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## Comparable Worth and the Market Defense: A National Debate

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# COMPARABLE WORTH AND THE MARKET DEFENSE: A NATIONAL DEBATE

## I. INTRODUCTION

The concept of comparable worth is rooted in a simple premise: salaries should be based on the intrinsic value of the employee's work to the employer.<sup>1</sup> Yet attempts to enact comparable worth measures have caused controversy in state legislatures, city boardrooms, and courts.<sup>2</sup> Increasingly, the debate has centered on the market's role in setting wages. Comparable worth advocates argue that employers pay women a sex-slanted wage which is illegal under Title VII. Employers, in turn, urge that far from being discriminatory, such wages reflect the market's workings, and are necessary to their survival.<sup>3</sup> The defense has hitherto proven remarkably successful before the courts. Two recent decisions illustrate the ground gained by its advocates.

On December 14, 1983, in *American Federation of State, County and Municipal Employees v. Washington (AFSCME I)*,<sup>4</sup> a United States District Court ruled that Washington had discriminated against approximately 15,500 state employees, at least seventy percent of whom were women, by paying them twenty percent less than men doing jobs of comparable worth.<sup>5</sup>

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1. Comparable worth "call[s] . . . for equal pay for male and female . . . [employees] doing work requiring comparable skill, effort and responsibility under similar working conditions." Bellack, *Comparable Worth: A Practitioner's View*, in 1 *COMPARABLE WORTH: ISSUE FOR THE 80's* 75, 75 (U.S. Civ. Rts. Comm. ed. 1984).

2. For a good overview of the debate, see 1 *COMPARABLE WORTH: ISSUE FOR THE 80's* (U.S. Civ. Rts. Comm. ed. 1984); *COMPARABLE WORTH: ISSUES AND ALTERNATIVES* (E. Livernash ed. 1980). See also Williams, *Comparable Worth: Legal Perspectives and Precedents*, in *COMPARABLE WORTH: ISSUE FOR THE 80's* 148 (U.S. Civ. Rts. Comm. ed. 1984). "[T]he essence of the doctrine is that compensation should be proportional to the intrinsic 'worth' or 'value' of jobs, as measured on some common scale." *Id.* at 149.

3. See *infra* notes 60-62 and accompanying text.

4. 578 F. Supp. 846 (W.D. Wash. 1983), *rev'd*, 770 F.2d 1401 (9th Cir. 1985), *petition for rehearing filed* (9th Cir. Sept. 24, 1985) (Nos. 84-3569, 84-3590) [hereinafter cited as *AFSCME I*].

5. *AFSCME I*, 578 F. Supp. at 863. The plaintiffs brought suit as a class of approximately 15,500 employees. All worked either for the Higher Education Personnel Board

The court ordered immediate implementation of a salary schedule based on a 1974 comparable worth study the State had conducted. The court also ordered four years of back pay for each of the 15,500 employees affected.<sup>6</sup>

On September 4, 1985, the Ninth Circuit Court of Appeal reversed (*AFSCME II*).<sup>7</sup> The court held that under Title VII,<sup>8</sup> the plaintiffs had not shown that Washington's salary structure had either a discriminatory impact or resulted from intentional discrimination.<sup>9</sup> In doing so, the Ninth Circuit went further than any previous court in accepting the validity of market-based wages and characterizing individual employers as passive registers of market forces.<sup>10</sup>

This Comment is an analysis of the two decisions. It focuses on the "market defense" itself<sup>11</sup> by examining its validity in the context of current trends in wage policy. Also included is a discussion of its strategic uses by an actual employer and a look at the "politics" of comparable worth in Washington and the city of San Francisco.

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(HEPB), the State Personnel Board (SPB), or the Department of Personnel (DOP). The HEPB has jurisdiction over all those employed in the state's institutions of higher learning; the SPB and DOP hire and supervise all state agency employees. *Id.* at 860.

6. *Id.* at 871. The order responded to a wage gap of approximately 20% found in 62 job classifications employing 70% or more women when compared to 59 classifications in which 70% or more men worked. *Id.* at 861. Updates to the study conducted in 1976, 1979 and 1980 broadening the class showed similar disparities. *Id.* at 865 n.9. *See also infra* notes 12-14, 20 and accompanying text for relevant discussion.

7. *American Federation of State, County and Municipal Employees v. Washington*, 770 F.2d 1401 (9th Cir. 1985), *petition for rehearing filed* (9th Cir. Sept. 24, 1985) (Nos. 84-3569, 84-3590) (specially remanded to the district court for settlement discussions on January 22, 1986; the Ninth Circuit retained jurisdiction for possible rehearing) [hereinafter cited as *AFSCME II*].

8. 42 U.S.C. §§ 2000e-2(a)(1),(2) (1982).

9. *AFSCME I*, 770 F.2d at 1405, 1408. 42 U.S.C. §§ 2000e-2(a)(1),(2)(1982). Title VII prohibits employment discrimination using two theories: disparate impact and disparate treatment. The latter has been read as requiring a showing of intentional discrimination on the part of the employer. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *See also International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977). Under the former, all that is required is a showing by the plaintiff(s) that a facially neutral policy not justified by business necessity of the employer's had a discriminatory impact on them. *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). *See infra* notes 48-50 and accompanying text for a fuller discussion.

10. *AFSCME II*, 770 F.2d at 1406.

11. *See infra* notes 60-73 and accompanying text for an extended discussion on the market defense.

## II. *AFSCME I* AND *II*

### A. BACKGROUND

The American Federation of State, County and Municipal Employees union sued the State of Washington after the latter's own study showed serious sex-based pay inequity existing in its workforce.<sup>12</sup> In 1974, the State of Washington hired Norman Willis, a professional management consultant, to evaluate the problem.<sup>13</sup> His independent study confirmed a twenty percent wage gap between sixty-two female-dominated and fifty-nine male-dominated job classes.<sup>14</sup> In two updates, adding eighty-five new classifications to the study, the State and Willis both projected the costs of equalizing state salaries.<sup>15</sup> In 1977, the State amended its compensation statutes,<sup>16</sup> earmarking the necessary funds.<sup>17</sup> Each state agency then created a supplemental pay schedule using comparable worth principles. Then, in a surplus year, Governor Dixie Lee Ray cut the appropriations from the budget.<sup>18</sup> The State has since been adamant in refusing to implement the new schedules.<sup>19</sup>

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12. *AFSCME I*, 578 F. Supp. at 851. The study was conducted by the HEPB and the DOP jointly. On January 8, 1974, the two Boards issued findings which included "clear indications of pay differences between [job] classes predominantly held by men and those predominantly held by women within the State systems and concluded such differences were not due to job worth alone." *Id.* at 860-61. Both Boards recommended further study to measure the pay gap and suggest a remedy. *Id.*

13. *Id.* at 861. Representatives of DOP and HEPB chose the job classifications to be studied, and evaluations of each were "arrived at by [the] consensus . . . of [members] consisting primarily of representatives of State agencies and institutions." *Id.*

14. *Id.* Willis also found that the greater the job worth, the greater was the discrimination factor. "For jobs evaluated at 100 points, men's pay was 125% of women's pay." *Id.* "For jobs evaluated at 450 points, however, men's pay was 135% that of women's . . . ." *Id.*

15. *Id.* at 861-62.

16. *Id.* at 862.

17. *Id.*

18. *Id.* Although the *AFSCME I* court did not elaborate on the costs of discrimination when balanced against those of implementing the comparable worth study, Washington's governor Dixie Lee Ray did in 1980: "The dollar cost of solution will be high; it probably cannot be achieved in one action. But the cost of perpetuating the unfairness within State government itself, is too great to put off any longer . . . ." *Id.* Despite Ray's insight, the State did nothing to remedy the problem until 1983 after the *AFSCME I* class action suit had already been filed. That year the state legislature passed two bills calling for full implementation of comparable worth for some of the classes affected by June 30, 1993. *Id.* at 862-63. See also *infra* note 67 and accompanying text for a fuller discussion of the costs of discrimination.

19. *AFSCME I*, 578 F. Supp. at 862-64.

