ment in Great Britain do not include (directly or by reference to a collective agreement or otherwise) an equality clause they shall be deemed to include one.

(2) An equality clause is a provision which relates to terms (whether concerned with pay or not) of a contract under which a woman is employed (the "woman's contract"), and has the effect that—

(*a*) where the woman is employed on like work with a man in the same employment—

(i) if (apart from the equality clause) any term of the woman's contract is or becomes less favourable to the woman than a term of a similar kind in the contract under which that man is employed, that term of the woman's contract shall be treated as so modified as not to be less favourable, and

(ii) if (apart from the equality clause) at any time the woman's contract does not include a term corresponding to a term benefiting that man included in the contract under which he is employed, the woman's contract shall be treated as including such a term;

[Subsection (*b*) ("work rated as equivalent") is reproduced below at note 72. Subsection (*c*) ("work of equal value") is reproduced below in the text accompanying note 263.] . . . .

(3) An equality clause shall not operate in relation to a variation between the woman's contract and the man's contract if the employer proves that the variation is genuinely due to a material factor which is not the difference of sex and that factor—

(*a*) in the case of an equality clause falling within subsection 2(*a*) or (*b*) above, must be a material difference between the woman's case and the man's; and

(*b*) in the case of an equality clause falling within subsection 2(*c*) above, may be such a material difference.[31]

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30. 29 U.S.C. § 206(d) (1982).

31. Equal Pay Act, 1970, ch. 41, *as amended* by Sex Discrimination Act, 1975, ch. 65, and Equal Pay (Amendment) Regulations, S.I. 1983, No. 1974. The text of the Equal Pay (Amendments) Regulations is reprinted in HALSBURY'S STATUTES OF ENGLAND 12/23 (3d ed. Cum. Supp. I 1985) [hereinafter HALSBURY'S STATUTES]. The text of the Equal Pay Act 1970 as amended by the Sex Discrimination Act and the 1983 Regulations can be found in B. HEPPLE, *supra* note 3, at 15-31.

The use of the term "equal work," without further definition, might have led to a requirement that each United States plaintiff demonstrate virtual identity between her job and that of one or more higher paid men. Indeed, a few decisions have hinted at such an interpretation.[32] The dominant interpretation, however, is very closely akin to the definition of "like work" in the United Kingdom act. Summarizing this development in *Thompson v. Sawyer*,[33] Judge Mikva observed: "In applying the term 'equal work,' courts have been led by the legislative history toward a 'substantially equal' test, a middle course between a requirement that the jobs in question be 'exactly alike' and a requirement that they be merely 'comparable.' "[34] The similarity between the general concepts of "like work" and "equal work" is thus very great. This similarity has manifested itself in case law developments: there are few, if any, major British "like work" cases without a United States counterpart.

Despite the doctrinal similarity between "like work" and "equal work" case law developments, significant casehandling differences exist. The individual-to-individual comparisons typical under the British act contrast sharply with the group comparisons that are more often appropriate in the United States. The British statute speaks to the situation of "a woman" whose contract of employment is to be compared to the contract of "a man." If a term in "the woman's contract is . . . less favourable than a term of a similar kind in the contract under which that man is employed" then her contract must be modified.[35] Under section 6(c) of the Interpretation Act 1978,[36] she may name more than one comparator.[37] Thus, the choice of an appropriate comparator or comparators is critical—and the applicant, not the tribunal, makes this choice.[38] This

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32. *See, e.g.*, Brennan v. Inglewood, Inc., 412 F. Supp. 362, 365 (S.D. Miss. 1975).

33. 678 F.2d 257 (D.C. Cir. 1982).

34. *Id.* at 271-72 (footnote omitted). Judge Mikva also stressed the limiting effect of compromise in interpreting the Equal Pay Act. He stated:

> Like most legislation, the Equal Pay Act of 1963 was a compromise. Congress for several years had considered competing versions of what ultimately became the Act. Some versions sought to prohibit unequal pay for *comparable* work; this approach had been used during World War II by the National War Labor Board. Other versions sought only to prohibit unequal pay for *equal* work. . . .
>
> Although passing the more limited statute, Congress recognized the disputatious nature of the term "equality." Sponsors of more extensive versions of the bill were careful to emphasize that "equality" did not mean "identity."

Id. at 271 (citation omitted) (emphasis in original).

35. Equal Pay Act, 1970, ch. 41, § 1(a)(2)(i).

36. 1978, ch. 30, § 6(c).

37. *Id.*

38. Ainsworth v. Glass Tubes & Components Ltd., 6 I.R.L.R. 74 (Emp. App. Trib.

highly individualized approach is consistent with the other types of cases entrusted to the industrial tribunal system, all of which originate with an application for relief for a particular person.[39] Consolidation of cases is permitted,[40] but class actions are not. Nevertheless, both parties may recognize that a decision in one applicant's case may in fact be determinative for other employees, and groups may apply for relief at the same time.[41]

The United States statute, in contrast, forbids an employer from "paying wages to employees . . . at a rate less than the rate at which he pays wages to employees of the opposite sex . . . ."[42] Clearly this is more group oriented language. The United States law also contemplates class actions[43] and actions by the Equal Employment Opportunity Commission (EEOC) on behalf of groups.[44] A United States Equal Pay Act case, like those in the United Kingdom, may therefore involve a claim by individual *A* that she should be paid at the same rate as *B*. An action may similarly seek relief for a group of women (not all of whom are paid the same rate) on the basis of comparison with a group of men (not all of whom are paid the same rate). This means that a United States court may be required to sort through an additional set of issues concerning aptness of comparisons that a United Kingdom tribunal panel will rarely face.

A useful example is *Brennan v. Sears, Roebuck & Co.*,[45] an action brought by the Secretary of Labor seeking the following: (1) damages for

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1976).

39. Industrial Tribunals (Rules of Procedure) Regulations, S.I. 1985, No. 16, sched. 1, rule 1, *reprinted in* [2 Additional Texts] Halsbury's Statutory Instruments (Butterworth's) at 2353, 2356 (Jan. 9, 1985) [hereinafter IT Rule].

40. IT Rule 15, *reprinted in* Halsbury's Statutory Instruments, *supra* note 39, at 2364.

41. *See, e.g.*, Neil v. Ford Motor Co., 13 I.R.L.R. 339 (Indus. Trib. 1984); Farthing v. Ministry of Defense, 9 I.R.L.R. 402 (C.A. 1980). Successful United Kingdom claimants report feeling substantial pride in having aided the situation of other women in their workplaces. *See* A. LEONARD, PYRRHIC VICTORIES: WINNING SEX DISCRIMINATION AND EQUAL PAY CASES IN THE INDUSTRIAL TRIBUNALS 1980-84, at 39-40 (1987).

42. 29 U.S.C. § 206(d)(1) (1982).

43. *Id.* § 216(b).

44. *Id.* § 216(c). The Secretary of Labor originally brought actions for group applicants under the Act. A later statute transferring enforcement power to the EEOC was held in part unconstitutional and led to inconsistent decisions. *Compare* EEOC v. Delaware Dept. of Health and Social Services, 595 F. Supp. 568 (D. Del. 1984) *with* EEOC v. Martin Indus., Inc., 581 F. Supp. 1029 (D. Ala. 1984), *appeal dismissed*, 469 U.S. 806 (1985). Congress, however, ratified the transfer of enforcement power soon after the two cited decisions. *See* Act of Oct. 19, 1984, Pub. L. No. 98-532, 98 Stat. 2705.

45. 410 F. Supp. 84 (N.D. Iowa 1976).

female division managers and salespersons at one Sears store from April 30, 1968, to the date of trial (July 1974); and (2) an injunction that would prohibit equal pay violations at all 900 Sears stores. The Secretary submitted proof with respect to six female division managers, eight male division managers, thirteen female salespersons, and eight male salespersons. The Secretary prevailed on liability for damages, but only after the court eliminated two male division managers and two male salespersons as comparators. Three of these performed extra duties not engaged in by any of the women; the other was engaged in out-of-store sales, an activity the court decided was significantly different from in-store work. Finally, the salary of one male salesperson was out of line with those of all others, both male and female.[46] The court's treatment is interesting:

> It is the Court's conclusion, however, that Hewitt's salary of $125.00 per week in 1970 was so out of line with the salaries of *both* men and women salespeople that it cannot be described as sex-based. Only two other counterpart salesmen were working contemporaneously with Hewitt, and neither one, Brown or Christians, was paid over $100.00 per week. While the reasons for this preferential treatment regarding Hewitt are somewhat unclear, the Court is convinced that they were not sex based. Accordingly, plaintiff's attempt to challenge the post-1972 salaries of Sears' saleswomen for the reason that they fall below Clyde Hewitt's unexplained prior high earnings must fail.[47]

This approach may be criticized because it takes the difference complained of as its own justification. Since the statute is written in group terms, however, the court's decision to consider the appropriateness of the grouping of comparators is clearly correct.

The British statute is not as group oriented, yet much the same attitude can be found in one relatively early United Kingdom case, *Dance v. Dorothy Perkins Ltd.*[48] In *Dance*, the comparator was found to be "an anomaly," and the Employment Appeal Tribunal (EAT) volunteered the comment that "in a case such as this the choice of one man ought to be examined in the context that he is a representative of a group."[49] The comment seems inconsistent with the EAT's usual position that the choice of comparator, whether wise or not, is strictly the applicant's; it was in fact later disapproved.[50] Demonstrating that a wage differential is

46. *Id.* at 99.
47. *Id.* (emphasis in original).
48. [1978] Indus. Case Rep. 760 (Emp. App. Trib.).
49. *Id.* at 764.
50. *See, e.g.*, Ainsworth v. Glass Tubes & Components Ltd., 6 I.R.L.R. 74 (Emp.

an anomaly, rather than sex-based, is a matter for the employer to prove.[51] When an applicant in the United Kingdom names multiple comparators, not all of whom are paid at the same rate, a tribunal must determine which is the most nearly similar in situation to the applicant.[52]

One should not, however, overstress the group orientation of the United States legislation. The successful plaintiff groups have been narrowly defined. Groups involving diverse job classifications must rely on Title VII, and they have not fared well.[53] The *Sears, Roebuck* litigation discussed above is instructive: damages were awarded to several individual female sales clerks. Injunctive relief was denied, however, on the ground that after the discrimination complained of, but prior to the conclusion of the case, the defendant had adopted a new pay plan as well as a general affirmative action plan designed to undo the effects of prior misconduct.[54]

Courts in both countries have considered whether a comparison can be made between persons who did not work for the defendant employer at the same time. In each country the answer has been "yes," in the United Kingdom perhaps in consequence of the obligation to apply Community law.[55] In *Clymore v. Far-Mar-Co.*,[56] for example, the plaintiff sought to have her pay compared to that of two non-immediate predecessors and an immediate successor. The court found that the successor was not an apt comparator because new responsibilities were added when plaintiff left.[57] The two non-immediate predecessors were found in some ways more apt comparators than the immediate predecessor because they shared with her certain characteristics of experience that her immediate predecessor did not share.[58]

The essence of the comparison to be made is to decide whether the demands made by the jobs are alike, for in each statute the starting pre-

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App. Trib. 1976); Thomas v. National Coal Bd., 16 I.R.L.R. 45 (Emp. App. Trib. 1987).

51. *See* R. HARVEY, INDUSTRIAL RELATIONS AND EMPLOYMENT LAW pt. I (1978).

52. *See* Buckland v. Dowty Rotol Ltd., 5 I.R.L.R. 162 (Indus. Trib. 1976).

53. *See infra* notes 214-26 and accompanying text (discussing decisions by the Seventh and Ninth Circuits).

54. Usery v. Sears, Roebuck & Co., 421 F. Supp. 411 (N.D. Iowa 1976).

55. *See* Macarthys Ltd. v. Smith, 7 I.R.L.R. 10 (Emp. App. Trib. 1977), *referred to Eur. Ct. Just.*, 8 I.R.L.R. 316 (C.A. 1979), *remanded to C.A.*, 9 I.R.L.R. 210 (Eur. Ct. Just. 1980), *on remand*, 9 I.R.L.R. 209 (C.A. 1980).

56. 709 F.2d 499 (8th Cir. 1983), *on remand*, 576 F. Supp. 1161 (W.D. Mo. 1984).

57. *Id.* at 504-05.

58. *Id.* at 502.

mise is that these demands determine "value." Differences in job content in both countries are typically analyzed in terms of four categories: Effort, skill, responsibility, and working conditions.

Significant differences in the effort required by two jobs will preclude a finding of "like" or "equal" work. A job that includes frequent heavy lifting is different from a job that does not, though occasional lifting of moderately heavy loads will not differentiate basically similar jobs from one another.[59] Much the same is true of mental effort; a need to perform routine pocket-calculator style computations will not set off one job from another.[60] Apart from the type of effort involved, the courts also consider the amount and intensity of the work, although this may be of less importance in the United Kingdom than in the United States.[61]

That a particular job utilizes an extra skill is usually easy enough to determine.[62] Determining the relative importance of the skill is more difficult. The panel that decided *Dorman v. Hadrian Plastics Ltd.*[63] used an interesting approach:

> The Tribunal consider[s] a fair test would be whether if all the men were to leave and were to be replaced by women of similar capabilities as those of [applicant], could the firm carry on substantially in the same manner as before? They consider it could not do so and that therefore this application must fail.[64]

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59. *Compare* Dugdale v. Kraft Foods Ltd., 5 I.R.L.R. 204 (Indus. Trib. 1976), *rev'd on other grounds*, 5 I.R.L.R. 368 (Emp. App. Trib. 1976), *on remand*, 6 I.R.L.R. 160 (Indus. Trib. 1977) (occasional lifting of thirty to thirty-five pounds by comparator; jobs "like") and Brennan v. Prince William Hosp. Corp., 503 F.2d 282 (4th Cir. 1974) (occasional lifting of patients by comparator, often with assistance; jobs "equal") *with* Walker v. Columbia Univ., 407 F. Supp. 1370 (S.D.N.Y. 1976) (male "heavy cleaners" regularly expended more physical effort than female "light cleaners"; jobs not "equal") and Dorman v. Hadrian Plastics Ltd., 5 L.R.L.R. 207 (Indus. Trib. 1976) (inability to handle heavy objects one of several factors differentiating applicant's job from comparator's).

60. Buckland v. Dowty Rotol Ltd., 5 I.R.L.R. 162 (Indus. Trib. 1976); Brennan v. J.M. Fields, Inc., 488 F.2d 443 (5th Cir. 1973), *cert. denied*, 419 U.S. 881 (1974).

61. *Compare* Usery v. Richman, 558 F.2d 1318 (8th Cir. 1977) (cafe cooks; male took the "heavy shift"; jobs not "equal") *with* Capper Pass Ltd. v. Lawton, 5 I.R.L.R. 366 (Emp. App. Trib. 1976) (male canteen chefs preparing 350 meals a day in six sittings in "like work" with woman preparing lunch for 10 to 20 persons a day).

62. One must rely, however, on the actual tasks involved; courts will not base decisions solely on job descriptions. *See* Hutchinson v. Electrolux Ltd., 5 I.R.L.R. 289 (Indus. Trib. 1976) (obligations to perform certain additional duties spelled out in men's contracts, but performance not shown); Brennan v. Prince William Hosp. Corp., 503 F.2d 282 (4th Cir. 1974), *cert. denied*, 420 U.S. 972 (1975).

63. 5 I.R.L.R. 207 (Indus. Trib. 1976).

64. *Id.* at 208.

That approach, however, is helpful only in a range of cases in which practical alternative means of doing things can be assessed with confidence. That a skill is essential does not necessarily mean that it is of great market value; that it is not essential does not mean that the skill is not desirable. A law school without a faculty member able to teach comparative labor law is not going to close its doors; expertise in the field would nonetheless be a good selling point for a faculty prospect at some institutions. Relevance, as well as necessity, is thus a proper criterion. The frequency with which the skill is to be exercised is likewise important.[65] Finally, one must consider the ease with which the skill can be acquired; a skill that can be learned in a day can hardly justify a substantial pay differential.

Responsibility is a many-sided concept. Three aspects often arise in equal pay litigation: Responsibility for safeguarding the employer's assets,[66] responsibility for supervising other workers,[67] and responsibility for decisions influencing the operation of the enterprise.[68] Important considerations in this respect include the regularity with which the responsibility is assumed[69] and the potential impact of failing to discharge the responsibility properly.[70] Finally, differences in working conditions are treated at times as matters of job content, and at other times as matters of affirmative employer defense.[71]

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65. *See* Peltier v. City of Fargo, 533 F.2d 374 (8th Cir. 1976) (plaintiffs' male predecessors rarely used skills acquired in extra training given them); Shields v. E. Coomes (Holdings) Ltd., 6 I.R.L.R. 131 (Emp. App. Trib. 1977), *aff'd*, 7 I.R.L.R. (C.A. 1978) (male counter clerks never performed the allegedly important function of handling unruly customers).

66. *See, e.g.*, Maidment v. Cooper & Co., 7 I.R.L.R. 462 (Emp. App. Trib. 1978) (packer/storeman distinguished from packer/clerk because of different responsibility); Brennan v. Victoria Bank and Trust Co., 493 F.2d 896 (5th Cir. 1974) (exchange teller a post with special responsibility for protecting employer's cash).

67. *See, e.g.*, Orahood v. Board of Trustees of the Univ. of Ark., 645 F.2d 651 (8th Cir. 1981)(comparator supervised more persons than did plaintiff; appropriate factor in job audit).

68. *See, e.g.*, Capper Pass Ltd. v. Allan, [1980] Indus. Case Rep. 194 (Emp. App. Trib. 1979) (stock control); Peskett v. Robinsons (Woking) Ltd., 5 I.R.L.R. 134 (Indus. Trib. 1976) (inventory decisions).

69. *See, e.g.*, Sharp v. Mogil Motors (Stirling) Ltd., 5 I.R.L.R. 132, 134 (Indus. Trib. 1976) ("four or five weeks in the year").

70. *See, e.g.*, Peskett v. Robinsons (Woking) Ltd., 5 I.R.L.R. 134 (Indus. Trib. 1976) (applicant and comparator both buyers, but comparator's department larger and more important).

71. *See infra* text accompanying notes 169-80.

B. *"Work Rated as Equivalent"*

Neither the United States statute nor the British statute imposes an obligation on an employer to perform a job evaluation study. Once such a study has been undertaken, however, the British statute comes into play explicitly. Section 1(5) of the Equal Pay Act provides:

> A woman is to be regarded as employed on work rated equivalent with that of any men if, but only if, her job and their job have been given an equal value, in terms of demand made on a worker under various headings (for instance effort, skill, decision), on a study undertaken with a view to evaluating in those terms the jobs to be done by all or any of the employees in an undertaking or group of undertakings, or would have been given an equal value but for the evaluation being made on a system setting different values for men and women on the same demand under any heading.[72]

The United States Equal Pay Act includes no equivalent provision. Nevertheless, job evaluation studies have been involved in United States equal pay litigation when asserted as a defense that resulting different job rankings accounted for variation in pay.[73] In recent years, plaintiffs have also sought to use the results of such studies in Title VII litigation.[74]

What is "a study undertaken with a view to evaluating in those terms the jobs to be done by all or any of the employees"? A neat encapsulation of the principal methods of job evaluation was given in an appendix to the opinion in *Eaton Ltd. v. Nuttall*:[75]

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72. Equal Pay Act 1970, ch. 41, § 1(5). Section 1(1)(b) of the British statute states the effect of an equivalency rating:

> (*b*) where the woman is employed on work rated as equivalent with that of a man in the same employment—
>
> (i) if (apart from the equality clause) any term of the woman's contract determined by the rating of the work is or becomes less favourable to the woman that a term of a similar kind in the contract under which that man is employed, that term of the woman's contract shall be treated as so modified as not to be less favourable, and
>
> (ii) if (apart from the equality clause) at any time the woman's contract does not include a term corresponding to a term benefiting that man included in the contract under which he is employed and determined by the rating of the work, the woman's contract shall be treated as including such a term.

Id. § 1(1)(*b*).

73. *See, e.g.*, Strecker v. Grand Forks County Social Services Bd., 640 F.2d 96 (8th Cir. 1980).

74. *See* American Nurses' Ass'n v. Illinois, 606 F. Supp. 1313 (E.D. Ill. 1985), *rev'd*, 783 F.2d 716 (7th Cir. 1986).

75. 6 I.R.L.R. 71 (Emp. App. Trib. 1977).

Job Ranking.
This is commonly thought to be the simplest method. Each job is considered as a whole and then is given a ranking in relation to all other jobs. A ranking table is then drawn up and the ranked jobs grouped into grades. Pay levels can then be fixed for each grade.
Paired comparisons.
This is also a simple method. Each job is compared as a whole with each other job in turn and points (0, 1 or 2) awarded according to whether its overall importance is judged to be less than, equal to or more than the other. Points awarded for each job are then totalled and a ranking order produced.
Job classification.
This is similar to ranking except that it starts from the opposite end; the grading structure is established first and individual jobs fitted into it.

A broad description of each grade is drawn up and individual jobs considered typical of each grade are selected as 'benchmarks.' The other jobs are then compared with these benchmarks and the general description [and] are placed in their appropriate grade.
Points assessment.
This is the most common system in use. It is an analytical method, which, instead of comparing whole jobs, breaks down each job into a number of factors-for example, skills, responsibility, physical and mental requirements and working conditions. Each of these factors may be analysed further.

