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## Sex Discrimination in Britain, the United States and the European Community

### Keywords

Discrimination, Equal Protection, Sex, Sex Discrimination, States, Women, European Commission, Regulation, Trade Regulation, European Communities

# Sex Discrimination in Britain, the United States and the European Community

CHRISTOPHER A. DOCKSEY\*

## I. INTRODUCTION

In 1957, six European states signed the Treaty of Rome<sup>1</sup> and established thereby the European Economic Community or "Common Market, "a Community of unlimited duration, having its own institutions, its own personality, and its own legal capacity."<sup>2</sup> The European Community is an economic confederation aimed ultimately at a "United States of Europe,"<sup>3</sup> and its founding fathers drew up the Treaty as an embryo Constitution,<sup>4</sup> left deliberately open ended to allow the Community to develop and to achieve aims unforeseen in 1957. The European Community<sup>5</sup> cur-

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1. The Treaty Establishing the European Economic Community Mar. 25, 1957, Belgium, France, Germany, Italy, Luxembourg, Netherlands, 298 U.N.T.S. 11. [hereinafter cited as the Treaty of Rome or EEC Treaty].

2. *Flaminio Costa v. E.N.E.L.* [1964] E. Comm. J.Rep. 585, 593, 3 Comm. Mkt. L.R. 425, 455 (1964). See *infra* note 11.

3. "We must build a kind of United States of Europe." Speech by Winston Churchill, Zurich University (Sept. 19, 1946). The first step by the Six was to place national coal and steel production under a common supra national authority, the European Coal and Steel Community, in 1951, See *infra* note 5. Attempts at political integration via a European Defense Community and a European Political Community were set back by the collapse of the European Defense Treaty in 1954, but were resumed by the Six at the Messina Conference in June, 1955. The Conference resolved to "pursue the establishment of a United Europe through the development of common institutions, a progressive fusion of national economies, the creation of a Common Market and harmonisation of social policies," and led to the Treaty of Rome in 1957, note 1 *supra*. For the historical background, see R. MAYNE, *THE RECOVERY OF EUROPE 1945-73* (rev. ed. 1973); R. VAUGHAN, *TWENTIETH CENTURY EUROPE: PATHS TO UNITY* (1979).

4. "[T]he EEC Treaty has, in a sense, the character of a genuine constitution, the constitution of the Community . . . but for the greater part, the Treaty has above all the character of what we call a 'loi-cadre;' and this is a perfectly legitimate approach when one is dealing with a situation of an evolutionary nature such as the establishment of a Common Market . . . ." Submissions of Advocate General Lagrange, *Flaminio Costa v. E.N.E.L.*, 3 Comm. Mkt. L.R. 425, 442 (1964).

5. The "Community" consists of three Communities: Coal and Steel (The Treaty Instituting the European Coal and Steel Community, Apr. 18, 1951, 261 U.N.T.S. 140); the European Economic Community (note 1 *supra*); and, Euratom (The Treaty Creating the European Atomic Energy Community, Mar. 25, 1957, 298 U.N.T.S. 169). Since 1967 the Communities have been administered by common institutions — A Commission, Council,

rently has ten member States,<sup>6</sup> with two more to follow shortly,<sup>7</sup> and today it resembles a functional quasifederal entity<sup>8</sup> rather than a simple international economic confederation such as E.F.T.A.<sup>9</sup> or G.A.T.T.<sup>10</sup>

The quasi-federal nature of Community law, commonly known as "functional federalism", flows from its status as a new, independent and autonomous legal order,<sup>11</sup> and is supreme over the national law of the

Parliament, and Court of Justice. See Convention on Certain Institutions Common to the European Communities, Mar. 25, 1957, 298 U.N.T.S. 267, and Treaty Establishing a Single Council and a Single Commission of the European Communities (Merger Treaty), Apr. 8, 1965, 1973 Gr. Brit. T.S. No. 1 (Cmd 5179). For a discussion of the Communities and their Institutions, See P.S.R.F. MATHJSEN, A GUIDE TO EUROPEAN COMMUNITY LAW (3rd ed. 1980). See also D. LASOK & J.W. BRIDGE, AN INTRODUCTION TO THE LAW AND INSTITUTIONS OF THE EUROPEAN COMMUNITIES (3d ed. 1982).

6. Denmark, Eire and the United Kingdom joined in 1973. See Treaty of Accession to the European Economic Community, Jan. 22, 1972, 1973 Gr. Brit. T.S. No. 1 (Cmd. 5179). Norway signed, but was unable to ratify the Treaty, following a negative Referendum, and did not become a member. Greece joined in 1981. See Second Treaty of Accession, May 28, 1979, 291 O.J.L. 9 (Nov. 19, 1979).

7. It was hoped that Spain and Portugal would become members of the Community simultaneously in 1983, but complex negotiations have delayed both applications and it also seems likely that Portugal will be ready in advance of Spain. See *School's Brief: The Enlarging of Europe*, *The Economist*, Dec. 18, 1982, at 58-9, col. 3.

8. The Community was also labelled early on a "prefederal association." Müller-Graff, *Direct Elections to the European Parliament*, 11 CASE W. RES. J. INT'L L. 1, 5 (1979). See *Bride, American Analogues in the Law of the European Community*, 11 ANGLO-AM. L.R. 131 (1982).

9. Concerned about the impact of the original European Economic Community on trade, the seven countries of Austria, Denmark, Norway, Portugal, Sweden, Switzerland, and the United Kingdom joined in a cooperative regional economic integration movement, the European Free Trade Association (EFTA), under the Stockholm Convention in 1960. Convention Establishing the European Free Trade Association, Jan. 4, 1960, 370 U.N.T.S. 3. Later joined by Finland and Iceland, the EFTA sought to remove internal barriers to trade, such as tariffs and quantitative import quotas, and to this extent has been largely successful. Unlike the EEC, EFTA has not sought to achieve political union. See S. ROBOCK, K. SIMMONDS & J. ZWICK, INTERNATIONAL BUSINESS AND MULTINATIONAL ENTERPRISE 135-36 (rev. ed. 1977).

10. The General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. Pts. 5 & 6, T.I.A.S. No. 1700, 55 U.N.T.S. 186, commonly known as GATT, is the principal multilateral arrangement directed toward establishing a free system of trade by substantially reducing tariffs and other nontariff barriers to trade and by eliminating discriminatory treatment. Becoming effective in 1948, GATT now has over eighty members. The Agreement provides for: (1) rules for tariff negotiations which culminate in approval of tariff schedules; (2) rules governing the conduct of international trade in the areas of customs, licensing, government procurement, and such; and (3) consultations among Members to establish policies and resolve disputes. See generally K. W. DAM, THE GATT; LAW AND INTERNATIONAL ECONOMIC ORGANIZATION (1970); J. H. JACKSON, WORLD TRADE AND THE LAW OF GATT (1969); S. ROBOCK, K. SIMMONDS & J. ZWICK, INTERNATIONAL BUSINESS AND MULTINATIONAL ENTERPRISES 127-30 (rev. ed. 1977); H. STEINER & D. VAGTS, TRANSNATIONAL LEGAL PROBLEMS 1141-75 (2d ed. 1976).

11. See *Flaminio Costa*, 3 Comm. Mkt. L.R. at 425, 439 (submissions of Advocate General Lagrange). This case is the cornerstone of the doctrine of supremacy; the Court of Justice declared:

[T]he Treaty instituting the E.E.C. has created its own order which was inte-

member States.<sup>12</sup> One of the principal areas of Community "federal" jurisdiction is the improvement and harmonisation of "social" law, which includes the enhancement of protection against sex discrimination in the workplace. The law here is of special interest to Americans, because it not only draws from American jurisprudence but also has something to offer in return.

One member State, the United Kingdom, developed an advanced code of gender discrimination protection before the relevant Community Law became operative. British Ministers travelled to the United States to examine American law in this area, and the relevant British legislation, though obviously targeted on specific local needs and tradition,<sup>13</sup> drew

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grated with the national order of the member States the moment the Treaty came into force; as such, it is binding upon them. In fact, by creating a Community of unlimited duration, having its own institutions, its own personality and its own capacity in law, apart from having international standing and more particularly, real powers resulting from a limitation of competence or a transfer of powers from the States to the Community, the member States, albeit within limited spheres, have restricted their sovereign rights and created a body of law applicable both to their nationals and to themselves. The reception, within the laws of each member-State, of provisions having a Community source, and more particularly of the terms and of the spirit of the Treaty, has as a corollary the impossibility, for the member-State, to give preference to a unilateral and subsequent measure against a legal order accepted by them on a basis of reciprocity.

*Id.* at 455. Cf. Wyatt, *New Legal Order or Old?*, 7 EUR. L. REV. 147 (1982).

12. Flaminio Costa, 3 Comm. Mkt. L.R. at 455. See also *Amministrazione delle Finanze dello Stato v. Simmenthal S.p.A.* (No. 2), [1978] E. Comm. Ct. J. Rep. 629, 23 Comm. Mkt. L.R. 263 (1978), currently the highwater mark of the doctrine of supremacy, see Note, *Has the "Incoming Tide" Reached the Palace of Westminster?*, 95 L.Q. REV. 167 (1979). Within its own terms, Community law is supreme over any form of prior or subsequent national law, and national courts in practice give effect to this doctrine. J. USHER, *EUROPEAN COMMUNITY LAW AND NATIONAL LAW: THE IRREVERSIBLE TRANSFER* (1981). Although supremacy is limited to the scope of Community Law, that scope, in areas such as social and commercial law, is constantly increasing, e.g., remarks of Lord Denning M.R. in *H.P. Bulmer Ltd. v. J. Bollinger S.A.*, [1974] Ch. 401, at 418:

[T]he Treaty covers only those matters which have a European element. . . . The Treaty does not touch any of the matters which concern solely England and the people in it. These are still governed by English law. They are not affected by the Treaty. But when we come to matters with a European element, the Treaty is like an incoming tide.

13. It should be strongly emphasized, however, that sexism in both systems has operated in a very similar manner in both countries in the Nineteenth and Twentieth Centuries. Women were simultaneously excluded from the legal profession in the United States, *Bradwell v. The State*, 83 U.S. 130 (1873) (Illinois state law prohibiting women from practicing law upheld), and from the medical profession in Scotland, *JexBlake v. Senatus of the University of Edinburgh*, 11 M. 784 (1873). Women had to wait half a century to gain the right to vote, in 1918 in the United Kingdom and 1920 in the United States. For a comparative history of women and the law up to the present, see A. SACHS & J. WILSON, *SEXISM AND THE LAW, A STUDY OF MALE BELIEFS AND JUDICIAL BIAS* (1978).

It made no difference whether the judges were operating in the context of the British system which enshrines the supremacy of Parliament, or whether they

heavily on American theory and practice. Indeed, as will be seen, the British legislation sought to improve upon perceived inadequacies in American law. However, the European Community provisions were developed independently of U.S. law and have led to a series of cases from the United Kingdom seeking to strike down provisions of United Kingdom law allegedly inconsistent with Community law.<sup>14</sup> By an ironic twist of fate, American theory has been used by the European Court of Justice to analyze the inadequacy of provisions of United Kingdom law; provisions inspired by American jurisprudence. This article will review the legal responses to common problems of gender discrimination arising in the United States, Britain, and the European Community.

## II. THE LEGAL STRUCTURES<sup>15</sup>

The United States has enjoyed a system of federal anti-discrimination law for almost two decades. In 1963, the Fair Labor Standards Act of 1933 (FLSA)<sup>16</sup> was augmented by the Equal Pay Act<sup>17</sup> which required that men and women performing "equal work" in the same establishment should receive equal pay.<sup>18</sup> An aggrieved party may resort to the federal courts under the normal FLSA procedure.<sup>19</sup> The second major anti-discrimination statute, Title VII of the Civil Rights Act, was passed the following year, 1964.<sup>20</sup> Under Title VII, it is an unfair employment practice for those covered by the legislation<sup>21</sup> to discriminate in employment opportunities: hiring, firing, conditions in employment, promotion, benefits,

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functioned in terms of the American Constitution guaranteeing individual rights. . . . The prevailing conception of womanhood proved to be a far more compelling determinant of judicial behavior than the terms of the statute or the words of the Constitution!

*Id.* at 225-26.

14. *MacCarthy's Ltd. v. Smith*, [1979] 3 All E.R. 325 (C.A.), [1981] 1 All E.R. 111 (E.C.J.), 120 (C.A.), *noted in* Schofield, 9 *INDUS. L. J.* 173 (1980); *Worringham v. Lloyds Bank Ltd.*, 27 *Comm. Mkt. L.R.* 293 (E.A.T.), 302 (C.A.) (1980), [1981] *Indus. Cas. R.* 558 (E.C.J.), [1982] *Indus. Cas. R.* 299 (C.A.); *Jenkins v. Kingsgate (Clothing Productions) Ltd.*, [1980] *INDUS. REL. L.R.* 6 (E.A.T.), 31 *COMM. MKT. L.R.* 24 (E.C.J.) (1981), [1981] *INDUS. CAS. R.* 715 (E.A.T.), *noted in* 4 *EUR. L. REV.* 193 (1980) (Court of Justice decisions); *Eileen Garland v. British Rail Engineering Ltd.*, [1979] *Indus. Cas. R.* 558 (C.A.); [1982] *INDUS. CAS. R.* 420 (E.C.J. and H.L.) *Burton v. British Railways Board*; [1982] *Indus. Cas. R.* 329 (E.C.J.). It is not surprising that the United Kingdom has provided all the recent art. 177 references to the Court of Justice in this arena; (*see* note 35, *supra*), the British legislation is extensive and specific, was passed without reference to the developing European legislation, and provides easy and swift remedial access.

15. For a broad survey of legal protections in the United States and the United Kingdom, *see* Covington, *American and British Employment Discrimination Law: An Introductory Comparative Survey*, 10 *VAND. J. TRANSNAT'L L.* 359 (1977).

16. 29 U.S.C. §§ 201-219 (1976).

17. 29 U.S.C. § 206(d)(1976).

18. 29 U.S.C. § 206(d)(1)(1976). Pub. L. No. 8838 (1963), 77 Stat. 56.

19. 29 U.S.C. § 216(b)(1976).

20. 42 U.S.C. §§ 2000e(17) (1976).

21. *See infra* note 28.

etc.—on the ground, *inter alia*,<sup>22</sup> of sex. An aggrieved individual must initially file a claim with the Equal Employment Opportunity Commission (EEOC)<sup>23</sup> or the appropriate state or local fair employment agency.<sup>24</sup> If the EEOC is unsuccessful in conciliating or settling the issue, the complainant may proceed *de novo* before the ordinary courts.<sup>25</sup> Administrative enforcement and review of both statutes is entrusted to the EEOC.<sup>26</sup>

In the United Kingdom, there are two fairly specific analogues to the American legislation, the Equal Pay Act of 1970<sup>27</sup> and the Sex Discrimination Act of 1975.<sup>28</sup> The two Acts came into force on the same date,

22. Title VII also prohibits discrimination on the grounds of race, color, religion or national origin. 42 U.S.C. § 2000e(2) (1976). It is commonly thought that “sex” was added to the grounds of discrimination as a careless afterthought, or even to “kill the Bill,” but a recent analysis of the legislative history concludes that Congress’ extension of Title VII to cover sex discrimination was deliberate and purposeful. See Gold, *A Tale of Two Amendments: The Reasons Congress Added Sex to Title VII, and Their Implication for the Issue of Comparable Worth*, 19 Duq. L. Rev. 453 (1981).

23. Claims must be filed within 180 days of the unfair employment practice. 42 U.S.C. § 2000e(5)(e) (1976). For EEOC practice and procedure in dealing with complaints, see Katz, *Investigation and Conciliation of Employment Discrimination Charges under Title VII: Employment Rights in an Adversary Process*, 28 HASTINGS L.J. 877 (1977).