## B. TWO PERSPECTIVES ON PAY EQUITY

The two decisions differ most in perspective. The *AFSCME I* court was the nation's first to accept "comparable worth" as viable under Title VII.<sup>20</sup> That court also rejected the "market defense" urged by the State.<sup>21</sup> The *AFSCME II* court followed earlier rulings rejecting "comparable worth" principles;<sup>22</sup> the court favored wages set in response to a variety of market forces.<sup>23</sup>

1. *AFSCME I: The Nation's Interest in Ending Gender Discrimination*

In reaching their distinct holdings, both courts focused on the State's refusal to implement comparable worth studies it had itself commissioned.<sup>24</sup> Yet only the *AFSCME I* court found the State's refusal was a violation of Title VII.<sup>25</sup> The court's approach was novel. It linked the existing twenty percent wage gap

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20. *Id.* at 865-67. Using the 1974 Willis study as its base, the *AFSCME I* court became the first in the country to find that Title VII has been violated when jobs comparable in knowledge and skills, mental demands, accountability and working conditions to those predominantly held by men earn less because they are held predominantly by women. *Id.* at 866. Until this decision, it was not clear that Title VII could entertain a "comparable worth theory" although the statute could be applied to a wide range of discriminatory job practices, including wage discrimination. *See generally* County of Washington v. Gunther, 452 U.S. 161 (1981); Spaulding v. Univ. of Washington, 740 F.2d 686 (9th Cir. 1984), *cert. den.*, 105 U.S. 511 (1984); Lemons v. City and County of Denver, 620 F.2d 228 (10th Cir. 1980), *cert. den.*, 449 U.S. 888 (1980); Christensen v. Iowa, 563 F.2d 353 (8th Cir. 1977). Although *Spaulding*, *Lemons*, and *Christensen* all reject comparable worth as a viable theory under Title VII, all three agree that Title VII has broad remedial powers whose exact scope is still unclear. *Spaulding*, 740 F.2d at 699-701; *Lemons*, 620 F.2d at 229; *Christensen*, 563 F.2d at 355-56.

21. *AFSCME I*, 578 F. Supp. at 867. In rejecting Washington's defense, the *AFSCME I* court chided it for being a government that "in the eighth decade of the Twentieth Century [is] attempting to use the American legal system to maintain attitudes and concepts that are no longer acceptable under the provisions of Title VII." 578 F. Supp. at 868 n.17.

22. *See Spaulding v. Univ. of Washington*, 740 F.2d 686, 706-07 (9th Cir. 1984), *cert. den.*, 105 U.S. 511 (1984); *Lemons v. City and County of Denver*, 620 F.2d 228, 229-30 (10th Cir. 1980), *cert. den.*, 449 U.S. 888 (1980); *Christensen v. Iowa*, 563 F.2d 353, 356-57 (8th Cir. 1977).

23. *AFSCME II*, 770 F.2d at 1407.

24. *Compare AFSCME I*, 578 F. Supp. at 860-63 with *AFSCME II*, 770 F.2d at 1404, 1408.

25. *AFSCME I*, 578 F. Supp. at 867.

to the State's past acts of discrimination.<sup>26</sup> The court thus put the findings of the Willis study into a broader context—one of longstanding discriminatory practices toward women.<sup>27</sup> The court reasoned that existing, intentional patterns of wage discrimination were outgrowths of these former policies<sup>28</sup> and the product of current wage policy, including the State's seminal decision in 1978 to conduct a comparable worth study.<sup>29</sup> In short, the *AFSCME I* court viewed the employer as an actor, playing a pivotal role in setting wages.<sup>30</sup>

The court also broke ground in rejecting the State's claims that implementing the Willis studies would be too costly. The court disagreed, finding the nation's interest in ending sex discrimination greater.<sup>31</sup> The court held that the latter overrode the State's claims of legitimate business necessity in maintaining a sex-based wage gap.<sup>32</sup> The district court then ordered Washington to remedy the pay disparity without further delay.<sup>33</sup>

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26. The court reached into the State's history and the nation's past for examples of blatant discriminatory attitudes toward women by government officials. In Washington, this included a definition of state citizenship which excluded women and was upheld by its highest court in 1888. *Bloomer v. Todd*, 3 Wash. Terr. 59, 19 P. 135 (1888). The Declaration of Independence went even further by failing to mention women at all. *AFSCME I*, 578 F. Supp. at 866 n.11 (citing The Declaration of Independence (U.S. 1776)).

27. The court noted contemporary discriminatory practices by the State which included the running of segregated help wanted ads from the 1950's to 1973, setting salaries based on discriminatory criteria, and failing to implement its own findings and recommendations to correct continuing pay inequity. *Id.* at 860.

28. *Id.*

29. *Id.* at 865-67.

30. *Id.* at 865-70.

31. One of the most interesting things about the *AFSCME I* decision was its emphasis on balancing the defendants' business justifications against the nation's interest in ending employment discrimination to see which were overriding. *AFSCME I*, 578 F. Supp. at 856-57 (citing *Bonilla v. Oakland Scavenger Co.*, 697 F.2d 1297, 1303 (9th Cir. 1982); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1977)). The court concluded that ending such discrimination has more urgency than any business rationale the state had offered. *AFSCME I*, 578 F. Supp. at 863.

32. *AFSCME I*, 578 F. Supp. at 863. The court found the state had "failed to produce credible, admissible evidence demonstrating a legitimate and overriding business justification . . . ." *Id.*

33. *Id.* at 868, 871. In ordering *immediate* implementation of the study and back pay to 1979 for all 15,500 members of the class, the court pointed to the lessons of *Brown v. Board of Education*, 394 U.S. 294 (1955), and its progeny, namely that to delay a remedy was often fatal to its effectiveness. "It is time, *right now* for a remedy," the court concluded. *Id.* at 868 (emphasis in the original).

2. *The AFSCME II Decision: The Costs of Pay Equity*

The Ninth Circuit also focused on the Willis studies.<sup>34</sup> That court, however, saw the studies as merely a part of a complex compensation system. The court cited the large number of government hearings, proposals, and recommendations involved in formulating state salaries as proof.<sup>35</sup> The court, moreover, found a variety of equally complex "market forces" shaping the State's deliberations.<sup>36</sup> In the court's view, the State had done nothing more than carry out wage measures dictated by such forces.<sup>37</sup> The State's refusal to implement the Willis studies was thus too intricate to label either intentionally discriminatory, or as having a disparate impact on women.<sup>38</sup>

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34. *AFSCME II*, 770 F.2d at 1403-04, 1406-08.

35. *Id.* at 1406.

36. *Id.*

37. *Id.* Although earlier courts had echoed *AFSCME II*'s position, none had gone as far in focusing its entire decision on the market as an external regulator, largely responsible for wage disparity, rather than on the employer as a wage setter. See generally *supra* note 22. But see *California State Employee's Association v. California*, No. C-84-7275 MHP (N.D. Cal. filed May 30, 1985) (Memorandum and Order granting conditional class certification) (a recent district court decision setting some limits on the market defense).

38. *AFSCME I*, 770 F.2d at 1405-06, 1408. The court contrasted the state's wage system with specific employment practices such as height and weight requirements, the requirement of a high school diploma where one is not needed to adequately perform a job, and mandatory maternity leave, and characterized all as facially neutral policies having a discriminatory impact under Title VII. The court also found the state's failure to implement its studies lacked the requisite animus to support a finding of intentional discrimination. *Id.* at 1406-07; see also *supra* text accompanying note 36.

In *Gunther*, however, a study very similar to that conducted in Washington was done by the County of Washington. The study revealed that although female matrons working in its jails should have been earning 95% of what male guards were, based on the duties of each, the county was paying the matrons only 70% of the wages earned by male guards. There, too, the county refused to remedy the wage gap based on its own findings. The court accepted the county's failure as evidence of an intent to discriminate against its female employees under Title VII. *County of Washington v. Gunther*, 452 U.S. 161 (1981).

Interestingly, a recent Minnesota appellate court decision distinguished *Gunther* on the facts above, from a situation in which an employer did implement the findings of job evaluation market survey resulting in allegations of sex discrimination under Title VII. *Bohm v. L.B. Hartz Wholesale Corp.*, 38 Fair Empl. Prac. Cas. (BNA) 415 (Minn. Ct. App. 1985). While rejecting comparable worth as a viable theory under Title VII, the *Bohm* court obviously agreed that, among other things, *Gunther* stands for the proposition that a failure to implement the findings of an employer's own studies is evidence of an intent to discriminate. *Id.* at 500. *AFSCME II*, however, clearly rejected that proposition, despite *Gunther*. "Assuming, however, that like other job evaluation studies, . . . [a comparable worth study] . . . may be useful as a diagnostic tool, we reject a rule that would penalize rather than commend employers for their effort and innovation in under-

The court also found the state-approved wage gap between predominately male and female job classes a necessary part of legitimate budgetary restraints without, however, citing supporting data.<sup>39</sup> The court thus implied that closing such a gap was cost-prohibitive.<sup>40</sup> Finally, the court's silence on the desirability of achieving pay equity was striking.<sup>41</sup>

In short, the *AFSCME II* court depicted the marketplace as an actor too elusive and complex for Title VII analysis<sup>42</sup> and characterized the employer as a register too passive to hold liable.<sup>43</sup> *AFSCME I* differed in its historical perspective, its passion, and its focus on the employer.<sup>44</sup> Taken together, the two decisions encompass the flavor and scope of a national debate, offering radically differing visions of the economy, the effect of the economy on employers and wage-earners, and the issue of pay equity.