Points are awarded for each factor according to a pre-determined scale and the total points decide a job's place in the ranking order. Usually, the factors are weighted so that, for example, more or less weight may be given to hard physical conditions or to a high degree of skill.
Factor comparison.
This is also an analytical method, employing the same principles as points assessment but using only a limited number of factors, such as skill, responsibility and working conditions.

A number of 'key' jobs are selected because their wage rates are generally agreed to be 'fair.' The proportion of the total wage attributable to each factor is then decided and a scale produced showing the rate for each factor of each key job. The other jobs are then compared with this scale, factor by factor, so that a rate is finally obtained for each factor of each job. The total pay for each job is reached by adding together the rates for its individual factors.[76]

It is obvious from this brief summary that even the simplest techniques, "ranking" and "paired comparison," are multi-step procedures. That nine posts are ranked one through nine does not compel that there

76. *Id.* at 74.

be nine different wage rates; it would be more common for there to be individual grades for the jobs ranked highest and lowest, and for the other seven to be grouped into one, two or three grades. Only one of the five methods—factor comparison—yields a base wage rate as its end product. The others yield grades or classes of jobs. And even the factor comparison method does not yield the wage rate for a particular employee; matters such as seniority and merit assessments must be taken into account. The Court of Appeal has recently held that a study proceeding entirely on a "whole job" comparison basis[77] does not meet the requirements of section 1(5) because such a study does not explicitly compare the particular "demands made" on applicant and comparator.[78]

Each step in these procedures can be the subject of debate and honest disagreement. In a "points assessment" scheme, for example, the opportunities for differences of opinion are nearly infinite. If all the jobs to be assessed are performed in a single office building, is there any need to include physical surroundings in the analysis? Is manual dexterity of much importance in such a study? What should be done about tasks that are critical to the enterprise but need to be performed only rarely? Once the working conditions and the tasks involved in a job have been identified and points assigned to the factors determined to be important, an important decision must be made concerning the location of "break points" for each grade. If "production assistant" has been assessed at 148 points and "inspector" at 152, the decision to fix the dividing line between Grade 2 and Grade 3 at 150 points rather than 145 is outcome determinative. There is then the question of how great a salary range is proper for each grade. Jobs characterized by rapid turnover may need only a few pence difference between top and bottom; jobs in which twenty years are spent may require more.

A job study at a workplace of any size is probably going to be done by a team or a committee, with members discussing such problems and expressing differing viewpoints—all defensible.[79] When a labor organiza-

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77. "Whole job" comparisons utilize the ranking and paired comparison techniques; factor comparisons are also typically used.

78. Bromley v. H & J Quick Ltd., 17 I.R.L.R. 249, 250 (C.A. 1988).

79. The EAT opinion in Arnold v. Beecham Group Ltd., 11 I.R.L.R. 307 (Emp. App. Trib. 1982), expresses this nicely:

> The attribution of value to work under a job evaluation study is not an exact science. Such studies are entered into with a view to establishing objective criteria: however, jobs vary very greatly and it is difficult to find any formula which in all circumstances will properly evaluate the content of the job. Therefore, however carefully a study is undertaken and conducted there is always a substantial risk that the results may offend common sense and be unacceptable to those whose

tion is involved, its attitudes and opinions may well differ from those of management or of outside evaluation consultants. Consequently, many studies afford opportunities for an individual worker to appeal the grading of his or her particular job.

Several problems are raised by the multi-step nature of job evaluation procedures. There is, for example, the question of determining when a study is sufficiently complete so that it should be given legal standing. United Kingdom defendants have had limited success in arguing that findings of equivalence were given effect before it was appropriate to do so. In November 1976, less than a year after the Equal Pay Act took effect, the EAT reversed an industrial tribunal finding that a study should be disregarded because both the employer and the union disliked its results.[80]

A variation of this problem emerged in *O'Brien v. Sim-Chem Ltd.*[81] The employer and the union had carried out a comprehensive joint study through a committee system, had accepted its results, and had communicated those results to the affected workers. The employer had not, however, implemented the policy because a government program of voluntary wage restraints was in effect. The company feared that giving the raises called for by the study's results would cause the company to lose vital government business. A female worker brought suit claiming that she was entitled to the raise.[82] The Court of Appeal found against the applicant, reasoning that until an employer implements a study there is no "term of the woman's contract determined by the rating of the work."[83] In the colorful words of Lord Justice Cumming-Bruce, "Until a system of equivalent jobs has been brought into force so that wages and other terms of employment are based upon it, it remains a thing writ in water."[84] The House of Lords overturned. The language of the principal opinion is as vigorous as that below:

> Once a job evaluation study has been undertaken and has resulted in a conclusion that the job of the woman has been evaluated under s. 1(5) as of equal value with the job of the man, then the comparison of the respective terms of their contracts of employment is made feasible and a decision

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relationship it is designed to regulate.

Id. at 310.

80. Greene v. Broxtowe Dist. Council, 6 I.R.L.R. 34 (Emp. App. Trib. 1976).

81. 7 I.R.L.R. 398 (Emp. App. Trib. 1978), *rev'd* 9 I.R.L.R. 151 (C.A. 1980)), *rev'd* 9 I.R.L.R. 373 (H.L. 1980).

82. 9 I.R.L.R. at 151.

83. *Id.* at 151-55.

84. *Id.* at 156.

> can be made (subject of course to s. 1(3)) whether 'modification' under (*b*)(i) or 'treatment' under (*b*)(ii) is called for by the equality clause. I would expect that at that stage when comparison becomes first feasible, and discrimination can first be detected, that the provisions of paragraph (*b*) would be intended to bite, and bite at once. Comparison of terms and conditions of employment must be at the heart of the legislation: and I cannot imagine any reason why Parliament should postpone to a later stage the operation of paragraph (*b*).
>
> . . .
>
> We were offered a number of dictionary substitutes for 'determined' none of which appealed to me. The best that I can do is to take the phrase as indicating that the very outcome of the equivalent job rating is to show the term to be less favourable. The next best that I can do is to echo the words of Lord Bramwell 'This beats me' and jettison the words in dispute as making no contribution to the manifest intention of Parliament.[85]

One must admire the vigorous turns of phrase in both the Court of Appeal and the House of Lords opinions in *O'Brien*, but neither doctrinal extravagance is likely to be acceptable over the long term. Taking the position of Lord Justice Cumming-Bruce allows a chauvinist employer or a male-dominated union to abort the effect of section 1(2)(b) by simple obstinate refusal to implement. If one accepts at face value the statement that the provision becomes operative "at the moment when the evaluation study and exercise has made available a comparison,"[86] however, there is a danger that unrefined, truly preliminary findings could be used as the basis of an equal pay award. The result could make a shambles out of a pay scheme that an employer and union have sought honestly to rationalize.

This latter risk explains the references to *O'Brien* in the 1982 EAT opinion in *Arnold v. Beecham Group, Ltd.*[87] The employer in *Arnold* undertook a points assessment study in 1979 in cooperation with the union representing the supervisory staff. The applicant's job was assessed at 233 points and that of her comparator at 254. Direct negotiations between management and the union fixed the boundaries between grades at a point such that both applicant's job and her comparator's job fell within Grade 2. In May 1980 the evaluation study committee's results were announced to the affected staff, who were given until the end of the month to appeal. There was widespread dissatisfaction, particularly among some engineering staff. As a result, in July 1980 collective

85. *Id.* at 374-75 (citation omitted).

86. *Id.* at 375.

87. 11 I.R.L.R. 307 (Emp. App. Trib. 1982).

bargaining negotiations, the parties decided that new salary levels would be based not on the 1980 study but rather on an earlier 1978 study, modified to meet certain management objections. The negotiations left applicant in her pre-1980 grade, Grade 1, while her comparator remained in Grade 2.[88] The industrial tribunal panel held against the applicant.[89] The EAT reversed, but instead of simply citing *O'Brien*, the writer of the *Arnold* opinion elaborated on the effect of that decision:

> The question is whether a job evaluation study can be treated as 'complete' until the parties to it (namely the employers and the employees) have accepted it as a valid study. The decision of the House of Lords in the *O'Brien* case does not cover this point. It is clear from the report of the *O'Brien* case in the [EAT that] employers and employees had agreed [to] the job evaluation study in that case: all that remained to be done was the addition of a merit assessment scheme and the implementation of the study by the employers putting money to it by paying in accordance with it. Therefore, there was nothing comparable to the present case where it is possible to argue that the 1980 job evaluation study has never been accepted by the parties.
>
> There is authority in this Appeal Tribunal that there is no job evaluation study for the purposes of s. 1(5) of the 1970 Act unless and until the study has been accepted, or adopted, or is in force. . . .
>
> . . .
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> [Counsel for the applicant] also sought to rely on Article 119 of the EEC Treaty and Article 1 of the Equal Pay Directive of 1975. . . . Article 1 of the Directive provides as follows:
>
> 'In particular where a job classification system is used for determining pay. . .'
>
> Although we accept that the passage we have quoted is not the whole of Article 1, so far as it goes it does indicate that the EEC legislation only applies in a case where the job evaluation study is actually used in determining pay, [that is,] the European law is even more limited than the law as stated by the House of Lords in the *O'Brien* case.[90]

The EAT found, however, that the employer and applicant's union had in fact accepted the validity of the study in May 1980 when the evaluation committee results were announced; therefore, the refusal to implement the study did not undercut the effectiveness of that acceptance.[91]

One sympathizes with the plight of the writer of the opinion in *Arnold*. *O'Brien's* language is dangerously overbroad. But is the time of

88. *Id.* at 308.
89. *Id.* at 307.
90. *Id.* at 309-10 (citation omitted).
91. *Id.* at 310.

"acceptance" much of an improvement? There are numerous practical difficulties in applying such a test.[92] Consequently, the judges have strenuously sought to avoid burdening the industrial tribunals with the duty of deciding whether a company or union refusal to accept or implement a study is sufficiently reasonable such that the study should be disregarded.

Why should the tribunals not make judgments about the validity of objections to evaluation studies? Once again, *Arnold v. Beecham Group* is instructive: "The attribution of value to work under a job evaluation study is not an exact science."[93] Since this inexactitude permits many legitimate differences, to allow a tribunal to reexamine each contested point in such a study could lead to interminable wrangling, while not insuring that the tribunal's decision would be any more precise or better reasoned than that of the challenged study. Thus, the EAT stated early on that a tribunal should never conduct its own evaluation; rather, it should simply determine whether the evaluation in issue was premised on a "fundamental error."[94]

What constitutes a "fundamental error"? The clearest example is a refusal to consider an element of the job that is obviously important, such as the extent to which one job involves protecting much more valuable interests of the employer than those protected by another job.[95] Giving significant weight to a factor that would be treated as trivial in a "like work" case would clearly justify the rejection of a study. Yet very few of the truly critical decisions are likely to be subject to attack under a "fundamental error" approach. A failure to give mental effort as much, if not more, weight as physical effort in a study evaluating clerical jobs in a bank might be so basic as to constitute a fundamental error, but what of a decision to give physical effort a maximum of ten points and mental

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92. *See Highlights: August 1982*, 11 I.R.L.R. 305 (1982).

93. 11 I.R.L.R. at 310.

94. Greene v. Broxtowe Dist. Council, 6 I.R.L.R. 34, 35 (Emp. App. Trib. 1977). The appeal tribunal observed:

> One thing which no Industrial Tribunal should be called upon to do is to carry out an evaluation exercise of its own. If they were, the whole point of subsection (5) would be rendered meaningless.
>
> . . .
>
> It seems to us that once the validity of an evaluation study has been called into question, there should be in very limited terms and over a very limited area an investigation into whether or not the evaluation study was based upon some fundamental error.

Id. at 35.

95. *See* Eaton Ltd. v. Nuttall, 6 I.R.L.R. 71 (Emp. App. Trib. 1977).

effort twenty, as opposed to physical effort ten and mental effort thirty? Even more important may be the selection of break points. In *Arnold*, for example, selecting 250 points as the line of demarcation between Grade 1 and Grade 2 would have undercut applicant's case, since her job received 233 points and her comparator's 254. Yet only in extreme cases is it likely that such a decision can be challenged as fundamentally wrong. The importance of this will emerge again below in the discussion of the new "equal value" legislation.

In the United States, no federal statute explicitly requires equal pay to male and female workers for work "rated as equivalent." Any such requirement arises because of the broad ban against "discrimination" in Title VII of the Civil Rights Act of 1964.[96] No case grounded solely on the theory that Title VII incorporates a duty to implement a job evaluation study has yet come before the United States Supreme Court for decision. Perhaps the nearest has been *County of Washington v. Gunther*.[97] The complaint in *Gunther* alleged that the defendant county conducted a labor market survey and a job evaluation study,

> determined that [plaintiffs] should be paid approximately 95% as much as the male correctional officers; that it paid them only about 70% as much, while paying the male officers the full evaluated worth of their jobs; and that the failure of the county to pay [plaintiffs] the full evaluated worth of their jobs can be proved to be attributable to intentional sex discrimination.[98]

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96. Blumrosen, *Wage Discrimination, Job Segregation, and Title VII of the Civil Rights Act of 1964*, 12 U. MICH. J. L. REFORM 397 (1979). Professor Blumrosen argues that, under Title VII, a class action plaintiff who has demonstrated the presence of gender-based job segregation in an employer's work force should be entitled to a remedy that includes the difference between what women were paid in fact and what they would have been paid if the job had not been assigned low pay because it was "women's work." She urges that this is proper under the "disparate impact" line of cases:

> Thus, when the job evaluation-community wage system is used to set wages in jobs which are sex- or race-segregated, discrimination has more probably than not been a negative influence on the value of those jobs. The lower wage rate determination follows directly from the fact that the jobs in question are substantially segregated by race or sex. To make a prima facie case of wage rate discrimination, then, a plaintiff should have to show only that the job has been and/or is presently identified as a minority or female job.

Id. at 459. Professor Blumrosen further advocates the admission into evidence of comparable worth studies as one element in determining the appropriate amount of damages to be awarded. *Id.* at 499-501.

97. 452 U.S. 161 (1981).

98. *Id.* at 180-81.

Relying on the Bennett Amendment,[99] the trial court held "that a sex-based wage discrimination claim cannot be brought under Title VII unless it would satisfy the equal work standard of the Equal Pay Act of 1963."[100] The court of appeals and the Supreme Court disagreed, holding that the Bennett Amendment simply incorporated the four exemptions of the other statute (for sex-based wage discrimination claims) into Title VII. The case was remanded to give plaintiffs a chance to develop their claims of intentional discrimination. The majority opinion explicitly noted that plaintiffs did not base their claim on the "controversial concept of 'comparable worth,' "[101] and further stated, "We are not called upon in this case to decide whether [plaintiffs] have stated a prima facie case of discrimination under Title VII . . . or to lay down standards for the further conduct of this litigation."[102]

The door was thus opened to allow plaintiffs to develop theories of liability—under the broad language of the Bennett Amendment—that would take into account job evaluation studies conducted by employers. In two major cases since *Gunther*, plaintiffs have succeeded at the trial level but failed in the court of appeals. *AFSCME v. Washington*[103] was a class action brought on behalf of women employees of the State of Washington in job categories in which seventy percent or more of all workers were women. Plaintiffs developed two principal theories. First, they argued that the defendant's wage policy of setting salaries of state employees to reflect "prevailing market rates" had a disparate impact on women.[104] Second, they argued that the state's refusal to correct the twenty percent wage disparity found in a study conducted by an outside consultant commissioned by the state constituted unlawful maintenance of a disparate treatment of women.[105] The Court of Appeals for the Ninth Circuit reversed a finding of disparate impact, holding that the

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99. 42 U.S.C. § 2000e-2(h) (1982). The Bennett Amendment provides:

> It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of the [Fair Labor Standards Act].

Id.

100. 452 U.S. at 165 (citation omitted).

101. *Id.* at 166.

102. *Id.* at 166 n.8.

103. 578 F. Supp. 846 (W.D. Wash.), *rev'd*, 770 F.2d 1401 (9th Cir. 1985).

104. 770 F.2d at 1405 (citing Griggs v. Duke Power Co., 401 U.S. 424, 430-31 (1971)).

105. *Id.* at 1403.

employer's compensation system was based on general market forces rather than a specific policy of discrimination.[106] The court further noted that the disparate treatment theory based on the job evaluation study failed for lack of proof that the state's purpose was to depress women's wages: "It is insufficient . . . to show the employer was merely aware of the adverse consequences the policy would have on a protected group."[107]

The other principal post-*Gunther* decision is *American Nurses' Association v. Illinois*.[108] One would not expect Judge Posner to be sympathetic to wage regulation,[109] and he proves not to be in a skillfully facile opinion. "Comparable worth is not a legal concept," he begins, "nor does this panel make it so."[110] Judge Posner's opinion approves the Ninth Circuit approach in *AFSCME*, but addresses more explicitly the

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106. *Id.* at 1405-06. The court, speaking through Judge (now Justice) Kennedy, stated that when disparate impact is alleged,

> analysis is confined to cases that challenge a specific, clearly delineated employment practice applied at a single point in the job selection process. . . . In the case before us, the compensation system in question resulted from surveys, agency hearings, administrative recommendations, budget proposals, executive actions, and legislative enactments. A compensation system that is responsive to supply and demand and other market forces is not the type of specific, clearly delineated employment policy contemplated by . . . *Griggs* . . . .

Id.

107. *Id.* (citing Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 279 (1979) (upholding a male-favoring "veterans' preference" employment practice against a fourteenth amendment equal protection challenge)).

108. 783 F.2d 716 (7th Cir. 1986).

109. *See* Posner, *Some Economics of Labor Law*, 51 U. CHI. L. REV. 988, 989-90 (1984).

110. 783 F.2d at 719. The opinion goes on to note that,

> economists point out that the ratio of wages in different jobs is determined by the market rather than by any a priori conception of relative merit, in just the same way that the ratio of the price of caviar to the price of cabbage is determined by relative scarcity rather than relative importance to human welfare.

Id. Given Judge Posner's general stance, one may read "economists" to mean those of the Chicago school and to assume that it equates roughly with "right-thinking people." His analogy, of course, is not a totally happy one; the caviar market has been notoriously subject to manipulation by certain suppliers. *See* Strasser & Schmidt, *A Classic Case of Red Herring*, NEWSWEEK, Apr. 28, 1980, at 55. The brusque dismissal of "importance to human welfare" as a factor of less importance than market freedom is likewise hardly surprising. *See* West, *Authority, Autonomy and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 HARV. L. REV. 384 (1985); Posner, *The Ethical Significance of Free Choice: A Reply to Professor West*, 99 HARV. L. REV. 1431 (1986); West, *Submission, Choice and Ethics: A Rejoinder to Judge Posner*, 99 HARV. L. REV. 1449 (1986).

problem of whether *Personnel Administrator of Massachusetts v. Feeney*[111] is an apt analogy. The opinion acknowledges, however, that neither *Feeney* nor *Washington v. Davis*,[112] on which reliance is also placed, was a Title VII case:

> But when intentional discrimination is charged under Title VII the inquiry is the same as in an equal protection case. The difference between the statutory and constitutional prohibitions becomes important only when a practice is challenged not because it is intended to hurt women (say), but because it hurts them inadvertently and is not justified by the employer's needs—when, in short, the challenge is based on a theory of "disparate impact" as distinct from "disparate treatment" ([*i.e.*,] intentional discrimination). The plaintiffs in this case, however, have said that they are proceeding on the basis of disparate treatment rather than disparate impact. Their decision is understandable. In the usual disparate-impact case the plaintiff challenges some job qualification—for example, that the applicant have a high-school diploma, or pass an entrance exam—as disproportionately excluding blacks or some other protected group . . . . It is not apparent what the analogy to an exclusionary job qualification would be in this case.[113]

The opinion in *American Nurses' Association* does not address why, in a Title VII disparate treatment case, "intent" must mean a specific purpose to harm rather than the intent to perform an act that is likely to harm a protected group. Still, the opinion goes on to state that "if all the plaintiffs in this case are complaining about is the State of Illinois' failure to implement a comparable worth study, they have no case and it was properly dismissed."[114] The court nevertheless finds that certain portions of the complaint "could mean that in classifying jobs for pay purposes the responsible state officials had used the fraction of men in each job as a factor in deciding how high a wage to pay—which would be intentional discrimination."[115] Thus, the complaint should not have been dismissed, although "plaintiffs have a tough row to hoe."[116] Tucked away in the discussion of plaintiffs' complaint is another interesting paragraph. Paragraph 9(c) of the complaint alleged as unlawful " '[c]ompensation at lower rates of pay of female employees in historically female-dominated sex-segregated job classifications which are or

111. 442 U.S. 256 (1979). *See supra* note 107.
112. 426 U.S. 229 (1976).
113. 783 F.2d at 722-23.
114. *Id.* at 723.
115. *Id.* at 725.
116. *Id.* at 730.

have been evaluated as being of comparable, equal or greater worth than historically male-dominated sex-segregated job classifications which receive higher rates of pay.' "[117] The court's analysis of this paragraph subdivides the "state" into various components:

> Subparagraph (c) is an effort to fit the case to the mold of *Gunther.* The critical difference, however, is that here the *state* is not alleged to have "evaluated" any of the predominantly female job classifications as being of comparable worth to predominantly male classifications. The Illinois Commission on the Status of Women, a public body, commissioned a comparable worth study which found the same sort of disparities that other comparable worth studies have found. The state itself—meaning the officials responsible for setting wage rates—has yet to reconfigure its wage system in accordance with the findings of the study . . . . But as we said earlier, the failure to accept recommendations in a comparable worth study is not actionable.[118]

Which officials would be thought sufficiently responsible for wage-setting? Department heads making budget recommendations? The state personnel management officers? Legislators fixing appropriation levels? Can private employers be subdivided in some similar way? The intriguing fact is that what Judge Posner is addressing is very much the same problem that the EAT confronted in *Arnold v. Beecham Group Ltd.*: When is it reasonable to say that an employer has accepted the validity of a job evaluation study? The question is much easier to answer in *Arnold*, because it is clear that top management expected the study to determine rates of pay in a short time. That is not at all clear in the circumstances of *American Nurses' Association.*

Community jurisprudence may not permit the same subdividing of government as that set out in *American Nurses' Association.* In *Marshall v. Southampton and South-West Hampshire Area Health Authority*,[119] for example, the applicant challenged the retirement policy of her employer, a government agency. The policy stated that "the normal retirement age will be the age at which social pensions become payable."[120] In the United Kindgom, such pensions are payable to women at age sixty and to men at age sixty-five. The Sex Discrimination Act 1975 excludes any "provision in relation to death or retirement" from its general ban on discrimination.[121] The European Court of Justice held that

117. *Id.* at 724.
118. *Id.* at 725.
119. 15 I.R.L.R. 140 (Eur. Ct. Just. 1986).
120. *Id.* at 140.
121. Sex Discrimination Act, 1975, ch. 65, § 6(4).