24. In which case, the period of limitation to file a complaint with the EEOC under Title VII is extended to 300 days, or to within 30 days of notification that the State or local agency has terminated proceedings under State or local law, whichever is the earlier. 42 U.S.C. Sec. 2000e(5)(e) (1976).

25. *Chandler v. Roudubush*, 425 U.S. 840 (1976) (federal employees have same right to trial *de novo* as private employees); *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974) (federal courts not bound to refer to arbitrator’s decision but should consider employee’s claim *de novo*; doctrines of election of remedies and waiver, and federal policy respecting arbitration do not limit independent access under Title VII); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (charging party is not limited to EEOC determination of “reasonable cause” in instituting court action).

26. 42 U.S.C. § 2000e(5) (1976). For a topical survey of the work of the EEOC, see LEACH & OWENS, *EQUAL EMPLOYMENT OPPORTUNITY TODAY: A TIME OF SCRUTINY AND EVALUATION* (1981). Enforcement was originally the responsibility of the Wages and Hour Division of the United States Department of Labor. Jurisdiction was transferred to the EEOC under Reorganization Plan No. 1 of 1978, effective July 1, 1979. Enforcement had been divided for many years because the EEOC was seen as primarily concerned with racial discrimination under Title VII. Therefore, it was thought that a separate enforcement body to focus on sex discrimination in pay would be appropriate. In the United Kingdom, there are still separate enforcement agencies for race discrimination, the Commission of Racial Equality (Part VII, Race Relations Act 1976), and sex discrimination, the Equal Employment Opportunities Commission (Part VI, Sex Discrimination Act 1975). The British provisions and agencies are not limited to employment discrimination but also cover education and the provision of goods and services.

27. Equal Pay Act, 1970, ch. 41 (as amended by Sex Discrimination Act 1975).

28. Sex Discrimination Act, 1975, ch. 65 [hereinafter cited Sex Discrimination Act]. Part II of the Sex Discrimination Act, entitled “Discrimination in the Employment Field,” amended the Equal Pay Act 1970. In the main, coverage of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2000e(17) and the Sex Discrimination Act, Part II, relating to employment is very similar. Both protect “employees,” those working or seeking work (42 U.S.C. § 2000e(f); Sex Discrimination Act §§ 6(1), (2)) from discrimination by “employers” (42 U.S.C. § 2000e(b); Sex Discrimination Act § 6) “labor organizations” (42 U.S.C. § 2000e(e)) or “trade unions” (Sex Discrimination Act § 12) and “employment agencies” (42

December 29, 1975, and together form a more or less harmonious code against sex discrimination. Both statutes are administered by the Equal Opportunities Commission (EOC), a statutory body created for this purpose by the Sex Discrimination Act.<sup>29</sup> Aggrieved individuals may present a complaint under either Act directly to the local statutory labor court known as the "Industrial Tribunal."<sup>30</sup>

In 1971, the United Kingdom signed the Treaty of Accession and subjected United Kingdom law to Community law.<sup>31</sup> In the area of gender

U.S.C. 2000e(c); Sex Discrimination Act § 15). There is a minimum qualifying number of employees (15 under Title VII 42 U.S.C. § 2000e(b) and 6 under the Sex Discrimination Act § 6(3)(b), which also exempts private households Sex Discrimination Act § 6(3)(a)). On July 25, 1980, the European Commission decided to commence infringement proceedings under article 169 of the Treaty of Rome (note 1 *supra*) against the United Kingdom on the basis that the Sec. 6(3) exclusion of private households and small businesses is contrary to article 2 of the Equal Treatment Directive, 76/207/EEC. Europe, July 26, 1980 (magazine) at 8. One major difference is the protection against "marriage bar" discrimination under Sec. 3 of the Sex Discrimination Act, *see infra* Part IV of text.

29. *See* Sex Discrimination Act, *supra* note 28, Part VI (regarding composition and duties of the Equal Opportunities Commission) Part VII (enforcement) and sched. 3 (incorporation, personnel and finance). *See* Byrne and Lovenduski, *Sex Equality and the Law in Britain*, 5 BRR. J.L. & Soc'y 148 (1978).

30. Equal Pay Act, 1970, ch. 41 § 2; Sex Discrimination Act, *supra* note 28, § 63. *See also* Employment Protection (Consolidation) Act, 1978, ch. 44 § 128, sched. 9. The Industrial Tribunal has jurisdiction over all statutory individual employment rights. It comprises a panel intended to be an "industrial jury" consisting of a legally qualified chairman supported by two "wing" persons representing either side of industry. Appeals on law are to the Employment Appeal Tribunal [hereinafter EAT], a superior court of record, in London for England and Wales, and Edinburgh for Scotland. *See* Employment Protection (Consolidation) Act, 1978, ch. 44, §§ 135, 136 and sched. 11. *See* Phillips, *Some Notes on the EAT*, 7 INDUS. L.J. 137 (1978). Appeals thence are in the normal way to the Court of Appeal and the House of Lords. At any stage, a Tribunal or Court may refer a question on Community Law to the European Court of Justice in Luxembourg under article 177 of the Treaty of Rome (note 1 *supra*). *See infra* note 35.

31. The actual date of subordination is January 1st, 1973, but for totally different reasons under British constitutional law and Community law. Under the former, treaty-making falls under the Royal Prerogative, and international obligations incurred by the Crown have no internal effect unless and until transformed by Act of Parliament into municipal law:

Within the British Empire there is a well-established rule that the making of a treaty is an executive act, while the performance of its obligations, if they entail alteration of the existing domestic law, requires legislative action. Unlike some other countries, the stipulations of a treaty duly ratified do not within the Empire, by virtue of the treaty alone, have the force of law.

Per Lord Atkin, *Attorney-General for Canada v. Attorney-General for Ontario*, [1937] A.C. 326, 347.

Thus, for example, the European Convention of Human Rights has no internal legal effect. *Ahmad v. I.L.E.A.*, [1978] 1 All E.R. 574. Community law is only part of British law insofar as it has been incorporated by the European Communities Act, 1972 ch. 68, which came into force on January 1st, 1973. For the modes of transformation adopted by the Act *see* Mitchell, Kuipers & Gall, *Constitutional Aspects of the Treaty and Legislation Relating to British Membership*, 9 COMMON MKT. L. REV. 134 (1972). The situation is different in the other member states. *See* K. LIPSTEIN, *THE LAW OF THE EUROPEAN ECONOMIC COMMUNITY* Ch. 2, pt. X (1974).

In contrast, the critical date under Community law is the ratification and entry into



discrimination, there are two levels of enforcement under Community law: by individuals under Article 119 of the Treaty of Rome, and by the European Commission under the Equal Pay and Equal Treatment Directives.

First, article 119 obliges member states to: "[E]nsure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work."<sup>32</sup> Article 119 has been held to be "directly effective,"<sup>33</sup> that is, it is a provision of Community law which confers rights on individuals which they may enforce before their national courts.<sup>34</sup> Individuals may thus plead article 119 before United Kingdom

force of the Treaty of Accession of January 22nd, 1972, which was, coincidentally, January 1st, 1973. Like ratification of the Treaty of Rome by the original Six this constituted a definitive extraconstitutional political act constituting a new legal order. See submissions of Procureur-General Touffait in *Administration des Douanes v. Soc. Cafés Jacques Vabre*, 16 Comm. Mkt. L.R. 336, 364 (French Cour de Cassation) (1975), discussed in Simon and Dowrick, *Effect of EEC Directives in France: The Views of the of the Conseil d'Etat*, 95 L.Q. REV. 376 (1979). See also L. COLLINS, *EUROPEAN COMMUNITY LAW IN THE UNITED KINGDOM* Ch. 1 (2d ed. 1980); Dagtoglou, *European Communities and Constitutional Law*, 32 CAMBRIDGE L.J. 256 (1973); Trinidad, *Parliamentary Sovereignty and the Primacy of European Community Law*, 35 MOD. L. REV 375 (1972).

32. The full text of article 119 is as follows:

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

For the purpose of this Article, 'pay' means the ordinary basic or minimum wage or salary and any other consideration which the worker receives, directly or indirectly, whether in cash or in kind, from his employer in respect of his employment.

Equal pay without discrimination based on sex means: (a) that pay for the same work at piece-rates shall be calculated on the basis of the same unit of measurement; (b) that pay for work at time-rates shall be the same for the same job.

Article 119 is perhaps the most dynamic provision of social law in the Treaty of Rome, but was included in the Treaty at the insistence of France for reasons of national self-interest. The Preamble to the French Constitution of 1946, confirmed by the 1958 Constitution, requires equal rights for women men "in all spheres." This was particularized into a duty to pay equally for work of equal value by the Act of 22nd December 1972 (Code du travail, art. L. 1402). See F. SCHMIDT, *DISCRIMINATION IN EMPLOYMENT: A STUDY OF SIX COUNTRIES BY THE COMPARATIVE LABOUR LAW GROUP* 142 (1978). France was concerned lest her textile industry, heavily serviced by women, would be at a competitive disadvantage as against textile producers in other Common Market nations. See Szyszczak, *Problems of Equal Pay Within the EEC Perspective*, 131 New L.J. 39 (1981).

See also submission of Belgium to the Court of Justice in the first Defrenne case: "The Belgian State, represented by the Minister of Social Security, states that Article 119 of the Treaty has only an economic objective, since its aim is to avoid discrepancies in cost prices due to the employment of female labour less well paid for the same work than male labour." *Defrenne v. Belgium*, 1972 E. Comm. Ct. J. Rep. 445, 449.

33. *Defrenne v. Sabena*, 1976 E. Comm. Ct. Rep. 455, 18 Comm. Mkt. L.R. 98.

34. *N.V. Algemene Transport en Expeditie Onderneming Van Gend en Loos v. Nederlandse Administratie der Belastingen*, 1963 E. Comm. Ct. J. Rep. 1. See Bebr, *Directly Applicable Provisions of Community Law: The Development of a Community Concept*, 19 INT'L & COMP. L.Q. 257 (1970); Steiner, *The Application of European Community law in*

courts<sup>35</sup> in addition to the Equal Pay Act and the Sex Discrimination Act, or in preference to the national legislation where such is inferior.<sup>36</sup>

Second, pursuant to the European Social Action Programme of 1974,<sup>37</sup> there are two binding directives on sexual equality in the work place.<sup>38</sup> The Equal Pay Directive amplifies article 119 and, inter alia, radically extends the scope of the principle of "equal pay."<sup>39</sup> The Equal

*National Courts Problems, Pitfalls and Percepts*, 96 L.Q. REV 126 (1980); Warner, *The Relationship between European Community law and the National Laws of Member States*, 93 L.Q. REV. 349 (1977); Winter, *Direct Applicability and Direct Effect*, 9 COMMON MKT. L. REV. 425 (1972).

35. There is no system of "federal" courts to enforce Community Law. National courts interpret and apply their own national law, and as "common law" (i.e., Community) courts apply Community law where the law is clear. Where there is a question of interpretation of Community law, any court or tribunal may, and every court of final jurisdiction must, refer the question to the Court of Justice for an advisory opinion, or "preliminary ruling" under art. 177 of the Treaty of Rome. Art. 177 establishes the Court of Justice as the final and authoritative arbiter of Community law under the Treaty System of "organic cooperation between the two orders of jurisdiction." Per Advocate General Lagrange, *Flaminio Costa v. E.N.E.L.*, 3 Comm. Mkt. L.R. 438, 443-44 (1964). See generally, Barav, *Some Aspects of the Preliminary Rulings Procedure in EEC Law*, 2 EUR. L. REV. 3 (1977); BRIDGE, *Community Law and English Courts and Tribunals: General Principles and Preliminary Rulings*, 1 EUR. L. REV. 13 (1976); GRAY, *Advisory Opinions and the European Court of Justice*, 8 EUR. L. REV. 24 (1983). An attempt by the British Court of Appeal to restrict the privilege of the lower courts to ask for a preliminary ruling was found to be inconsistent with art. 177 and may not necessarily be authoritative. *H.P. BULMER LTD. v. J. BOLLINGER S.A.*, [1974] Ch. 401, 420-426. See, e.g., *Pigs Marketing Board v. Redmond*, 22 Comm. Mkt. L.R. 697, 706-07 (1978).

36. Note 14 *supra*.

37. Council Resolution on a Social Action Programme of 21 Jan. 1974, 17 O.J. EUR. COMM. (No. C13) 1 (1974). The Council of the Communities expressed the political will to achieve certain objectives, including the attainment of full and better employment in the Community, during a first stage over the period 1974-1976. Specific priorities include: (1) action to ensure equality between men and women regarding access to employment, to vocational guidance and training, and in respect of work conditions and pay; (2) the reconciliation of family responsibilities with the professional aspirations of the people concerned. On Dec. 9, 1981 the Commission submitted a memorandum to the Council proposing a New Community Action Programme on the Promotion of Equal Opportunities for Women 1982-1985, Com(81) 758 final. The Commission proposed specific action to (1) strengthen the rights of the individual as a way of achieving equal treatment, involving closer monitoring of the Directives, new legal measures, and specific guidelines with regard to unfamiliar concepts, such as indirect discrimination, and (2) achieve equal opportunities in practice, involving vocational and educational initiatives.

Towards these ends, the Commission has set up an Advisory Committee on Equal Opportunities for Women and Men to advise the Commission and coordinate activities of national bodies (such as the EOC). Decision of Dec. 9, 1981, 37 O.J. EUR. COMM. (No. L 20) 35 (1982).

38. A third, on social security, Directive 79/7/EEC, 22 O.J. EUR. COMM. (No. L 6) 24 (1979), gives the member States until 1985 to implement its requirements. This is an unusually long implementation period, and was castigated by Parliamentarians as excessively long and "astonishingly smug." Remarks of Mrs. Dunwoody, O.J. EUR. COMM. (No. 237) 135 (Dec. 13, 1978) (Debates of European Parliament).

39. Council Directive 75/117/EEC, 18 O.J. EUR. COMM. (No. L 45) 19 (1975), art. 1(1). "The principle of equal pay for men and women . . . means, for the same work or for work

Treatment Directive<sup>40</sup> is an independent and novel provision<sup>41</sup> which requires equal opportunities to be provided to men and women in vocational training<sup>42</sup> and employment<sup>43</sup>. The Court of Justice has stressed that only article 119 is directly effective and enforceable by individuals. The Directives are detailed guidelines for member States, setting out objectives which must be implemented by national legislation in each State. Individuals must bring suit under their own national law, rather than the Directives. National legislation is monitored by the European Commission in Brussels. Recourse to the Court of Justice ensures, if necessary, that the legislation adequately fulfills the requirements of the Directives.<sup>44</sup>

### III. "SEX" DISCRIMINATION

An employer discriminates on the grounds of sex when it treats a woman less favorably<sup>45</sup> than a man<sup>46</sup>. Three basic problems of definition

to which equal value is attributed, the elimination of all discrimination on grounds of sex with regard to all aspects and conditions of remuneration." See Part V of text, *infra*.

40. Council Directive 76/207/EEC, 19 O.J. EUR. COMM. (No. L 39) 40 (1976).

41. The Equal Treatment Directive was made under the general legislative authority of art. 235 of the Treaty of Rome, implementing arts. 117 and 118. Also, the Social Action Programme is a good example of the opened nature, *traite cadre*, of the Treaty of Rome.

42. Art. 4 of the Directive, note 40 *supra*, includes "all types and . . . all levels of vocational guidance, vocational training, advanced vocational training and retraining." The European Commission has informed the U.K. Government that Sec.20 of the Sex Discrimination Act, which excludes the training and employment of midwives from the scope of the Act, is contrary to the Directive. See London Times, Apr. 24, 1981, at 3, col. 6 (Discriminatory to compel male nurse in Sunderland to travel to Scotland or London to study because only two nursing schools in U.K. admit male midwifery students). The Commission rejected the frequently offered justification of privacy as applicable to midwifery, stating that it is not one of the occupations excluded by art. 2(2) of the Directive in which "by reason of their nature or the context in which they are carried out, the sex of the worker constitutes a determining factor." See London Times, July 26, 1980, at 4, col. 1.