### III. THE DEVELOPMENT OF THE MARKET DEFENSE

The "market defense" was not prominent in early Title VII wage discrimination cases.<sup>45</sup> The landmark *County of Washington v. Gunther*<sup>46</sup> decision had established that Title VII actions can encompass a variety of discriminatory employment practices and that such actions were not limited to those alleging unequal pay for the same or substantially similar work as that done by men. The decision, however, said nothing about the elements of a Title VII wage discrimination claim.<sup>47</sup> Thus, initially, the

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taking . . . [it]." *AFSCME II*, 770 F.2d at 1408.

39. *AFSCME II*, 770 F.2d at 1407.

40. See *AFSCME II*, 770 F.2d at 1408. See also *infra* notes 60-62 and accompanying text for a fuller discussion of this important issue.

41. The court's only reference to the subject was its observation that Washington was not responsible in creating it. *AFSCME II*, 770 F.2d at 1407.

42. *Id.* at 1406 (citing *Spaulding v. Univ. of Washington*, 740 F.2d at 708 (1984)); see also *AFSCME II*, 770 F.2d at 1407-08.

43. *AFSCME II*, 770 F.2d at 1408.

44. See *supra* notes 26-33 and accompanying text for relevant discussion.

45. See generally *AFSCME I*, 578 F. Supp. 840, 856-59; Dean, *Comparable Worth*, in *WOMEN AND THE LAW 2-7 to 2-7 to -15* (C. Lefcourt ed. 1984). The latter provides both an excellent summary and analysis of the elements of a wage discrimination claim brought under Title VII; see also *Antonio v. Wards Cove Packing Co.*, 768 F.2d 1120, 1125 (9th Cir. 1985) (discussing appellate standards of review).

46. *County of Washington v. Gunther*, 452 U.S. 161, 178-81 (1981).

47. In affirming for the plaintiffs, the Supreme Court specifically declined to rule on the merits of the plaintiff's sex discrimination under Title VII, or set "standards for the



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ruling produced an evidentiary battle. The debate centered on (1) the evidence necessary to show either disparate impact or disparate treatment under Title VII, and (2) which party carried the burden of proof in either case.<sup>48</sup> While this was a highly technical phase of Title VII litigation, plaintiffs did gain significant ground. They won the right to bring suit under a variety of theories.<sup>49</sup> They then tested Title VII's scope—for the first time raising comparable worth under the statute.<sup>50</sup> In doing so, the plaintiffs contrasted pay based on the intrinsic value of their work with wages determined by a sex-slanted market.<sup>51</sup> Defendants responded with claims that they set wages according to legitimate market forces—hence the “market defense.”<sup>52</sup> In numerous rulings holding for the defendant, the courts agreed, depicting market-based salary systems as given. All refused, therefore, to hold employers liable for any resulting pay gaps.<sup>53</sup>

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further conduct of . . . [similar] litigation.” *Id.* at 166. Instead, the Court held only that “claims of discriminatory undercompensation are not barred by Section 703(h) of Title VII merely because . . . [female guards] do not perform work equal to that of male . . . guards . . . .” *Id.* at 181. The Supreme Court in *Gunther*, “stressing the broad remedial purposes of Title VII . . . [also] construed the Bennett Amendment to incorporate into Title VII the four affirmative defenses of the Equal Pay Act, but not to limit discrimination suits involving pay to the cause of action provided in the Equal Pay Act.” *AFSCME II*, 770 F.2d at 1404 (citing *Gunther*, 452 U.S. at 168-71).

48. See *AFSCME I*, 578 F. Supp. at 857-59, showing how the shifting burdens of proof/production are allocated between plaintiff and defendant; see also Dean, *supra* note 45, at 2-8 nn.21, 22-26, 2-9, 2-10 n.40, 2-11, showing ongoing developments in this area, including varying judicial interpretations by the courts of the type of evidence necessary to meet such burdens.

49. *AFSCME I*, 578 F. Supp. at 856. Both “the availability of disparate impact analysis” in such cases, and the possibility of “the same set of facts giv[ing] rise to a claim under the disparate impact and disparate treatment theories” were originally unclear, but subsequently won acceptance by the courts. *Id.* at 856.

50. But see Dean, *supra* note 45, at 2-17 to -18, showing various judicial attempts to limit the impact of *Gunther*, 452 U.S. at 161, particularly in the context of “comparable worth” claims.

51. See generally *Spaulding v. Univ. of Washington*, 740 F.2d 686, 706 (9th Cir. 1984), *cert. den.*, 105 U.S. 511 (1984); *Lemons v. City and County of Denver*, 620 F.2d 228, 229 (10th Cir. 1980), *cert. den.*, 449 U.S. 888 (1980); *Christensen v. Iowa*, 563 F.2d 353, 355 (8th Cir. 1977).

52. See *supra* note 51 and accompanying text. This cluster of cases is presently the main theoretical base of the “market defense.” In each, the defendants reiterated the claim of paying wages based on legitimate market forces, an argument the courts readily approved, in holding that any wage gaps (between male and female workers) resulting are outside the scope of Title VII's remedial powers.

53. See *Spaulding*, 740 F.2d at 686; *Lemons*, 620 F.2d at 228; *Christensen*, 563 F.2d at 353.

In *Spaulding v. University of Washington*,<sup>54</sup> the court, nevertheless, emphasized the poor quality of statistical evidence plaintiffs had offered to support their comparable worth arguments. This implied that if more reliable data were presented, the court might find the underlying comparable worth argument more acceptable.<sup>55</sup>

The *AFSCME II* ruling made it clear that this was not the case. Unable to discredit the data gathered in the Willis study, that court shifted direction. It found that using any statistical data to prove intentional discrimination was suspect without further supporting evidence.<sup>56</sup> The shift clarified that the court's dislike of comparable worth was a philosophical one.<sup>57</sup>

Also evident was the shift of the comparable worth debate to a scrutiny of the market. Thus far, however, employers have provided courts with little more than generalities about the market's role in wage setting.<sup>58</sup> Plaintiffs armed with specific findings on the market's actual workings might effectively offset

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54. *E.g.*, *Spaulding*, 740 F.2d at 703-04. The *Spaulding* court found the plaintiff's wage statistics defective because they were gathered solely within the University of Washington (rather than being compared with wages paid by other universities or the outside labor market). *Id.* at 704. The court also emphasized that wages for females working in the nursing faculty had not been compared to those of female faculty in other departments. *Id.* Moreover, it complained of research done by paralegals who did not use a multiple regression model, an accepted and more sophisticated approach to gathering statistical proof of discriminatory treatment and impact. *Id.* (citing D. BALDUS & J. COLE, *STATISTICAL PROOF OF DISCRIMINATION* (Supp. 1983); Fisher, *Multiple Regression in Legal Proceedings*, 80 COLUM. L. REV. 702, 705 (1980)). Because the *Spaulding* court decided the statistics were too flawed to be reliable, it "refuse[d] to specify exactly the role such comparative statistics play" in wage discrimination cases under Title VII. *Id.* (emphasis added). Note, however, how this finding also reflects the limited financial resources of plaintiffs undertaking such suits, since the more sophisticated the data gathered, the more costly.

55. *Spaulding*, 740 F.2d at 704.

56. *AFSCME II*, 770 F.2d at 1407 (citing *Spaulding*, 740 F.2d at 703 (1984)). "[J]ob evaluation studies and comparable worth statistics alone are insufficient to establish the requisite inference of discriminatory motive critical to the disparate treatment theory." *Id.* As already noted, however, the *Spaulding* court refused "to specify exactly what role . . . comparative statistics play . . . [because of the unreliability of the plaintiffs' data]." *AFSCME II*, 770 F.2d at 1407. Thus *AFSCME II* appears to overstate *Spaulding*. See also *Spaulding*, 740 F.2d 686, 704.

57. The *AFSCME II* court found the comparable worth concept itself had not proven to be "a feasible approach to employee compensation [but rather] a matter of debate." *AFSCME II*, 770 F.2d at 1408.