Directive 76/207 requires the United Kingdom to prohibit mandatory retirement of men and women at different ages.[122]

A general principle of European Community law permits an individual to rely on the provisions of a Directive in national courts if the provisions are both unconditional and sufficiently precise. Reliance on a Directive is not possible against an individual, such as a private employer.[123] The United Kingdom argued in *Marshall* that applying the Directive against the health authority employer would be improper for two reasons: (1) the state is not acting in its sovereign capacity when it engages workers such as the applicant, a dietitian; and (2) applying the Directive "would give rise to an arbitrary and unfair distinction between the rights of State employees and those of private employees . . . ."[124] Both arguments were rejected.

Does this mean that job evaluation studies are simply irrelevant to wage discrimination cases in the United States? The answer is clearly, no. First, such studies help resolve "equal work" theory cases.[125] An employer whose job evaluation system regularly gives substantially greater weight to physical than to mental effort can argue more convincingly that he has weighed physical effort heavily in good faith (as a reason not to regard two jobs as equal) than can an employer whose system cannot be perceived to have given it such weight. Second, an employer's acceptance of a study recommendation to adjust part of a wage structure may be evidence of other improprieties. In *Roesel v. Joliet Wrought Washer Co.*,[126] a decision that predated *Gunther,* a government agent reviewing the employer's affirmative action program suggested that female employee *A*, a pricing supervisor, was significantly underpaid compared to a male production control supervisor, whose job involved similar functions. The employer responded by raising *A*'s salary in two rapid installments. Plaintiff, the only other woman in management at the firm, later brought a Title VII action claiming, *inter alia*, wage discrimination.[127] The trial court held that plaintiff's job was similar enough to *A*'s so that the salary paid *A* could be a "benchmark" figure for plaintiff.[128] The reviewing court observed:

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122. 15 I.R.L.R. at 146.

123. *See* Treaty of Rome, *supra* note 9, art. 189; Duke v. GEC Reliance, 17 I.R.L.R. 118 (H.L. 1988) (Sex Discrimination Act, 1975).

124. 15 I.R.L.R. at 149.

125. *See* Freed & Polsby, *Comparable Worth in the Equal Pay Act*, 51 U. CHI. L. REV. 1078, 1097-99 (1984).

126. 596 F.2d 183 (7th Cir. 1979).

127. *Id.* at 185.

128. *Id.* at 186.

> In substance, the court inferred that the company, in paying an increased salary to Ms. Agazzi, recognized that it would have paid that salary to a male performing Ms. Agazzi's job, and the court inferred that, the jobs being equal, the company would have paid a male employee, performing the same work as Ms. Roesel, the increased salary paid Ms. Agazzi. Thus the court found sex-based discrimination in paying Ms. Roesel less.
>
> This seems a reasonable analysis, and the finding is not clearly erroneous.[129]

The *Roesel* fact pattern is obviously not the usual "job study" pattern, since the evaluation was performed by an outsider rather than under the employer's sponsorship. The employer's decision to act on the recommendation, however, to some degree compensates for that deficiency.

Despite the general inefficacy of job evaluation studies in United States litigation, one Fifth Circuit decision held an adequate *Gunther* case to have been stated. In *Wilkins v. University of Houston*[130] plaintiffs proved:

> In 1975 the university formulated a pay plan for most of its professional and administrative staff employees. With the aid of an outside consulting firm, all of the jobs to be covered by the pay plan were evaluated and classified into one of nine levels, with the highest paying, most responsible jobs being those in level nine. Each level had a low and high figure associated with it representing the minimum and maximum pay a person whose job fell in that level should receive. The academic division . . . employed some 68 persons when the pay plan was formulated—35 men and 33 women. Plaintiffs introduced evidence that, of those 68 persons, 21 were paid less than the minimum for the level in which their job fell, and that 18 of those 21 were women . . . . This showing is strengthened by evidence that all of the four employees in the academic division who were paid more than the maximum set for the job level of their position were men.
>
> Furthermore, the jobs of five of the eighteen women who were paid less than the minimum for their job level and two of the women who were not paid less . . . were reclassified to a lower job level, while the jobs of none of the men in the academic division, including the three who were underpaid, were similarly reclassified.[131]

The court found this a sufficient basis to justify a finding for the plaintiffs. The Supreme Court vacated the Fifth Circuit decision on the

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129. *Id.*

130. 654 F.2d 388 (5th Cir. 1981), *reh'g denied*, 662 F.2d 1156, (5th Cir. 1981), *vacated and remanded on other grounds*, 459 U.S. 809 (1982), *on remand*, 695 F.2d 134 (5th Cir. 1983).

131. 654 F.2d at 406 (footnotes omitted).

ground that it should have applied the "clearly erroneous" standard to questions of ultimate fact as well as of evidentiary fact.[132] On remand, the circuit court panel held that the district court must reconsider the evidence of pay discrimination.[133] Thus, *Wilkins'* precedential value is limited. The Fifth Circuit has, however, continued to cite with approval the original panel decision.[134]

III. EMPLOYER DEFENSES IN CASES OF "LIKE WORK—EQUAL WORK" AND "WORK RATED AS EQUIVALENT"

A. *Introduction*

The United States equal pay statute provides affirmative defenses to employers in four instances. Three concern relatively specific categories, while the fourth encompasses one broad category.[135] The British statute until 1984 afforded only one broadly stated affirmative defense.[136]

On both sides of the Atlantic, an employer typically presents affirmative defense arguments by urging that the higher paid male comparator possesses a characteristic (for example, education, experience, credentials, or an impressive earnings record) that the lower paid female lacks. The female will then argue that the characteristic on which the employer relies is either (1) not important enough to justify the pay difference, or (2) not gender neutral because the trait is more likely to be shared by males than females. The employer then offers one or more business reasons to prove that the trait is important—so important, in fact, that it should be allowed as a defense even if the characteristic is more likely to be shared by men than by women.[137] The court or tribunal must there-

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132. 459 U.S. 809 (1982).

133. 695 F.2d 134 (5th Cir. 1983).

134. *See* Plemer v. Parsons-Gilbane, 713 F.2d 1127, 1133-34 (5th Cir. 1983).

135. Section 206(d) of the Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1) (1982), states that its provisions apply "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."

136. Section 1(3) of the Equal Pay Act, 1970, ch. 41, *as amended by* Sex Discrimination Act, 1975, ch. 65, provides: "[A]n equality clause shall not operate in relation to a variation between the woman's contract and the man's contract if the employer proves that the variation is genuinely due to a material difference (other than the difference of sex) between her case and his."

137. A more difficult case arises when the employer concedes that male and female are doing the same work, are doing it equally well, and are alike in relevant characteristics of education, training and so on, but nonetheless asserts that the male's work is worth more to the employer than is the female's. *See infra* notes 234-41 and accompanying text (discussing the *Robert Hall Clothes* litigation).

fore determine whether the differentiating characteristic is significant enough to be allowed as a defense. Because three value judgments have been made explicit in the relevant statute, that decision is a bit easier in some instances in the United States than in the United Kingdom, where only the word "material" is given as a guide to the decision maker. The outcomes in United Kingdom and United States cases involving the three circumstances spelled out in the United States statute are much the same. The next three subsections present those parallels.

B. *Seniority*

The exception for seniority systems in the United States Equal Pay Act has caused relatively little difficulty compared to a similar provision in Title VII.[138] In *Brennan v. Victoria Bank and Trust Co.*,[139] for example, the court permitted an employer the benefit of the seniority system defense despite a challenge that pay rates for exchange tellers, based in part on longevity, were so affected by an unduly subjective merit review that the total system was invalid. The court concluded that, taken as a whole, "[d]efendant's program was a systematic, formal system guided by objective, written standards."[140]

The weight given longevity is sometimes accorded without being made explicit. The employer in *Kilpatrick v. Sweet*[141] paid the plaintiff thirty cents an hour less than the $2.60 rate for her male comparator. The male had been employed by defendant two years longer than plaintiff, but no seniority policy had been communicated in specific terms. None-

138. In International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977), the Court held that seniority rights acquired before Title VII became applicable to the seniority system involved could be exercised under § 703(h) even though this might perpetuate the effect of pre-Act discrimination. The Court further set out standards for determining when a seniority system to which the Act applies is valid. Contrast with *Teamsters* the decision in Steel v. Union of Post Office Workers, 6 I.R.L.R. 288 (Emp. App. Trib. 1977), *on remand*, 7 I.R.L.R. 198 (Indus. Trib. 1978). In *Steel*, a discriminatory exclusion of women from permanent worker status was ended September 1, 1975, three months before the Sex Discrimination Act 1975 was to take effect; that date was used as applicant's seniority date even though she had worked for the Post Office since 1961. As a result, she lost a desired transfer to a male. The use of that date was held to be improper because "some acts of discrimination may be of a continuing nature and it would seem to us to be in accordance with the spirit of the Act if it applied as far as possible to remove the continuing effects of past discrimination." 6 I.R.L.R. at 290. The reasoning reminds one of the court's reasoning in Quarles v. Philip Morris, Inc., 279 F. Supp. 505 (E.D. Va. 1968), an opinion displaced by *Teamsters*.

139. 493 F.2d 896 (5th Cir. 1974).

140. *Id.* at 901.

141. 262 F. Supp. 561 (M.D. Fla. 1967).

theless, the court held "that the Defendants did have a de facto seniority system in effect at the time . . . ."[142] In judging whether the amount of difference between plaintiff's pay and her comparator's was reasonable, the court considered "[t]he sum total of the differences in work and longevity of service . . . ."[143]

The British tribunals have also faced the problems posed by highly informal seniority systems. In *Boyle v. Tennent Caledonian Breweries Ltd.*,[144] the employer offered two explanations for the higher rate paid the male comparator: (1) longevity of service (five years longer service than the applicant); and (2) the male comparator's past performance of additional duties that had been removed from the job, the extra pay for those duties having been carried forward since at a personal "red circle" rate.[145] Just as the Equal Pay Act was about to come into effect, the employer conducted a job evaluation. Consequently, both applicant and her comparator were rated as "Technical C." The employer thereupon awarded applicant an "equal pay" increase of £ 360 a year. This left a difference of £ 300 a year between her rate and his. Applicant argued that the employer "could not quantify with any precision the basis upon which they had arrived at the figure of £ 360 for an equal pay increase."[146] The EAT, clearly impressed by the effort made to come into compliance, upheld a finding for the employer. The opinion states: "That length of service and a special personal rating can be such differences is undoubted. . . . In our opinion a Tribunal does not require to be satisfied in every case that such an ["equal pay"] increase eliminated that element [of sex discrimination in pay] with mathematical precision."[147] Thus the United Kingdom recognized early that a factor not directly related to present job performance could be a "material difference."

142. *Id.* at 564.

143. *Id.*

144. 7 I.R.L.R. 321 (Emp. App. Trib. 1978).

145. *Id.* at 322.

146. *Id.*

147. *Id.* (citations omitted). The limits on basing pay differences on longevity of service are evidenced by Post Office v. Page, No. 554 (Emp. App. Trib. Mar. 30, 1988) (LEXIS Enggen library, cases file), approving a finding by an industrial tribunal that a pay differential justified by claimant's lack of experience when hired was no longer justified after she had spent time in her post. That opinion does not address seniority in a specific way, however, and may reasonably be said to be limited to its rather peculiar facts.

C. *"Merit Systems"*

Merit systems seek to reward employees through higher pay for performance of high quality work. Merit adjustments typically follow a review of employee performance by one or more supervisors. Because quality of performance is determined to a large extent by the eye of the beholder, these reviews inevitably involve many subjective judgments. Merit reviews thus offer a major chance for conscious or unconscious sexism to creep in. Despite that danger, merit systems have fared well in equal pay litigation on both sides of the Atlantic, provided they include reasonable controls on the exercise of subjectivity.

The criteria applied by American courts were well summarized in the opinion of Judge Murnaghan in *EEOC v. Aetna Insurance Co.*:[148]

> While the definition of experience, training, or ability [in the House report accompanying the Equal Pay Act] is self-explanatory, what constitutes a merit system, may not be so obvious. A merit system, to be recognized as valid, need not be in writing. Notwithstanding the absence of a writing requirement, a merit "system" must be an organized and structured procedure whereby employees are evaluated systematically according to predetermined criteria. Moreover, to be recognized, it would seem that an unwritten merit system must fulfill two additional requirements: the employees must be aware of it; and it must not be based upon sex.[149]

The merit system defense was accordingly denied in *Grove v. Frostburg National Bank*[150] because the reviews performed by the manager were in no way controlled by predetermined criteria, or otherwise systemized, but were essentially determinations based on his "gut feeling."[151] Managers' merit reviews of persons performing work similar to that in *Grove* were found to constitute a defense in *Herman v. Roosevelt Federal Savings & Loan Association.*[152] In *Herman*, the reviews were performed on a regular schedule, were done on prepared forms that indicated what characteristics should be given weight, and were the subject of a training session for the managers who would do the reviewing.[153]

National Vulcan Engineering Insurance Group Ltd. v. Wade,[154] the first case to reach the Court of Appeal in England under the Equal Pay Act, involved the question whether ratings assigned under a merit system

148. 616 F.2d 719 (4th Cir. 1980).
149. *Id.* at 725.
150. 549 F. Supp. 922 (D. Md. 1982).
151. *Id.* at 934.
152. 432 F. Supp. 843 (E.D. Mo. 1977), *aff'd*, 569 F.2d 1033 (8th Cir. 1978).
153. 432 F. Supp. at 848.
154. 7 I.R.L.R. 225 (C.A. 1978).

can constitute a "material difference" justifying variation in pay rates. Base salary ranges for clerks were determined according to which of eight grades the worker was assigned. Within each grade, pay rates were determined by performance ratings. Applicant was in Grade 6, and was assigned D as a performance rating; she sought equal pay with a male in category 7E. The employer defended on the basis of the combined grading-performance assessment system.[155] In affirming the decision for the woman applicant, the EAT concluded that the scheme was in practice "a promotion system based entirely upon personal assessment."[156] The Court of Appeal reversed. Lord Denning wrote: "a grading system according to ability, skill and experience is an integral part of good business management: and, as long as it is fairly and genuinely applied irrespective of sex, there is nothing wrong with it at all."[157] His fellow justices were equally untroubled by the system's elements of subjectivity.[158] They were also reassured about the non-sexist nature of the scheme by the fact that two women were rated higher than most of the men in the relevant group.[159]

Merit system ratings must often be analyzed in light of other elements of an employer's pay system. In *EEOC v. Aetna Insurance Co.*,[160] for example, a merit system regularly applied to current employees had been used in setting the woman's salary; she was a long-term employee with a substantial record of evaluations. Her male comparator was a newcomer. The company's merit system was not applied to new employees, since on-site evaluation data was not available. Instead, new employee salary levels were based on credentials, on experience elsewhere, and on impressions formed and information obtained in interviews.[161] Because the factors assessed under the two systems were not gender discriminatory, the court treated a pay variation accounted for by the two working together as valid under a combination of exceptions (ii) and (iv) of section 6(d).[162]

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155. *Id.* at 225-26.

156. 6 I.R.L.R. 109, 112 (Emp. App. Trib. 1977).

157. 7 I.R.L.R. at 227.

158. *Id.* at 227-28.

159. *Id.*

160. 616 F.2d 719 (4th Cir. 1980).

161. *Id.* at 722.

162. *Id.* at 724-26. Differences in pay resulting from the application of different compensation schemes have also occasionally survived challenge in the United Kingdom, provided the reviewing tribunal has been satisfied that each of the two compensation schemes is itself non-discriminatory. *See, e.g.*, Reed Packaging Ltd. v. Boozer, 17 I.R.L.R. 333 (Emp. App. Trib. 1988) (applicant and comparator paid under two differ-

D. *"A System Which Measures Earnings by Quantity or Quality of Production"*

Total pay for a pay period is determined for hourly-paid workers by multiplying hours worked by wage rate; for commission-paid workers by multiplying the employee's volume of sales by the commission rate; and for "piece rate" workers by multiplying the rate for one unit by the number of units produced. An employer is usually entitled to defend a variation in take-home pay by showing that the rate was the same for male and female and that the male simply worked more hours, made more sales, or produced more units. Problems can arise, however. For example, overtime may be allocated only to males, or women may be assigned only to departments with low sales volumes. Such limits on women's opportunities are generally dealt with under laws other than the equal pay acts, but arguably an unlawful job assignment system should not be a basis for a defense in equal pay actions.[163]

That this provision of the United States statute permits higher total take-home pay for one gender as long as the unit rate is the same for both sexes was most clearly stated in a case involving an employer's effort to equalize male and female paychecks by paying men a higher rate. The employer in *Bence v. Detroit Health Corp.*[164] paid its male managers and assistant managers higher commission rates on each membership sold than it paid its women managers and assistant managers. The spas operated by the defendant were open on alternate days to men and women, and only staff of the sex of members admitted on that day would be assigned to work. The "market" for men was roughly two-thirds of the women's market, and the employer set the women's commission rate at two-thirds of the male rate. In fact, total women's compensation was substantially equal to total men's compensation.[165] The court rejected the employer's argument that it was operating "a system which measures earnings by quantity or quality of production," stating:

> The "quantity" test refers to equal dollar per unit compensation rates. There is no discrimination if two employees receive the same pay rate, but one receives more total compensation because he or she produces more. In the instant case, women had to produce more to be paid the same as men.

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ent collective bargaining agreements).

163. *Compare* Shultz v. Wheaton Glass Co., 421 F.2d 259, 266 (3d Cir.), *cert. denied*, 398 U.S. 905 (1970) *with* Hodgson v. Brookhaven Gen. Hosp., 436 F.2d 719, 726 (5th Cir. 1970). The problem should not arise often in the United States, since claims under both Title VII and the Equal Pay Act can be asserted in the same action.

164. 712 F.2d 1024 (6th Cir. 1983), *cert. denied*, 465 U.S. 1025 (1984).

165. *Id.* at 1027.

The "quality" test is not met because it was not easier to sell memberships to women than to men, and there was no difference between the memberships offered to men and women. Any other result would undermine the purpose of the Equal Pay Act by allowing employers to pay women lower incentive rates than men for the same work.[166]

E. *"Any Other Factor Other than Sex"*

1. Historical Anomalies

The leading case on the meaning of "a differential based on any other factor other than sex" in the United States Equal Pay Act is *Corning Glass Works v. Brennan.*[167] In *Corning Glass Works,* the Secretary of Labor sought relief on behalf of women inspectors working on the day shift who received lower wages than certain male inspectors performing the same duties on the night shift. The differential had developed over several decades.[168] The Secretary of Labor urged a comparison between

166. *Id.* at 1029. Readers in the United Kingdom may perceive a very rough analogy to the outcome in Hayward v. Cammell Laird Shipbuilders Ltd., 17 I.R.L.R. 257 (H.L. 1988)

167. 417 U.S. 188 (1974).