A contrary view was taken by an Arkansas District Court, which held that a male nurse could lawfully be excluded under the BFOQ exception to Title VII from a hospital's labor and delivery rooms in order to protect patients' "privacy and personal dignity." *Backus v. Baptist Medical Center*, 510 F.Supp. 1191 (E.D. Ark. 1981), *vacated as moot*, 671 F.2d 1100 (8th Cir. 1982). Personal privacy of patients justified a BFOQ exception in *Fesel v. Masonic Home of Delaware, Inc.*, 447 F.Supp. 1346 (D.Del. 1978), *aff'd mem.*, 591 F.2d 1334 (3d Cir. 1979). See Comment, *Sex Discrimination Justified under Title VII: Privacy Rights in Nursing Homes*, 14 VAL. U.L. REV. 577 (1980).

43. Art. 3 requires equality of treatment with regard to hiring and promotion, and art. 5 requires equality of working conditions, including conditions governing dismissal. See Part IV of text, *infra*.

44. The Commission enforces Directives under art. 169 of the Treaty of Rome. The Commission first writes to the member State concerned and sets out its views on the alleged infringement of the Directive. If the member State does not provide an answer satisfactory to the Commission and refuses to amend its legislation in line with the Commission's views, the Commission may initiate suit before the Court of Justice. The decision of the Court is final, and its terms must be implemented by a member State found to be in default.

45. "Disparate Treatment" . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race,

arise: what is a "woman"; does discrimination on the grounds of sexual preference constitute "gender" discrimination; and, is sexual harassment (a phenomenon falling within the same cultural spectrum as rape<sup>47</sup>) an evil which may properly be remedied by anti-discrimination legislation. All three involve prejudice and cultural conditioning at the deepest level; none were contemplated by the legislature when it considered the legislation.

The woman who claims to be a man, or vice-versa, can present problems to an employer in the context of affirmative action programmes or protective legislation. At one level, the absurdity of cultural stereotyping is exposed when the same individual can step from one sex to the other, and presumably be no better or worse a car mechanic or secretary than before. At a deeper level, the transsexual will ask, who has the major say on gender identity, the individual or the State? In one case, a person was lawfully discharged under protective legislation because s/he was biologically female, i.e., had the ability to bear a child, notwithstanding a personal decision at the age of seven to be a male.<sup>48</sup> In Britain, so far, Freud's maxim still holds true—"anatomy is destiny." Elsewhere, a contrary approach is gaining favor, that the right to determine one's physical and psychological identity is a fundamental personal right which must be recognized by the State. Authorities to this effect in California,<sup>49</sup> the Fed-

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color, religion, sex or national origin." *International Brotherhood of Teamsters v. U.S.*, 431 U.S. 324, 335 n. 15 (1977)(Stewart, J.). *cf.* Sex Discrimination Act, *supra* note 28, § 1(1)(1): "A person discriminates against a woman . . . if on the ground of her sex he treats her less favourably than he treats or would treat a man."

46. Or vice versa. Sex Discrimination Act, *supra* note 28, § 2. "Equality is the order of the day. In both directions. For both sexes." *Ministry of Defence v. Jeremiah*, [1979] 3 All E.R. 833, 836 (Lord Denning M.R.).

47. Sexual harassment and rape both involve invasion of the woman's personal privacy and human dignity, the employment of superior power, economic or physical, and feelings of shame and humiliation. See Montgomery, *Sexual Harassment in the Workplace*, 10 GOLDEN GATE U.L. REV. 879, 880 (1980). Both tend to be underreported. See S. BROWN MILLER, *AGAINST OUR WILL: MEN, WOMEN AND RAPE* 175 (1975). See generally C.A. MacKINNAN, *SEXUAL HARASSMENT OF WORKING WOMEN* (1979).

48. *White v. British Sugar Corp.*, [1977] Indus. Rel. L. R. 121. See also *Corbett v. Corbett*, 1971 P. 83. The issue was the validity of an alleged marriage involving a male transsexual who had undergone surgery to become a female. The court held that sexual identity is determined conclusively at birth and consists not only of the genital but also of the chromosomal and gonadal attributes of that person. This approach has been strongly criticised, see Walton, *When is a Woman Not a Woman?*, 124 New L.J. 501 (1974); Pannick, *Homosexuals, Transsexuals and the Sex Discrimination Act*, 1983 PUBLIC LAW 279.

49. *M.T. v. J.T.*, 355 A.2d 204 (1976). A male transsexual had a sex change operation, married and lived with her husband for two years. The court held she was a woman because she had changed her genital anatomy to accord with her sense of self-identity as a female and had brought about the necessary congruence between her psyche and genital features. "Sex (is) one's selfimage, the deep psychological or emotional sense of sexual identity and character." *Id.* at 209. See also *Holloway v. Arthur Anderson & Co.*, 566 F.2d 659 (9th Cir. 1977)(Goodwin, J., dissenting). "When a transsexual completes his or her transition from one sexual identity to another, that person will have a sexual classification. Assuming that this plaintiff has now undergone her planned surgery, she is . . . female . . ." *Id.* at 664.

eral Republic of Germany,<sup>50</sup> and under the European Convention of Human Rights<sup>51</sup>, are a powerful influence on the United Kingdom and American jurisdictions to allow transsexuals to require the law to recognize their new sexual identity.

It is interesting to contrast this progressive definitional response to transsexuality with the legal response to the second problem, sexual preference. Discrimination against homosexuals, the so-called "third sex," consistently provides clear examples of cultural stereotyping and prejudice,<sup>52</sup> but such discrimination is not characterized in any jurisdiction as "sex" discrimination.<sup>53</sup> None the less, certain individuals are particularly prone to suffer arbitrary discharge simply because of their sexual preferences, unlike other individuals whose sexual preferences are socially acceptable. In America and the United Kingdom, homosexuals are forced to resort to alternative, less specific, legal remedies,<sup>54</sup> where they must rebut what is *effectively* a presumption of wrongful behavior inferred from their homosexuality by demonstrating that their sexual preferences have no impact upon their jobs.<sup>55</sup> Homosexuals are likely to remain rela-

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50. Decision of Bundesverfassungsgericht of October 11, 1978, *Juris tenzeitung* 34, 64 (1979). German Basic Law arts. 1.1 (dignity of man) and 2.1 (free development of personality) require sex of person to be determined according to his/her psychical and physical constitution; a transsexual is therefore able to require correction of sex on birth register.

51. *D. Van Oosterwijck v. Belgium*, 1978 Y.B. EUR. CONV. ON HUMAN RIGHTS 476 (Eur. Comm'n on Human Rights). The Commission ruled that the refusal of transsexual's request to amend his sex entry on the Belgian civil status register from female to male was a violation of arts. 8 (respect for life) and 12 (right to marry) of the Convention. See Note, 6 *Eur. L. Rev.* 67 (1981).

52. See generally Rivera, *On Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 *HASTINGS L.J.* 799 (1979); Warner, *Homophobia, "Manifest Homosexuals" and Political Activity: A New Approach to Gay Rights and the 'Issue' of Homosexuality*, 11 *GOLDEN GATE U.L. REV.* 635 (1981).

53. A Title VII disparate treatment argument was firmly rejected in *DeSantis v. Pacific Telephone & Telegraph Co., Inc.*, 608 F.2d 327 (9th Cir. 1979). Title VII is limited strictly to the traditional meaning of "sex" discrimination. Interestingly, the case followed an earlier decision that discrimination against a transsexual as such, rather than as a female or a male, is not protected by Title VII. *Holloway v. Arthur Anderson & Co.*, 566 F.2d 659 (9th Cir. 1977)(colleagues unable to cope with transsexual during and after transition). Similarly, a disparate impact argument was rejected in *DeSantis* as an attempt to "bootstrap" Title VII protection for homosexuals, cf. Sneed, J. dissenting, who would have been willing to admit evidence that a disproportionate number of males were homosexual to establish disparate impact against males. *DeSantis*, 608 F.2d at 333-4.

54. *Gay Law Students Association v. Pacific Telephone & Telegraph, Co.*, 24 Cal. 3d 458, 595 P.2d 592, 156 Cal. Rptr. 14 (1979)(Regulated public utility could not dismiss employees merely for being homosexual; protected under State Constitution, State Public Utilities Labor Code and State Labor Code).

55. In Britain, there is a general statutory protection against Unfair Dismissal (wrongful discharge) in Part V of the Employment Protection (Consolidation) Act, 1978 ch. 44, but homosexuals do not in practice receive the same level of protection against arbitrary discharge as heterosexuals. Job-related heterosexual misbehavior has to be proven to justify a dismissal. See *Treganowan v. Robert Knee Ltd. & Co.*, [1975] *Indus. Cas. R.* 405 (Q.B.)(Dismissal justified because employee's unwelcome revelations about personal life and sexual activities made workplace intolerable for fellow employees). In contrast, employee

tively unprotected by the law as long as present prejudices endure.

However, a third definitional problem has been resolved in the face of similarly strong cultural traditions, that is, the characterization of sexual harassment as discrimination under Title VII. Sexual harassment was almost certainly never contemplated as a form of discrimination by any of the framers of anti-discrimination legislation, but it is a strong example of adverse treatment analysis. Harassment clearly demonstrates elements of less favorable treatment (detriment, *malignant* motivation and lack of justification). Even the narrowest "sex only"<sup>56</sup> approach would have to characterize it as "sex" discrimination. Harassment of women in employment is a serious social problem both in the United States<sup>57</sup> and in Europe,<sup>58</sup> and the ongoing development of a broad definition of harassment by the EEOC and some American jurisdictions<sup>59</sup> provides a lead which

misconduct or employer detriment is likely to be inferred from the mere fact of homosexuality. See *Saunders v. Scottish National Camps Association Ltd.*, [1980] Indus. Rel. L. R. 174 (EAT), *aff'd* [1981] Indus. Rel. L. R. 277 (Ct. of Session). (Only police and employer knew employee was homosexual, but dismissal justified on grounds of effect on employer's business of possible adverse customer reaction). Only the most innocuously placed homosexuals are likely to succeed, *Bell v. The Devon & Cornwall Police Authority*, [1978] Indus. Rel. L. R. 283 (homosexuality of canteen cook not an acceptable reason for dismissal). See C. BEER, R. JEFFERY AND T. MUNYARD, *GAY WORKERS: TRADE UNIONS AND THE LAW* (1981).

56. An approach which limits the scope of "sex" discrimination to cases where a woman is treated less favorably than a man would be treated in identical circumstances on the sole ground that she is a woman. There is no discrimination if the circumstances are perceived as inapplicable to men, e.g., pregnancy requirements that women should wear skirts (*Schmidt v. Austicks Bookshops Ltd.*, [1977] Indus. Rel. L. R. 360 or possess large bosoms (*State Div. of Human Rights on the Complaint of Mary Chamberlain v. Indian Valley Realty Corp.*, 38 A.D.2d 89 (1970), *aff'd per curiam* case no. CS21209870, N.Y. State Human Rights Appeal Bd.)

57. In 1975, 70% of women surveyed by the Working Women United Institute reported sexual harassment experiences. See Note, *Sexual Harassment in the Workplace*, 10 GOLDEN GATE U.L. REV. 879, n. 2 (1980). In 1976, 90% of women who responded to a questionnaire published in November edition of Redbook magazine claimed they had experienced sexual harassment. See C.A. MACKINNAN, *supra* note 47, at 2526.

58. See H. Riffault, *European Women in Paid Employment, their perception of discrimination at work* 5860 (Dec. 1980)(study conducted in the nine Community member States at the request of the "Ad Hoc" Commission of the European Parliament for Women's Rights). In the Community overall, 6% of women surveyed complained of "sexual blackmail," 7% in Britain, and 8%, the highest proportion, in France. In Britain, sexual harassment is coming to be recognised as a social and legal issue, see Rubenstein, *The Law of Sexual Harassment At Work*, 12 INDUS. L.J. 1 (1983). A recent pamphlet points out that there seems to be a serious problem although research in the U.K. is as yet "embryonic," and recommends that a test case be brought under the Sex Discrimination Act as soon as possible. See A. SEDLEY AND M. BENN, *SEXUAL HARASSMENT AT WORK* (NCCL, 1982).

59. Guidelines on Sexual Harassment, 29 C.F.R. § 1604.11, which define sexual harassment as "[u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature." *Id.* at § 1604.11(a). Three criteria are set out:

- (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as a basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating,

Europe must follow.

#### IV. "SEX-PLUS" DISCRIMINATION—WIVES AND MOTHERS

The most fundamental area of debate over the definition of "gender" discrimination is undoubtedly that of family status. Working women suffer "sex-plus" discrimination which flows from the physical and cultural consequences of gender. Wives, expectant mothers and mothers with dependent children often suffer dismissal or exclusion from employment and employment opportunities. Indeed, cultural stereotyping of the "proper" female role in the family is the cause of the employment segregation that limits both the pay and the career aspirations of most women. The problems of family status and equal pay, to be considered below, are two sides of the same coin. European law is specific: "[T]here shall be no discrimination whatsoever on grounds of sex, either directly or indirectly by reference in particular to marital or family status . . . ."<sup>60</sup> This provision goes further than either United States or United Kingdom law at present.

Three overlapping issues arise under the rubric of family status: marriage, pregnancy, and parenthood. Pregnancy is the only condition of the three unique to women, but all three entail the same consequences for working women. Married men and fathers (other than single parents) do not suffer from "sex-plus" discrimination, due to social stereotypes of the family responsibilities of men and women.

Sexual stereotyping can clearly be seen in discrimination against married women. In the United States, flight attendants have provided the litigation which tests the boundaries of Title VII, but they have achieved comparatively little. Disappointingly, the courts have held that where only women were employed as flight attendants a no-marriage rule was

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hostile or offensive working environment." *Id.*

Conduct has to be considered in the light of all the circumstances, including the nature and context of the unwelcome behavior. *Id.* § 1604.11(b). The Guidelines go on to impose vicarious liability on the employer for harassment by agents or supervisors, *Id.* § 1604.11(c), and direct liability on the employer for harassment by nonsupervisory coworkers where the employer knew, or should have known, of the harassment and does not take "immediate and appropriate corrective action." *Id.* § 1604.11(d), (e). See Note, *New EEOC Guidelines on Discrimination because of Sex: Employer Liability for Sexual Harassment under Title VII*, 61 B.U.L. Rev. 535 (1981), where the cases are discussed and compared to the Guidelines, and the author concludes that the guidelines go further than current jurisprudence in that they (i) do not require employer knowledge to impose vicarious liability for harassment by supervisors and (ii) do not so far impose direct liability for the actions of coworkers. *Id.* at 546-47. The Guidelines have been cited with approval and applied in the leading case of *Bundy v. Jackson*, 641 F.2d 934, 947 (D.C. Cir. 1981), though the decision itself turned on unremedied harassment by supervisors well known to the employer.