58. See *infra* note 70 and accompanying text for an extended discussion of this complex issue.

such generalities in court. The result could be a change in judicial perception of the issues involved.<sup>59</sup>

#### IV. THE MARKET DEFENSE AS STRATEGY

Employers owe their current success before the courts to an insistence that they are economic competitors whose bottom line is survival.<sup>60</sup> They repeatedly use several techniques to reinforce this image. Uniformly in articles and amicus briefs, employers emphasize the astronomical costs of comparable worth to the

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59. *Id.*

60. See Amicus Curiae Brief of Assoc. of Washington Business at 28, *AFSCME II*.

Although the fairness of the free market may be debated, the market itself is an economic reality that a comparable worth study cannot alter. An employer, even if armed with such a study, must compete . . . [He] must set wages high enough to attract and retain qualified workers, but low enough to keep production at a competitive level. Thus . . . his decision to abide by the market's valuation of a job, rather than that of a comparable worth committee, simply reflects an awareness that the market is the milieu in which . . . [he] must operate.

*Id.*

"In structuring wage systems . . . employers . . . regularly take into account the need for *external* competitiveness. For a wage system to be effective, . . . it must compensate the jobs within the employer's organization at rates that are competitive with . . . [those] existing in the outside labor market for those jobs." Amicus Curiae Brief of the Equal Employment Advisory Council at 16, *AFSCME II* (emphasis in original). See 1 COMPARABLE WORTH: ISSUES AND ALTERNATIVES, *supra* note 2; see, e.g., R. WILLIAMS & L. KESSLER, A CLOSER LOOK AT COMPARABLE WORTH at 39-48 (1984); O'Neill, *An Argument Against Comparable Worth*, in COMPARABLE WORTH: ISSUE FOR THE 80's 177, 184 (1984) (speaking of the private sector).

In a letter to Christine Curtis, the chairperson of the Comparable Worth Task Force, the President of Federated Employers of the Bay Area, representing 1000 Bay Area companies and 25 affiliated associations, also emphasized that "the 'average' employer in . . . [California] has 20 employees . . . [while] . . . 94 percent have less than 50 . . . and approximately 50 percent employ three or less . . . ." Letter from J. Arthur Lindsay to Christine Curtis at 1. (December 28, 1984) (discussing effect of comparable worth on larger employers). He then explained that since his organization represents employers only 25% of whom employ less than 50 workers, he is attaching a position paper written by a member association representing 50,000 California small businesses. *Id.* at 1-2. The attached paper concluded that implementation of comparable worth would place small employers at a competitive disadvantage. Any personnel strategy could expose him to the risk of litigation and liability, particularly given the subjective nature of job evaluation. J. Sloan Jr., *The Practical Consequences of Comparable Worth for Small Business* 47-49 (December 19, 1984) (unpublished manuscript).

The aforementioned represents a much more subtle attempt to persuade policy makers that comparable worth threatens the survival of both large and small businesses, since the arguments Sloan makes for smaller companies somehow reverberate when considering the larger ones, even though their survival is nowhere discussed in Lindsay's letter.

employer if enacted:

[R]egarding the cost to employers if such legislation should be enacted, it would seem on the surface to be quite simple to calculate. The Bureau of National Affairs has estimated it would cost \$320 billion nationwide for employers to implement a comparable worth program. A similar estimation for California employers (i.e., total number of women employed multiplied by an average annual rated pay, subtracted from a similar calculation for men) would result in something between \$1 and \$1.5 billion. These figures, however, are really quite meaningless and not even germane to the issue. It might be more; it might be less; it totally ignores administrative and enforcement costs . . . . Moreover, costs have never been considered to be a legitimate excuse for discriminating actions that are proscribed by law . . . .<sup>61</sup>

By presenting cumulative, nationwide costs, rather than a realistic breakdown of the costs of actual comparable worth pay scales, these writings project figures running into the billions.<sup>62</sup> In effect, such literature emphasizes the disastrous effect comparable worth might have on the economy. Employers also tie com-

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61. Letter from J. Arthur Lindsay to Christine Curtis, at 5 (December 28, 1984).

62. *Id.* at 5. *But see* Ramey, *The Price of Equality*, 4 CALIFORNIA LAWYER 27, 34 (Winter 1984), showing that comparable worth has to date cost employers in the public sector only one to five percent of monies spent on personnel and one to two percent of their whole budget. *See also* Rothchild, *Overview of Pay Initiatives, 1974-1984*, in 1 COMPARABLE WORTH: ISSUE FOR THE 80's 119, 122-25 (U.S. Civ. Rts. Comm. ed. 1984). In Idaho, \$7 million has been distributed in raises to the state's 8,700 classified employees. Following a strike by San Jose, California city workers, \$1.4 million has been allocated over a two year period to supplement a 7.5% overall raise. In Minnesota \$21.8 million dollars (representing less than four percent of the state's payroll) was allocated over a four year period. Costs of implementation to a small municipality might be even lower. Princeton, Minnesota, for example, employs 33 workers. After the city created its own job evaluation study, six employees were given raises to achieve pay equity. The city spent only \$10,000 or one-tenth of one percent of the city budget for both the study and wage increase. *Id.* at 123.

As already noted, Lindsay's letter quoted Bureau of National Affairs figures estimating the nationwide costs of implementing comparable worth to be \$320 billion. *See* Letter, *supra* note 61, at 4. Neither the letter, paper, nor any of the literature above provides any meaningful figures about what the yearly costs of implementing comparable worth would be to a single company of a particular size. *Id.*

parable worth to chaos in the workplace.<sup>63</sup> Small-business men, for example, first extol the "intimacy" existing between staff and employer in a smaller workforce. They then predict that unrest caused by "comparable worth" salaries would destroy the fabric of that intimacy.<sup>64</sup> Finally, certain words are often repeated in management writings. The word "market," for example, is often either itself repeated, or combined with the word "free" in an attempt to remind readers that the survival of the "free market" economy is at stake.<sup>65</sup>

The effect on the courts has been twofold. First, most have adopted the market defense as "given" rather than "suspect." They have thus ruled a market-based wage gap outside the scope of Title VII's remedial powers.<sup>66</sup> Second, courts have accepted a subtle but important language shift—one that emphasizes the costs of pay equity and ignores the effect of discriminatory pay gaps on workers.<sup>67</sup> That is, pay equity has virtually disappeared as an issue, in cases where startling and acknowl-

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63. Letter, *supra* note 60, at 4-7.

64. *Id.* But see Letter from Drucilla S. Ramey to Burk E. Deventhal, Esq., Office of the City Attorney, San Francisco, at 2 (1983) (discussing the market and comparable worth). Ms. Ramey observes that the enactment of "minimum wage laws, child labor laws, occupational health and safety laws and . . . anti-discrimination laws . . . [were] all . . . met with . . . similar predictions of doom." *Id.* Critics of Massachusetts' child labor act, for example, foretold that it would not only "drive employers from the state, [but] destroy harmony between workers and management, and lead the country into socialism." *Id.* at 2 (emphasis added); see also Freed & Polsby, *infra* note 87, at 1079 (citing Levin, *Comparable Worth: The Feminist Road to Socialism*, COMMENTARY 13 (Sept. 1984)).

65. See Amicus Curiae Brief of the Assoc. of Washington Business, *AFSCME II*, at 28.

Title VII was designed to further this policy and enhance the free functioning of the *employment market* by removing discriminatory barriers. Congress' effort to *unclog* the flow of market forces reflects its underlying confidence in the virtues of a *free market* system. The district court's interpretation of Title VII, however, distorts the *free market* . . . Although the fairness of the *free market* may be debated . . . [it] is an economic reality . . .

*Id.* (emphasis added).

66. See *supra* note 52 and accompanying text.

67. Sex discrimination has actual, calculable costs. For a survey of the growing literature on the subject, see Niemi, *Sexist Earning Differences—The Cost of Female Sexuality*, 36 AM. J. ECON. & SOC. 39 (Jan. 1977). The authors argue that women get less value for their education than men, with minority women getting the smallest returns for their education. *Id.* See, e.g., Remick, *The Comparable Worth Controversy*, 10 PUB. PERSONNEL MGMT. 371, 372 (1981).

edged pay gaps exist.<sup>68</sup>

## V. PENETRATING THE MARKET DEFENSE

The market defense has specific strategic uses which remain largely unexplored.<sup>69</sup> Moreover, neither the complex nature of the marketplace nor the crucial role an equitable wage policy plays in its intricate workings have been examined fully.<sup>70</sup>

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

69. See Risher, *Job Evaluation: Problems and Prospects*, 61 PERSONNEL 53 (1984). Its generalities, for example, tend to obscure specific practices employers use to arrive at wages. Job evaluation and its relation to market surveys offers an important example. It illustrates that employers shape their companies by choosing among different courses of action. *Id.*

Risher noted that job evaluation as such is "independent of the decisions that set salaries . . . [because] . . . it focuses entirely on internal relative values without regard to monetary considerations . . . [in establishing] what is in effect a hierarchy of jobs within an organization." *Id.* at 53. He emphasized that not only do ways of conducting job evaluations differ depending on the kind of job, but that "comparing [their] results with existing pay rates . . . [results in] replic[ating] existing pay discrimination." *Id.* at 55.