168. The history can be set out most easily in a semitabular form:

Date	Events	Comment
Pre-1925	Corning employs only women as inspectors; operates during daytime only.	Lawful; no law prohibits "women only" jobs.
1925-1930	Corning sets up night shift; hires men as inspectors for night shift because state laws prohibit women from night factory work; pays men on night shift higher rate than women on day shift in response to men's demands.	Lawful; state laws of this sort were not pre-empted by federal law until July 1965.
1944	Corning organized by union; collective agreement (a) introduces night shift differential, and (b) carries forward the higher base rate for male night inspectors.	Probably lawful; the notion of the duty of fair representation had not yet developed.
Pre-June 1964	State laws prohibiting night factory work for women are amended to permit such work; Corning carries on as before.	
11 June 1964	Equal Pay Act takes effect; Corning carries on as before.	Issue 1 (in the opinion).
June 1966	Corning opens up night inspector jobs to women; both male and female night inspectors	Issue 2.

a woman working on the day shift and a man working at a higher rate on the night shift for the period following June 11, 1964.[169]

Issue 1. Are the two jobs "equal"? The Court held that the jobs were equal. The skill, effort and responsibility required are the same, and thus the jobs are equal unless work done at night is not "performed under similar working conditions." The Court found that "working conditions" is a term of art referring only to "surroundings" and "hazards," not to the time of day.[170] Therefore, the woman would be entitled to the higher pay rate unless the employer could establish that the higher man's rate was "pursuant to . . . (iv) a differential based on any other factor other than sex."[171] The company had argued that following June 11, 1964, the higher rate was, in essence, a night shift differential and thus lawful.[172] The Court agreed that a night shift differential falls within the language of exception (iv); but it upheld the finding of the trial court that the higher rate was not in fact a "night rate," but a "man's rate."[173] This finding was held to be proper in light of the circumstances surrounding the establishment of the higher rate.[174]

Issue 2. The claim that the higher rate was a "night rate" was clearly stronger for the period beginning in June 1966, when women were given access to night inspector jobs at the higher figure. The Court's opinion states: "[T]he issue . . . is not whether the company . . . can be said to have treated men the same as women after 1966. Rather, the question is whether the company remedied the specific violation of the Act which the Secretary proved."[175] That "specific violation" must have been the carrying forward in June 1964 of the man's rate, and the Court holds that "the company could not cure its violation except by equalizing the base wages of female day inspectors with the higher rates paid the night

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	are paid higher base rate than day inspectors.	
10 January 1969	New "job evaluation" system set up under collective agreement; new base rate (higher than either the former day or night rate) set up for all inspectors (day and night) but a special "red circle" rate is set up for inspectors hired before 20 January 1969 when working on night shift.	Issue 3.

169. *See id.* at 207.
170. *Id.* at 202.
171. *Id.* at 196.
172. *Id.* at 197.
173. *Id.* at 204-05.
174. *Id.*
175. *Id.* at 206.

inspectors."[176]

Issue 3. The Court went on to find that the January 1969 red circle rate was also not within exception (iv) since it would not have been provided for except for the failure by the company to equalize male and female inspector rates in 1964. One is, of course, led to wonder whether the outcome would have been the same had Corning opened night inspector jobs to women on or before June 11, 1964, the effective date of the Equal Pay Act. The outcome would most likely be the same. Exception (iv) is reserved for those differentials "based on any other factor other than sex." A differential with origins so clearly sex-based hardly fits that language. There exists the possibility that Corning could have shown a justifiable belief that a differential of roughly this magnitude was necessary in 1964 to insure full staffing of the night shift, but no such proof was offered since Corning had maintained an all male night shift for two years after the statute's effective date.

This refusal to permit employers to defend on the basis of "red circling" of a "man's rate" has several parallels in British cases. In *United Biscuits Ltd. v. Young*[177] an employer was denied the defense because it had paid the red circle rate not only to male night shift inspectors who had once carried the extra responsibilities that were the professed reason for the higher rate, but also to two later-hired males who had never carried those added responsibilities.

A case remarkably similar to *Corning Glass* is *Snoxell v. Vauxhall Motors Ltd.*[178] Prior to 1970, the applicant inspectors were in a women's pay grade, W2, doing the same work as men in grade X2. In 1970, a new unified system was put into effect for male inspectors and for all male and most female production workers. The male inspectors went into grade H2. It was later decided that their jobs had been misgraded and should have been graded lower, as H3. Those already in place were, however, to continue to be paid at a higher grade rate. This "red circle" grade was called OX. In June 1975, women were permitted to transfer out of the old W grades into the appropriate H grades. Applicants went into H3. After the Equal Pay Act came into effect, they sought payment at the OX rates.[179] The EAT, citing *Corning Glass*, held for the women. The tribunal found that the employer faces a seemingly irrebuttable presumption in demonstrating that present pay differences are due to factors other than sex when it is clear that past discrimination contrib-

176. *Id.*
177. 7 I.R.L.R. 15 (Emp. App. Trib. 1977).
178. 6 I.R.L.R. 123 (Emp. App. Trib. 1977).
179. *Id.* at 123-24, 127.

uted to the variations in pay.[180]

An excellent example of a true "personal" rate is *Methven v. Cow Industrial Polymers Ltd.*[181] The applicants and their comparator were all clerks to managers of different departments. The male was receiving a rate one-third higher than the two women for "like work." The employer demonstrated, however, that the job held by the comparator was one traditionally held by persons who had previously worked in higher paid jobs on the shop floor but who could no longer do so because of age and infirmity. When the present comparator came into the job he was paid the rate of his predecessor, which was barely less than the comparator's shop-floor rate.[182] The industrial tribunal, EAT, and Court of Appeal all found that it was the comparator's age and infirmity—not his gender—that resulted in the higher rate.[183]

2. Potential

Greater potential for future achievement has been found to be a material difference in both countries. In *EEOC v. Aetna Insurance Co.*,[184] for example, the employer's assessment that a male it lured away from a competitor could likely make the employer more competitive in the casualty underwriting market was accepted as a relevant reason for his higher pay. Similarly, the insurer in *National Vulcan Engineering Insurance Group Ltd. v. Wade*[185] was permitted to consider—in its personnel evaluation scheme—that a worker was a " 'young man going

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180. *Id.* at 128. The tribunal stated:

> The onus of proof under [section 1(3) of the Equal Pay Act 1970] is on the employer and it is a heavy one. Intention, and motive, are irrelevant; and we would say that an employer can never establish in the terms of s. 1(3) that the variation between the woman's contract and the man's contract is genuinely due to a material difference (other than the difference of sex) between her case and his when it can be seen that past sex discrimination has contributed to the variation. To allow such an answer would, we think, be contrary to the spirit and intent of the Equal Pay Act 1970, construed and interpreted in the manner we have already explained. It is true that the original discrimination occurred before [December 12, 1975,] and accordingly was not then unlawful; nonetheless it cannot have been the intention of the Act to permit the perpetuation of the effects of earlier discrimination.

Id.

181. 9 I.R.L.R. 289 (C.A. 1980).

182. *Id.* at 290.

183. *Id.* at 292-93.

184. 616 F.2d 719 (4th Cir. 1980).

185. 7 I.R.L.R. 225 (C.A. 1978).

places.' "[186] The danger that potential will be perceived through consciously or unconsciously sexist eyes is obvious here, just as in the case of other judgments of merit. In each of the cases just mentioned, the assessment of potential occurred in the context of a general evaluation scheme and thus could be viewed as controlled by the structure of that system. One is nonetheless taken aback a bit by the somewhat casual acceptance in *Wade* of the "young man on the way up" stereotype.[187]

3. Different Pay Systems

In *Waddington v. Leicester Council for Voluntary Services*,[188] the applicant (appointed as a "community worker") and comparator (a "playleader") were compensated under different compensation systems; she on "Scale III/IV in the National Salary Scale for Social Workers," he at "Range 3 as laid down by the Joint Negotiating Committee for Youth Leaders and Community Centre Wardens."[189] The EAT implied that the industrial tribunal should find on remand that this constituted a material difference. The opinion clearly states that a familiar example of valid material difference exists when a man is paid more because of seniority.[190]

4. Training Program Participation

It is lawful in both countries to pay a higher wage to one of two persons doing the same job if the better paid is a trainee being rotated through several jobs in order to become familiar with a fuller range of the employer's operations. The training program need not be highly formal. It must, however, be regular enough to demonstrate its reality as a program. Unjustifiable attribution of higher male pay to "trainee" status is a recognized danger, and the defense was denied on this ground in

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186. *Id.* at 226.

187. There is a somewhat similar flavor to Edmonds v. Computer Services (South-West) Ltd., 6 I.R.L.R. 359 (Emp. App. Trib. 1977), in which the EAT remanded a case for consideration of whether an older male with greater general office work experience might reasonably be viewed as having greater potential for carrying broader responsibilities than the female applicant.

188. 6 I.R.L.R. 32 (Emp. App. Trib. 1976).

189. *Id.* at 33.

190. *Id.* at 34. The opinion further notes that,

> Where men and women are employed on like work, and the variation is in the rate of remuneration, and the remuneration is fixed in accordance with nationally, or widely, negotiated wage scales, it would seem to us that there will usually be a strong case for saying that the case falls within subsection (3).

Id.

Brennan v. Victoria Bank and Trust Co.[191] in the United States and in *Harper v. Redland Roof Tiles Ltd.*[192] in the United Kingdom.

5. Prior Earnings and Other Bargaining Tokens

Is a differential based on differences in bargaining power between an allegedly wronged woman and her male comparator a "variation genuinely due to a material difference (other than sex) between her case and his"? Is it "a differential based on any other factor other than sex"? The answers depend on how directly and immediately the characteristic that gives rise to the male's greater bargaining power is seen to flow from the gender difference alone. And, as is often the case, the way in which burdens of proof are structured may influence outcomes. Two British cases, an influential early Court of Appeal decision authored by Lord Denning, *Fletcher v. Clay Cross (Quarry Services) Ltd.*,[193] and the recent House of Lords decision overruling *Clay Cross, Rainey v. Greater Glasgow Health Board,*[194] illustrate the difficulty of the problem.

The applicant in *Clay Cross* was one of three clerks in her employer's sales office. In June 1975, one of her fellow clerks left, and the vacancy was advertised. Only one of the three persons who sought the post proved suitable. He asked for a weekly wage of £ 43, the amount he was then earning elsewhere, and the employer agreed to that figure in order to attract him. The applicant was then being paid £ 35 a week. Each received a weekly £ 6 raise in February 1976. At about that time, the employer engaged consultants to perform a general job evaluation scheme, and they recommended that the sales office clerk wage be set at £ 43.46. The employer accepted the recommendation in the case of the applicant, and raised her to that figure. The male clerk's wage was left at £ 49 a week. The employer conceded before the industrial tribunal that the applicant and the male clerk engaged in like work, but argued that the difference was justified by the fact that it was a practical necessity to offer the man a higher wage than the applicant was receiving in order to attract him.[195] The industrial tribunal held for the employee, but the EAT reversed,[196] stating: "The only reason why they had to pay Mr. Tunnicliffe more was because he had previously been paid more in

191. 493 F.2d 896 (5th Cir. 1974).
192. 5 I.R.L.R. 208 (Indus. Trib. 1976).
193. 7 I.R.L.R. 361 (C.A. 1978).
194. 16 I.R.L.R. 26 (H.L. 1986).
195. 7 I.R.L.R. at 363, 364.
196. 6 I.R.L.R. 258 (Emp. App. Trib. 1977).

another job. It was not because he was a man."[197] Gender was said to be a "matter of indifference" to the employer.[198] The Court of Appeal reinstated the tribunal's decision for the applicant. Lord Denning wrote in broad terms:

> Take heed to those words: 'between her case and his'. They show that the Tribunal is to have regard to *her* and to *him*—to the personal equation of the woman as compared to that of the man—irrespective of any extrinsic forces which led to the variation in pay. . . . Thus the personal equation of the man may warrant a wage differential if he has much longer length of service, or has superior skill or qualifications; or gives bigger output or productivity; or has been placed, owing to down-grading, in a protected pay category, vividly described as 'red-circled'; or to other circumstances personal to him in doing his job.
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> But the Tribunal is not to have regard to any extrinsic forces which have led to the man being paid more. An employer cannot avoid his obligations under the 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.[199]

The troubling term is, obviously, "extrinsic forces." Just how does one decide what is "extrinsic" to the "personal equation"?[200] Why is earnings experience not factored into the personal equation if job experience is? When the consultants fixed £ 43.46 a week as the appropriate figure for the sales clerk job, did they do so without regard to such "extrinsic forces" as earnings experience of clerks generally? Surely not. No sensible job evaluation scheme proceeds in disregard of the labor market; the impacts of those labor market forces are too ubiquitous to be avoided. When an evaluator selects "benchmark" jobs from which to begin calculations of appropriate rates for other jobs, the rate of that benchmark will have been set in response to those very forces—union pressures, skill scarcities, oversupply of workers, and the like—that are to be left out of the "personal equation" according to *Clay Cross*.[201]

While the absolutist language of Lord Denning's opinion in *Clay Cross* is clearly open to question, one cannot doubt the reality of the dangers to which he adverted. Permitting employers to defend on the basis of response to employee demand would, as he points out, make the

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197. *Id.* at 259.
198. *Id.*
199. 7 I.R.L.R. at 363.
200. The personal equation compares the applicant's case to that of her comparator.
201. *See* M. RUBENSTEIN, EQUAL PAY FOR WORK OF EQUAL VALUE 131-34, 140 (1984).

statute easily avoidable. To allow the defense only if the employer convinced the tribunal of his sincere indifference to gender would entangle tribunals in worrisome state of mind issues of a sort likely to interfere with the intent of Parliament "that Industrial Tribunals should provide a quick and cheap remedy," a forum in which the parties "could present their cases without having to go to lawyers for help."[202] In a situation like that found in *Clay Cross*, however, the employer could argue that he was responding not to a naked demand, but to a demand backed by objective evidence—an individual earnings record. Does that added evidence justify the different treatment? One possible answer is that the statute reflects the conclusion reached by the Parliament that "[i]n the labour market women have always been in a worse position than men. Under both Article 119 and the Equal Pay Act that was no longer to be so."[203] In light of that assessment by Parliament, the Court of Appeal could refuse to accept as "material" a difference in earnings experience in that flawed sexist labor market.

The applicant for relief in *Rainey v. Greater Glasgow Health Board*[204] was employed by the local health board as a prosthetist. She chose as comparator Mr. Alan Crumlin, a fellow prosthetist at Belvidere Hospital. As Lord Emslie stated in his opinion, "They do like work, and their qualifications and experience are broadly similar. Mr. Crumlin, however, is paid more. . . ."[205] Mr. Crumlin may be seen, indeed, as a living exemplar of the phrase "in the right place at the right time." He qualified as a prosthetist in April 1980 and went to work at Belvidere Hospital in the service of a private employer with whom the local health board had a contract for providing prosthetic services. At that time, all prosthetic services in Scotland were provided on this sort of contract basis. In 1980, however, a decision was made to end the contracting out arrangement and to establish a Prosthetic Fitting Service as part of the National Health Service in Scotland. After discussions, the relevant government agencies selected an appropriate wage rate in the National Health Service pay scale.[206]

In the meantime, negotiations were taking place between government officials and the private contractors (and their employees), who were already at work in the Scottish hospitals. The government officials hoped

202. *Clay Cross*, 6 I.R.L.R. at 364 (Lord Justice Lawton).

203. *Id.* at 365 (Lord Justice Lawton).

204. 13 I.R.L.R. 88 (Emp. App. Trib. 1983), *aff'd*, 14 I.R.L.R. 414 (Sess. 1985), *aff'd*, 16 I.R.L.R. 26 (H.L. 1986).

205. 14 I.R.L.R. at 415.

206. *Id.* at 416.

to recruit as many of this generally experienced group as possible and to keep them in place at the same facilities. These negotiations revealed that all the private contractor prosthetists were earning more than the wage rate fixed as the National Health Service rate for that job. In order to retain the services of the experienced prosthetists, an offer was made to the entire group then working for private contractors, conditioned upon at least half of them accepting transfer into the National Health Service.[207] Those who were willing to transfer over would be given

> the option of entering the service at their existing salaries and subject to the [trade union] negotiating machinery. As it happened, all the prosthetists privately employed were male. In the result, Mr. Crumlin had the benefit of the offer and so emerged with a higher salary and better prospects for an increase than did the [applicant]. . . .[208]

The majority of private contractor prosthetists, including Mr. Crumlin, agreed to transfer. Mr. Crumlin was then earning £ 6680 per year. Ms. Rainey, the applicant, qualified as a prosthetist in September 1980 (five months after Mr. Crumlin) and was employed by the Health Board on October 1 of that year. Her pay rate was set by the National Health Service scale at £ 4773 a year. By 1984, the gap between the applicant and her barely senior colleague had widened; he was earning £ 10,085 a year, while she earned £ 7295.[209] The industrial tribunal, the EAT, and the Court of Session (by a two to one division) all upheld that outcome.[210]

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207. 13 I.R.L.R. at 90.

208. 16 I.R.L.R. at 29.

209. *Id.* at 28.

210. The Scottish judges—in the interest of uniformity on both sides of the Scotland-England border—accepted the "general guidance to the construction and application of the far from clear language of s. 5.1(3) to be found in the *Clay Cross* case." 14 I.R.L.R. at 418. The majority went on, however, to point out that it was "far from easy . . . to lay down any general rule as to . . . what 'differences' are to be regarded as falling within the personal circumstances of the man and the woman." *Id.*; *see also id.* at 422 (opinion of Lord Cameron). The majority found guidance with respect to what is "personal" in a 1980 Court of Appeal decision, Farthing v. Ministry of Defense, 9 I.R.L.R. 402 (C.A. 1980). Applicants in that case were male drivers of light cars who sought a £ 1.25 a week increase in their base pay to make it equal to the base pay for female drivers of light cars. The higher rate for the fifty-one female light car drivers had arisen from attempts to make men's and women's pay equal! Prior to 1970, the employer had maintained different "pay bands" for men and women. Female drivers of light cars were in women's pay band 4; women drivers of heavy cars were in women's pay band 6; men drivers of light cars were in men's pay band 4; men drivers of heavy cars were in men's pay band 6. Between 1970 and 1975, the employer (in order to comply with the Equal Pay Act by the time it was to come into effect) began increasing women's pay. By hap-

The lead opinion in the House of Lords quotes at length from Lord Denning's opinion in *Clay Cross,* and then states that those quoted statements

> are unduly restrictive of the proper interpretation of s. 1(3). The difference must be 'material', which I would construe as meaning 'significant and relevant', and it must be between 'her case and his.' Consideration of a person's case must necessarily involve consideration of all the circumstances of that case. These may well go beyond what is not very happily described as 'the personal equation', ie the personal qualities by way of skill, experience or training which the individual brings to the job. . . . In particular, where there is no question of intentional sex discrimination whether direct or indirect (and there is none here) a difference which is connected with economic factors affecting the efficient carrying on of the employer's business or other activity may well be relevant.[211]

The members of the group that included Mr. Crumlin, Ms. Rainey's comparator, had advantages to offer—as a group—that neither Ms. Rainey nor any subsequently-hired prosthetist could offer: on-site experience and the opportunity to maintain continuity in providing a signifi-

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penstance, the wage rate for women's pay band 6 was very nearly the same as that for men's pay band 4, so the employer placed female light car drivers into women's pay band 6. In 1975 the employer replaced both of its single-sex pay bands with a new common pay scheme. In that new unisex system all light car drivers, male and female, were placed in (new) pay band 4 and received equal pay. Then, as Lord Denning stated, "trouble arose":

> Fifty-one women light car drivers (who had been put on the women's band 6 during the equalization period) objected to being transferred to the common pay band 4. They said that they wanted to be on the common pay band 6. They thought a question of status arose. So, with their union's support, they complained. It was not very logical. It does not seem to me to be very justifiable. Nevertheless, they put it to their union: and there were discussions between the union and the Ministry over a period of two years. Then on 25.8.77 the union and the Ministry arrived at a settlement whereby the 51 ladies were given special treatment.

Id. at 403. A unanimous Court of Appeal found the variation in pay "genuinely due to a material difference (other than the difference of sex)." *Id.* at 404. As noted by Lord Cameron of the Court of Session, it was difficult to reconcile *Farthing* with much of the language in *Clay Cross*: "One might be excused for a passing heretical thought that union pressure mobilised by the 51 ladies might have been regarded as constituting an extrinsic circumstance of most potent influence . . . ." *Rainey,* 14 I.R.L.R. at 422. The dissenter in the Court of Session in *Rainey* urged that *Farthing* was not at all consistent with *Clay Cross. Id.* at 424-25. Certainly the special rate paid the fifty-one women would probably be thought by American courts to be a gender-based rate, given the treatment of the "red circle" rate in *Corning Glass.*

211. 16 I.R.L.R. at 29.

cant medical service. Mr. Crumlin belonged in the group as one who could offer continuity of practice on the transfer date of July 1, 1980. To treat him as a member of this group—even though less experienced than his colleagues—was thus reasonable. There was, then, "undoubtedly a good and objectively justified ground for offering him that scale of remuneration."[212]

Lord Keith's opinion in *Rainey* does not conclude with the finding that the offer of current pay to the comparator was objectively justified. He also addresses whether the rate fixed for the group to which the applicant belongs is objectively justifiable. That wage rate was set, he states, by means of the usual practices of the National Health Service, and the desire of the Board of Health to have all its employees subject to that one scale is clearly justified: "[F]rom the administrative point of view it would have been highly anomalous and inconvenient if prosthetists alone, over the whole tract of future time . . . , were to have . . . a different salary scale and different negotiating machinery."[213]

What of the fact that the group of transferring prosthetists was all male? That single gender composition makes one suspicious about whether the claimed need for continuity and experience might be pretextual. No such allegation seems to have been made. Two factors indicate that the reason given for disparate treatment was genuine: The private contractors' pay scales were consistently unisex during the period before the National Health Service takeover; since that takeover, two males had been hired and were paid on the same basis as the newly hired females, including Ms. Rainey. Neither factor is totally persuasive. To say that a rate is common to both sexes when in fact it is being paid only to one requires that considerable weight be given to the good faith of the employers who pay such purportedly unisex rates. The second factor—hiring two male inspectors at the newer, lower rate —distinguishes this case from *United Biscuit*, but is hardly helpful in deciding whether the origins of that higher rate should lead to its being treated as a "man's rate." When the higher-paid group is all (or predominantly) male, and the difference in pay very substantial, might the purpose of the statute be served by requiring the employer to demonstrate that access to the higher-paid group was in fact available to women, so that its single sex composition was truly adventitious?