60. Art. 2.1 of Council of Directive 76/207/EEC, 19 O.J. EUR. COMM. (No. L 39) 40 (1976). "[T]his term should be interpreted as referring to hidden discrimination which might in practice affect workers of one sex as a result of marital or family status being taken into account." (Answer given by Commissioner Richard to European Parliament Written Question #2295180 by Mrs. Liziu, 30 April 1981).

not discrimination because there were no male flight attendants who were treated better.<sup>61</sup> These decisions are unfortunate, because equal opportunity cases, unlike equal pay claims, do not require an actual comparison between men and women (although males who have been treated more favorably will be highly relevant to the plaintiff carrying the burden of proof.) Equal opportunity cases merely require a consideration of whether a man (such as a member of the flight crew) would have been treated more favorably in the same circumstances. The decisions have lost much of their impact due to the hiring of male flight attendants. This allows the courts to rule that a no-marriage provision applied to the female staff alone is discriminatory.<sup>62</sup> However, the major interpretative step that the marriage bar itself reflects social stereotyping, impacts exclusively on women, and therefore constitutes "sex" discrimination, has not been taken. The EEOC has decided that a "sex-neutral" marriage bar contravenes Title VII; the fact that it is facially neutral is "irrelevant".<sup>63</sup> American courts have not followed this administrative lead, so the law continues to allow marriage bars which are applied to both sexes.

The inadequacy of the American approach led the United Kingdom to include a second ground of discrimination, marital status, in its Sex Discrimination Act.<sup>64</sup> This was a welcome statutory recognition of an important bar to equal opportunity, but judicial treatment of the provision has shed an interesting light on the prejudices of British judges; it has been narrowly construed to apply only to those actually *married*.<sup>65</sup> In *Skyrail Oceanic v. Coleman*,<sup>66</sup> for example, the Employment Appeal Tribunal (EAT) considered the case of a female travel agency clerk whose fiance worked for a rival firm. Their competing employers privately agreed that one of the two would have to be discharged after the marriage and accordingly Mrs. Coleman was dismissed. The EAT, later supported by Lord Justice Shaw's dissent in the Court of Appeal,<sup>67</sup> took a "marriage only" approach; the woman's dismissal was lawful because it was based not on her sex or marital status, but on the fact that she had become a

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61. EEOC v. Delta Air Lines, Inc., 578 F.2d 115 (5th Cir. 1978); Stroud v. Delta Air Lines, 544 F.2d 892 (5th Cir. 1977).

62. Sprogis v. United Air Lines, Inc., 444 F.2d 1194 (7th Cir. 1971).

63. Neal v. American Airlines, Inc., EEOC Dec., Case No. 665759, C.C.H. EEOC Dec. (1973) ¶ 6002 at 4015 (June 20, 1968).

64. *Supra* note 28, § 3.

65. Bick v. Royal West of England Residential School for the Deaf, [1976] Indus. Rel. L. R. 326 (Engaged woman lawfully dismissed immediately prior to marriage because she had not yet acquired protected marital status). Cf. Gay Law Students Association v. Pacific Telephone & Telegraph, Inc. 24 Cal. 3d 458, 487, n. 16. (Supreme Court of California refusing to exclude applicants for employment from Cal. Labor Code protection of "employees," §§ 1101, 1102):

Such an anomalous interpretation of these statutes would allow employers to thwart the legislative purpose of protecting citizens by merely advancing their discriminatory practices to an earlier stage in the employer-employee relations.

66. *Skyrail Oceanic Ltd. v. Coleman*, [1980] Indus. Cas. R. 596.

67. [1981] Indus. Cas. R. 864, 873-74.



business risk to her employer.

This approach refuses to recognize that the two employers had jointly decided to dismiss the woman, due to the "male breadwinner" stereotype.<sup>68</sup> If Mr. Coleman had been employed by Skyrail, he would not have been dismissed, and, fortunately, the majority of the Court of Appeal felt this was a clear case of unlawful sex stereotyping.<sup>69</sup> This is a strong and welcome precedent to guide British tribunals in the treatment of marital discrimination. American jurisdictions require legislation or similar judicial analysis for Title VII to cover the same ground.

In contrast, American treatment of pregnancy discrimination exposes the inadequacies of British law. In both jurisdictions, the courts have had to deal with a conceptual problem, because pregnancy may be regarded as so unique a female disability that pregnant women cannot be compared with men: "When she is pregnant, a woman is no longer a woman. She is a woman. . .with child, and there is no masculine equivalent."<sup>70</sup>

Until 1976 this was not seen as a problem in America. The EEOC and all six circuit courts of appeal which considered the point found that pregnancy discrimination violated Title VII.<sup>71</sup> In *General Electric v. Gilbert*, however, the Supreme Court overturned this body of law and held that pregnancy discrimination fell outside Title VII. An employer's benefit plan which excluded coverage for pregnancy disabilities was held not to constitute gender discrimination because the plan was otherwise even-handed and pregnancy-related disabilities were regarded as an additional

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68. In evidence, respondents admitted that: "We came to that decision (that is, to dismiss Mrs. Coleman) on the assumption that the husband was the breadwinner." See also *Short v. Poole Corporation*, [1926] 1 Ch. 66 (married women schoolteachers dismissed before single women or men on grounds that they could rely on husbands for support).

69. "The courts, both in the United Kingdom and the United States, have adjudged that general assumptions, or as they are called in the United States, "stereotyped assumptions," do amount to discrimination against women." Per Lawton L.J., [1981] Indus. Cas. R. 864, 870.

70. *Turley v. Allders Departmentt Stores Ltd.*, [1980] Indus. Cas. R. 66, 70 (Bristow, J.) (dismissal of pregnant women not unlawful because no male equivalent). See Pannick, *Sex Discrimination and Pregnancy: Anatomy is Not Destiny*, 3 OXFORD J. OF LEGAL STUD. 1 (1983). On the same lines, see also *Geduldig v. Aiello* 417 U.S. 484 (1974) (no violation of Equal Protection clause of Fourteenth Amendment where California insurance program covered a substantial number of disabilities but specifically excluded coverage of pregnancy and related ailments). "There is no risk from which men are protected and women are not." *Id.* at 4967). *Rafford v. Randle Eastern Ambulance Service, Inc.*, 348 F.Supp. 316 (S.D. Fla. 1972). Rationale applied to Title VII in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976).

71. Pointed out in the dissent of Justice Brennan in *Gilbert*. The federal courts distinguished as inapplicable to Title VII the inconsistent 14th Amendment decisions in *Cleveland Bd. of Education v. LaFleur*, 414 U.S. 632 (1974) (mandatory maternity leave violated due process) and *Geduldig v. Aiello*, 417 U.S. 484 (1974) (exclusion of pregnancy from disability program not in contravention of Equal Protection Clause). Justice Brennan summarized the exclusion of pregnancy from disability benefits as having "the intent and effect of providing that only women [are subject] to a substantial risk of total loss of income because of temporary medical disability!" *General Electric v. Gilbert*, 429 U.S. at 146-47.

risk unique to women.<sup>72</sup> *Gilbert* was followed in *Nashville Gas Co. v. Satty*,<sup>73</sup> where the majority affirmed that it was lawful to deny sick pay (or maternity benefits) to pregnant employees. However, in that case, seniority rights were also affected by maternity leave, and the court felt, somewhat inconsistently, that this did constitute sex discrimination, because it imposed an unjustifiable and substantial burden on women which adversely affected their employment opportunities.<sup>74</sup>

The Senate Human Relations Committee paraphrased the *Gilbert* decision as saying: "[E]ven though only women are affected by pregnancy, and even though the ability to become pregnant is the fundamental difference between genders, discrimination on the basis of pregnancy is not sex discrimination."<sup>75</sup> Unhappy with this interpretation, Congress in 1978 reversed *Gilbert* and characterized pregnancy discrimination as sex discrimination in the Pregnancy Discrimination Amendment to Title VII:<sup>76</sup>

The terms "because of sex" or "on the basis of sex" include, but are not limited to, because of or on the basis of pregnancy, childbirth or related medical conditions; and women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work . . . .

The question remains, why did the Supreme Court dedicate three major decisions to a "distinction without a difference"?<sup>77</sup> The answer is: policy. In all three major cases the Supreme Court was concerned with the enormous social cost to employers required to extend pregnancy coverage to their employees. The *Satty* decision incorporated a benefit/burden test whereby denial of seniority benefits fell within Title VII because it cost women more, and employers less, than exclusion of pregnancy disability coverage. Denial of seniority benefits imposed a burden on women that men would never have to bear, and thus effectively reduced their salaries. The benefit/burden test has been characterized as more semantic than real.<sup>78</sup> The action of Congress, which did no more<sup>79</sup> than to restore the

72. *General Electric v. Gilbert*, 429 U.S. at 138-39.

73. *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977).

74. *Id.* at 14143. In terms of analysis of principle, it is impossible to distinguish between the two types of discrimination in this case. Women employees denied seniority after maternity leave suffered only because they had been pregnant; women who took ordinary sick leave were not discriminated against. Justice Stevens, concurring, criticized the distinction as "mere semantics" because "[a]s a logical matter, the favored class is always benefited and the disfavored class is equally burdened." *Id.* at 154, n. 4. In both types of discrimination, the favored class consisted of nonpregnant employees, men and women, and the disfavored class of pregnant women only.

75. S.REP. No. 331 (to accompany Sec. 995), 95th Cong., 1st Sess. 2 (1977).

76. Pub.L. No. 95555, 92 Stat. 2076 (1978). § 701(k) of the Civil Rights Act 1964. See Wald, *Judicial Construction of the 1978 Pregnancy Discrimination Amendment to Title VII: Ignoring Congressional Intent*, 31 AM. U.L. REV. 591 (1982).

77. *Coyne v. Exports Credits Guarantee Department*, [1981] Indus. Rel. L. R. 51, 54.

78. Note, *The 1978 Amendment to Title VII: The Legislative Reaction to the*

intended scope of Title VII,<sup>80</sup> is welcome.

Policy also lurks behind the decision of the English Employment Appeal Tribunal in *Turley v. Allders Department Stores*.<sup>81</sup> The woman concerned had been continuously employed for less than 26 weeks,<sup>82</sup> and hence she fell outside the specific statutory protection against "unfair dismissal" on the grounds of pregnancy.<sup>83</sup> The majority clearly felt she was seeking an illicit "backdoor" remedy,<sup>84</sup> but was unable to see that the two types of statutory protection, unfair dismissal and sex discrimination, are separate remedies to separate types of problems.<sup>85</sup> The American experience is persuasive evidence that pregnancy discrimination necessarily falls within the proper scope of "sex" discrimination. It is time for the Court of Appeal or the Employment Appeal Tribunal to bring the letter of English law back within the spirit of the Sex Discrimination Act<sup>86</sup> and

*Geduldig-Gilbert-Satty Pregnancy Exclusion Problem in Disability Benefits Programs*, 27 *Loy. L. Rev.* 532, 569 (1981).

79. *Supra* note 76, § 701(k) does not require an employer to provide pregnancy benefits as such; the employer may choose to provide no disability benefits at all. The Amendment simply requires evenhanded treatment with regard to the provision or otherwise of benefits.

80. The dissent of Justice Brennan in *Gilbert*, 429 U.S. at 146-47, emphasized that pregnancy discrimination properly fell within the spirit and ultimate objective of Title VII. *Gilbert* flew in the face of decisions by 18 Federal District Courts, 7 Circuit Courts of Appeal, and nearly half of state courts interpreting state fair employment laws: Civil Rights Act of 1964 Pregnancy Discrimination, Pub. L. 95-555, 92 Stat. 2076 (1978), reprinted in 1978 U.S. CODE CONG. & AD. NEWS 4749. Even after *Gilbert*, some state courts continued to characterize pregnancy discrimination as contrary to their state laws. See Note, *The 1978 Pregnancy Discrimination Act: A Problem of Interpretation*, 58 *WASH. U.L.Q.* 607, 617 (1980).

81. *Turley v. Allders Department Stores Ltd.*, [1980] *Indus. Cas. R.* 66.

82. The then minimum qualification period (now one year) under the Trade Union and Labour Relations Act 1974 for entitlement to the general statutory employment protection right against "unfair dismissal," or statutory wrongful discharge, now contained in the Employment Protection (Consolidation) Act 1978, Part IV. The Act, as amended by the Employment Act 1980, creates a comprehensive code of rights to maternity leave, maternity pay, the right to return to work, time off work during pregnancy, and protection against unfair dismissal on the grounds of pregnancy. For a critical survey concluding the code is too flawed to provide an adequate level of protection, see Upex and Morris, *Maternity Rights Illusion or Reality?*, 10 *INDUS. L.J.* 218 (1981).

83. Employment Protection (Consolidation) Act, 1978 ch. 44 § 60 (formerly Employment Protection Act, 1975, ch. 71 § 34).

84. "The situation of pregnant women in industry and commerce is dealt with by Sec. 34 . . . of the Employment Protection Act 1975 . . . . The (Sex Discrimination) Act makes no express provision for cases of discrimination against pregnant women because they are pregnant . . . ." *Turley v. Allders Department Stores Ltd.*, [1980] *Indus. Cas. R.* 66, 69 (Bristow J.).

85. See dissent of Ms. Pat Smith:

This argument does not conflict with the Employment Protection Act . . . [which gives rise to automatic rights]. The Sex Discrimination Act would not give an automatic right; it would give a much more limited right, resting on a comparison with other employees; a right not to be singled out for dismissal for pregnancy a female condition as distinct from other medical conditions.

*Id.* at 71.

86. The disparate treatment analysis suggested by Ms. Smith is simple and convincing:

within the requirements of European Community Law.<sup>87</sup>

The third and most contentious aspect of family status is parenthood and the problem of discrimination against mothers with dependent children. Child-bearing and child-rearing were described by the European Parliament as inescapable facts for most working women.<sup>88</sup> The Social Action Programme included the objective "to insure [that] the family responsibilities of all concerned may be reconciled with their job aspirations."<sup>89</sup> Two years later, this aim was embodied in the Equal Treatment Directive, 76/207/EEC,<sup>90</sup> a legislative guideline in fairly specific terms, which obliged member states to pass legislation implementing the principle of equal treatment. Article 2.1 specifically includes "marital or family status" within the definition of "sex" discrimination. The issue is whether the law in the United States or the United Kingdom measures up to this "sex-plus" definitional standard. (The United Kingdom, unlike the United States, is obligated to meet this standard, as are all EEC members.)

As it happens, the only Supreme Court contribution to the first decade of Title VII was in this area of family status. In *Phillips v. Martin Marietta Corp.*,<sup>91</sup> the Fifth Circuit considered the automatic rejection of plaintiff's application for employment as an assembly trainee on the grounds that she had "pre-school age children." Men with dependent children were allowed to continue their applications. The court took the "sex-only" approach; that plaintiff had been rejected, not solely because she was a woman, but because she was a woman with dependent children. The legislative history shows that Congress had already rejected such an approach in drafting Title VII on the grounds that it would "emasculate" the statute,<sup>92</sup> and the Supreme Court swiftly overturned the Fifth Circuit in a brief per curiam decision.<sup>93</sup> Comparing "like with like," men with preschool age children were treated better than women in the same position. This constituted unlawful gender discrimination and it was irrele-

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"1. Did the applicant's pregnancy incapacitate her in her job? [if not] 2. Would the employer have treated a man in similar circumstances differently that is, a man requiring time off for a medical condition who is not incapacitated in his job." *Id.* at 71.

87. Under the Equal Treatment Directive, 76/207/EEC, 19 O.J. EUR. COMM. (No. L 39) 40 (1976). See *supra* note 60 and accompanying text and *infra* note 88 and accompanying text.

88. "Childbearing and child care [are] inevitably the distinguishing features of the female employment pattern. . . . Dismissal because of pregnancy is an unacceptable practice." Opinion of European Parliament upon proposed Equal Treatment Directive, Comment No. 8, 1974-1975 Eur. Parl. Doc. (No. 39.856) 13 (1975). "[M]aternity, an essential human function, should also be regarded as a vital social function, not as an automatic bar to women's employment." *Id.* preamble, at 5.

89. Council Res. of 21 Jan. 1974, 17 O.J. EUR. COMM. (No. C 13) 1 (1974). See note 37 *supra*.

90. 19 O.J. EUR. COMM. (No. L 39) 40 (1976).

91. *Phillips v. Martin Marietta Corp.*, 411 F.2d 1 (5th Cir. 1969).