A 1979 National Academy of Sciences study contained similar observations, noting that current job evaluation methods have not kept up with the "advances in measurement in social sciences." *Id.* at 56. It recommended that further research be done to modernize such techniques, but fell short of advocating the wholesale scrapping of some systems or in favor of a single job evaluation system for the entire country. "[T]he report . . . had a negligible impact on job evaluation practices . . . [much to the relief of employers]." *Id.*

Risher's article also offers an excellent summary of how the methods of evaluating lower paid positions and higher paid professional jobs differ. *Id.* at 57. Inexperienced practitioners may also contribute to the problem. Risher notes that job evaluation is normally considered an entry-level job by organizations. *Id.* at 58. See also Schwab, *Using Job Evaluation to Obtain Pay Equity*, in 1 COMPARABLE WORTH: ISSUE FOR THE 80's 83, 88 (U.S. Civ. Rts. Comm. ed. 1984) (showing that job evaluation has a flexibility which helps employers address external changes in the market); Steinberg, *Identifying Wage Discrimination and Implementing Pay Equity Adjustments*, in 1 COMPARABLE WORTH: ISSUE FOR THE 80's 99, 102-03 (U.S. Civ. Rts. Comm. ed. 1984) (discussing differing methods of conducting job evaluations and how cultural assumptions may affect the process); Beatty & Beatty, *Some Problems with Contemporary Job Evaluation Systems*, in COMPARABLE WORTH AND WAGE DISCRIMINATION 59 (H. Remick ed. 1984). But cf. Remick, *Dilemmas of Implementation: The Case of Nursing*, in COMPARABLE WORTH AND WAGE DISCRIMINATION 106 (H. Remick ed. 1984) for ways of constructing job evaluation using comparable worth concepts and use of a "single bias-free point factor job evaluation system . . . across job families both to rank-order jobs and set salaries . . . ." *Id.*

70. The first important factor is the continuing debate about the nature of the external market. The *AFSCME II* court calls the market a complex of forces which function according to the laws of supply and demand. *AFSCME II*, 770 F.2d at 1406. Our notions of the market, however, are based on neither laws nor forces but theoretical assumptions about how the Western economy functions, common to both "classical economy theory and neoclassical or marginal productivity theory . . . ." Schwab, *supra* note

## A. INTERNAL EQUITY

To compete, employers must attract and keep employees. Wages play a central part in this process.<sup>71</sup> In this regard, wage analysts have for many years stressed the value of "internal equity," the process of creating fair pay scales *within* an organization.<sup>72</sup> By motivating employers to work harder, equitable wages

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69, at 84.

Contrary to such assumptions, however, a phenomenon known as the "balkanization of markets" has been well documented. *Id.* Simply put, balkanization describes two types of markets: those horizontally and vertically structured. In the former, employees have a strong commitment to their occupation (e.g., construction trades, medical specialties, law and other professions). In the latter, however, a large number of jobs are specialized and unique to that firm only. Thus, only entry level positions pay according to the external market. *Id.* For the other positions, there is essentially no external market and "firms must find some alternative . . . for making wage setting decisions." *Id.* at 85. The firm's discretion in manipulating wages is thus far greater with seniority and merit systems playing an important part. *Id.* See also *id.* at 91 for a general bibliography on the phenomenon of balkanization.

Personnel guides geared for use by management agree that "internal conditions require the employer to pay certain jobs above and below the market rate." 14 [Personnel Manual] EMPL. COORDINATOR (RIA) 142,101 (Feb. 17, 1986). The same guide also cautions employers to define the market in which they are competing precisely, noting that proper definition "will depend on the nature of the business and competition for labor in the industry . . . ." *Id.*

71. See *infra* notes 72-73 for an indepth discussion.

72. Systems of compensation are, however, becoming more and more sophisticated. Where it was formerly thought that structured pay raises motivated employees, personnel strategists now favor merit pay, which is an unstructured recognition of superior performance. 1 [Compensation] HUMAN RESOURCES MGMT. (CCH) ¶ 10,356 (1983). The change is based on the theory that raises serve only to "avoid dissatisfaction." *Id.* "[O]nly when money is paid as a recognition for an individual's outstanding effort . . . [and not] . . . as a wage in disguise . . . [do employees work harder]." *Id.*

Merit pay is becoming a pronounced feature of earnings generally, according to a 1985 survey of 875 firms across the country. Fifteen percent of the firms surveyed have merit budgets that are larger than their competitors'. While inflation, collective bargaining agreements, and a concern for profits account for some of the rise, the chief reason employers gave for enlarging such budgets was a desire to *remain competitive in the outside markets*. *Employer Compensation Practices Studied in Salary Planning Survey*, 89 EMPL. ALERT (RIA), 4 (Nov. 15, 1984) Note that the market itself seems to reflect the need for arriving at some form of internal wage equity, a process accomplished by constant studies within a company. Wing, *Achieving Internal Salary Equity Through Job Management*, in HANDBOOK OF WAGE AND SALARY ADMINISTRATION 2-19, 2-22 (M. Rock ed. 1972). But see also Schwab, *supra* note 69, at 85. Deciding which employee has performed above the norm can, however, be a much more subjective process than awarding structured raises, particularly in vertical markets where wages are not determined from the outside except for entry level jobs. *Id.* Courts have recognized the danger by requiring "notice to the affected parties, consistency, and objectivity [before they will accept a] 'merit system' defense." Freed & Polsby, *infra* note 88, at 1094 (citing EEOC v. Whitin Machine Works, Inc., 635 F.2d 1095, 1097-98 & n.6 (4th Cir. 1980); Brennan v.

lead to superior performance which, in turn, raises the employer's ability to compete.<sup>73</sup> Maintaining pay equity has, in fact, been a basic, accepted goal of personnel management since World War II.<sup>74</sup> One theorist, for example, commented that a salary structure based on nothing more than a survey of the market is an extremist rather than a typical approach to wage-setting.<sup>75</sup> A dramatic example of the ineffectiveness of such pay scales is the difficulty of finding nurses and clericals willing to work for low wages in the early eighties. Although the pay offered was "competitive" with the external market, it was totally ineffective in reducing the critical shortage in both fields.<sup>76</sup>

#### B. TITLE VII LITIGATION AND WAGE POLICY CHANGES

Employers also show a puzzling ability to restructure wages under a threat of costly "comparable worth" litigation. A warning to employers *before* the *AFSCME II* ruling advises: "[C]aution: The comparable worth threat to market rate pay systems is a point of vulnerability of potentially devastating disruption and expense. Facing this potential challenge, cautious employers might consider instituting an internal mechanism for measuring the relative worth of jobs."<sup>77</sup> The warning appeared in a policy guide tailored to a national audience. The same guide suggested that employers limit job evaluation to smaller job classes to protect themselves from comparable worth litigation.<sup>78</sup> Yet immediately following an Illinois ruling rejecting compara-

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Victoria Bank & Trust Co., 493 F.2d 896, 901 (5th Cir. 1974); *Hodgson v. Brookhaven Gen. Hosp.*, 436 F.2d 719, 726 (5th Cir. 1970); *cf.* 29 C.F.R. § 800.144 (1983) (an informal or unwritten merit system may qualify under the statutory language if the standards or criteria of the system are applied pursuant to an established plan, the essential terms of which have been communicated to employees).

73. 1 [Compensation] HUMAN RESOURCES MGMT. (CCH), *supra* note 72, at ¶ 10,356. The authors do, however, point out that during periods of inflation, wages paid in the market may become more important than what is paid to fellow workers within a company, since buying power and survival in general are at stake. But when inflation slows, employees are primarily interested in "what the person sitting next to them is earning." *Id.* The point is that the buying power of the dollar, the market and the economy are constantly changing and wage systems reflect those changes.