How have the American courts fared with this sort of case? The Court of Appeals for the Ninth Circuit considered a prior salary-based

212. *Id.* at 31.
213. *Id.*

pay scheme in *Kouba v. Allstate Insurance Co.*[214] In *Kouba*, the employer paid its new sales agents the greater of (1) a guaranteed minimum based on "ability, education, experience and prior salary", or (2) commissions earned from sales. During the agents' first eight to thirteen weeks, they were in a training program, not selling, and would thus necessarily be paid the guaranteed minimum. The system's result was that female agents' incomes were less than those of male agents.[215] The trial court found against the employer, reasoning that,

> (1) because so many employers paid discriminatory salaries in the past, the court would presume that a female agent's prior salary was based on her gender unless Allstate presented evidence to rebut that presumption, and (2) absent such a showing (which Allstate did not attempt to make), prior salary is not a factor other than sex.[216]

The Ninth Circuit reversed. The court noted that, "while the Congress fashioned the Equal Pay Act to help cure long-standing social ills, it also intended to exempt factors such as training and experience that may reflect opportunities denied women in the past."[217] Nonetheless, to allow automatic use of prior salary as a defense would create too great an opportunity for erosion of the statute. The court therefore developed a "pragmatic standard" to protect against employer abuse of a prior salary defense—"that the employer must use the factor reasonably in light of the employer's stated purpose as well as its other practices."[218] The employer must thus be able to show that its use of prior earnings makes business sense.

In *Kouba*, Allstate urged two purposes for using prior salary. First, "[b]y limiting the monthly minimum according to prior salary, Allstate hopes to motivate the agent to make sales, earn commissions, and thus improve his or her financial position."[219] This, the court said, can hardly justify its use during training when no commissions could be earned.[220] The court could assess whether, after training, Allstate was using the minimum guarantee as a motivator by inquiring into the proportion of

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214. 691 F.2d 873 (9th Cir. 1982), *reversing* 523 F. Supp. 148 (E.D. Cal. 1981).

215. *Id.* at 874-75.

216. *Id.* at 875 (summarizing the decision of the district court). Another federal district court expressed similar skepticism. *See* Futran v. RING Radio Co., 501 F. Supp. 734 (N.D. Ga. 1980).

217. 691 F.2d at 876.

218. *Id.* at 876-77.

219. *Id.* at 877.

220. *Id.* at 878.

agents paid on a commission rather than a guarantee basis.[221] The second reason to use prior salary, Allstate argued, was that prior earnings probably correspond roughly to an employee's ability; thus, "it uses prior salary to predict" a new sales agent's likely success.[222] The credibility of this rationale could be tested on remand, the court suggested, by examining what other predictors the employer was using and whether prior selling job earnings were given added weight.[223]

This opinion demonstrates the willingness of American courts to give substantial weight to an individual employer's business purposes. It also demonstrates their unwillingness to accept the mere assertion of superficially reasonable purposes as decisive.

The pay scheme in *Kouba* allegedly used prior salary to keep initial pay low so that employees would have an incentive to work harder. The employers in *Covington v. Southern Illinois University*[224] and *Glenn v. General Motors Corp.*[225] used prior salary for a different purpose—to make transfer within the organization more attractive by guaranteeing that pay in a new position would not be less than that in a former position. The outcomes in the two cases differ. In *Covington*, the Seventh Circuit permitted the employer to use its salary retention policy as a defense under the rubric of "any other factor other than sex."[226] On the other hand, the Eleventh Circuit in *Glenn* rejected General Motors' attempt to use an almost identical policy as a defense, saying that the Seventh Circuit had given undue weight to market forces and had ignored Congressional intent.[227] The *Glenn* opinion makes clear, however, that its rejection of a salary retention policy as the sole basis of a defense did not mean that individual salary retention could never be justified by business requirements.[228]

Overall, the American courts have been unsympathetic to employer pleas that women employees were paid less because "that is what the market will bear." Indeed, that justification was roundly condemned in the influential early decisions in *Hodgson v. Brookhaven General Hospital*[229] and *Brennan v. City Stores, Inc.*[230] That an employer has given

221. *Id.*
222. *Id.*
223. *Id.*
224. 816 F.2d 317 (7th Cir. 1987), *cert. denied,* 108 S.Ct. 146 (1987).
225. 841 F.2d 1567 (11th Cir. 1988).
226. 816 F.2d at 321.
227. 841 F.2d at 1571.
228. *See id.*
229. 436 F.2d 719 (5th Cir. 1970).
230. 479 F.2d 235, 241 n.12 (5th Cir. 1973).

a male more money to match offers from other employers competing for that particular male's services was, however, given substantial weight in *Horner v. Mary Institute.*[231] The precise weight given this factor is impossible to assess; the court found the male comparator superior to the female plaintiff on several counts.[232] The court may also have been influenced by the fact that one of the supervisors who set plaintiff's salary was a well-known advocate of women's rights.[233]

6. Economic or Administrative Benefit to the Employer

The treatment of prior earnings in *Rainey* in the United Kingdom and in *Kouba* in the United States demonstrates that in both countries an employer may defend against a prima facie case of paying men and women differently for equal work by showing objective grounds for believing that the comparator gives the employer economic or administrative benefits the claimant does not offer. In those two cases, the anticipated benefit was to be relatively immediate. Variations in pay based on employer evaluations of "potential" or on participation in a training program involve judgments about long-term economic benefit. Each of these situations can be easily recast into present tense "personal equation" terms: The higher paid comparator is "more able" or "is marked for advancement." In some cases, however, the economic benefit that the employer perceives is more difficult to treat reasonably as a "personal" one. Recognizing that economic or administrative benefit to an employer is the unifying theme of affirmative defense is particularly important when analyzing cases in which an apparently gender-neutral pay scheme may have a disparate impact on men and women workers.

The Court of Appeals for the Third Circuit adopted an "economic benefit" rationale in 1973 in *Hodgson v. Robert Hall Clothes, Inc.*[234] The female sales clerks for whom relief was sought all worked in the women's and girls' clothing department of defendant's Wilmington, Delaware store. The comparators were male clerks in the men's and boys' clothing department of the same store. Only women worked in the former, only men in the latter; this was found by the trial court to be justified, and that (arguably erroneous) decision was not challenged on appeal.[235] The appellate court found that, on average, the merchandise in the men's department was of higher quality, sold at a higher price, and

231. 613 F.2d 706 (8th Cir. 1980).
232. *Id.* at 713-14.
233. *Id.* at 712.
234. 473 F.2d 589 (3d Cir.), *cert. denied*, 414 U.S. 866 (1973).
235. *Id.* at 591.

produced a greater profit margin than the clothing in the women's department. From this the court determined that the men's department created a greater gross profit for Robert Hall. Therefore, the court found that the male clerks sold more merchandise and produced more gross profit per hour of work than the female clerks.[236] The work performed in the two departments, however, was found to be "equal" in terms of effort, skill, and responsibility.[237]

The Secretary of Labor argued that economic benefit to the employer cannot be used to justify a wage differential under section 206(d)(1)(iv). As the court summarized the argument:

> He argues that "any other factor" does not mean *any* other factor. Instead he claims it means any other factor other than sex which "is related to job performance or is typically used in setting wage scales." He contends that economic benefits to an employer do not fall within this exception.[238]

In rejecting the argument, the court relied on the broad wording of the phrase "any other factor," on the legislative history of the provision, and on references in the Secretary's regulations interpreting the act to factors such as "sales volume, markup, [or] . . . turnover" in determining whether a given commission rate is reasonable.[239]

At trial, the employer prevailed with respect to its full-time employees, but lost with respect to part-time workers. Only fragmentary records of the sales volumes of particular part-time workers were available, but these showed that the male clerks achieved higher dollar volumes of sales than the females. The district court held that defendant had the burden of proving its defense of greater economic benefit on an individual-by-individual basis, and that it had not been able to do so on the data available.[240] The appellate court reversed on that point, holding that it was enough for defendant to show the economic rationality of maintaining a lower general wage level for the women's department than for the men's

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236. *Id.* at 590-91. Evidence produced at trial indicated, for example, that during each year from 1965 through 1969, the gross profit per hour worked in the men's department was more than twice that in the women's department. In 1969, that figure for the men's department was $34.16; it was $15.03 for the women's department. The men's hourly pay that year was $3.13; the women's was $2.16. *Id.*

237. *Id.* at 594.

238. *Id.* at 593.

239. *Id.* at 594-95. The court specifically rejected Griggs v. Duke Power Co., 401 U.S. 424 (1971), as a controlling precedent. *Griggs* was relevant, the court indicated, on the issue of whether the job assignment was proper. Once the question of wage differential was reached, however, the question became one of legitimate business purpose, not one of job relatedness. 473 F.2d at 596.

240. 326 F. Supp. 1264, 1278 (D. Del. 1971).

department.[241]

The relevance of economic benefit to the employer is most clearly stated in the United Kingdom in the EAT's very important opinion in *Jenkins v. Kingsgate (Clothing Productions) Ltd.*[242] The case had a lengthy litigation history. The applicant complained that, as a part-time worker, she was paid less than males working full-time. At the time of the hearing before the industrial tribunal, the employer had thirty-four full-time male employees, forty-nine full-time female employees, one part-time[243] male employee, and five part-time female employees. Until shortly before the effective date of the Equal Pay Act, the employer had paid the same rate to full-time and part-time workers. As that date approached, men's and women's rates were equalized, but new part-time rates were established that were ten percent lower than the full-time rates. The employer did not force women into part-time assignments; rather, the tribunal found, "[i]t was . . . the company's desire that its workers should be employed on a full time basis."[244] The tribunal also found "that the company had maintained its differentiation between part time and full time workers to discourage absenteeism in the factory, and also in order to ensure that the machinery which was in use, was used on a full time basis."[245] On this basis, the tribunal held for the employer.

Applicant appealed to the EAT, urging that part-time status could not be a "material difference." At the outset of the EAT oral hearing, however, counsel for the applicant conceded that prior EAT rulings strongly indicated that part-time status would be treated as a "material difference" under the British statute, but that this should not be allowed under article 119 of the Treaty of Rome. Counsel therefore asked that questions based on the circumstances of the *Jenkins* case and on circumstances in the United Kingdom generally be referred to the European Court of Justice.[246] The EAT accepted the proposal, and referred four questions to the ECJ:

> 1. Does the principle of equal pay, contained in Article 119 of the EEC Treaty and Article 1 of the Council Directive of [February 10, 1975], require that pay for work at time rates shall be the same, irrespective:

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241. 473 F.2d at 597.

242. 9 I.R.L.R. 6 (Emp. App. Trib. 1980), *limited review by Eur. Ct. Just*, 10 I.R.L.R. 228 (Eur. Ct. Just. 1981) (EAT referred four questions of law to ECJ), *on remand*, 10 I.R.L.R. 388 (Emp. App. Trib. 1981).

243. A part-time employee is one working less than forty hours per week.

244. 9 I.R.L.R. at 7.

245. *Id.*

246. *Id.* at 8.

(a) of the number of hours worked each week; or

(b) of whether it is of commercial benefit to the employer to encourage the doing of the maximum possible hours of work and consequently to pay a higher rate to workers doing 40 hours per week than to workers doing fewer than 40 hours per week?

2. If the answer to Question 1(a) or (b) is in the negative, what criteria should be used in determining whether or not the principle of equal pay applies where there is a difference in the time rates of pay related to the total number of hours worked each week?

3. Would the answer to question 1(a) or (b) or 2 be different (and, if so, in what respects) if it were shown that a considerably smaller proportion of female workers than of male workers is able to perform the minimum number of hours each week required to qualify for the full hourly rate of pay?

4. Are the relevant provisions of Article 119 of the EEC Treaty or Article 1 of the said Directive, as the case may be, directly applicable in Member States in the circumstances of the present case?[247]

The Delphic quality of the ECJ's response can best be appreciated by quoting from its decision at some length:

It appears from the first three questions . . . that the national court is principally concerned to know whether a difference in the level of pay for work carried out part-time and the same work carried out full-time may amount to discrimination of a kind prohibited by Article 119 of the Treaty when the category of part-time workers is exclusively or predominantly comprised of women.

The answer to the question thus understood is that the purpose of Article 119 is to ensure the application of the principle of equal pay for men and women for the same work. The differences in pay prohibited by that provision are therefore exclusively those based on the difference of the sex of the workers. Consequently the fact that part-time work is paid at an hourly rate lower than pay for full-time work does not amount *per se* to discrimination prohibited by Article 119 provided that the hourly rates are applied to workers belonging to either category without distinction based on sex.

If there is no such distinction, therefore, the fact that work paid at part time rates is remunerated at an hourly rate which varies according to the number of hours worked per week does not offend against the principle of equal pay laid down in Article 119 of the Treaty in so far as the difference in pay between part-time work and full-time work is attributable to factors which are objectively justified and are in no way related to any discrimination based on sex.

Such may be the case, in particular, when by giving hourly rates of pay

247. 10 I.R.L.R. at 388.

which are lower for part-time work than those for full-time work the employer is endeavouring, on economic grounds which may be objectively justified, to encourage full-time work irrespective of the sex of the worker.

By contrast, if it is established that a considerably smaller percentage of women than of men perform the minimum number of weekly working hours required in order to be able to claim the full-time hourly rate of pay, the inequality in pay will be contrary to Article 119 of the Treaty where, regard being had to the difficulties encountered by women in arranging to work that minimum number of hours per week, the pay policy of the undertaking in question cannot be explained by factors other than discrimination based on sex.

Where the hourly rate of pay differs according to whether the work is part-time or full-time it is for the national court to decide in each individual case whether, regard being had to the facts of the case, its history and the employer's intention, a pay policy such as that which is at issue in the main proceedings although represented as a difference based on weekly working hours is or is not in reality discrimination based on the sex of the worker.

The reply to the first three questions must therefore be that a difference in pay between full-time workers and part-time workers does not amount to discrimination prohibited by Article 119 of the Treaty unless it is in reality merely an indirect way of reducing the level of pay of part-time workers on the ground that that group of workers is composed exclusively or predominantly of women.[248]

The principal source of difficulty is the contrast between the second, third, and final paragraphs quoted. Paragraphs two and three establish three conditions for allowing the defense:

(a) The same part time rates must be paid to men working part time and to women working part time;
(b) The difference in part-time and full-time rates must be "attributable to factors which are objectively justified"; and
(c) Those objectively justified factors must be "in no way related to any discrimination based on sex."[249]

The final paragraph, on the other hand, can be read to say that part-time status is a justifiable reason for lower pay unless that status is being used as a pretext for setting a lower rate for women.

On remand, the EAT indicated its confusion over how to interpret the ECJ decision by stating that "one is left in considerable doubt as to the effect of Article 119 in relation to unintentional indirect discrimina-

248. *Id.* at 234.
249. *Id.*

tion."[250] The tribunal also noted that "93% of all part-time workers are women. Therefore, not only in relation to this particular employer but in general, the impact of lower pay for part-time workers bears much more heavily on women than on men."[251] The EAT proceeded on the now questionable assumption that the ECJ opinion should be read to mean "that Article 119 . . . does not apply to cases of unintentional indirect discrimination."[252] However, the tribunal stated:

> It would not contravene s. 2 of the European Communities Act if the United Kingdom statutes conferred on employees greater rights than they enjoy under Article 119. Since the Act of 1970 is an integral part of one code against sex discrimination and the rest of the code plainly renders unlawful indirect discrimination even if unintentional, it seems to us right that we should construe the Equal Pay Act 1970 as requiring any difference in pay to be objectively justified even if this confers on employees greater rights than they would enjoy under Article 119 of the Treaty. We therefore hold that in order to show a 'material difference' within s. 1(3) of the Act of 1970 an employer must show that the lower pay for part-time workers is in fact reasonably necessary in order to achieve some objective other than an objective related to the sex of the part-time worker.
>
> To sum up, an Industrial Tribunal in considering cases of part-time workers under the Act of 1970 will have to consider the following points:
>
> (1) Do the part-time workers consist mainly of women?
>
> (2) Do the part-time workers do 'like work' to full-time male employees of the same employer?
>
> (3) If the answers to (1) and (2) are 'yes', the equality clause will apply unless the employers can justify the differential in pay by showing a material difference for the purposes of s. 1(3).
>
> (4) If the Industrial Tribunal finds that the employers intended to discriminate against women by paying part-time workers less, the employers cannot succeed under s. 1(3).
>
> (5) Even if the employers had no such intention, for s. 1(3) to apply the employer must show that the difference in pay between full-time and part-time workers is reasonably necessary in order to obtain some result

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250. *Id.* at 393.

251. *Id.* at 391.

252. *Id.* at 393. As mentioned above, the ECJ decision in Bilka-Kaufhaus v. Weber von Hartz, 15 I.R.L.R. 317 (Eur. Ct. Just. 1986), indicates that this assumption was not correct. The court there held:

> Article 119 of the EEC Treaty is infringed by a department store company which excludes part-time employees from its occupational pension scheme, where that exclusion affects a far greater number of women than men, unless the undertaking shows that the exclusion is based on objectively justified factors unrelated to any discrimination on grounds of sex.

15 I.R.L.R. at 321.

(other than cheap female labour) which the employer desires for economic or other reasons.[253]

The net outcome, then, is remarkably similar to that in *Robert Hall Clothes*. If the applicant makes out a prima facie case, the employer may assert a general pay policy as a defense even though that policy has a disparate impact on women. The employer must, however, be able to demonstrate that a policy with such an impact is objectively justifiable in practice: a superficially valid statement of purpose is not enough. In both countries, apparently, the employer's justification may be based on the general experience of that employer, and not limited just to the case of the applicant.

IV. "WORK OF EQUAL VALUE"

In July 1982, the European Court of Justice issued its decision in *Commission of the European Communities v. United Kingdom*.[254] The Commission urged that the Equal Pay Act 1970 did not fulfill the obligation to implement Directive No. 75/117, which required the elimination of all discrimination with respect to equal value work.[255]

The Commission argued that the British legislation fell short because it provided no avenue of relief for a worker who regarded his or her work of equal value to the work done by a member of the other sex, but whose employer had not adopted a job evaluation system.[256] The British Government responded that the provision requiring equal pay for work "rated as equivalent" should be read together with that requiring equal pay for "like work" and that the two combined covered all cases in which a remedy should, as a practical matter, be imposed.[257] The European Court of Justice held against the United Kingdom, declaring that,

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253. 10 I.R.L.R. at 394.

254. 11 I.R.L.R. 333 (Eur. Ct. Just. 1982).

255. Council Directive 75/117, *supra* note 10. Article 1 of Directive No. 75/117 provides:

> 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.

11 I.R.L.R. at 334-35.

256. *Id.* at 334.

257. *See id.* at 336.

> by failing to introduce into its national legal system in implementation of the provisions of Council Directive No 75/117/EEC of [February 10, 1975,] such measures as are necessary to enable all employees who consider themselves wronged by failure to apply the principle of equal pay for men and women for work to which equal value is attributed and for which no system of job classification exists to obtain recognition of such equivalence, the United Kingdom has failed to fulfil [sic] its obligations under the [EEC] Treaty.[258]

The British Government responded by enacting the Equal Pay (Amendment) Regulations 1983.[259] The Government chose to introduce the amendments through a procedure[260] that restricts opportunity for debate on, and amendment of, technical amendments required to bring United Kingdom domestic legislation into conformity with European Community Law. The decision to use the abbreviated procedure has been criticized,[261] and it may be that the understandable desire to act quickly led to provisions that are difficult to understand fully.

The basic contours of the amendments are simple enough. Regulation 2(1) amends section 1(2) of the Equal Pay Act by adding a third basis for an equal pay claim to the existing "like work" and "work rated as equal" bases.[262] Under regulation 2(1),

> (c) where a woman is employed on work which, not being work in relation to which paragraph (a) or (b) above applies, is, in terms of the demands made on her (for instance under such headings as effort, skill and decision), of equal value to that of a man in the same employment—
> (i) if (apart from the equality clause) any term of the woman's contract is or becomes less favourable to the woman than a term of a similar kind in the contract under which that man is employed, that term of the woman's contract shall be treated as so modified as not to be less favourable, and
> (ii) if (apart from the equality clause) at any time the woman's contract does not include a term corresponding to a term benefiting that man included in the contract under which he is employed, the woman's contract shall be treated as including such a term.[263]

These claims, like those based on "like work" and "work rated as equal," are handled by the industrial tribunals. The procedures employed are, however, significantly different. Special provisions for em-

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258. *Id.* at 340.
259. *See supra* note 31.
260. European Communities Act, 1972, ch. 68, § 2.
261. *See, e.g.*, M. RUBENSTEIN, *supra* note 201, at 48-49.
262. HALSBURY'S STATUTES, *supra* note 31, at 12/23.
263. *Id.*

ployer defenses are also included.