92. 110 CONG. REC. 13,825 (1964)(remarks of Sen. Case).

93. *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971).

vant that many other women were not discriminated against. The Supreme Court then went on, however, to assert that an employer might legitimately exclude mothers with dependent children if the employer could show there was a greater likelihood that a woman's work performance would suffer because of conflicting family obligations. This would be a defense under the "bona fide occupational qualification" (BFOQ) exception to Title VII, whereby an employer may justify less favorable treatment of members of one sex as "reasonably necessary for the normal operation of that particular business or enterprise."<sup>94</sup> In his separate opinion, Justice Marshall pointed out that this pronouncement was plainly wrong. To demonstrate, he chose the most difficult cases, where an employer could prove that most women with dependent children would find it difficult to work efficiently in certain types of business operations (one obvious example might be night work). Even here, he said, Title VII does not allow an employer to utilize a sex-based test based on "ancient canards about the proper role of women."<sup>95</sup> Legitimate sex-neutral performance standards must be set, and an employee must be given the chance to meet them.<sup>96</sup> The bona-fide occupational qualification ex-

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94. Civil Rights Act of 1964, § 703(a), 42 U.S.C. §§ 2000e(2)(a) (1976). The EEOC regard the BFOQ as an extremely narrow exception, justified only "[w]here it is necessary for the purpose of authenticity or genuineness, e.g. actor or actress." 29 C.F.R. § 1604.2.(a)(1977), but the analysis applied by the courts is wider. See Note, *Dothard v. Rawlinson: A Method of Analysis for Future BFOQ Cases*, 16 URB. L. ANN. 361 (1979)(two stage analysis; employer must show (i) qualification or characteristic is necessary rather than tangentially related to the job; and (ii) all or substantially all members of one sex do not possess that qualification). The "all or substantially all" formulation has been criticized as overbroad by depriving those persons who could do the job of the protection of Title VII. See *Developments in the Law: Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1179-80 (1971). Nonetheless, even under the wider test enunciated in *Dothard v. Rawlinson*, 433 U.S. 321 (1977), the majority in *Phillips* seems to have gone too far, the Court commenting in the later case that "the BFOQ exception was in fact meant to be an extremely narrow exception . . ." *Id.* at 334. The British equivalent of the BFOQ is the "genuine occupational qualification," § 7, Sex Discrimination Act, note 28 *supra*, which sets out in § 7(2) various criteria familiar to the American reader:

- (a) reasons of physiology (excluding strength) or authenticity (in dramatic performances) relating to the "essential nature of the job";
- (b) decency or privacy;
- (c) jobs involving singlesex accommodation where it would be unreasonable to expect the employer to change;
- (d) special establishments such as hospitals or persons where the inmates are all of one sex and it would be reasonable to limit employees to members of that sex having regard to the "essential character of the establishment";
- (e) "personal services" most effectively provided by members of one sex;
- (f) statutory regulations;
- (g) employment in foreign maledominated countries; and
- (h) jobs of married couples.

The National Council for Civil Liberties has severely criticized the GOQ as being exceptionally overbroad, see J. Coussins, *The Equality Report* 61 (1976).

95. *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 545 (1971).

96. Compare the judgment of the Industrial Tribunal in *Thorndyke v. Bell Fruit (North Central) Ltd.*, [1979] Indus. Rel. L. R. 1, 5:

Many would share [the] view that a woman with or without a husband, with three very young children is unlikely to be able to do justice to a demanding fulltime job involving possibly abnormal hours, if she is to give her young chil-

ception ought to be construed narrowly and, certainly, may not be predicated on "characterizations of the proper domestic roles of the sexes." Justice Marshall concluded: "[w]hen performance characteristics of an individual are involved, even when parental roles are concerned, employment opportunity may be limited only by employment criteria that are neutral as to the sex of the applicant."<sup>97</sup>

But even Justice Marshall did not fully realize the extent of the problem. If an employer raises a facially neutral employment bar against persons with dependent children, is that the end of the matter? Community law would certainly regard this as unlawful discrimination on the grounds of family status, contrary to Article 2.1 of directive 76/207/EEC<sup>98</sup>. The question was considered by the EAT in *Hurley v. Mustoe*.<sup>99</sup> The complainant was dismissed shortly after commencing work as a waitress for two to three nights a week from 6 to 11:30 in the evening when her employer learned she had four children under the age of 11. The EAT found, as in the *Phillips* case, that there was evidence of adverse treatment; comparing "like with like," the employer would not have treated married men with children in the same way.<sup>100</sup>

However, the EAT went further and subjected the case to an adverse impact analysis, in the event that it was mistaken in holding that there was a discriminatory "no women with dependent children" requirement. Assuming that there was a facially neutral "no dependent children" condition of employment, the EAT concluded that there was a disproportionate impact upon married women, a *de facto* marriage bar, and was therefore unlawful. As has been seen, British legislators were careful to embody marital status as a ground of sex discrimination. *Hurley v. Mustoe* is an effective illustration of the type of case where a requirement which is aimed at women and exclusively affects women, but which is expressed in facially neutral terms, may be struck down in terms of "sex-plus" discrimination.<sup>101</sup> A meaningful and effective definition of discrimi-

dren all the material attention they may need, and which, if any conflict of duties arises, many would still regard as the primary call on a woman who has chosen to have children. Nevertheless . . . it amounts in law to unlawful discrimination. A woman with young children can choose, and in some cases may be obliged by circumstances, to take employment which may possibly create difficulties for them, and for her and for her employer. Whether one likes it or not, she is not to be denied that opportunity merely because she has young children. It is up to the employer to make sure she does comply properly with the job requirements and to dismiss her after due warnings if she does not.

97. *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 545 (1971).

98. 19 O.J. EUR. COMM. (No. L 39) 40 (1976).

99. *Hurley v. Mustoe*, [1981] Indus. Cas. Rev. 490; see Docksey, *Indirect Discrimination and the Protection of Mothers*, 10 INDUS. L.J. 188 (1981).

100. The employer claimed his "no dependent children" requirement was facially neutral, on the basis of an alleged refusal to hire a deserted husband with three children, see *The Daily Telegraph*, Feb. 24, 1981, at 3, but a male single parent is a "like" comparator only for a female single parent, not a married person living with her spouse.

101. Especially since the Sex Discrimination Act, like Title VII, makes no mention of

nation must include all the physical and cultural disabilities flowing directly from sex. A definition which excludes the protection of married women with children is inadequate, and dangerously close to the "sex only" approach of the 5th Circuit in the *Phillips* case. A Supreme Court concerned about job segregation and inadequate implementation of the spirit of equal opportunity under the Civil Rights Act ought to reconsider the definition of "sex" discrimination and include not only pregnancy but also marital and parental status.

## V. EQUAL PAY

The council would, in my view, fail in their duty if, in administering [public] funds . . . they . . . allowed themselves to be guided in preference by some eccentric principles of socialistic philanthropy, or by a feminist ambition to secure the equality of the sexes in the matter of wages in the world of labour."<sup>102</sup>

Times have changed since the above decision in 1925, and to modern eyes it seems simple and unexceptional that working men and women should be paid the same for doing the same. However, the potential for debating the proper scope of the "equal pay for equal work" remedy is enormous. There are three main possibilities: a woman's work may be compared with that of a man which is (a) identical, (b) substantially equal, or (c) merely comparable.<sup>103</sup> The American and British Equal Pay Acts were deliberately worded quite narrowly<sup>104</sup> and are targeted at par-

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family status. Justice Browne Wilkinson asserted that "Parliament has legislated that it is up to each mother to decide whether or not she goes out to work and employers may not discriminate against them just because they are mothers." *Hurley v. Mustoe*, [1981] Indus. Cas. R. at 496. However, Parliament deliberately limited the wording of the Act to marital status and the problem of the marriage bar (*Jenkins*, 889 PARL. DEB. H.C. (5th ser.) col. 513 (1975); *Harris*, 362 PARL. DEB. H.C. (5th ser.) col. 98 (1975)); a proposed amendment in the Lords to add the words "or parent" was blocked by the Government (363 PARL. DEB. H.L. (5th ser.) col. 967-75 (1975)) as it was "a new issue of major importance" (per Lord Harris, *id.* at col. 974, ¶ 1). The Equal Treatment Directive was treated very superficially: "[it] would, I think . . . have required us to introduce this kind of legislation" (per Lord Colville, 362 PARL. DEB. H.L. (5th ser.) col. 174 ¶ 1 (1975)), and the Government clearly did not consider that the rejected amendment was necessary to bring the Act within art. 2.1 of the Directive. The judgment in *Hurley*, whilst purporting to implement the will of the legislature, has in fact overridden it and brought English law within the requirements of Community law. See note 60 *supra* and accompanying text.

102. *Roberts v. Hopwood*, [1925] A.C. 578, 594 (Lord Atkinson)(equal wages for women paid by borough council set aside as excessive, ignoring market conditions; members of council in breach of public duty, personally surcharged for amount of excess).

103. "While the standard of equality is clearly higher than mere comparability yet lower than absolute identity, there remains an area of equality under the Act the metes and bounds of which are still indefinite." *Brennan v. City Stores, Inc.*, 479 F.2d 235, 238 (5th Cir. 1973). See also *Bowers and Clarke, Four Years of the Equal Pay Act*, 130 New L.J. 304 (1980).

104. The American Bill as originally drafted provided an "equal wages for comparable work" test, 108 CONG. REC. 14,767 (1962), which was felt to be too broad and was narrowed by replacing "comparable" with "equal," 108 CONG. REC. 17,441 (1962).

ticular pay injustices rather than general social or economic change. The Acts draw a bright line for courts; equal pay claims may be addressed when:

(a) women and men are working for the same employer in the same establishment;

(b) a woman does the same work as a man;<sup>105</sup>

(c) the woman is paid less; and

(d) the employer cannot demonstrate a legitimate reason unconnected with gender to justify the pay differential.<sup>106</sup>

Within these constraints, the courts have developed a remarkably creative parallel jurisprudence on both sides of the Atlantic. The "sex-only" problems of perception already discussed, which bedevil equal opportunity legislation, have not figured significantly in the area of equal pay. The courts decided early on that the test of "equal work"<sup>107</sup> or "like work"<sup>108</sup> used in comparing a man's work with that of a woman, is not limited to identical work but to work which is "substantially" equal.<sup>109</sup>

105. Or, under the British Act, where the woman's work has been rated equivalent to the man's following a job evaluation study: § 1(2)(b). Once the study has been completed a woman may sue to have it applied notwithstanding the employer's refusal to implement. *O'Brien v. SimChem Ltd.*, [1980] Indus. Cas. R. 573. Because it is up to the employer, however, to initiate and complete the job evaluation, with no provision for evaluation by the courts, the United Kingdom has been found to be in breach of the Equal Pay Directive. *Commission v. U.K.*, [1982] Indus. Cas. R. 578 (ECJ). British law is being changed to bring it into line with the requirements of the Directive. See *infra* note 161 and accompanying text.

106. The American Equal Pay Act authorizes pay differentials "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 factor than sex . . ." 29 U.S.C. § 206(d)(1) (1976). Exclusions from the British Equal Pay Act are differently drafted. *Supra* note 30, § 1(3) of the Act authorizes pay differentials "genuinely due to a material difference (other than sex)," the equivalent of the American exception (iv). See *infra* note 148. Sec. 6(1) excludes compliance with protective legislation, and Sec. 6 (2) excludes "terms related to death or retirement, or to any provision made in connection with death or retirement." Even this narrow formulation has proved broader than, and to that extent void as inconsistent with, art. 119 of the Treaty of Rome. See *infra* note 145.

107. 29 U.S.C. § 206(d)(1)(1976).

108. Equal Pay Act 1970, *supra* note 30, § 1(2)(a).

109. "Congress in prescribing 'equal' work did not require that the jobs be identical, but only that they must be substantially equal. Any other interpretation would destroy the remedial purposes of the Act . . . (which) . . . sought to overcome the ageold belief in women's inferiority and to eliminate the depressing effects on living standards of reduced wages for female workers and the economic and social consequences which flow from it." *Schultz v. Wheaton Glass Co.*, 421 F.2d 259, 265. (3d Cir. 1970)(Freedman, J.). Compare the explanation of "like work" in Sec. 1(4) of the British Act:

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 difference (if any) between the things she does and the things they do are not of practical importance in relation to terms and conditions of employment; and accordingly in comparing her work with theirs regard shall be had to the frequency or otherwise with which any such differences occur in practice as well



The courts take a common sense approach and evaluate what actually happens in practice, rather than compare conditions of employment<sup>110</sup> or job title classifications.<sup>111</sup> Moreover, it is the job taken as a whole, rather than its individual segments, which forms the basis for comparison.<sup>112</sup> This has provided a relatively wide scope for equal pay remedies. In one British company, a female cook dealing with an average of 10 to 20 meals a day in the director's dining room was held to be doing "like work" with a male cook in the company's canteen, who provided 350 less sophisticated meals per day.<sup>113</sup> In both countries, the courts seek to locate a functional core common to both jobs being compared, and then to consider whether differences outside the core-function are such as to justify the pay differential. It is often appropriate where there is an unavoidable external differential, such as night work, to take an intermediate approach. The night work and day work are regarded as "equal work," but a shift differential may be authorized over and above a common basic rate for the job itself, regardless of time of performance.<sup>114</sup>

The exceptions to the Equal Pay Acts,<sup>115</sup> which authorize otherwise discriminatory pay differentials, have similarly caused little trouble for the courts of either system. Problematic justifications such as "market forces" have been firmly limited. For example, an employer may not pay a new male employee more than existing women employees on the basis of "market forces." The market is not a legitimate ground for discrimination in pay since it embodies and will perpetuate the discriminatory pay differentials targeted by the legislation. The courts have developed a

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as the nature and extent of the differences.

110. *Redland Roof Tiles, Ltd. v. Harper*, [1977] *Indus. Cas. R. (E.A.T.)* 349 (male clerk-typist performing "like work" with women despite having to serve briefly as transport supervisor). *Cf. Interpretative Bulletin*, 29 C.F.R. § 800.130 (temporary supervisory duties must be available equally to both sexes to justify pay differential). Where difference in duties is significant, differential will be justified. *Brennan v. Victoria Bank & Trust Co*, 493 F.2d 896 (5th Cir. 1974) (male "exchange teller" found to have more complicated duties than female "note tellers").

111. U.S. Department of Labor Wage and Hour Administrator's Regulations, 29 C.F.R. Sections 800.121-123 (1979). *See Wirtz v. Versail Mfg., Inc.*, 58 Lab. Cas. (CCH) ¶ 32,047 (N.D. Ind. 1968) (men on "heavy work" pay schedule, women paid less on "light work" schedule; classification irrelevant because women did same work as men); *Wirtz v. Midwest Mfg. Corp.*, 58 Lab. Cas. (CCH) ¶ 32,070 (S.D. Ill. 1968) (men paid more in Class I than women in Class III but all performed substantially the same work).

112. *Usery v. Richman*, 558 F.2d 1318, 1321 (8th Cir. 1977). While a woman was able to substitute for a man in terms of his individual work assignments, the overall work for which he was responsible was not substantially the same as that of the women. The overall job and not its individual segments must form basis of the comparison.

113. *Capper Pass Ltd. v. Lawton*, [1977] 2 W.L.R. 26.

114. *Dugdale v. Kraft Foods Ltd.*, [1976] *Indus. Rel. L.R.* 368 (No. 2), [1977] *Indus. Rel. L. R.* 160. *Corning Glass Works v. Brennan*, 417 U.S. 188 (1974). A higher basic rate for night work may be justified in exceptional circumstances, such as difficulty in recruiting night workers at day work basic rate. *Kerr v. Lister & Co. Ltd.*, [1977] *Indus. Rel. L. R.* 259.