74. *Id.*

75. Wing, *supra* note 72, at 2-28 to -29.

76. Remick, *supra* note 67, at 372-74.

77. *Job Evaluation*, 14 [Personnel Manual] EMPL. COORDINATOR (RIA) 142,076 (April 1, 1984).

78. *Id.*



ble worth, another such guide advised that conducting internal job evaluation studies was safer. The same manual, however, also warned about the continuing threat of *AFSCME I*.<sup>79</sup>

Thus, litigation which presumably should have nothing whatsoever to do with remaining competitive, is affecting employment wage strategies far more dramatically than any shifts in the outside market. This suggests that the cost of lawsuits is at least as important as the market in changing wage policy.<sup>80</sup> Also, these manuals illustrate that wage setting is strategic rather than passive, active rather than reactive.

### C. THE PITFALLS OF USING STATISTICS TO PROVE WAGE DISCRIMINATION

Ironically, plaintiffs have themselves contributed to the success of the "market defense" by an overwhelming reliance on statistical evidence of wage discrimination. Because such evidence has become important to arguing Title VII cases, this dependence is understandable.<sup>81</sup> The chief drawback of such data, however, is the tendency to stress end results rather than the atmosphere in which an employer makes decisions. Nor can statistics capture the particular dynamics of the workplace in which discrimination has occurred.<sup>82</sup> One reason for this is that statistics work by inference rather than offering specific examples of the phenomena they document. Statistics are therefore largely incapable of isolating specific instances of wage discrimination.<sup>83</sup>

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79. *District Court Refuses to Extend Title VII to Cover Comparable Worth Claims*, 12 EMPL. ALERT (RIA) 2 (Apr. 18, 1985).

80. Personnel guides such as the above provide a wealth of material, generally focused on how to make personnel decisions that are litigation-proof. They thus provide fertile ground for analysts interested in study of the strategic nature of wage setting.

81. D. BALDUS & J. COLE, *STATISTICAL PROOF OF DISCRIMINATION* v, v (Supp. 1984). The authors note that the importance of statistical proof has grown steadily between the bringing of early Title VII litigation and present second-generation cases. *Id.* See also *infra* notes 83, 84 and accompanying text. Despite its distrust of the statistics in the case before it, the *Spaulding* court acknowledged their importance in employment discrimination cases generally although cautioning that they can be exaggerated and distorted. *Spaulding v. Univ. of Washington*, 740 F.2d 686, 703 (9th Cir. 1984), *cert. den.*, 105 U.S. 511 (1984).

82. "[S]tatistics can provide powerful insight into general or long-run behavior but as for a particular decision—and many cases are concerned with just one decision—at best it can provide a presumption by inferring from the general to the particular." D. BALDUS & J. COLE, *supra* note 81, at 5.

83. Multiple regression studies, which *Spaulding*, 740 F.2d 686, 704, favored, for

Without such information, it is nearly impossible to determine how an employer actually made decisions regarding wages. Although the gathering of statistics is becoming more sophisticated, their reliability remains at issue.<sup>84</sup>

The Ninth Circuit has, in fact, noted its distrust of statistical evidence in proving intentional discrimination under Title VII.<sup>85</sup> The court has asked Title VII litigants for current ho]examples of discriminatory treatment, refusing to accept historical patterns of discrimination as sufficient.<sup>86</sup> Plaintiffs will thus have to put more effort into gathering testimonial evidence in any case.<sup>87</sup> The sooner such efforts begin, the more likely plaintiffs are to defeat the market defense.

Plaintiffs might find the latter approach rewarding for two other reasons. Both American and European theorists have noted that as governments introduce equal pay legislation, occu-

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example, are constructed so that the basic premises (lower wages paid to one sex than those paid another) are tested by the injection of numerous variables such as qualifications, education, etc., which *could have* legitimately accounted for the inequity. Presumably any remaining gap is unexplained and hints strongly that discriminatory treatment is responsible. Fisher, *supra* note 54, at 722-24. Notice, then, that actual testimony of employees, memoranda, or other evidence of actual company policy is never examined in such studies.

84. See *Spaulding* at 740 F.2d at 704 (citing Fisher, *supra* note 54, at 702-05). See also *infra* note 87 discussing some potential sources of unreliability.

85. *AFSCME II*, 770 F.2d at 1407.

86. *Id.* at 1407-08.

87. See, e.g., Freed & Polsby, *Comparable Worth in the Equal Pay Act*, 51 U. CHI. L. REV. 1078, 1081-99 (1984), for a novel approach. While the authors' perspective is a conservative one, critical of comparable worth, their methodology may interest advocates of pay equity. But cf. Becker, *Comparable Worth in Antidiscrimination Legislation: A Reply to Freed and Polsby*, 51 U. CHI. L. REV. 1112 (1984). The authors show that it is possible to focus on employers' actual decisions rather than trends. Instead of limiting themselves to case law or numerical information, they imagine hypothetical scenarios in which an advertising executive contemplates paying a female employee less than a male. The authors then show the various possibilities underlying the employer's decision (some discriminatory, some not). The point is to try to capture the "sense" of the decision, rather than just the fact that it was made.

A telling example of the limits of statistics the authors give is the paradox of "[a] statistical [result that] indicates that the difference in average salary between men and women is explained completely by differences in such factors as education and experience." *Id.* at 1099. "[D]espite this exonerating data, however] the employer does not consciously set salaries on the basis of such factors, but rather proceeds on the basis of unstructured, unsystematic reactions [or 'gut feelings'] to various employees' qualifications and productivity." *Id.* Although his real motivation would fail as a defense, statistical analysis saves him by not being able to tell the difference.

pational segregation increases.<sup>88</sup> Apparently this occurs because as blatant pay inequity becomes extinct, other discriminatory practices arise such as sex-biased job hiring, promotion and job classification. While all such practices *result* in a wage gap, they are increasingly more elusive than an outright wage discrepancy.<sup>89</sup> One could, of course, consider the market defense just such a policy.

Thus, considering pay equity and remedies such as comparable worth apart from other employment practices gives a highly inaccurate picture of the issues involved. In some of the more recent "pay inequity" cases for example, plaintiffs have also alleged other forms of sex discrimination.<sup>90</sup> Stressing the presence of such practices may be key to better understanding the strategic uses of the market defense.

## VI. THE *BOHM V. HARTZ* DISSENT: PROVING SEX DISCRIMINATION THROUGH AN IMMERSION IN THE WORKPLACE

### A. THE WORKPLACE

One of the few judicial attempts to focus in detail on the workplace in which a pay dispute involving a market survey arose is a dissenting opinion in *Bohm v. Hartz Wholesale Manufacturing Co.*,<sup>91</sup> a recent Minnesota Court of Appeals decision.

The defendant, L.B. Hartz Wholesale is a grocery wholesale business located in Thief River Falls, Minnesota. By 1980, Hartz had employed 125 men and seventeen women. That same year, the company conducted a market salary survey which revealed that its male warehouse workers were underpaid compared to

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88. Johung, *Patterns of Occupational Segregation by Sex in the Labor Market*, in *SEX DISCRIMINATION AND EQUAL OPPORTUNITY: THE LABOR MARKET AND EMPLOYMENT POLICY* 44 (G. Schmid & R. Weitzel eds. 1984).

89. See, e.g., *Spaulding*, 704 F.2d at 706 (citing *Bryant v. Int'l Schools Services, Inc.*, 675 F.2d 562, 565 (3d Cir. 1982) ("challenge to policy giving unequal employment benefits to people hired to work in Iran . . .")).

90. See, e.g., *Craik v. Minnesota State Univ. Bd.*, 731 F.2d 465 (8th Cir. 1984)); *Taylor v. Charly Brothers*, 25 Fair Empl. Prac. Cas. (BNA) 602 (W.D. Pa. 1981); *Lane-gan-Grimm v. Library Ass'n of Portland*, 560 F. Supp. 486 (D. Ore. 1983).

91. *Bohm v. L.B. Hartz Wholesale Corp.*, 38 Fair Empl. Prac. Cas. (BNA) 495 (Minn. Ct. App. 1985).

the average wage for such positions.<sup>92</sup> The survey also showed that Hartz's unskilled clericals were paid wages higher than the market norm. Annual raises were then adjusted downward to 5.97 percent for the latter category, consisting of fourteen women.<sup>93</sup> The women worked in five separate departments of the company in jobs ranging from clerk-typist to secretary, accounting clerk and bookkeeper.<sup>94</sup>

Hartz's non-clerical staff received raises as high as twenty percent. All but four of these employees were male. Although most worked in Hartz's warehouse assembling, loading and delivering groceries to retailers, some had clerical duties very similar to those held by thirteen out of the seventeen female employees. Yet all 125 men were either classified as warehouse workers or given special exempt classifications.<sup>95</sup>

When Reva Bohm, a female clerical worker affected by the pay cut, publicly protested the wage adjustments, she was

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92. *Id.* at 496.