An equal value case begins, like any other before an industrial tribunal, with an originating application, a copy of which goes to the named respondent.[264] There then follows an investigation of varying intensity, depending on the circumstances, and possibly a prehearing assessment.[265] At the hearing, the tribunal must decide whether "there are no reasonable grounds for determining that the work is of equal value."[266] Section 2A(2) allows the tribunal to find that no reasonable grounds exist if the work of the woman applicant and that of her comparator "have been given different values on a study such as is mentioned in section 1(5) . . . ."[267] At this point, either party (but usually the employer) may ask the tribunal to hear evidence on the defense of "genuine material difference."[268] A tribunal is thus likely to consider three major questions at its initial hearing: (1) Does the applicant offer any reasonable ground for the claim of work of equal value?; (2) Must applicant's claim fail because applicant's job has received different values from those of her comparator in a nondiscriminatory job evaluation?; and (3) Does the appli-

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264. IT Rule 2 places the responsibility for transmittal on the Secretary of the Tribunals. *See* Halsbury's Statutory Instruments, *supra* note 39, at 2356.

265. In an "equal value" case, as in "like work" and "work rated as equivalent" cases, the tribunal may make a "pre-hearing assessment" of the strength of an applicant's claim. If the tribunal "considers that the . . . application . . . or any particular contention of a party . . . appears to have no reasonable prospect of success, it may indicate that in its opinion, if the originating application shall not be withdrawn . . . or contention of the party shall be persisted in up to or at the hearing, the party in question may have an order for costs made against him at the hearing . . . ." IT Rule 6(2), *id.* at 2358. Defects in the originating application can, however, be "cured" by the introduction of evidence at the hearing. In Dennehy v. Sealink U.K. Ltd., 16 I.R.L.R. 120 (Emp. App. Trib. 1986), the EAT held that a tribunal must consider both the written application for relief and whatever evidence has been taken and then ask itself whether, "[l]ooking at the matter in the round, do we find that there was no reasonable basis for a claim?" *Id.* at 122.

266. Equal Pay Act, 1970, ch. 41, § 2A(1)(a) *as amended by* Equal Pay (Amendment) Regulations, 1983, reg. 3(1), *reprinted in* HALSBURY'S STATUTES, *supra* note 31, at 12/25.

267. *Id.* § 2A(2). Section 1(5) is the provision that defines "work rated as equal." *See supra* note 72 and accomanying text. An employer was denied the use of the section 2A(2) defense on the ground that the study in question did not meet the requirements of section 1(5) in Bromley v. H & J Quick Ltd., 17 I.R.L.R. 249 (C.A. 1988).

268. *See* McGregor v. General Mun. Boilermakers and Allied Trades Union, [1987] Indus. Case Rep. 505 (Emp. App. Trib. 1986). A recent decision by a divisional court suggests that a tribunal must receive "evidence" in order to grant this defense at the preliminary stage, even though the basis for the defense was the fact that the employer was bound by law to pay the specific rates of pay it was paying. *See* R. v. Secretary of State for Social Services *ex parte* Clarke, 17 I.R.L.R. 22 (Q.B. 1987).

cant's claim fail because the difference in pay is "genuinely due to a material factor which is not the difference of sex?" A fourth issue may also arise: Does the applicant's case fall within the "like work" provisions?

If the tribunal finds a reasonable basis for the claim and does not find that the employer has made out either defense, then the tribunal must appoint a member of the panel of independent experts to present a report[269] on "whether any work is of equal value to other work in terms of the demands made on the person employed on the work (for instance under such headings as effort, skill and decision) . . . ."[270] The expert's report is prepared on the basis of written evidence only; the expert need not observe either applicant or comparator.[271] The matter is submitted in writing[272] to the expert, who must produce a report based on all available information, including the parties' representations. The expert must then transmit the report—along with any conclusions reached—to the tribunal.[273] Once the report is received, it is transmitted to the parties

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269. Industrial Tribunals (Rules of Procedure) Regulations, S.I. 1985, No. 16, sched. 2, rule 7A(1) (incorporating the definition of "expert" contained in section 2 of the Industrial Tribunal (Rules of Procedure) Regulations 1985) [hereinafter IT Complementary Rule], *reprinted in* Halsbury's Statutory Instruments, *supra* note 39, at 2367.

270. *Id.*

271. This rule rejected Irish practice, which the ECJ mentioned as a possible model. *See* Townshend-Smith, *The Equal Pay (Amendment) Regulations 1983,* 47 MOD. L. REV. 201, 206-10 (1984).

272. IT Complementary Rule 7A(2) reads as follows:

> The requirement . . . shall set out—
> (*a*)the name and address of each of the parties;
> (*b*) the address of the establishment at which the applicant is (or, as the case may be, was) employed;
> (*c*) the question; and
> (*d*) the identity of the person with reference to whose work the question arises; and a copy of the requirement shall be sent to each of the parties.

IT Complementary Rule 7A(2), *reprinted in* Halsbury's Statutory Instruments, *supra* note 39, at 2367.

273. IT Complementary Rule 7A(3). *Id.* The full text of the rule requires the expert to:

> (*a*) take account of all such information supplied and all such representations made to him as have a bearing on the question;
> (*b*) before drawing up his report, produce and send to the parties a written summary of the said information and representations and invite the representations of the parties upon the material contained therein;
> (*c*) make his report to the tribunal in a document which shall reproduce the summary and contain a brief account of any representations received from the parties upon it, any conclusion he may have reached upon the question and the reasons for that conclusion or, as the case may be, for his failure to reach such a

and the hearing is resumed. At the resumed hearing, either party may seek to persuade the tribunal that the report of the independent expert should not be admitted; if the tribunal is so persuaded, another member of the panel of independent experts is charged with preparing a report. Either party may ask the tribunal to require the expert to attend the hearing for cross-examination,[274] call an expert of the party's own choosing to address the same issue as that submitted to the member of the panel of independent experts,[275] and offer evidence on the question whether a variation in pay is due to a genuine material factor other than sex.[276] Other factual evidence is generally not admissible at the resumed hearing,[277] since it should have been made available to the independent expert previously.[278] The tribunal must then decide the case.

Only a handful of decisions above the industrial tribunal level have been reported under these new provisions.[279] Applicants are often hard pressed to find appropriate comparators. Although the work of applicant and comparator need not be "like work," they must be "in the same employment," which means either (1) in the same establishment, or (2) in different establishments operated by the same employer in which

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conclusion;

(d) take no account of the difference of sex and at all times act fairly.

Id.

274. IT Complementary Rule 8(2A), *reprinted in* Halsbury's Statutory Instruments, *supra* note 39, at 2368.

275. IT Complementary Rule 8(2B). *Id.*

276. IT Complementary Rule 8(2E). *Id.* at 2369.

277. IT Complementary Rule 8(2C). *Id.*

278. IT Complementary Rule 8(2D), however, provides that a party may,

> give evidence . . . call witnesses and . . . question any witness upon any such matters of fact . . . if . . . the report of the expert contains no conclusion on the question of whether the applicant's work and the work of the [comparator] are of equal value and the tribunal is satisfied that the absence of that conclusion is wholly or mainly due to the refusal or deliberate omission of a person required by the tribunal . . . to furnish information or to produce documents to comply with that requirement.

Id.

279. A survey article in the March/April 1986 issue of EQUAL OPPORTUNITIES REVIEW states that some 600 applications for relief were filed in 1984 and 1985. EQUAL OPP. REV. 6-13 (Mar./Apr. 1986). Only eighteen had gone beyond the preliminary screening hearing, and just four were subjects of tribunal decisions after receipt of an independent expert's report. *Id.* A fifth reached that stage just afterwards. *See* EQUAL OPP. REV. 6-8 (July/Aug. 1986). In 1986, the Equal Opportunities Commission (EOC) was asked to provide assistance in 432 Equal Pay Act cases, but its report does not break these down by like-work, rated-equal, and equal-value categories. 1986 EQUAL OPP. COMM'N ANN. REP. 44.

"common terms and conditions of employment" apply to the relevant jobs.[280] Some applicants have sought to compare their work with that of males in other establishments but have been rebuffed because the employment settings were found to be too different. In *Clwyd County Council v. Leverton*,[281] the applicant, a nursery nurse, established a prima facie case by referring to a document submitted jointly by her employer (the Clwyd County Council) and her union to another government body seeking better wage levels for nursery personnel. The document stated " 'that the pay of Nursery Assistants (Classes 1 and 2) compares unfavourably with the salary grades for clerical staff in local government.' "[282] No comparators were named; the application referred to " '[u]nqualified, short-service and junior male clerical workers with less responsibility and lesser relative value duties . . . .' "[283] The employer noted that the great majority of clerical workers in the same employment were female; thus, it argued that the applicant was seeking to remedy a wage variation based on factors other than gender. The industrial tribunal granted discovery to the applicant, saying that "in a large organisation . . . an applicant might have no means of knowing whether or not she has a *prima facie* claim, because she would not have the information upon which she could actually name a male comparator."[284] The EAT affirmed, finding that a prima facie case had been made out and that applicant's discovery order could lead to her getting "the relevant names."[285] The applicant finally selected eleven males as comparators, but these were found unsuitable because their hours of work and holidays were significantly different from the applicant's; therefore, they did

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280. Section 1(6) of the Equal Pay Act 1970, as amended, states:

> [A]nd men shall be treated as in the same employment with a woman if they are men employed by her employer or any associated employer at the same establishment or at establishments in Great Britain which include that one at which common terms and conditions of employment are observed either generally or for employees of the relevant classes.

Equal Pay Act, 1970, ch. 41, § 1(6), *as amended by* Sex Discrimination Act, 1975, ch. 65, sched. 1, § 1. The respondent in Lawson v. Britfish Ltd., 17 I.R.L.R. 53 (Emp. App. Trib. 1987), argued that the phrase "at which common terms and conditions of employment are observed" should be read to apply to the establishment at which the applicant and a comparator worked. The EAT, reversing a decision of an industrial tribunal panel, held that that phrase does not apply in cases in which applicant and comparator work at the same establishment. *Id.* at 54.

281. 14 I.R.L.R. 197 (Emp. App. Trib. 1985).

282. *Id.* at 197.

283. *Id.*

284. *Id.* at 198.

285. *Id.*

not work under the same "terms and conditions of employment."[286] This was affirmed in turn by the EAT and the Court of Appeal. The three members of the Court of Appeal panel were unable to reach agreement, however, about the meaning of "common terms and conditions of employment."[287]

A still more troubling problem arose in *Pickstone v. Freemans PLC.*[288] In *Pickstone*, the applicants (female "warehouse operatives") sought to pursue an "equal value" claim using as comparators more highly paid male "checker warehouse operatives," although there were also in the same firm male "warehouse operatives" receiving the same pay as the applicants.[289] The new subsection (2)(c), added in response to the ECJ decision in *Commission of the European Communities v. United Kingdom*,[290] begins as follows: "where a woman is employed on work which, not being work in relation to which paragraph (*a*) or (*b*) above applies . . . ."[291] Paragraph (a) is the "like work" provision, and paragraph (b) is the "work rated as equivalent" provision. The industrial tribunal, Employment Appeal Tribunal, and Court of Appeal all held that a woman who is in like work with a man is in work "in relation to which paragraph (a) . . . applies"; therefore, she is not entitled to bring an equal value claim under paragraph (c).[292] The Court of Ap-

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286. [1987] 1 W.L.R. 65 (Emp. App. Trib. 1986), *aff'd*, 17 I.R.L.R. 239 (C.A. 1988).

287. 17 I.R.L.R. 239.

288. 15 I.R.L.R. 335 (Emp. App. Trib. 1986), *rev'd*, 16 I.R.L.R. 218 (C.A. 1987). The House of Lords affirmed, though on different reasoning. *See* 17 I.R.L.R. 357 (H.L. 1988). The Court of Appeal decision is discussed in Collins, *Equal Pay*, 16 INDUS. L.J. 196 (1987).

289. 16 I.R.L.R. at 218.

290. *See supra* notes 254-58 and accompanying text.

291. Equal Pay Act, 1970, ch. 41, § 1(2)(c), *as amended by* Equal Pay (Amendment) Regulations 1983, at reg. 2(1), *reprinted in* HALSBURY'S STATUTES, *supra* note 31, at 12/23. *See supra* notes 262, 263 and accompanying text.

292. 16 I.R.L.R. at 224. The inclusion of a reference to (b) in this introductory phrase is mildly confusing, given the more specific statement later that an employer may rely on a previously conducted study meeting the requirements of section 1(5) as creating a defense. Section 2A(2) of the Equal Pay Act 1970 states:

> [T]here shall be taken . . . to be no reasonable grounds [for applicant's case]. . . if . . . [the applicant's] work and the work of the man in question have been given different values on a study . . . and . . . there are no reasonable grounds for determining that the evaluation contained in the study was . . . made on a system which discriminates on the grounds of sex.

Equal Pay Act, 1970, ch. 41, § 2A(2), *as amended by* Equal Pay (Amendment) Regulations, 1983, reg. 3(1), *reprinted in* HALSBURY'S STATUTES, *supra* note 31, at 12/25-12/26.

peal, however, decided that the ECJ decision in *Commission of the European Communities v. United Kingdom*[293] required that a remedy be made available to a woman who believes that she performs work of equal value to that done by a man receiving higher pay, even though her chosen comparator is not doing like work and there is a man doing like work who is receiving the same pay or lower pay than the woman. The Court of Appeal went on to hold that the Equal Pay directive is directly applicable to individuals in the United Kingdom and that an industrial tribunal can grant relief on the basis of the directive—even absent a specific implementing British statute.[294] The House of Lords affirmed the outcome reached by the Court of Appeal, but did so by interpreting the statute in light of its purpose—to bring British law into line with the ECJ decision.[295]

The outcome in *Pickstone* presents an opportunity for "leap-frogging": If the female "warehouse operatives" are found to perform work of "equal value" with the male "checker warehouse operatives," their rate of pay will be raised accordingly. The male "warehouse operatives" will then have a valid "like work" claim under paragraph (a) of section 1 of the Equal Pay Act, using as comparators the female "warehouse operatives." Such a ratcheting upward of wages in general is probably

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This language provides a way of grappling with cases in which Mary Doe's job has been awarded a rating equivalent to that given John Doe's job but lower than that given Tom Smith's job. If Mary chooses Tom as comparator, the respondent employer will argue that its prior study was a proper one under section 1(5) and that Mary's case must be dismissed.

If the employer's study was not complete at the time of the application, but is complete when the hearing is resumed after receipt of the independent expert's report, the employer may introduce its own study into evidence and seek to convince the tribunal of the high quality of that study. Thus, an applicant should be able to obtain a ruling on the adequacy of an employer study whether complete or not, and her claim would not be dismissed prior to the time she had an opportunity to present evidence on the matter.

293. *See supra* notes 254-58 and accompanying text. The Court of Appeal found the application of Directive 75/117 so clear that it did not refer the matter to the ECJ. 16 I.R.L.R. at 224. The language of EEC Directive 75/117 speaks of elimination of discrimination in remuneration "for the same work *or* for work to which equal value is attributed . . . ." 18 O.J. EUR. COMM. (No. L45) 19 (1975) (emphasis added). One might have thought that an employer could argue from that disjunctive form that if Mary and John are receiving the same pay for the same work its obligations have been met even if Tom is earning more for different work that Mary claims is of equal value.

294. 16 I.R.L.R. at 224, 229.

295. 17 I.R.L.R. 357 (H.L. 1988). The House of Lords accomplished this by holding that the phrase "not being work to which paragraph (a) or (b) applies" refers only to a circumstance in which the particular man chosen as comparator is engaged in like work or work rated as equivalent with the applicant. *Id.* at 359.

not the purpose of the directive or of the statute.

The potential for such leap-frogging—and concern about it—are demonstrated in three other cases brought under the new amendments. In *Hayward v. Cammell Laird Shipbuilders Ltd.*,[296] the industrial tribunal found the applicant's job (canteen cook) to be of equal value with those of certain male painters, engineers and carpenters. The tribunal then considered what remedial order it should issue. The employee argued for a literal application of section 1(2)(c) of the Equal Pay Act: "if . . . any term of the woman's contract is or becomes less favourable to the woman than a term of a similar kind in the contract under which that man is employed, that term of the woman's contract shall be treated as so modified as not to be less favourable . . . ."[297] The terms setting her basic hourly and overtime rates should be modified, she argued, without regard to any other terms of her contract of employment. Her employer urged that the phrase "any term of the woman's contract" should be interpreted to mean "any term concerning pay." Thus, whether the applicant should receive monetary relief should reflect the comparison of her total compensation package with the total compensation package of her comparators. Such matters as holiday benefits, sickness benefits, and the like should be considered along with basic hourly pay rate and overtime rate. This would be particularly appropriate, the employer argued, in the equal value setting since the United Kingdom equal value concept was derived from article 119 of the Treaty of Rome, which defines "pay" broadly. The applicant opposed this on the basis of results in "like work" cases, interpretations in two treatises,[298] and on the ground that such an approach would involve the tribunal in the complexities of how to compare the value of a sickness benefit, or the value of a holiday, or any one of an infinite number of other benefits with the value of a pay rate. In short, tribunals would become the referees of pay systems generally.

The industrial tribunal panel and the EAT accepted the employer's argument that the remedial order would consider overall compensation, rather than taking a one-term-at-a-time approach.[299] The avoidance of

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296. 13 I.R.L.R. 463 (Indus. Trib. 1984), *aff'd*, 15 I.R.L.R. 287 (Emp. App. Trib. 1986). For an extract of an industrial tribunal decision of September 12, 1985 in this case, see EQUAL OPP. REV. 39 (Nov./Dec. 1985).

297. Equal Pay Act, 1970, ch. 41, § 1(2)(c), *as amended by* Equal Pay (Amendment) Regulations, 1983, reg. 2(1), *reprinted in* HALSBURY'S STATUTES, *supra* note 31, at 12/23.

298. R. HARVEY, *supra* note 51; M. RUBENSTEIN, *supra* note 201.

299. 15 I.R.L.R. at 291.

leap-frogging is mentioned as one reason.[300] The House of Lords reversed,[301] taking the view that the "natural meaning" (roughly the same as "plain meaning" in the United States) of the language required the term-at-a-time perspective.[302] Thus, the one opinion to deal explicitly with leap-frogging suggests that the argument should be addressed to the Parliament and that perhaps it can in part be controlled by the "genuine material difference" defense.[303]

The other two cases that have "leap-frogging" implications also illustrate the types of controversy likely to be generated in considering the independent expert's report. In the earlier case, *Wells v. F. Smales & Son (Fish Merchants) Ltd.*,[304] the fourteen applicants were packers who sought the same wages as those paid a laborer. The independent expert found nine of the women to be performing tasks the demands of which—considered under the headings "skill and experience," "responsibility," "working conditions," and "effort," each subdivided into two components—were greater than those of the comparator. Yet, the expert also found that the demands of the jobs of the other five were less than those of the comparator. The employer submitted a report of its own expert who found that the comparator's job was far more demanding than those of the applicants. The applicants criticized the independent expert's report for refusing to find all fourteen jobs to be equal to the comparator's, since, when converted into points, the expert's study showed that the points awarded the demands on the "rejected" five were

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300. *Id.*

301. [1988] 2 W.L.R. 1134 (H.L.).

302. *Id.* at 1138-40.

303. The latter was also suggested in a sharp critique of the EAT opinion. *See* EQUAL OPP. REV. 7 (July/Aug. 1986). In all deference to the court and to the expert critic, this suggestion does not seem consistent with the idea that measuring values of differences in benefits is too difficult for a tribunal; nor is it borne out by what little case law exists. In Atkinson v. Tress Engineering Co., 5 I.R.L.R. 245 (Indus. Trib. 1976), the industrial tribunal dismissed as trivial a difference of three days in paid holiday and unspecified variations in sickness benefits. A 10% variation in paid vacation seems to this writer more than trivial. Three days would be at least 1.5% of days worked in the year, possibly a bit more. A manager who cut labor costs 1.5% a year would expect a bonus at many firms. Indeed, in Tremlett v. Freemans (London SW9) Ltd., 5 I.R.L.R. 292 (Indus. Trib. 1976), the male applicants found a few minutes extra in rest breaks worth pursuing through litigation.

The "genuine material difference" defense may, however, be important in the context of collective bargaining. The House of Lords opinion refers to Reed Packaging Ltd. v. Boozer, 17 I.R.L.R. 333 (Emp. App. Trib. 1988), in which an employer's need to respond to the demands of different unions was found to give rise to a genuine material difference defense.