115. *See note 106 supra.*

"personal equation" analysis<sup>116</sup> whereby individuals must be compared with individuals in their particular circumstances, taking into consideration factors such as qualification, experience and seniority, rather than comparing external circumstances, such as higher pay elsewhere.<sup>117</sup>

The personal equation approach may be seen in the judicial response to "red circles."<sup>118</sup> An employer may justify salary differentials in favor of certain employees which have been preserved in "red circles," but only in individual terms flowing neither directly nor indirectly from sex discrimination. Thus, it is acceptable to "red circle" the salary of an employee who becomes ill and is moved to a less demanding and normally less well-paid job.<sup>119</sup> His particular circumstances justify the salary differential between himself and female colleagues. Similarly, an employer may temporarily assign an employee to a less well paid job and "red circle" his normal wage during the assignment.<sup>120</sup> However, an employer cannot

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116. "[T]he personal equation of the woman as compared to that of the man" per Lord Denning M.R. in *Fletcher v. Clay Cross (Quarry Service) Ltd.*, [1979] 1 All E.R. 474, 477, applying dicta of Lord Denning M.R. in *Shields v. E. Coomes (Holdings) Ltd.* [1979] 1 All E.R. 456, 464.

117. "[T]he courts in the United States had held that the Act was violated even though the employer had no intention to discriminate . . . [and] . . . even though market forces brought about the difference in pay." *Fletcher v. Clay Cross (Quarry Service) Ltd.* [1979] 1 All E.R. 474, 478. In fact, there are two meanings to "market forces," one lawful and one unlawful. Unlawful market forces flow from stereotyped assumptions as to the pay expectations of women, prevailing wages, etc. See *Fletcher* note 116 *supra*, *Pointon v. University of Sussex*, [1979] Indus. Rel. L. R. 119; *Brennan v. City Stores, Inc.*, 479 F.2d 235 (5th Cir. 1973); *Hodgson v. Brookhaven General Hospital*, 436 F.2d 719 (5th Cir. 1970). Lawful market forces are economic factors acting upon the employer, such as a rundown in business, *Albion Shipping Agency v. Arnold*, [1982] Indus. Cas. R. 22 (E.A.T.), or reduced profitability, *Hodgson v. Robert Hall Clothes, Inc.*, 473 F.2d 589 (3d Cir. 1973); *Jenkins v. Kingsgate (Clothing Productions) Ltd.*, [1981] Indus. Cas. R. 592 (E.C.J.) and 715 (E.A.T.). In principle, the economic factors should be outside the employer's control and not a pretext for sex discrimination, see *infra* notes 155 and 157. Where "comparable work" is concerned, however, market forces have been approved wholesale. *Christensen v. State of Iowa*, 563 F.2d 353 (8th Cir. 1977). "We do not interpret Title VII as requiring an employer to ignore the market in setting wage rates for genuinely different work classifications." *Id.* at 356, cited with approval in *Lemmons v. City and County of Denver*, 620 F.2d 228, 229, (10th Cir. 1980), cert. denied, 101 S.Ct. 244 (1980). The Title VII analysis of the Eighth and Tenth Circuits is erroneous, in principle, and inferior to preexisting equal pay analysis.

118. "Unusual, higher than normal, wage rates" (29 C.F.R. § 800.146) which reflect some factors personal to particular employees which are not based on sex. "Red circle" is not a term of art or proposition of law but simply a "shorthand description of a particular state of affairs." *Methven v. Cow Industrial Polymers Ltd.*, [1980] Indus. Cas. R. 463, 469 (C.A.) (Dunn L.J.).

119. The example cited in the Interpretative Bulletin, 29 C.F.R. § 800.146. See also *Methven v. Cow Industrial Polymers Ltd.*, [1980] Indus. Cas. R. 463, 469; *Outlook Supplies Ltd. v. Parry*, [1978] Indus. Cas. R. 388 (look at all circumstances, including length of time elapsed since the "protection" was introduced) (E.A.T.); *Charles Early & Marriott (Witney) Ltd. v. Smith and Ball*, [1977] 3 W.L.R. 189 (E.A.T.) (9 year period of "protection" not necessarily suspect).

120. See Interpretative Bulletin, Temporary Reassignments, 29 C.F.R. § 800.147 (1976), which specifies one month as the normal maximum period of "temporary" reassignment.

permanently "red circle" the pay of long serving employees to preserve differentials existing before the employment protection legislation came into full force as this would simply perpetuate sex discrimination.<sup>121</sup>

In general, therefore, the courts seem to have interpreted equal pay legislation satisfactorily, and it is a surprise to find that women's pay has actually declined, relative to men's, over the last five years.<sup>122</sup> The reason is that the Equal Pay Acts are inadequately drafted in three major respects.<sup>123</sup> First, they do not allow a person claiming equal pay to compare herself with a hypothetical member of the opposite sex in similar circumstances, the famous "hypothetical male" or "notional man." Because a woman must be able to compare herself with an actual male colleague, it is impossible for most women, segregated into traditional areas of female employment,<sup>124</sup> to make a successful claim for equal pay. Second, it is not possible to claim equal pay for work of equal value.<sup>125</sup> And third, com-

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121. *Snoxell and Davies v. Vauxhall Motors Ltd.*, [1977] Indus. Rel. L. R. 123 (EAT), following *Corning Glass Works v. Brennan* 417 U.S. 188 (1974). See also *United Biscuits Ltd. v. Young*, [1978] Indus. Rel. L. R. 15 (E.A.T.) ("Red circle" must be perfect, must not have a discriminatory origin, and all persons within it must be employed at time anomaly creating "red circle" existed). In both jurisdictions there have been unexpected results where an employer has raised the pay of women employees to bring them into line with their male colleagues, only to suffer litigation at the hands of males paid less than the upgraded women's salaries. See *opposite results in Board of Regents of University of Nebraska v. Dawes*, 522 F.2d 380 (8th Cir. 1975) (differential solely because were women) and *Ministry of Defense v. Farthing*, [1980] Indus. Cas. R. 705 (C.A.) (differential on personal basis).

122. The average salary of fulltime working women in the United States has dropped from 63% of the salaries of fulltime male workers in 1956 to 59% in 1977, comparing median earnings for women and men in 1956 (\$2,827 v. \$4,466) and 1977 (\$8,618 v. \$14,626). Women's Bureau, U.S. Dept. of Labor, *The Earnings Gap Between Women and Men* 6 (1979). See also Khan, *The British Equal Pay Act - Some Developments*, 11 *ANGLO-AM. L.R.* 89, 108-10 (1982). In the United Kingdom, women's average gross earnings dropped from a peak equivalent of 75.5% of men's earnings in 1977 (L 1.77.4 v. L 1.33.9) to 73.9% in 1982 (L3.54.8 v. L2.62.1). See EOC: Seventh Annual Report (1982).

123. In January, 1981, the EOC wrote to the Secretaries of State for Employment and the Home Office proposing 25 amendments to the Sex Discrimination Act and the Equal Pay Act, including the amendments to the Equal Pay Act suggested in this text. See EOC News, February/March, 1981 at 1, 4-5.

124. Women remain clustered in low status, poorly paid, and relatively unskilled occupations. Two thirds of American female workers hold sales, service or clerical jobs. L. HOWE, *PINK COLLAR WORKERS, INSIDE THE WORLD OF WOMEN'S WORK* 16 (1977). Comparatively few women hold "professional" jobs, Levy, *'Comparable Worth' May Be Rights Issue of '80s*, *Washington Post*, Oct. 13, 1980 at 20, col.3. British women are similarly situated, see EOC: Fourth Annual Report (1979), most women remained clustered in "women's jobs." A significant element of both low pay and job segregation is parttime work, which tends to impact upon women and to be grossly underpaid; three-quarters of all female British part-time workers earned less than \$150 per week in 1982. See Williams, *The Low Paid in Britain*, *London Times*, Nov. 20, 1982, at p. 3, col. 7, and see *infra* notes 152 and 156.

125. The examination of "fair comparisons and fair differentials, the basic issues which the courts have by and large avoided," can only be achieved by allowing job evaluation. "It is time to put away the restrictive notion of 'like work' in favour of equal value." Bowers and Clarke, *supra* note 103, at 305-306. British law is being changed to this effect, see *infra* note 165 and accompanying text.

plainants are confined to disparate treatment analysis in pleading equal pay claims. This has allowed employers to defend pay differentials on grounds such as mobility or full-time work, which do not directly discriminate on the sex of the complainant. Such reasons or requirements, however, often have a demonstrable impact upon a disproportionate number of women, particularly married women with families or single parents, and would constitute a prima facie case of adverse impact discrimination, requiring the employer to demonstrate a legitimate justification related to the requirements of the enterprise.<sup>126</sup> It is not surprising, therefore, that

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126. The burden of proof will differ depending on whether plaintiff pleads disparate treatment or disparate impact, but three factors are common to the U.S. and the U.K.:

(1) Direct evidence of discrimination is usually difficult or impossible to provide, so that it is necessary to allow circumstantial evidence to create inferences. *Gates v. GeorgiaPacific Corp.*, 326 F.Supp. 397, 399 (D.Ore. 1970), *aff'd*, 492 F.2d 292 (9th Cir. 1974); *Wallace v. South Eastern Education and Library Board*, [1980] Indus. Rel. L. R. 193, 195. See Note, *The Prima Facie Case Approach to Employment Discrimination*, 33 MAINE L. REV. 195, 204 (1981).

(2) Substantive law deals with this problem by dividing the "burden of proof" into the burden of persuasion, which remains with plaintiff (*Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 101 S.Ct. 1089, 1093 (1981); *Oxford v. Department of Health and Social Services*, [1977] Indus. Cas. R. 884, 886 (E.A.T.)), and the evidential burden, which may shift to defendant (IX Wigmore on Evidence § 2485 (3d. ed. 1940); *Oxford v. D.H.S.S.*, [1977] Indus. Cas. R. 884).

(3) A three-part, shifting burden analysis is common to disparate treatment and impact cases. First, a "prima facie case" must be shown by plaintiff. This is simply a set of facts which establish that plaintiff was treated differently than members of the opposite sex (*McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); *Moberley v. Commonwealth Hall (University of London)*, [1977] Indus. Cas. R. 791, 79394 (E.A.T.)), or that facially neutral practices fall more heavily on women than on men, (*Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971); *Steel v. U.P.O.W.*, [1978] Indus. Cas. R. 181, 187-88). The evidential burden then shifts to the employer to rebut the presumption raised by the prima facie case that there was unlawful discrimination. Defendant must "articulate some legitimate, nondiscriminatory reason" for the adverse treatment or justify the requirement on the ground of business necessity (*McDonnell Douglas*, 411 U.S. at 802; *Wallace*, [1980] Indus. Rel. L. R. at 195). In both jurisdictions, "business necessity" may be applied strictly (*Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *Steel*, [1978] Indus. Cas. R. at 18788) or more loosely, especially, where health and safety is concerned (*Woods v. Safeway Stores, Inc.*, 420 F.Supp. 35, 42 (E.D. Va. 1976), *aff'd* 579 F. 2d 43 (4th Cir. 1978), *cert. denied*, 440 U.S. 930 (1979); *Panesar v. Nestle Co., Ltd.*, [1980] Indus. Cas. R. 144 (C.A.)). If the employer discharges this burden, it returns to plaintiff, who must then prove that defendant's reasons are pretextual. In disparate treatment cases, plaintiff must prove unlawful intent (*Texas v. Burdine*, 450 U.S. at 253; *Bindman, Proving Discrimination: Is The Burden Too Heavy?* Law Soc'y Gazette, Dec. 17, 1980 at 1270). In disparate impact cases, where specific intent is not a factor, plaintiff must rebut defendant's evidence or demonstrate some viable alternative (*Albemarle Paper Co. v. Moody*, 422 U.S. at 425; *Steel*, [1978] Indus. Cas. R. at 188). The EAT has tried to simplify the evidential process for industrial tribunals coping with the "rather nebulous" concept of shift in the evidential burden period. The tribunal should concentrate on whether the employer has given a clear and specific explanation of the conduct in the questioned period, and if the employee has not, then discrimination may simply be inferred from the primary facts. See *Khanna v. Ministry of Defence*, [1981] Indus. Cas. R. 653, 658-59. Comparing the two systems, two conclusions emerge:

(i) English cases impose a heavier burden on plaintiff in disparate treatment cases, for example, where plaintiff in practice needs to show she is better qualified than the successful

the current debate in the United States, the United Kingdom and the EEC centers on the availability of an equal pay remedy alternative to the equal pay legislation.

In the United States, individuals and the EEOC have turned to Title VII to provide a broader area of comparison of equal pay. The first hurdle, which has taken several years to surmount, is the problem of whether Title VII may be pleaded in pay cases at all. The courts had to decide the impact of a floor amendment<sup>127</sup> to Title VII known as the Bennett Amendment:

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 wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by provisions of Section 206(d) of Title 29.<sup>128</sup>

The courts were divided on whether to apply a narrow or broad interpretation to the Bennett Amendment. Under the broad view, equal pay cases could be pleaded under Title VII subject to the four exceptions set out in the Equal Pay Act.<sup>129</sup> Under the narrow view, the Bennett Amendment reserved equal pay cases totally to the Equal Pay Act, so that Title VII is limited to the scope of the provisions of the earlier Act.<sup>130</sup>

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male applicant. Commentators recommend a shift in the legal burden once a prima facie case has been established, see Pannick, *The Burden of Proof In Discrimination Cases*, 131 *NEW L.J.* 895, 896 (1981).

(ii) In disparate impact cases arising out of layoffs, English law ought to provide better protection for women, who tend to lack seniority due to past discrimination, because there is no "seniority" exception equivalent to § 703(h), and the only issue before the Tribunal is whether the requirement of seniority in a particular case is justifiable, see *Steel*, [1978] *Indus. Cas. R.* at 187-88. *But cf.* *Clarke and Powell v. Eley (IMI Kynoch Ltd.)*, [1983] *Indus. Cas. R.* 165 (EAT held selection of parttime workers for redundancy was unlawful because of disparate impact upon women but approved *obiter* the practice of "last in, first out"); see also *Docksey, Part-Time Workers, Indirect Discrimination and Redundancy*, 46 *MOD. L.R.* 504 (1983). In the U.S., however, the seniority exception has been applied to require proof of discriminatory intent even in adverse impact cases, regardless of whether the act of discrimination allocating seniority took place before or after Title VII became effective. See *American Tobacco Company v. Patterson*, 50 *U.S.L.W.* 4364, 4366-7 (1982).

127. 110 *CONG. REC.* 13,647(1964)(remarks of Sen. Bennett).

128. 42 *U.S.C.* §§ 2000e2(h)(1976). *Pub. L. No.* 88352, tit. VII, § 703, 78 *Stat.* 255 (1964).

129. *City of Los Angeles, Department of Water & Power v. Manhart*, 435 *U.S.* 702 (1978). The "broad" view would have two consequences: (1) complainants could claim equal pay under Title VII against any fellow employees rather than being limited to colleagues in the same "establishment"; and, (2) complainants may argue that their work, although different, is of equal value, or "comparable worth," to that of a man.

130. *Willingham v. Macon Telegraph Publishing Co.*, 507 *F.2d* 1084 (5th Cir. 1975)(en banc)(stronger evidence of Congressional intent required to justify "questionable" extensions of the scope of Title VII). The cases leading up to the Supreme Court decision in *Gunther* are analyzed in the Note, *Sex-Based Wage Discrimination Under Title VII: Equal Pay for Equal Work or Equal Pay for Comparable Work?* 22 *WM. & MARY L. REV.* 421,

The question was finally addressed by the Supreme Court in *County of Washington v. Gunther*.<sup>131</sup> Four women formerly employed as guards in the female section of a county jail claimed back pay under Title VII. Their work was not substantially equal to that of male colleagues in the men's section, so that no Equal Pay Act remedy was available, but it had been assessed by the employer as being of equal value<sup>132</sup> and had been intentionally depressed on the grounds of sex.