93. *Id.* The survey showed Hartz's clerical workers were earning \$6.92 per hour. Clericals employed by two other area wholesalers, however, were being paid \$6.09 and \$6.04 per hour. The area's average hourly wage for clericals was determined to be somewhere between \$4.34 and \$4.78 by an earlier state survey. *Id.* The hourly wage of order pickers and truck drivers working in Hartz's warehouse was \$8.46 and \$9.06 respectively. Warehouse workers at one area facility earned \$9.51. At another they made \$8.52 per hour. Truck drivers working for the same two employers earned \$9.86 and \$8.82 hourly. *Id.*

94. *Id.* at 502 (Crippen, J., dissenting). The plaintiff's range of duties contradict the notion that she was unskilled. After graduating from high school and completing a year-long secretarial course, the plaintiff, Reva Bohm, was hired as a keypunch operator by Hartz in August 1975. From 1976 to March 1981, when she was fired, Bohm worked in Hartz's computer and billing or data processing department. There she helped prepare master sheets showing routes, deliveries, loadweights and trucks used and kept records of the truckers' mileage and hours. In addition, she filed and answered phones. *Id.* The four women not included in the "unskilled clericals" category were classified as junior buyer (1), computer operator (2) and "clerical" (1). Their average hourly wage was \$7.33. None of the four earned as much as any of Hartz's male employees. The two fulltime computer operators earned \$2.27 an hour less than Hartz's *lowest paid* male employees. No female at Hartz was a salaried employee; twenty males were salaried. *Id.* at 502-03.

95. Two males, for example, worked with the plaintiff in the computer and billing department. Their jobs included clerical duties, although not identical to the plaintiff's. Yet, one man was classified as a "merchandise shipper." The other was classified as a "merchandise receiver." Both were thus exempted from the unskilled clerical class. *Id.* at 502. In 1980 these two employees were already earning \$2.46 an hour more than the female "unskilled clericals." The 1981 wage increases promised them a 9.9% increase, more than two times the raises the women were to receive. *Id.* at 502-08.

fired.<sup>96</sup> Despite these documented practices, the trial court concluded that Hartz had not discriminated against its female employees on the basis of sex. The court also rejected the plaintiff's comparable worth claim under Title VII and found that her firing was not retaliatory. The Minnesota Court of Appeals affirmed.<sup>97</sup>

Whether through reluctance or an inability to grasp the significance of key facts before it, the *Bohm* majority refused to stray from the surface issues in the case. The court concluded, that since Bohm had not filed an Equal Employment Opportunity Commission complaint until a month after her dismissal, her firing could not have been retaliatory.<sup>98</sup> Bohm's repeated public protests to her supervisor well before the firing, however, went unnoticed by the court.<sup>99</sup>

There were also glaring signs that the defendant's job classifications were discriminatory. The clerical category, which was made up entirely of women and included jobs ranging from clerk-typist to bookkeeper appeared particularly specious. Men working in jobs almost identical to the plaintiff's were classified as "merchandise shipper" and "receiver." Yet the court refused to examine either category closely. Instead, the court found for the defendants, after a cursory discussion of existing job pat-

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96. *Bohm*, 38 Fair Empl. Prac. Cas. (BNA) at 497. See also *infra* note 98 for a more extensive discussion.

97. *Id.* at 497-501. *Bohm*, 38 Fair Empl. Prac. Cas. (BNA) at 500-01.

98. Bohm filed a sex discrimination claim with the Equal Employment Opportunity Commission on April 4, 1981. She had been fired in March of that year. *Id.* at 497. The majority concluded that since Hartz did not receive notice of her charges until some time after April 4, her firing could not have been retaliatory. *Id.* at 498.

99. *Id.* at 500. In contrast, the dissent refused to limit itself to the sequence of the two events. It looked instead at the atmosphere existing at Hartz before the firing. Its detailed portrait of the tensions the 1981 market survey produced among employees and management captured the underlying flavor of events leading to Bohm's firing, as no statistical study ever could. *Id.* at 503 (Crippen, J., dissenting). The seven employees of the computer and billing department were informed of the 1981 wage increases at a department meeting held in their supervisor's office in December 1980. The plaintiff protested to her boss immediately following the announcement. *Id.* "You can't do that," she told her supervisor. *Id.* She also pointed out that the planned increases would enlarge an already existing wage gap between male and female members of the department. *Id.* Following the meeting, she approached her supervisor several more times asking if she could speak to Hartz's Board of Directors. According to Bohm, the Board was never informed of her wishes. *Id.* The majority itself admits that "[t]wo months after she confronted Olson," her hours were cut. *Bohm*, 38 Fair Empl. Prac. Cas. (BNA) at 497. One month later she was fired. *Id.*

terns in Minnesota,<sup>100</sup> and an unquestioning belief in the legitimacy of Hartz's market survey. Not surprisingly, the court also refused to relate the survey to other actions of the defendant.<sup>101</sup>

The dissent responded by noting that the trial court had made two major errors.<sup>102</sup> First, it had misinterpreted the scope of Title VII's powers, believing the statute required allegations of unequal pay for equal work.<sup>103</sup> Second, the trial court had mistakenly concluded that Hartz's market survey could legitimize discriminatory patterns evident in its wage practices.<sup>104</sup>

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100. *Id.* at 498. The majority's superficial analysis of these two issues was typical of its approach throughout the opinion. Echoing the testimony of a state expert on job patterns in northwest Minnesota, the majority concluded the region's workforce was segregated by choice. Ninety to ninety-two percent of the area's clerical applicants were women but almost none applied for warehouse positions. *Id.* at 498. To the majority, the above also explained why no women at Hartz, including Bohm, had ever applied to transfer to its warehouses, once hired. *Id.* The latter conclusion is striking given the majority's own admission that Hartz's seniority system was structured to deprive any employee transferring to any seniority benefits they had acquired. *Id.* "[The seniority system] . . . is . . . [one] agreed upon by the majority of employees, presumably to perpetuate the autonomy of individual departments," the court stated. *Id.* (emphasis added). Note that in 1980, Hartz employed 125 men and 17 women. *Id.* at 496. Thus, even had all 17 women disapproved of the seniority system and voted to change it, they could never have come near the majority required. The majority also found that even were Hartz's seniority system discriminatory, Bohm had not been harmed as a result, since she had never requested a transfer to the higher-paying warehouse jobs. *Id.* at 499 (emphasis added).

101. As with Hartz's seniority system, the majority found legitimate reasons for Bohm's dismissal; it was simply the result of necessary economic cutbacks, following the loss of three large grocery accounts. *Id.* at 503 (Crippen, J., dissenting). The majority also found the legitimacy of using market factors in setting wages solidly grounded in the usual cluster of "market defense" cases. *Bohm*, 38 Fair Empl. Prac. Cas. (BNA) at 500-01. It concluded there was no pattern of intentional discrimination by the defendants. *Id.*

102. *Bohm*, 38 Fair Empl. Prac. Cas. (BNA) at 506 (Crippen, J., dissenting).

103. Because of its belief that Title VII does not encompass claims of unequal pay for differing jobs performed by men and women "the court may have failed to recognize a lawful basis for any discrimination claim . . ." *Id.* at 504. *County of Washington v. Gunther*, 452 U.S. 161 (1981), of course, established otherwise, according to the dissent. Even before *Gunther*, the dissent noted, the "equal pay/equal work" doctrine never existed for cases of discrimination on the basis of race or religion." *Bohm*, 38 Fair Empl. Prac. Cas. (BNA) at 504 (Crippen, J., dissenting) (citing *International Union of Electrical, Radio and Machine Workers v. Westinghouse Electric Corp.*, 631 F.2d 1094 (3d Cir. 1980). The dissent considered *Westinghouse* a precursor to *Gunther*. *Bohm*, 38 Fair Empl. Prac. Cas. (BNA) at 504 (Crippen, J., dissenting). *Gunther*'s role was to clarify that already prohibited discriminatory wage practices based on race or religion were also prohibited on the basis of sex. Thus, the Bennett Amendment's limited function in Title VII cases was for the first time established. *Id.* See also *supra* note 47 and accompanying text.