304. EQUAL OPP. REV. 24 (July/Aug. 1985) (Indus. Trib.).

95%, 92%, 91%, 86% and 79% of the comparator's point total.[305] Applicants referred to a statement in the EAT opinion in *Capper Pass Ltd v. Lawton*,[306] a "like work" case: "But again, it seems to us, trivial differences, or differences not likely in the real world to be reflected in the terms and conditions of employment, ought to be disregarded."[307] The tribunal must have accepted the argument. The holding on the issue is stated baldly:

> We are at variance with the expert in that we find on his own judgment the other five ladies . . . score so closely that the differences between them and the comparator are not relevant or make real material differences. We hold that they too perform work which is at least of equal value to the comparator in terms of the demands made upon them.[308]

In *Brown v. Cearns & Brown Ltd.*[309] this "broad brush" approach is rejected. Following intense examination of the independent expert, the tribunal concluded that she had given one aspect of an applicant's job less weight than appropriate.[310] Even with that adjustment, both applicants scored lower than the comparator, although one came very close (eighteen points to nineteen for the comparator). The tribunal acknowledged the *Wells* decision but refused to adopt it. Unlike the opinion in *Wells*, the tribunal sets out its reasons at some length. First, it points out that *Capper Pass* was decided on the basis of the statute's "like work" definition—a definition that commands a broad brush approach.[311] There is no such definition of "equal value"; thus, no broad brush approach is required. Second, the opinion reasons that tribunals are not to view themselves as undertaking the investigation as to whether jobs are of equal value. That task is delegated by the statute to "an expert in a matter which in the industrial relations context has become one which is regarded as properly the subject of professional expertise."[312] Thus, both the structure of the statute and regulations, and respect for good industrial practice, lead to a decision not to declare an applicant's job equal to

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305. *Id.* at 31.
306. 5 I.R.L.R. 366 (Emp. App. Trib. 1976).
307. *Id.* at 367-68.
308. *Wells*, EQUAL OPP. REV. at 31 (July/Aug. 1985).
309. EQUAL OPP. REV. 27 (Mar./Apr. 1986) (Indus. Trib.).
310. *Id.* at 31.
311. *Id.* "A woman is to be regarded as employed on like work with men if, but only if, her work and theirs is of the same or a broadly similar nature, and the differences (if any) between the things she does and the things they do are not of practical importance . . . ." *Id.* at 32.
312. *Id.*

that of a comparator unless an expert has declared it to be of equal or greater value:

> [I]n the absence of any contrary expert view being put before us, we should not, merely on the basis of cross-examination, adopt a view contrary to that of the independent expert in a matter in which we are not experts. The furthest we should go, if cross-examination demolishes the credibility of the expert, is to reject the report as fundamentally flawed, and start again—and indeed the Regulations make provision for just that. . . . If we, in our final decisionmaking role, adopt the professional view of the independent expert (perhaps, as in the present case, modified somewhat in the perception of it, but not fundamentally changed) because we are satisfied it is justified on the facts and methodology, it seems to us we should adopt it as it is given—namely, that this applicant's job is or is not of equal value to the job of the comparator.[313]

The *Brown* panel also felt that the general use of a broad brush approach would be undesirable in job evaluations because of the likelihood that such an approach would result in chaotic appeals.[314] Finally, the opinion notes that translating evaluations into points is as likely to result in unfair minimizing of differences as in undue inflation of them.[315]

Both *Wells* and *Brown* demonstrate the difficulty of grouping jobs that are concededly not of precisely equal value. One is clearly reminded of the circumstances in *Arnold v. Beecham Group, Ltd.*[316] in which a job rated at 254 points was placed in the same general grade with a job rated at 233 points. That is not an unusual phenomenon, and the employer was there held to have accepted that result.[317] The prior study had put the two jobs into different grades, and that result is not surprising either. The fixing of "break points," with consequent grouping of jobs into grades, is not a matter of whim and caprice, but neither is it a matter of exact science—any more than job evaluation generally. In the United Kingdom, the grouping of jobs will often be a matter of management-union negotiation. That jobs with different values may end up in the same grade is thus of interest, but to say that because jobs are "close" in value means they are "equal" under the law is to go rather far.[318]

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313. *Id.* at 33.

314. *Id.*

315. *Id.* at 34.

316. 11 I.R.L.R. 307 (Emp. App. Trib. 1982).

317. *Id.* at 310.

318. So argues a disgruntled expert, however, in a critique of the independent expert reports he assisted in challenging in *Wells* and *Brown*. *See* Beddoe, *Independent Experts?*, EQUAL OPP. REV. 13 (Mar./Apr. 1986). The writer speaks of the expert's practices in those cases as not conducive to "a satisfactory outcome." *Id.* He further argues

The leap-frogging potential of the broad brush approach is obvious. Assume *A*, a male general laborer, makes £ 3 per hour and *B*, a female warehouse operative, makes £ 2.80 an hour. *B* presses an equal value claim. The independent expert report concludes that *B*'s job demands are appropriately valued at 19 points in a sixty-four point scale, and *A*'s are valued at 21. A tribunal notes that *B*'s score is ninety percent of *A*'s, and that scores that close often lie within the same grade. Using the broad brush approach, the tribunal awards *B* a pay term equal to *A*'s. Now *C*, a male warehouse operative, asks for a "like work" order raising his £ 2.80 rate to *B*'s new £ 3 rate. After *C* succeeds, *D*, a female packer, presses her equal value claim, naming *C* as comparator. *D*'s job is rated by the new independent expert at eighteen points, and *C*'s at twenty, once again on a sixty-four point scale. Another broad brush tribunal could readily justify an order. This potential exists because the independent expert, looking at only a few jobs in an establishment, is engaged in a very different sort of process than a consultant called in to assist an employer and a union for an establishment-wide job study. In the latter case, the judgments about grouping jobs into grades can be made by groups intimately acquainted with the workings of the establishment generally. When labor union representatives agree with management that the jobs rated twenty and above are generally deserving of a higher grade than those under twenty, that decision has a credibility lacking in a tribunal's determination, particularly when the tribunal's decision is based on obviously rough notions of what sorts of things sometimes happen in job evaluation.

The defense provided by new section 2A(2), under which a tribunal must hold that there are "no reasonable grounds" for an equal value determination if the applicant's work and that of the comparator have been given different value in a study, is available only if the study is one "such as is mentioned in section 1(5) above" and if "there are no reasonable grounds for determining that the evaluation contained in the study was . . . made on a system which discriminates on grounds of sex."[319] The determination of whether a study discriminates must be made on the basis of section 2A(3):

> An evaluation contained in a study . . . is made on a system which dis-

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that the experts overemphasized trivial differences. *Id.* at 14. Despite the writer's understandable—and apparent—bias, the article is useful as an illustration of some of the objections likely to be raised to virtually any report.

319. Equal Pay Act, 1970, ch. 41, § 2A(2), *as amended by*, Equal Pay (Amendment) Regulations 1983, reg. 3(1), *reprinted in* HALSUBURY'S STATUTES, *supra* note 31, at 12/25-12/26.

> criminates on grounds of sex where a difference, or coincidence, between values set by that system on different demands under the same or different headings is not justifiable irrespective of the sex of the person on whom those demands are made.[320]

The language "not justifiable irrespective of the sex of the person on whom those demands are made" is not easy to interpret, as the opinion in *Neil v. Ford Motor Co.*[321] acknowledges. Applicants in *Neil* were three sewing machine operators in grade B who sought to be compared with certain males in grades C and D. At the preliminary hearing, Ford tendered as a defense that the jobs in question had been differently rated in its job evaluation study. The tribunal's description of the study illustrates the way in which workers, union and management representatives, and outside experts interacted:

> First, Ford and Urwick Orr ('the consultants') selected 28 characteristics under the four main headings of responsibility, working conditions, physical demands and mental demands, which were considered to be the principal requirements of the hourly-paid jobs in the company. Ford and the consultants then selected 56 'benchmark' jobs, representative of the whole range of hourly-paid jobs throughout the company's plants, which would serve as reference points in the study of all the other jobs. The benchmark jobs included jobs affecting each of the 20 unions representing employees and served to provide examples of rating at each level of the 28 selected characteristics.
>
> A Central Review Committee (CRC) had been set up, consisting of four representatives of Ford and one chosen by the unions. This Committee examined each benchmark job and discussed it with management, operatives and shop stewards. They then drew up detailed job descriptions and assessed the demand under each heading at one of four levels, low, moderate, high and exceptional. . . . The result of each of the CRC assessments was a 'profile'.
>
> As a separate exercise, each CRC member considered each benchmark job in relation to each of the other 55 benchmark jobs and recorded his opinion as to which of the two was of greater overall worth to the company. This was called a paired comparison. From the five sets of such comparisons a rank order of the 56 benchmark jobs was extracted.
>
> It was at this stage that a computer was used in a multiple regression analysis to determine which characteristics had to be weighted, and by how much, to get a high correlation co-efficient between the two sets of data obtained from the profiles resulting from the CRC assessments and the rank order resulting from the paired comparison. The weightings were

320. *Id.* § 2A(3), *reprinted in* HALSBURY'S STATUTES, *supra* note 31, at 12/26.
321. 13 I.R.L.R. 339 (Indus. Trib. 1984).

not disclosed to those involved subsequently either as assessors of the other jobs or in review committees.

The next stage was that all other jobs were profiled by assessors, who were company personnel working in teams of two, trained for the task by the consultants. The profiles so completed were then considered by one of seven Divisional Review Committees (DRC) which in all but one case consisted of trained management and union representatives, to check their consistency and accuracy. . . . Any disagreements between the assessors and the DRCs, left unresolved after referral back to the assessors, were passed to the consultants for arbitration.

The CRC then checked the profiles and in a small number of cases put the assessments up or down to the next level. The accepted profiles were then referred to the consultants to apply the set of weightings. After this the profiles were returned to the CRC to enable it to put all the jobs in their correct place in the ranking.

The gradings were made by doubling the basic score, calculated from the weighting of the profiles, and subtracting the result from an arbitrary figure, in this case 239. Doubling was to eliminate half points; and subtraction was intended to reduce bias by obscuring the effect on profile values of individual characteristic ratings. The grade break point between grades B and C was 90; that is to say, 71 to 90 was C, 91 to 126 was B. Eastman Cutters were 89; sewing machinists 94.[322]

The sewing machine operators were so upset by their original grade B placement that they went on strike in 1967. One aspect of the strike settlement was to appoint a special committee to review the scoring of the job. That committee changed three of the twenty-eight ratings, two up and one down, but the result was that the sewing machine operators were still in grade B. Reviews of the scoring on five occasions between 1970 and 1983 also left the job in grade B.

The tribunal split two to one in deciding to dismiss the application. First, the tribunal determined that an employer does not carry the burden of demonstrating both that it has conducted a job evaluation study and also that the study was so absolutely foolproof in excluding any latent sexism that the applicant's case lacks reasonable grounds.[323] The tribunal accepted section 2A(2) as saying that once an employer has proved that it has rated applicant's and comparator's jobs in a study, the applicant must then assert a convincing reason for not giving effect to that study: "[W]e should not lightly set in train a new evaluation unless we are tolerably certain that there are reasonable grounds for believing the previous job evaluation study to have been distorted by discrimina-

322. *Id.* at 340-41.
323. *Id.* at 347-48.

tion."[324] To raise some modest doubt about a few particular values given will not be enough to justify disregarding the study for purposes of section 2A(2).

Applicant's attacks on the study can be summarized roughly as follows: (1) the 1966 environment was filled with largely unconscious sex bias that the study did not sufficiently overcome; (2) the result of the study, so far as the applicants' job is concerned, was not reasonable, as can be seen by a comparison of that job with that of an Eastman Cutter, which barely fit into grade C;[325] (3) the jobs have changed since the original study, and these changes have not been properly assessed; and (4) a study by applicant's expert is sufficiently at variance with the prior study, indicating that the study is invalid. Given the decision to include section 2A(2) in the amendments, one would think that the first of applicant's attacks is of little relevance. Unspecified latent sex bias may well be present in one or more aspects of a study. That must have been recognized, yet the drafters chose to give effect to such studies unless a specific sort of bias can be detected in the study pursuant to section 2A(3).[326] The second attack was rejected on the basis of proof of frequent reviews performed on this job.[327] The third reminds one of the "broad brush" of *Wells*. No one at Ford denied that there are many similarities between a sewing machine operator and an Eastman Cutter. Indeed, the point total result for the two was very close, with Eastman Cutter just barely a C (at ninety-four). Absent proof of bias in setting a break point at ninety, however, it is not proper to rethink a close call and thereby undercut the working of a complex evaluation system, in which union and management have sought respected outside help.[328] Applicant's final attack was rejected on the grounds of doubt of the applicant's expert's true expertise.[329] The dissent found the applicant's expert's credentials more acceptable and was beguiled by applicant's able counsel into deciding that he should reject the Ford study because he might have differed with four of the twenty-eight ratings.[330]

It is interesting to note that after the decision in *Neil* yet another review was performed—by an ACAS panel. As a result, the operators' position was moved into the higher pay grade. The evaluation system

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324. *Id.* at 348.
325. An Eastman Cutter testified to this effect.
326. *See* 13 I.R.L.R. at 348.
327. *See id.* at 349.
328. *Id.*
329. *Id.* at 346, 349.
330. *Id.* at 350 (Mr. Lebow, dissenting).

used had been employed by Ford since the 1960s (with occasional revision since).

The Court of Appeal rejected a defense under section 1(5) in *Bromley v. H & J Quick Ltd.*,[331] holding that the defense did not satisfy the requirement that such a study explicitly value "the demand made on a worker under various headings (for instance effort, skill, decision). . . ."[332] The study in question had positioned comparators' jobs in the pay scale on the basis of "whole job" comparisons, rather than weighing demands made by particular job elements. Two of the opinions state that the use of "whole job" comparisons at certain stages of a study would not invalidate the entire study, so long as a "demands" analysis was accomplished with respect to the jobs before the tribunal.[333]

V. ADJECTIVE LAW COMPARISONS

A. *The Forums*

In the United States, an equal pay action is usually brought in federal district court, although a state court of general jurisdiction is also appropriate.[334] The procedural regime applied is that used for civil actions generally, with full opportunity for discovery, preliminary motions and the like. Assistance of counsel is essential. Appeals may be taken to the United States Court of Appeals for the relevant circuit, and ultimately to the United States Supreme Court. In the United Kingdom, an equal pay action is commenced by filing an application with the Secretary of the Industrial Tribunals.[335] An industrial tribunal consists of two lay persons—one nominated by the Confederation of British Industry, the other by the Trade Union Congress—and one lawyer. The rules of procedure have been kept to a minimum so that parties may conduct their own cases, although discovery of documents is possible.[336] The first level of review is the EAT, the lawyer members of which hear a substantial volume of cases involving employment protection statutes and thus become experts in quickly ascertaining the central issues in the typical case. This expertise may be one reason for the EAT's commendable

331. 17 I.R.L.R. 249 (C.A. 1988).

332. Equal Pay Act, 1970, ch. 41, § 1(5).

333. 17 I.R.L.R. at 253-54, 256.

334. *See, e.g.*, Arrington v. Public Service Co., 24 N.C. App. 631, 211 S.E.2d 819 (1975).

335. IT Rule 1, *reprinted in* Halsbury's Statutory Instruments, *supra* note 39, at 2357.

336. IT Rule 4(b)(iii), *reprinted in* Halsbury's Statutory Instruments, *supra* note 39, at 2357.

promptness in reaching decisions.[337]

Review beyond the EAT lies with the Court of Appeal and then the House of Lords, although leave to appeal to the House of Lords is granted rarely, as is the case with appeals to the United States Supreme Court. At any level, a question of European Community law may be referred to the European Court of Justice. Those referrals tend to require substantial amounts of time.[338]

Panels at both tribunal levels have shown that they are aware of the need to advise and help those who have not retained counsel. In *Sharp v. Mogil Motors (Stirling) Ltd.*,[339] for example, one applicant had chosen an inappropriate comparator, and an order for relief was therefore improper. In the course of the hearing, however, the tribunal panel heard convincing testimony about the general salary schedule. Thus, at the end of its opinion, it included a paragraph of "advice," suggesting to the employer where the applicant should be positioned on that scale.[340] The employer likely complied rather than waiting for the applicant to commence a further proceeding with attendant costs.

The typical United Kingdom case will not go beyond the EAT. The remedy afforded is thus probably quicker, cheaper and—due to the use of persons familiar with industrial affairs—as credible to the parties as in an Equal Pay Act case in the United States. To an untutored claimant, however, tribunal procedures are likely to appear intimidating and complex; those who go forward without a lawyer's help are less likely to prevail.[341] There are, moreover, limitations imposed by the nature of the tribunal system. Remanding a case to the same tribunal panel is not always possible due to the limited time that these "part-time judges" are able to give or because of other logistical problems that attend any multiperson group. Some have complained about inconsistencies in case handling resulting from the extensive independence and authority of each industrial tribunal chair.[342] A recent opinion of the EAT, *Thomas v.*

337. *See, e.g.*, Navy, Army & Air Force Inst. v. Varley, 5 I.R.L.R. 408 (Emp. App. Trib. 1976) (industrial tribunal decision June 22, 1976; EAT decision October 20, 1976); Electrolux Ltd. v. Hutchinson, 5 I.R.L.R. 410 (Emp. App. Trib. 1976) (industrial tribunal decision May 3, 1976; EAT decision November 12, 1976).

338. *See*, e.g., Jenkins v. Kingsgate (Clothing Productions) Ltd., 10 I.R.L.R. 388 (Emp. App. Trib. 1981).

339. 5 I.R.L.R. 132 (Indus. Trib. 1976).

340. *Id.* at 134.

341. A. LEONARD, *supra* note 41, at 12-13, 47.

342. *See* T. WILKINSON, INDUSTRIAL TRIBUNALS SURVEY 49-51 (1986) (management view). The survey also demonstrated widespread concern over "growing legalism," delays, and higher costs. *Id.* at 70-73.

National Coal Board,[343] demonstrates that tribunal procedures may not be fully adequate in the case of multiple applicants. *Thomas* has its roots in a 1977 EAT decision that was never appealed further, *National Coal Board v. Sherwin*.[344] The applicants in the 1977 case were two women employed as canteen attendants at a coal mine. Their comparator, Mr. Tilstone, was paid a rate one grade higher than the applicants for doing much the same work as they did. Tilstone, however, worked at night and alone, rather than in the daylight and with a fellow worker, as did the applicants. The applicants prevailed in that case, and although leave to appeal to the Court of Appeal was granted,[345] the employer chose not to pursue that appeal; instead, it reached a settlement with the applicants, who left their positions soon thereafter. The opinion in the 1987 case states that of the several hundreds of canteen attendants in the mines of the United Kingdom, Tilstone was the only person to receive the higher rate of pay; all others were paid at a lower rate.[346] Tilstone remained a canteen attendant, with his unusual rate, until 1985. In 1982, some 2000 female canteen attendants at locations throughout the United Kingdom filed applications under the Equal Pay Act naming Tilstone as comparator, apparently at the instigation of union leaders. The first applications were filed in June 1982. It was not until October 1984 that "it was possible to get the claims into some sort of order . . . ."[347] Trial required eleven days, even though it was conducted in a representative fashion.

The multi-stage, multi-issue procedures in United Kingdom "equal value" cases are formidable. Only the hardiest of claimants or employers would attempt such a case without counsel. An employee's breach of contract claim can also be commenced in the law courts. The statute provides, however, that a court may refer such issues to a tribunal[348] on its own motion or that of a party, and it is likely that most courts would do so.

B. *Remedy*

If an applicant in the United Kingdom convinces the industrial tribunal of the justice of her case, the remedy will be an order (1) reforming the applicant's employment contract by adding or deleting one or more terms as of a date up to two years prior to the institution of the proceed-

343. 16 I.R.L.R. 451 (Emp. App. Trib. 1987).
344. 7 I.R.L.R. 122 (Emp. App. Trib. 1978).
345. *Id.* at 127.
346. 16 I.R.L.R. at 453, 455.
347. *Id.* at 453.
348. European Communities Act, 1972, ch. 68, § 2(3)

ing, and (2) requiring the payment of whatever additional sums should have been paid had the contract been amended when appropriate. A successful individual plaintiff in the United States may do better financially because the statute imposes liability for the additional wages that should have been paid plus "an additional equal amount as liquidated damages."[349] Attorney fees and other litigation costs are recoverable in both nations. The United States statute makes such an award mandatory;[350] in the United Kingdom, it is a discretionary matter at the tribunal level.[351] Many United Kingdom claimants are assisted by counsel provided by Legal Aid or by the Equal Opportunities Commission (EOC).[352]

Relief in the United Kingdom is available with respect to contract terms other than just those concerning remuneration. In *Tremlett v. Freemans (London SW9) Ltd.*,[353] for example, the tribunal entered an order increasing the contract-required rest break time for men to that provided for women. On the other hand, the limitation of the United Kingdom statute to terms and conditions of the contract of employment once provided a relatively narrow concept of "pay"—one that did not consider *ex gratia* payments at all. This is doubtless no longer true. In *Garland v. British Rail Engineering Ltd.*,[354] the European Court of Justice interpreted article 119 of the Treaty of Rome to require that men and women receive the same "pay" whether or not specified by contract. That decision was made under the Sex Discrimination Act 1975, but would clearly extend to the Equal Pay Act 1970 under *Macarthys Ltd. v. Smith.*[355] The definition of "pay" for article 119 seems very similar to definition of "wages" in the United States statute.[356]

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349. 29 U.S.C. § 216(b) (1982). *See* Overnight Motor Trans. Co. v. Missel, 316 U.S. 572 (1942) (liquidated damages provision held constitutional).

350. 29 U.S.C. § 216(b) (1982) ("The court in such action shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action."). *See* Hill v. J.C. Penney Co., 688 F.2d 370 (5th Cir. 1982).

351. *See* IT, Rule 11, *reprinted in* Halsbury's Statutory Instruments, *supra* note 39, at 2361-62.

352. A. LEONARD, *supra* note 41, at 12-13, 43-47, 52; 1986 EQUAL OPP. COMM'N ANN. REP. 44.

353. 5 I.R.L.R. 292 (Ind. Trib. 1976).