The Supreme Court took a broad view of the Bennett Amendment, and held that Title VII wage claims are not limited to the Equal Pay Act's equal work test.<sup>133</sup> Otherwise, the Court noted, "a woman who is discriminatorily underpaid could obtain no relief—no matter how egregious the discrimination might be—unless her employer also employed a man in an equal job at the same establishment at a higher rate of pay."<sup>134</sup> The Court concluded that "Congress surely did not intend the Bennett Amendment to insulate such blatantly discriminatory practices from judicial redress under Title VII."<sup>135</sup>

*Gunther* was the first<sup>136</sup> of a series of cases planned by the EEOC, which regards it as a significant victory but stresses that *Gunther* is only a gateway to further litigation.<sup>137</sup> It is now up to American courts to work out the scope of "equal value" or "comparable work" claims under Title VII.<sup>138</sup> Two recent developments in the European Community may provide some helpful ideas as to the potential scope of remedies under the

470-482 (1981).

131. *County of Washington v. Gunther*, 452 U.S. 161 (1981).

132. The employer had evaluated the women's jobs as worth 95% as much as the men's jobs, but only paid the women 70% as much. *Id.* at 162.

133. At this stage, one cannot say more about *Gunther* because the Court's decision is so narrow. It remains that Title VII may be pleaded where there is evidence of intentional suppression of a woman's salary on account of her sex. In practice it would provide no more latitude than the pre-amendment scope of British law. Where an employer has conducted but refuses to implement a job evaluation under the EPA § 1(5), it may nonetheless be enforced by the employee under § 1(2)(b) of the Act. *O'Brien v. SimChem Ltd.*, [1980] 1 W.L.R. 1011 (H.L.), noted in *Thompson* 97 LAW Q. REV. 5 (1981). The dissent in *Gunther* felt that the Court's "narrow holding is perhaps its saving feature" (per Rehnquist J; Burger C.J., Stewart and Powell JJ concurring, at 203), but that in principle the majority were wrong, that "the legislative history of both the Equal Pay Act and Title VII clearly establish that there can be no Title VII claim of sex-based wage discrimination without proof of 'equal work.'" *Gunther*, 452 U.S. at 204.

134. *Gunther*, 452 U.S. at 173 (Justice Brennan).

135. *Id.* at 179.

136. In fact, the first case of "comparable worth" to reach the Supreme Court was *Lemons v. City and County of Denver*, 620 F.2d 228 (10th Cir. 1980), cert. denied, 101 S.Ct. 244 (1980), a relief to advocates of comparable worth, who had tried to discourage plaintiffs in *Lemons* from filing for certiorari because the case, unlike *Gunther*, did not involve intentional discrimination. It was felt more appropriate that the Supreme Court's first exposure to comparable worth under Title VII should involve intentional discrimination. See *Legal Times of Washington*, June 30, 1980, at 8, col.2.

137. See LEACH AND OWENS, *supra* note 26, at 39.

138. See Newman and Vonhof, *Separate but Equal Job Segregation and Pay Equity in the Wake of Gunther*, 1981 U. ILL. L. REV. 269.

Equal Pay Act and Title VII in the future.

### A. *Equal Pay*

In the United Kingdom, the narrow scope of the Equal Pay Act has caused dissatisfied equal pay litigants, supported by the EOC, to resort to the European Court of Justice for redress under article 119 of the Treaty of Rome. Indeed, in one case, counsel deliberately conceded the argument in English law, notwithstanding an express invitation from the Bench to argue the point, in order to compel a reference to the Court of Justice on the scope of article 119.<sup>139</sup> Counsel's tactics proved successful; the subsequent decision of the Court of Justice has become one of the leading authorities in this area.<sup>140</sup>

The "founding father" of equal pay law under article 119 is a woman, Gabrielle Defrenne, a Belgian flight attendant employed by Sabena Belgian Airlines. Ms. Defrenne's conditions of employment were inferior to those of her male colleagues in several ways. Women were paid less, were obliged to retire earlier (at age 40) and received inferior pension provisions. Three times she fought her way through the Belgian courts to the European Court of Justice, losing twice and succeeding once, and her persistence has established a corpus of *Defrenne* jurisprudence which governs the scope of article 119.<sup>141</sup> This has been refined through a series of recent cases challenging the narrow scope of the British legislation,<sup>142</sup> but significantly extended only once, in the *Jenkins* case.

The *Defrenne* analysis of article 119 is as follows:

- (1) Article 119 is limited to "pay" discrimination on the basis of sex. Broader remedies must be looked for in further legislation at the Community level or national level.<sup>143</sup>
- (2) A woman may compare her pay to that of a man working<sup>144</sup> for the

139. Oral argument in *Jenkins v. Kingsgate (Clothing Productions) Ltd.*, [1980] Indus. Rel. L. R. 6, (exchange between Sir Gordon Slynn and Anthony Lester, Q.C.) (unreported).

140. In holding art. 119 is capable of a disparate impact analysis.

141. *Defrenne v. Sabena* (No. 3), 1978 E. Comm. Ct. J. Rep. 1365; *Defrenne v. Sabena* (No. 2), 1976 E. Comm. Ct. J. Rep. 455; *Defrenne v. Belgium*, 1971 E. Comm. Ct. J. Rep. 445. See Burrows, *The Promotion of Women's Rights by the European Economic Community*, 17 COMMON MKT. L. REV. 191, 192-200 (1980).

142. See generally Bridge, *National and Transnational Regulation of Equal Pay for Equal Work in England and the European Community*, 5 J. EUR. INTEGRATION 117 (1982); Crisham, *The Equal Pay Principle: Some Recent Decisions of the European Court of Justice*, 18 COMMON MKT. L. REV. 601 (1981); Thomson and Wooldridge, *Equal Pay, Sex Discrimination and European Community Law*, LEGAL ISSUES EUR. INTEGRATION 1 (1980).

143. *Defrenne v. Sabena* (No. 2), 1976 E. Comm. Ct. J. Rep. at 473, ¶ 18; *Macarthy's Ltd. v. Smith*, [1981] 1 All E.R. 111, 119, ¶ 15.

144. Or who has previously worked for that employer. *Macarthy's Ltd. v. Smith*, [1979] 3 All E.R. 325 (C.A.), [1981] 1 All E.R. 111 (E.C.J.), 120 (C.A.). See Schofield, *Requirements of Community Law*, 9 INDUS. L.J. 173 (1980). The EAT held that the wording of the Equal Pay Act would allow a comparison with a male predecessor. See *Macarthy's Ltd. v. Smith*, [1978] 2 All E.R. 746. But the majority of the Court of Appeal construed the statute narrowly as requiring a coterminous male comparator, necessitating a reference to the Court of

same employer.<sup>145</sup>

(3) "Pay" is broadly defined to include any consideration, whether in cash or in kind, which the worker receives, directly or indirectly, in respect of his employment.<sup>146</sup> Such consideration may be noncontractual and incidental to employment so long as it is linked to the employment.<sup>147</sup>

Justice on the scope of art. 119. In the U.S., the broader interpretation favored by the EAT and the Court of Justice is likely to be applied to the Equal Pay Act. *See* 1 A. Larson, *Employment Discrimination in Sex*, § 29.70 "Sequent Inequality" (1979), *citing* Murphy, *Female Wage Discrimination: A Study of the Equal Pay Act of 1963-70*, 39 U. CINN. L. REV. 615, 633 (1970); *Wirtz v. Koller Craft Plastic Products, Inc.*, 296 F.Supp. 1195 (E.D. Mo. 1968); *Wirtz v. Versail Mfg., Co.*, 58 Lab. Cas. (CCH) ¶ 32,047 (N.D. Ind. 1968).

145. *Macarthys Ltd. v. Smith*, [1981] 1 All E.R. 111. The requirement of present or prior common employment represents an important policy decision by the Court of Justice. Advocate-General Capotorti urged the Court to decide that art. 119 did not require the existence of an actual male comparator employed or formerly employed by that employer. *Id.* at 117. This "notional" or "hypothetical male" analysis was rejected by the Court, which limited art. 119 firmly to the "equal work" approach and left the equal value remedy unequivocally to national legislation implementing the Equal Pay Directive. *Id.* at 119 ¶ 14 & 15.

146. Art. 119(2). *See* *Worringham v. Lloyds Bank Ltd.*, 31 Common Mkt. L.R. 1 (1981)(discrimination in contributions to employer's pension fund by men and women under age 25 affected determination of salary and entitlement to benefits, and was therefore sex discrimination contrary to art. 119). Any private pension arrangements provided directly or indirectly by the employer which discriminate against women in what they pay or receive may be regarded, after the decisions in *Worringham* and *Garland*, *infra* note 147, as likely to be contrary to art. 119. Community law now offers a similarly flawed protection to that presently afforded under Title VII. *See generally* *Henderson v. Oregon*, 405 F.Supp. 1271 (D. Ore. 1975)(payment of inferior monthly retirement benefits to women violative of Title VII); *City of Los Angeles, Department of Water and Power v. Manhart*, 435 U.S. 702, 98 S.Ct. 1370 (1978)(higher contributions paid by women to pension fund violative of Title VII; implication that unequal benefits would also be unlawful); *EEOC v. Colby College*, 589 F.2d 1139 (1st Cir. 1978)(employer indirectly responsible for provision of inferior pension benefits to women by independent insurer); *Spirit v. Teachers Insurance and Annuity Association* 475 F.Supp. 1298 (S.D.N.Y. 1979)(independent variable annuity company held liable under Title VII as an "employer," construed functionally, for providing unequal benefits based on sex-segregated mortality tables). *See* *Bernstein and Williams, Sex Discrimination in Pensions: Manhart's Holding v. Manhart's Dictum*, 78 COLUM. L. REV. 1241 (1978); *Gold, Of Giving and Taking: Applications and Implications of City of Los Angeles, Department of Water and Power v. Manhart*, 65 VA. L. REV. 663 (1979); *Kistler and Healy, Sex Discrimination In Pension Plans Since Manhart*, 32 LAB. L.J. 229 (1981). *See also* *Ellis and Morrell, Sex Discrimination in Pension Schemes: Has Community Law Changed the Rules?* 11 INDUS. L.J. 16 (1982); *McCullum and Smith, EEC Law and United Kingdom Occupational Pension Schemes*, 2 EUR. L.R. 266 (1977); *Flender, Equal Pay for Men and Women: Two Recent Decisions of the European Court*, 30 AM. J. COMP. L. 627 (1982).

147. *Eileen Garland v. British Rail Engineering Ltd.*, [1982] Indus. Cas. R. 420 (E.C.J. and H.L.). The Court of Justice held that special travel facilities extended to spouses of retired male employees constituted discrimination contrary to art. 119, against retired female employees whose spouses do not enjoy the same facilities. "The argument that the facilities are not related to a contractual obligation is immaterial. The legal nature of the facilities is not important for the purposes of art. 119 provided they are granted in respect of the employment." *Id.* at 434, ¶ 10. The Employment Appeal Tribunal and the Court of Appeal disagreed on the interpretation of § 6(4) of the Sex Discrimination Act (exempting "provision in relation to death or retirement"). The EAT took a "narrow" view (exemption did not apply to employment privileges allowed to continue after retirement), *see* [1978]



(4) "Pay" does not include, however, contractual provisions which are the result of statutory policy, such as public pension schemes.<sup>148</sup>

(5) A facially neutral requirement which results in a differential in pay and which has a disproportionate impact upon members of one sex must be objectively justified on grounds other than gender.

Part (5) of the *Defrenne* analysis flows from the recent case of *Jenkins v. Kingsgate (Clothing Productions) Ltd.*<sup>149</sup>, decided on 31st March 1981, two months before *Gunther*. In that case, part-time and full-time workers performed the same work but were paid different rates for the job. There were both men and women full-time workers but only women part-time workers.<sup>150</sup> Two questions arose: (i) is part-time work comparable to full-time work, is it the same "job" and, if so, (ii) is the pay differential justified? Mrs. Jenkins had a strong case under the British Equal Pay Act, since the work was identical, and there was arguably no "genuine material difference"<sup>151</sup> between the two jobs. Instead, counsel conceded the point and requested the court to refer the issue to the Court of Justice to consider the scope of article 119.

The response of the Court of Justice has broad implications; it did not content itself with considering "equal work" under standard disparate treatment equal pay analysis—i.e., is this woman paid less than a male colleague? Instead, it declared that article 119 is capable of the disparate impact analysis formulated by the Supreme Court in *Griggs v. Duke Power Co.*<sup>152</sup> and applied to gender discrimination in *Dothard v. Rawlin-*

Indus. Cas. R. 495. The Court of Appeal reversed, comprehensively interpreting § 6(4) to cover any provision about retirement, see *Eileen Garland v. British Rail Engineering Ltd.*, [1979] Indus. Cas. R. 558. Having received the opinion of the Court of Justice, the House of Lords sidestepped the problem of the clash between article 119 and the subsequently enacted British statute by construing § 6(4) in the light of article 119 and adopting the "narrow" interpretation advanced by the EAT. For the noncontractual coverage of art. 119, see also the Submission of Advocate-General Warner in *Worringham v. Lloyds Bank Ltd.*, 31 Comm. Mkt. L.R. 1, 14 (1981) (covering Christmas bonuses).

148. *Defrenne v. Belgium* (80/70), 1971 E. Comm. Ct. J. Rep. 445. See also *Burton v. British Railways Board* [1982] Indus. Cas. R. 329 (E.C.J.) (male employees unable to take voluntary early retirement as early as female employees because eligibility for voluntary redundancy (lay-off) benefits scheme linked to statutory retirement ages for men and women. Held that Community Law under Directives 76/207/EEC and 79/7/EEC does not prohibit discrimination in affording access to retirement benefits linked to minimum pensionable age fixed by national social security legislation).

149. *Jenkins v. Kingsgate (Clothing Productions) Ltd.*, 31 Comm. Mkt. L.R. 24 (1981). See *Barrett, Part-Time Workers and Equal Pay: The Case of Jenkins v. Kingsgate*, 6 HUM. RTS. REV. 174 (1981).

150. There was one male parttime worker; a former fulltime worker rehired after retirement for a trial period as an exceptional case. The facts do not disclose if he remained, but suggest his salary would have been "red circled."

151. § 1(3) of the Equal Pay Act exempts pay differentials, regardless of "like work," which the employer can prove are "genuinely due to a material difference (other than the difference of sex)." The defense was successful in *Handley v. H. Mono. Ltd.*, [1979] Indus. Cas. R. 147, see *infra* note 153. The equivalent exception appears in 29 U.S.C. § 206(d)(1)(iv), see note 106 *supra*.

152. *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849 (1971) (unnecessary employ-

son.<sup>153</sup> The disparate impact analysis considers whether these persons are paid less than other persons because of an unjustifiable requirement or condition that has a disproportionate impact upon women. Full-time work may be characterized as a facially neutral requirement for higher pay. However, if the complainant can demonstrate a disproportionate impact of the requirement upon women workers,<sup>154</sup> it is presumed that there is pay discrimination contrary to article 119 unless the employer can demonstrate an economic justification for the requirement.<sup>155</sup> When the Employment Appeal Tribunal received the preliminary ruling of the Court of Justice, it was able to apply, for the first time and contrary to precedent,<sup>156</sup> disparate impact analysis to the Equal Pay Act, thereby

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ment tests constituted unlawful race discrimination because of disproportionately large impact on black workers).

153. *Dothard v. Rawlinson*, 433 U.S. 321, 97 S.Ct. 2720 (1977)(statutory height and weight requirements which could not be shown to be necessarily job-related were unlawful sex discrimination because excluded disproportionate amount of women).

154. "Ample material has been placed before us to show that in the Community as a whole, about 90 percent of parttime workers are women, mostly married women with family responsibilities." Submission of Advocate-General Warner, *Jenkins v. Kingsgate (Clothing Productions) Ltd.* 31 Comm. Mkt. L.R. 24, 29 (1981). The Advocate General cited a Communication from the Commission to the Standing Committee on Employment of 17 July 1980, entitled "Voluntary Part-Time Work," Com (80) 405 final, to show that in 1977, 93 percent of parttime workers in the United Kingdom were women, the highest proportion in the Community, including Germany. The Commission submitted a Draft Directive on Voluntary Part-Time Work to the Council on January 4, 1982, 25 O.J. EUR. COMM. (No. C62) 7 (1982). Member States will be obliged to pass legislation by January 1, 1984 to create a new head of disparate treatment protection (pursuant to art. 10). Disparate treatment of parttime workers is prohibited under art. 2, and their pay is required to be "in proportion" to that of equivalent fulltime workers (art. 4). Employers will no longer be able to argue a business justification defense under disparate impact analysis.

155. As in the disparate treatment case of *Handley v. H. Mono Ltd.*, [1979] Indus. Cas. R. 147, where the employer paid parttime workers less than fulltime workers and successfully argued economic grounds as a "genuine material difference" defense under Sec. 1(3) of the Equal Pay Act. The EAT accepted the fact that the economic return from parttime workers was less than from fulltime workers because each worker had a machine allocated to her and the employer obtained proportionately less output from the part-timers. However, the decision was strongly criticized in principle, for allowing the employer to pay less for the same work because it has less economic value, and in practice, for allowing this in a context where the employer is responsible for the lower return on capital by choosing to underutilize machinery. See Wallington, *Position of Part-Time Workers*, 8 INDUS. L.J. 237 (1979). The same conflict of opinion can be seen in *Hodgson v. Robert Hall Clothes, Inc.*, 473 F.2d 589 (3d Cir. 1973). The majority therein held that economic benefits to the employer flowing from greater profits earned by salesmen in the men's department were a "factor other than sex" justifying the wage differential, under 29 U.S.C. § 206(d)(1)(iv). Judge Van Dusen, dissenting, felt that the employer was responsible for the segregation of women in the less profitable women's department and had not shown that the reason for the segregation was other than sex. As in *Handley*, the economic justification flowed from a decision by the employer which was not based on business necessity.

156. *Meeks v. N.U.A.A.W.*, [1976] Indus. Rel. L. R. 198 (complainant able to demonstrate disparate impact on women due to fulltime work requirement for higher pay, but case dismissed on ground that Equal Pay Act limited to disparate treatment).

harmonizing that statute with the Sex Discrimination Act.<sup>157</sup>

The application of the *Defrenne/Jenkins* approach to the Equal Pay Act could be a powerful weapon against "women's jobs" in the United States, where 69.5% of part-time workers are women aged between 25 and 65.<sup>158</sup> It is surprising that disparate impact analysis, which was formulated in the United States, has not been applied to the Equal Pay Act, and that government guidelines specifically state that facially neutral pay discrimination against part-time<sup>159</sup> or temporary<sup>160</sup> workers is not unlawful.

### B. *Equal Value*

The impact of the *Defrenne/Jenkins* analysis is limited to claims involving the same kind of work performed within a common employment. The wider concept of "equal value" was placed firmly by *Defrenne* outside the scope of article 119, requiring further measures at the Com-

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157. *Jenkins v. Kingsgate (Clothing Productions) Ltd.*, [1981] Indus. Cas. R. 715 (E.A.T.), wherein BrowneWilliamson, J., commented that the "Equal Pay Act was an integral part of one code against sex discrimination, and the rest of the code plainly rendered unlawful indirect discrimination even if unintentional." The EAT was unsure whether art. 119 had been interpreted as applying to cases of disparate impact discrimination, and therefore simply expanded the scope of English law. This is a welcome decision, since the Commission had already noted unfavorably the absence of a disparate impact analysis from the Equal Pay Act in its Report to the Council of Feb. 11, 1981. That report assessed the situation as of Aug. 12, 1980 with regard to the implementation of the principle of equal treatment for men and women, Com (80) 832 at 17 final. The case was remitted to an industrial tribunal to determine whether the pay differential was in fact "objectively justified," i.e., necessary to enable the employers to reduce absenteeism and to obtain the maximum utilization of their plant.

158. Employment and Training Report of the President: 1981, Appendix A (Persons on voluntary parttime schedules). The 1980 figures show that 30.5% of parttime workers were male, 69.5% female. In the critical age group of 25-44 years, only 7.2% of parttime workers were men, but 42.7% were women.

159. "No violation of the equal pay standards would result if the difference in working time is the basis for the pay differential, and the pay practice is applied uniformly to both men and women." Interpretative Bulletin, 29 C.F.R. § 800.150 (1976). Interestingly, although the Bulletin only applies a disparate treatment analysis to parttime work, it goes on to qualify the nature of genuine parttime work, which should normally be for working weeks of 20 hours or less. Where parttimers are composed of workers of one sex and work 30-35 hours a week, as opposed to fulltime work of 40-45 hours a week, its nature as part time work will be in doubt and there may well be sex discrimination, *Id.* In *Jenkins*, part-timers worked 30 hours per week, fulltimers 40 hours, and sex discrimination could have been found on a disparate treatment analysis, applying the Bulletin's interpretation.

160. The payment of different wages to temporary workers, such as seasonal help, is "not necessarily" illegal "where payment of such differential conforms with the nature and duration of the job and with the customary practice in the industry and the establishment, and the pay practice is applied uniformly to both men and women." Interpretative Bulletin, 29 C.F.R. § 800.150 (1976). As with temporary reassignment, *see note 120 supra*, employment over one month may be suspect, though it has been suggested that temporary employment is not generally regarded as a camouflage of sex discrimination. *See Sullivan, The Equal Pay Act of 1963: Making and Breaking A Prima Facie Case*, 31 ARK. L. REV. 545, 603-604 (1978).

munity or national level for provision of redress.<sup>161</sup> These measures now exist.

At the Community level, the Equal Pay Directive, 75/117/EEC,<sup>162</sup> requires member states to enact national legislation on equal pay, including the concept of equal value. At the national level, relevant legislation now exists in all the member states.<sup>163</sup> In member States such as Germany and Eire, the legislation is based exclusively upon the Equal Pay Directive, and there is an unfettered right to claim equal pay for work of equal value. National courts have been obliged from the outset to evaluate different jobs sought to be compared for the purposes of claiming equal pay. In the United Kingdom, however, the Equal Pay Act does not provide complainants such an unfettered right to allege a "comparable work" test before the courts. Instead, Section 1(5) of the Act requires a prior job evaluation by the employer, which establishes in effect an inquiry by the employer as constitutive of the right to an equal value claim. The European Commission obtained a decision from the Court of Justice that this condition is contrary to the Directive, which requires that it must be possible to initiate the assessment of allegedly comparable work, if necessary in adversary proceedings, notwithstanding the wishes of the employer.<sup>164</sup> The United Kingdom is thus in breach of the Treaty of Rome until it alters the Equal Pay Act to provide an effective right to claim "comparable work." The Government has accordingly submitted a draft amendment to the Act to Parliament,<sup>165</sup> but it is widely regarded as inadequate in several important respects and thereby in breach of the Directive.<sup>166</sup>

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161. See note 143 *supra*. The Court of Justice has implicitly recognized the clear intention of the member States that progress in social law reform should be by way of harmonization of national action rather than direct Community action. See Treaty of Rome, *supra* note 1, arts. 117 and 118, and the European Social Action Programme, note 37 *supra*. These provisions all contemplate action by the member States, with each State's mode of reform reflecting its own peculiar legal and cultural background. Hence three of the four Directives and Draft Directives in this area have been made under the authority of art. 100 (approximation of laws). Only one, the Equal Treatment Directive, was made under art. 235 (new Community legislative activity).

162. 18 O.J. EUR. COMM. (L 45) 19 (1975).

163. See Report of the Commission to the Council on the Application of 12 February 1978 of the principle of equal pay for men and women, Com (78) 711 final. The scope of the report was criticized as inadequate by the European Parliament Committee on Social Affairs, Employment and Education, 1979-1980 EUR. PARL. DOC. (No. 56.361) 98 (1979) (Report of 2 May 1979).

164. *Commission v. United Kingdom*, [1982] Indus. Cas. R. 578 (ECJ). See *supra* note 105. For the art. 169 enforcement procedure, see note 44 *supra*.

165. Equal Pay (Amendment) Regulations 1983, draft debated in House of Commons July 20, 1983, 46 PARL. DEB. H.C. (5th Ser.) col. 479-98 (1983).

166. Some problems are, *inter alia*, that the amendments do not come into force until one year after the Regulations come into effect, cases are excluded where there are job evaluation or other studies, burden of proof is shifted to the claimant and criteria for assessing work of equal value are inadequate. See Leading Counsel's Opinion on the Proposed Amendments to the Equal Pay Act 1970 (Anthony Lester Q.C.), 24 February 1983 (EOC, 1983).

See also Young, *Alas, He Was Sober*, Times, Jul. 24, 1983, at 13: "The weaseling mode

Further litigation supported by the Equal Opportunities Commission is likely in the near future.<sup>167</sup>

In the United States, of course, no such direct statutory or Community right to an equal value remedy exists, and the question arises whether and how far equal value is likely to develop in American jurisdictions in the foreseeable future. The author would argue that developments in Europe will be paralleled in the United States, and that American courts are likely to develop an equal value remedy under Title VII for employees working for the same employer.

There is a groundswell of public opinion, reflected in the actions of public employers such as the City of San Jose<sup>168</sup> and the State of Idaho,<sup>169</sup> in favour of equal pay for jobs of equal value as a necessary aspect of achieving social justice in the workplace. Various schemes of job evaluation exist which may be helpful to the courts;<sup>170</sup> the courts are themselves already familiar with complex evaluative process under the rubric of "substantial equality." Recent decisions of the Third and Ninth Circuits have been favorable to a broader remedy against wage discrimination under Title VII,<sup>171</sup> and one may assume that the necessary further litigation invited by *Gunther* will be forthcoming, in part because the structural nature of pay discrimination in traditional women's jobs lends itself to class actions<sup>172</sup> and "quasi-class" claims by the EEOC.<sup>173</sup>

of compliance the government has selected stands an excellent chance of leaving us in further breach, with another long round of litigation to come."

167. See *Miles v. Shakespeare Tavern Playhouse*, noted in *London Times*, Aug. 3, 1983, at 3, col. 1, and Aug. 4, 1983 at 2, col. 4 (Aug. 2, 1983) (Industrial Tribunal held women could claim equal pay for work of equal value). This case is suitable for referral to the European Court of Justice for an Opinion upon the direct effect of the equal value provision of the Equal Pay Directive, art. 1(1).

168. In 1979, the city requested an outside survey of wage comparability. The report in 1981 revealed gross disparities, e.g. nurses paid \$9,210 less a year than assistant mechanics, though jobs were comparable in requirements and responsibilities. The city will spend \$1.5 million as a start to correcting such disparities, by raising the salaries of some women's jobs, such as senior librarians, up to 15%. See *The Economist*, Aug. 1 1981, at 32, col. 2.

169. Idaho has implemented a comparable worth job evaluation system for state employees (Idaho Code Sec. 675309B), which has resulted in an average 16% increase for female workers. See also Gasaway, *Comparable Worth: A Post-Gunther Overview*, 69 *Geo. L.J.* 1123, 1159 (1981) (use of Hay evaluation system resulted in salary increases of 10-20% for clerical workers, who are predominantly female).

170. Gasaway, *supra* note 169, at 1155-60. See also National Academy of Sciences, *Women, Work Wages: Equal Pay for Jobs of Equal Value* 70-82 (1981); Schwab, *Job Evaluation and Pay Setting: Concepts and Practices*, printed in E. LIVERNACH, *COMPARABLE WORTH: ISSUES AND ALTERNATIVES* 49, 52-70 (1980); Fisher, *Multiple Regression in Legal Proceedings*, 80 *COLUM. L. REV.* 702, 721-25 (1980); Nelson, Opton & Wilson, *Wage Discrimination and the 'Comparable Worth' Theory in Perspective*, 13 *U. MICH. J.L. REF.* 231, 278-87 (1980).

171. For the contrary view, that the courts are unable to evaluate job content, see *I.U.E. v. Westinghouse*, 631 F.2d 1094, 1110 (3d Cir. 1980), (Van Dusen, J., dissenting) *cert. denied* 101 S.Ct. 312 (1981).

172. Fed. R. Civ. P. 23(a). The class action device is a vital means of providing effective redress to individuals under Title VII, removing the prohibitive economic burden of litiga-

It is interesting how parallel social conditions and economic exigencies have produced the development of a concept of equal value at the same time in both the United States and the European Community. As developed, equal value will almost certainly be limited to common employment and will not, therefore, strike directly at market forces and job segregation.<sup>174</sup> It should, however, undermine the economic roots of job segregation, and remove the financial consequences of "women's work," simply by striking effectively, for the first time, at sexist pay differentials between fellow employees.

## VI. CONCLUSION

Women are entering the workforce in greater numbers than ever before and families increasingly depend on their "second" incomes, but the situation of women with regard to job segregation and inferior pay has actually deteriorated since the 1960s. The recession must take a share of the blame,<sup>175</sup> but a comparative perspective shows that there are significant loopholes in the protective legislation, and that, in its present state, it has often been both insensitively and inadequately applied. The *Jenkins* case demonstrates the value of an awareness of developments in other jurisdictions:

[T]he Supreme Court of the United States and this court often find themselves confronted with similar problems. Although of course the provisions of the United States Civil Rights Act of 1964 . . . were worded differently from art. 119 of the Treaty, their essential purpose was the same . . . I draw considerable comfort from finding that my conclusion accords with the conclusions of that court . . . .<sup>176</sup>

Surprisingly, there seems to be a growing acceptance of the concept of comparable worth, without which pay equity is impossible. In the area of equal pay, more than any other, there are grounds for cautious optimism that injustice may be significantly mitigated by law over the next few years.

Perhaps the most important grounds for optimism are social rather than legal. Women have become a significant part of the workforce, and

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tion which otherwise deters many litigants from pursuing small claims. *Deposit Guaranty National Bank of Jackson v. Roper*, 445 U.S. 326, 339 (1980). The introduction of this device into United Kingdom Discrimination law has been strongly advocated. See *The Economist*, Feb. 20, 1982, at 13, col. 2. See generally Rutherglen, *Title VII Class Actions*, 47 COLUM. L. REV. 688 (1980).

173. *General Telephone Co. of the Northwest, Inc. v. EEOC*, 446 U.S. 318 (1980) (Commission executing public policy may obtain class-wide relief without being subject to requirements of Rule 23 governing private class action complaints). See LEACH AND OWENS, *supra* note 26, at 6-9.

174. See *Lemons v. City and County of Denver*, 620 F.2d 228 (10th Cir. 1980); *Christensen v. State of Iowa*, 563 F.2d 353 (8th Cir. 1977).

175. See *The Economist*, Sept. 25, 1982, at 76-79.

176. *Jenkins*, 31 Comm. Mkt. L.R. at 35-36 (1981)(Advocate-General Warner).

they are entering higher status occupations and professions in numbers only dreamed of twenty years ago.<sup>177</sup> Every working woman, and every successful woman, is both a practical and psychological boost to the women that follow. For these women, at last, the legislation that now exists has the potential to play a supporting role.

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177. See C.F. EPSTEIN, *WOMEN IN LAW* (1981). Ms. Epstein discusses the dramatic rise in numbers of women entering the legal profession since the passage of Title VII, and points out, notwithstanding the "primary importance" of the legislation, the level of individual and collective effort required of women lawyers to succeed.