354. 11 I.R.L.R. 111 (Eur. Ct. Just.), *on remand*, 11 I.R.L.R. 257 (H.L. 1982). It should be noted, however, that portions of the House of Lords opinions in *Garland* have since been criticized in another important House of Lords case, Duke v. GEC Reliance, 17 I.R.L.R. 118 (H.L. 1988).

355. 9 I.R.L.R. 209 (C.A. 1980).

356. 29 U.S.C. § 203(m) (1982).

When actions other than those brought by individual workers are considered, it is clear that the range of remedies afforded in the United States is greater. As mentioned above, class actions are possible,[357] although they are restricted to the "opt in" variety. More importantly, the United States statute authorizes actions by the EEOC with or without the consent of the employee involved.[358] Both damages—primarily arrears of wages—and equitable relief are available actions. The British Sex Discrimination Act authorizes the EOC to seek equitable relief in cases of persistent failure to obey the Equal Pay Act. In fact, however, that remedy has proved meaningless for a variety of causes, one of which is the limitation on the agency power to conduct formal investigations. In *London Burough of Hillingdon v. Commission for Racial Equality*,[359] the House of Lords held that an agency similar in status and responsibility to the EOC must not undertake such an investigation without a "real belief" that the statute has been violated, and must confine the investigation to that violation.[360] The "formal investigation" is a requirement for issuing a nondiscrimination notice; that notice is one of the alternative prerequisites for an injunction. No award of such injunctive relief has been formally reported.

In the United States, on the other hand, many violations of the Equal Pay Act have been detected during routine inspections of employer records under the Fair Labor Standards Act. Those inspections need not be based on a belief that there has been a violation;[361] thus, they are not as limited in scope as British investigations. Now that the EEOC is charged with enforcement of the Equal Pay Act, wage-hour inspections by the Department of Labor are probably less important, while the number of violations detected by virtue of investigations of Title VII complaints has probably increased.[362] An agency enforcement suit in the United States is likely to ask for both a restitutionary injunction ordering payment of wages improperly denied, as well as a prospective injunction against future violations. The former is routinely granted upon proof of

357. *Id.* § 216(b).

358. *Id.* § 216(c).

359. 11 I.R.L.R. 424 (H.L. 1982).

360. *Id.* at 427-28, 430.

361. *See* Oklahoma Press Publishing Co. v. Walling, 327 U.S. 186 (1945); Foster, *Jurisdiction, Rights and Remedies for Group Wrongs Under the Fair Labor Standards Act: Special Federal Questions*, 1975 WIS. L. REV. 295 (1975).

362. *See Policies on Pay Equity and Title VII Enforcement: Hearings before a Subcomm. of the House Comm. on Government Operations*, 99th Cong., 1st Sess. 103-04 (1985).

a violation.[363] The grant of a prospective injunction is addressed more to the discretion of the trial court.[364] Employers who fail to comply with such orders are subject to the contempt powers of the court.[365]

In both countries, the award of arrears in pay is ordinarily limited to the two years prior to the institution of the action. In the United States, however, arrears can be awarded for a three year period for a "willful" violation.[366]

VI. A Commentary on Developments to Date

A. *"Value" Equals "Demands"*

The most fundamental similarity between the two nations' equal pay statutes is that both call for the aggrieved party to establish a prima facie case by showing that the demands made on her are the same as the demands made on a higher-paid comparator. The handling of the case thus starts with an examination of what the compared workers "give," rather than of what the employer "gets."

Defining a claimant's burden of proof in this fashion is appropriate for several reasons. First, this is information that she is likely to be in a position to offer. She is well-placed to know what she does "from whistle to whistle" and is likely to have had a chance to observe what those around her do. If there has been a job study involving her post, she is likely to have had access—directly or through her union—to the assessment made. Second, this "value equals demands" approach reflects a widely-shared social value judgment in both nations—effort counts. From gymnasium—"no pain, no gain!"—to poet's corner—"its better to have loved and lost than never to have loved at all"—to finance—"nothing ventured, nothing gained"—we honor the expenditure of effort. Requiring like pay for like work is consistent with this philosophy.

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363. *See* Donovan v. Sabine Irrigation Co., 695 F.2d 190 (5th Cir.) (minimum wage provisions action), *cert. denied sub. nom.*, Alberding v. Donovan, 463 U.S. 1207, *reh'g denied*, 463 U.S. 1249 (1983).

364. Mitchell v. Lublin, McGaughy & Assocs., 358 U.S. 207 (1959). *See* Dunlop v. Davis, 524 F.2d 1278 (5th Cir. 1975); Usery v. Johnson, 436 F. Supp. 35 (D.N.D. 1977) (equal pay provisions).

365. *See, e.g.*, Usery v. Fisher, 565 F.2d 137 (10th Cir. 1977).

366. The Supreme Court has recently stated that the term "willful" in the context of the Fair Labor Standards Act, of which the Equal Pay Act is a part, means "that the employer either knew or showed reckless disregard for the matter of whether its conduct was prohibited by the statute . . . ." McLaughlin v. Richland Shoe Co., 108 S.Ct. 1677, 1681 (1988).

How much proof of similarity of work must be presented remains a problem. "Broadly similar nature" is a phrase that has satisfied reviewing judges in both countries, but obviously so vague a phrase can ensure consistency of decision of only a gross sort. The next stage of "testing" the proof is to ask if the difference in demands between plaintiff's job and her comparator's are such that in the practical world they would likely result in different treatment. Although this question is sensible, it nevertheless requires expertise about the field of personnel management that a tribunal—or federal district court judge—may not have available. The use of persons with industrial experience on industrial tribunals in the United Kingdom is probably of some help on this score.

Can "demands" be measured accurately enough across classes of jobs to justify a court or agency to grant relief? This is a question thus far differently answered in the two countries.

B. *Affirmative Defenses Allowed*

The plaintiff's initial burden of proof thus has a single coherent focus—demands on the employee as a surrogate for "value." Neither statute apparently has the same degree of coherence with respect to employer defenses. The United States Congress and the United Kingdom Parliament have both been content to leave it to the judiciary to sort out which factors, beyond job content, should be regarded as reasonable in considering setting rates of pay. The United Kingdom statute did place some limit, through the "his case and hers" equation, but as the opinion in *Rainey*[367] demonstrates, it is not all that difficult for able counsel and a receptive bench to transmute a market force into a factor in the personal equation.

Thus far, the British and the American courts have given effect to two major principles. First, an employer may reward, through its compensation system, those characteristics of workers that fit within the general traditions of industrial "good citizenship." Longevity of service fits here, as does red-circling the rates of workers who have become disabled in the employer's service or who once performed onerous chores now made obsolete by changes in technology. Second, an employer may pay more to those whom it can reasonably demonstrate provide additional economic benefit. This category of defense includes merit pay, pay based on unusual quality of performance, and extra pay for those who provide the employer with greater flexibility and potential.

Both nations have also flirted with a third defense: An employer may

367. 16 I.R.L.R. 26 (H.L. 1987). *See supra* notes 204-13 and accompanying text.

pay what it must to be able to attract the workers it needs. This defense was rejected in the United Kingdom in *Clay Cross*[368] and in the United States in *Hodgson v. Behrens Drug Co.*,[369] but there is a strong flavor of it in *Rainey*[370] and in the United States cases rejecting "comparable worth" interpretations of Title VII.[371]

What are the limits on these two types of defenses; how does one prevent the exceptions from eating up the rule? In the case of the "good citizen" exceptions, the limit is best fixed by examining intent. For the time being, any system recognizing longevity of service, or enshrining an anomalous personal rate through red-circling, is a system that will favor men, simply because men have had a greater rate of participation in the wage worker force for a long time. To allow a system that takes longevity of service into account to operate at all is thus to allow a disparate impact. To look for business necessity in these cases is likely futile. Rewarding seniority rather than ability has been a practice many employers have fought hard, particularly in the promotion context. Reducing turnover would provide a justification, or perhaps an argument, that more experienced workers usually are more productive. We do not in practice, however, ask an employer to prove that either of these benefits actually flows from its particular seniority system.

In this area of personnel management tradition, the limit on the use of such stereotypes is one of abuse. What is such an abuse? It is the use of factors such as seniority as a subterfuge for paying one gender more than another. This can sometimes be readily detected. For example, a seniority system that rewards only male-dominated segments of a work force would be strong evidence. Even easier is the *Corning Glass*[372] situation which involved red-circling a rate that women had been wrongfully prevented from earning; or *United Biscuits Ltd. v. Young*,[373] in which a supposedly red-circle personal rate was being paid to men who had never performed the special tasks that allegedly justified the rate in the first place.

Setting appropriate limits on the defenses that focus on employer benefit—on "what the employer gets"—is more difficult. The starting point on both sides of the Atlantic has been the belief that, in a capitalist soci-

368. 7 I.R.L.R. 361 (C.A. 1978).

369. 475 F.2d 1041, 1050 (5th Cir.), *cert. denied*, 414 U.S. 822 (1973).

370. 16 I.R.L.R. 26 (H.L. 1987)

371. For a discussion of the decisions on the Seventh and Ninth Circuits, see *supra* notes 214-26.

372. *See supra* notes 167-76 and accompanying text.

373. 7 I.R.L.R. 15 (Emp. App. Trib. 1978).

ety, the employer must have adequate power to run the business and to make judgment calls in the process. Both nations permit "merit pay" despite the danger that merit judgments may be affected by unconscious sexism, requiring little more than that the system appear fair and rational and, in the case of all but the smallest firms, that it be used on a regular basis. "Rational business judgment" seems the key. But there are limits on the permitted scope of those judgments. At this point disparate impact analysis sometimes comes into play. If a plaintiff can show that an employer's compensation program, submitted as a rational basis for a variation between the pay of a woman and her comparator, has a disparate impact on the two genders, what then? One response would, of course, be, "So what, leave the poor employer alone. He has enough problems. If he can offer a decent argument for it, let it pass." One must not dismiss that sort of argument too quickly. Employers are, after all, hedged in these days with a bevy of regulations and demands, from government, workers, and shareholders—not to mention clients. Nonetheless, employers on neither side of the Atlantic have been left that free. When disparate impact has been shown, the most fully reasoned cases—*Kouba*[374] in the United States and *Jenkins*[375] in the United Kingdom—have imposed on employers the burden of showing that the professed business objective is in fact served by the challenged practice.

What kind of disparate impact proof will put an employer to this burden? On this there is little guidance. The practice of basing wages on prior earnings elsewhere in *Kouba* and that of paying part-timers at a lower rate in *Jenkins* could be shown to have disparate impact on men and women on the basis of readily available official statistical data, as well as in the concrete circumstances of the parties to the litigation. In both *Kouba* and *Jenkins* the women made out a prima facie case without relying on disparate impact analysis. The Seventh Circuit Court of Appeals was not even willing to put the employer to the burden of going forward in *American Nurses' Association*[376] if plaintiffs could show no more than that a massive job evaluation study conducted by a state agency suggested that existing state government employment personnel practices had a disparate impact on the pay received by men and by

374. 691 F.2d 873 (9th Cir. 1982).

375. 10 I.R.L.R. 228 (Emp. App. Trib. 1981). *See also* Rainey v. Greater Glasgow Health Board, 16 I.R.L.R. 26 (H.L. 1987); Bilka-Kaufhaus v. Weber von Hartz, 15 I.R.L.R. 317 (Eur. Ct. of Just. 1986). The latter case imposed on an employer the burden of demonstrating that its exclusion of part-time employees from certain benefit schemes was justified by a "real need" of the enterprise. 15 I.R.L.R. at 318.

376. 783 F.2d 716 (7th Cir. 1986).

women.

The third defense—"I pay this male comparator more because I had to do so in order to attract him"—has the recognized potential of destroying the statutes' effects entirely. Its "flip side" is, of course, "I pay my women so little because I can get them cheap." The potential for sapping the vitality of these acts had led to total rejection in the individual "like work" and "equal work" context. For a time, under *Clay Cross,*[377] it seemed that in the United Kingdom a broad judgment had been made that the market rates of pay for men and women were so influenced by carried over sexism that no proof that a rate was needed because of market forces could be allowed. That judgment was abandoned in *Rainey,*[378] however, and there is no present likelihood that it will be revived.

C. *The Coming Decade: The Imprecision of the Market versus the Imprecision of Job Evaluation Studies*

To this point, both nations may be said to have made roughly the same type of choice in defining what employer conduct is prohibited: gender-based rates of pay for doing the same work are forbidden. Whether a wage or salary rate set by a pay system that regularly pays women less than men for doing different jobs is unlawful depends on how clearly it can be shown that the pay system is based on discriminatory premises. In both nations, the ways in which the statutory schemes have developed and been interpreted mean that relief in a given proceeding will be afforded only to an individual claimant or to a narrowly defined class, not to a class of all women employees. Title VII can be read to permit a wholesale class action challenge to an employer's pay system, but no such generic challenge to a total compensation structure has yet succeeded. The reason is the very heavy burden of proof claimants must carry. To show that most women in a workplace make less than most men in the same workplace is not enough. Plaintiffs must show that sexism is very near the surface—that a facially gender neutral pay system is a subterfuge for obtaining cheap female labor. The language of opinions rejecting prior earnings experience as a defense in Equal Pay Act cases suggests that a Title VII plaintiff could prevail by showing that such a specific factor, when used to determine a wage rate, has a demonstrable disparate impact on women's pay rates in a general compensation scheme. No broader use of disparate impact theory seems

377. *See supra* notes 193-203 and accompanying text.

378. 16 I.R.L.R. 26 (H.L. 1987).

likely in the foreseeable future.

In the United Kingdom, the formal burden for some potentially large groups is at times a bit easier: failure by an employer to implement a valid job evaluation study (either voluntary or forced on an employer under the "equal value" provision of the statute) that would call for higher pay for the discriminated-against gender is unlawful. How large and varied a group of claimants may be put together under present Industrial Tribunal Rules is not wholly clear. *Thomas*[379] indicates that problems would arise in handling a broad numerous group. In neither country is an employer forced to undertake such a study itself. In the United Kingdom, as in the United States, it remains open to an employer to argue that such a study is flawed because it fails to give sufficient weight to the realities of the marketplace or because of other flaws justifying an inference of imprecision.

Those who argue that rates set through job evaluation studies should sometimes be preferred to the prevailing wage rates set by the market do not profess to believe that such studies are scientifically perfect. They point instead to the arguably more serious imperfections of the market.[380] As one writer put it:

> The dual labor market excludes women from good jobs and crowds them into jobs that are undervalued and underpaid.
>
> . . .
>
> Once the value of women's work is fairly determined, the market can be utilized . . . [to price and allocate labor] again. Until then, however, the market, which reflects the bias against women, cannot be used as a reference point.[381]

Certainly it is clear that more than supply and demand are at work in valuing jobs in both countries, whether in the organized or unorganized sector. It is difficult to believe that some of the valuing is fully rational; in both nations, statutes have been passed recognizing that outright bias has depressed both earnings and opportunities on the basis of race, ethnicity and gender. As Professor Weiler has observed, a perfectly functioning labor market would not have led to the enactment of the Equal Pay Act, much less Title VII.[382]

The United Kingdom is likely coming to grips more quickly than the United States with the problem of how to assess both the gender neutral-

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379. *See supra* notes 343-47 and accompanying text.

380. *See, e.g.*, M. RUBENSTEIN, *supra* note 201, at 27-31; Weiler, *The Wages of Sex: The Uses and Limits of Comparable Worth*, 99 HARV. L. REV. 1728 (1986).

381. M. GOLD, A DIALOGUE ON COMPARABLE WORTH 94-95 (1984).

382. Weiler, *supra* note 380, at 1759.

ity and the overall quality of job evaluation studies. At one point it seemed that the EEOC would tackle the problem with the same vigor it displayed in the case of testing practices. That agency commissioned a study of job evaluation techniques by the National Academy of Sciences in 1980.[383] The EEOC has since experienced a change of heart, however, and in its eagerness to distance itself from comparable worth has ceased to address job evaluation in a serious way.[384]

The problem posed by *Wells*[385] and *Brown*[386] in the United Kingdom has no totally satisfying solution. How equal is equal? The *Brown* approach—totally rejecting any use of a "broad brush"—ignores the reality illustrated in *Arnold v. Beecham Group Ltd.*[387]—that jobs with point totals nearly ten percent apart are sometimes put into the same pay grade. *Wells* can be faulted equally for ignoring the frequency with which jobs having almost the same "point count" fall on different sides of a grade dividing line. This fact is well illustrated by the tortured history of *Neil v. Ford Motor Co.*,[388] in which the comparators nudged into the higher pay group by a single point, while applicants missed it by less than five—in a system in which grades cover a 20-point spread. One possible approach—perhaps best taken legislatively—would be to ask the expert to report whether the difference detected is of such magnitude that many pay systems would put the two jobs into the same grade. If the answer is "yes" then it would be the employer's burden to show that differences of roughly that magnitude have resulted in different pay rates elsewhere in its compensation scheme, or to provide other objective justification for selecting a given break point. If it was felt this would be an improper matter for the expert, perhaps an arbitrary mathematical question could be used: Do the demands of comparator's job exceed those of applicant's by less than five percent or eight percent?

When the United Kingdom equal pay for work of equal value amendments have been in force for a decade, most such technical problems should either have been resolved, or have proved insoluble—itself a valuable lesson. Will the learning thus acquired be applied on this side of the Atlantic?

A fully defensible step in the United States would be to use job evalu-

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383. WOMEN, WORK AND WAGES: EQUAL PAY FOR JOBS OF EQUAL VALUE (D. Treiman & H. Hartmann eds. 1981).

384. Job evaluation studies remain important to Title VII litigation, however, because of their potential use by employer defendants.

385. *See supra* notes 304-08 and accompanying text.

386. *See supra* notes 309-15 and accompanying text.

387. *See supra* notes 87-95 and accompanying text.

388. *See supra* notes 321-30 and accompanying text.

ation schemes as part of a remedy imposed on an employer found to have been guilty of widespread intentional wage discrimination. Since such a finding implies that the employer has abandoned the use of the labor market by paying males more than required in order to attract workers, that employer has little claim that only the job market should be used to set wages. In formulating the evaluation scheme the employer would be required to institute, the British experience could be a valuable source of instruction on what schemes are most likely to prove gender neutral.

A second possibility is that such schemes could be used as a monitoring device in the case of employers that have received federal grants and contracts. At the very least, British experiences might teach United States agencies about likely gender biases in job evaluation schemes already in place in United States factories. The litigation against state governments in Washington and Illinois evidence the way in which political pressure can be coupled with collective bargaining pressure to make such studies possible in the public sector.

Will the Congress be convinced in the near future that job evaluation has progressed to the point that it is feasible to permit plaintiffs to make out a prima facie case of wage discrimination solely on the basis of a properly done study? If the use of the equal value amendments in the United Kingdom does not prove to be substantially disruptive, the case for that sort of statutory directive becomes much stronger.

The overall likelihood is that job comparison schemes that attempt to make evaluations of the relative worth of clerical, production, management, and other jobs will look more sensible, but still imperfect, by the time the Bush Administration is firmly in office in the United States. Assuming that a statute can be devised that would permit plaintiffs to make out a prima facie case by the use of such a study—no doubt a statute that would still permit employers to use as an affirmative defense the argument that a given male wage should not be used for comparison purposes because it reflects peculiar situations in the labor market—will such a statute be enacted?

That question is clearly not a matter of law, but of politics. Enacting such a statute is an unlikely step for two reasons. First, to require an employer to restructure its entire pay system in the absence of specific proof of discriminatory intent would place the value given gender neutrality above the value given entrepreneurial freedom and the associated values of the free market. We are unlikely to make that choice in the case of total compensation systems.[389] The second and perhaps more crit-

389. Nevertheless, as noted above, we may be ready to make such a choice when a claimant demonstrates the particular discriminatory impact of a facially neutral factor in

ical factor is how willing people in the United States are to pay for gender neutrality. If the "gender gap"—the difference between male and female earnings that reflects nothing other than the difference of gender—is truly in the twenty percent range, as estimated by some scholars,[390] the bill for equality could be substantial. This would be true even if paid over time—as it would have to be given the administrative problems of filing suit, getting studies done, and so on. At present, widespread concern about American competitiveness in international trade makes it unlikely that such a statute would pass. Of the various arguably inflationary measures now on the horizon, a raise in the minimum wage seems far and away more likely to attract support. If the United States economy revives, and if American goods sell well again on the world market, then there is a chance. Probably the best estimate is that the United States will not enact broad "comparable worth" legislation in the near term, but will instead continue on a slower path toward pay equality, relying on the following: (1) existing equal pay for equal work legislation; (2) improved access of women to jobs and promotions through enforcement of Title VII and through affirmative action programs; and (3) incremental improvements in the availability of child care as the primary policy means toward that end.

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setting her specific rate.

390. *See* Shack-Marquez, *Earnings Differences Between Men and Women: An Introductory Note*, 107 MONTHLY LAB. REV. 15, 15-16 (June 1984) (and works cited therein). An excellent discussion of why the "gender gap" is hard to measure, and a sensible statement of what the upper and lower limits of such a gap may be in the United Kingdom, appears in the opening chapter of A. ZABALZA & Z. TZANNATOS, WOMEN AND EQUAL PAY: THE EFFECTS OF LEGISLATION ON FEMALE EMPLOYMENT AND WAGES IN BRITAIN (1985). The authors of that study found that the enactment of anti-discriminatory legislation in the United Kingdom may have eliminated as much as half of the pre-1970 gender gap.