104. *Bohm*, 38 Fair Empl. Prac. Cas. (BNA) at 506-07 (Crippen, J., dissenting). To

The dissent, however, found that unless a defendant could justify the taking of a market survey by some business necessity, the presence of a survey heightened the suspicion that other discriminatory practices had also occurred.<sup>105</sup> Bearing out this theory, the dissent linked the Hartz survey to a variety of other suspect practices taken by the defendant.<sup>106</sup>

In the dissent's view, the "unskilled clericals" category into which Hartz had placed most of its female employees, was overbroad, including females with varying skills in a wide range of duties.<sup>107</sup> The defendant's only purpose in establishing the category had been to create wage disparity between male and female employees.<sup>108</sup> In addition, the 1981 wage increases had clearly affected men differently than women. Even before 1981, all of Hartz's female employees were being paid less than its male workers.<sup>109</sup> Moreover, when the plaintiff protested these practices, she was fired. Her firing was relevant not only to the issue of retaliatory discharge, but increased the evidence of the defendant's discriminatory wage practices.<sup>110</sup> Essentially, Hartz's market survey had only one purpose: to put a ceiling on the already inequitable wages paid to Hartz's female employees.<sup>111</sup>

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the dissent, the *circumstances* in which a market survey is taken, rather than its results, are the crucial thing to examine in Title VII cases. The point is that while some market surveys are legitimately used by employers to set competitive salaries, many are taken to legitimize already existing and suspect wage disparity. *Id.* At Hartz, "suspect job classifications, the firing of an objector and wage disparities for all women . . . [accompanied Hartz's wage setting practices] . . . [T]he evidence [also] showed that market information had nothing to do with . . . the firing decision. Likewise, the market does not explain disparate 1981 raises for female and male clerical workers." *Id.* at 507.

105. *Id.* at 508.

106. *Id.* at 502-03.

107. "The category of 'unskilled clericals' is a specious device that serves to limit wages for women; it is 'transparently' discriminatory." *Id.*, at 505 (citing *Gunther*, 452 U.S. at 179). See also *supra* note 95.

108. *Bohm*, 38 Fair Empl. Prac. Cas. (BNA) at 497-500; see also *id.* at 505 (Crippen, J., dissenting).

109. *Id.* at 502-05.

110. *Id.* at 505-06. Note that for the dissent, one fact, such as *Bohm's* dismissal, may raise numerous issues, each of which are linked to the other. The importance of this approach is two-fold. First, the connections that different pieces of evidence have to each other are stressed, thus enriching the picture of the workplace. Second, the question of a plaintiff's potential damages is addressed much more carefully. The dissent would, for example, have awarded *Bohm* damages to remedy the discriminatory wage gap she had protested. *Id.* at 506. But it would also have given a separate and potentially greater award for the retaliatory discharge itself. *Id.*

111. A Hartz official testified that its market survey showed a wage "ceiling" had been reached for the "unskilled clericals" category. *Id.* at 503. But the defendants pre-

The plaintiff had therefore presented a *prima facie* case of both intentional sex-based discrimination and retaliatory discharge, neither of which the defendant had rebutted.<sup>112</sup>

## B. LIMITING THE "MARKET DEFENSE"

The dissent also severely criticized the "market defense" itself for making cases like *Bohm* possible.<sup>113</sup> By providing a seemingly rational basis for suspect wage practices, the dissent concluded, market factors act as a convenient screen for employers like Hartz.<sup>114</sup> More important, constant reference to the marketplace also distorts Title VII's broad remedial powers.<sup>115</sup> Ground newly gained in *County of Washington v. Gunther* is thus lost to plaintiffs, with devastating results.<sup>116</sup>

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sent no evidence showing that the ceiling had any *legitimate business purpose*. *Id.* at 508-09 (Crippen, J., dissenting). The only other employees on whose wages a ceiling was placed were two of Hartz's top salaried officers. *Id.* at 508. Thus, "market information was used to shape . . . an inequitable lid on the wages for one class of employees," the dissent concluded. *Id.*

112. *Id.* at 506. See also *supra* notes 48-51 and accompanying text. A vigorous debate currently exists as to what constitutes a *prima facie* Title VII case. *Id.*

113. *Id.* The dissent focused its criticism on *Christensen v. Iowa*, 563 F.2d 353 (8th Cir. 1977), but the group of Ninth and Tenth Circuit cases, including *Lemons v. City and County of Denver*, 620 F.2d 228 (10th Cir. 1980), *cert. den.*, 449 U.S. 888 (1980) and *Spaulding v. Univ. of Washington*, 740 F.2d 686 (9th Cir. 1984), *cert. den.*, 105 U.S. 511 (1984), also came under its attack. *Bohm*, 38 Fair Empl. Prac. Cas. (BNA) at 508 (Crippen, J., dissenting). The dissent's main point was that *County of Washington v. Gunther*, 452 U.S. 161 (1981), decided four years after *Christensen* and one year after *Lemons*, made the reasoning of the latter "obsolete." *Bohm*, 38 Fair Empl. Prac. Cas. at 507 (Crippen, J., dissenting). Since "any wage inequality among those in *different* job categories can normally be explained by reference to the market," *Gunther* would become moot were such unqualified references allowed. *Id.* (emphasis added). *Christensen* was also distinguishable on its facts in that there the defendant did not use suspect criteria in setting wages. *Id.* (citing *Christensen*, 563 F.2d at 354).

114. Market information simply failed to account for the defendant's numerous suspect actions in *Bohm*, according to the dissent. *Bohm*, 38 Fair Empl. Prac. Cas. (BNA) at 507 (Crippen, J., dissenting).

115. *Id.* at 507-08. Although *Bohm* was analyzed by both the majority and the dissent under the Minnesota Human Rights Act, *id.* at 498-500, the statute is commonly construed by applying the principles developed in Title VII litigation. See MINN. STAT. § 363.03(2) (1984). See also *id.* at 501-07 (Crippen, J., dissenting). Moreover, Title VII's broad purpose of ending discrimination is also in direct conflict with exonerate defendants who can point to the marketplace to explain discriminatory wage practices that "reflect" the social or economic practices in the community," according to the dissent. *Bohm*, 38 Fair Empl. Prac. Cas. (BNA) at 507 (Crippen, J., dissenting).

116. Errors of analysis, such as those made by both the trial court and the majority in *Bohm* would cut off any remedy to plaintiffs with valid causes of action under Title VII. *Id.* at 509.



For these reasons, the dissent proposed severely limiting the "market defense" in two ways. In disparate impact claims, the dissent would require that defendants show a legitimate business need for the use of market factors to justify otherwise discriminatory wage practices.<sup>117</sup> Second, it would require a much more thorough probing of any justification offered by a Title VII defendant for an apparent sex-based wage gap.<sup>118</sup>

The dissent's final insight was its most innovative. According to the dissent, the *Gunther* decision, establishing that Title VII actions may include allegations of unequal pay for different work, opened new territory that falls somewhere between an acceptance of "pure" comparable worth and the doctrine of equal pay for equal work.<sup>119</sup> Cases arising in this unexplored area call for rigorous, individualized analysis. This is particularly true when, as in *Bohm*, an employer has set wages without using any objective criteria.<sup>120</sup>

But the dissent also warned plaintiffs to stop clinging to the comparable worth banner. The dissent instead urged plaintiffs to point to specific discriminatory practices by the employer when alleging wage discrimination.<sup>121</sup> The *Bohm* dissent, therefore, provides the first judicial suggestion of how to break through the tangle of rhetoric surrounding the comparable worth issue.<sup>122</sup> For the first time, the market defense is firmly

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117. *Id.* at 507 (citing *Craik v. Minnesota State Univ. Bd.*, 731 F.2d 465, 468 n.4 (8th Cir. 1984)). To the dissent, *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), was the key to examining disparate impact claims. Under *Griggs*, any practice which though neutral on its face has a discriminatory impact is forbidden unless a defendant can show a specific necessity for it. *Bohm*, 38 Fair Empl. Prac. Cas. (BNA) at 507 (Crippen, J., dissenting) (citing *Griggs*, 401 U.S. at 424)). In *Craik*, the defendant was able to make such a showing; all male job categories given wage increases were shown to be ones for which it was very difficult to recruit properly qualified staff). *Bohm*, 38 Fair Empl. Prac. Cas. (BNA) at 507 (citing *Craik*, 31 F.2d at 465).

118. *Bohm*, 38 Fair Empl. Prac. Cas. (BNA) at 508 (Crippen, J., dissenting) (citing *Danz v. Jones*, 263 N.W.2d 395, 402 n.3 (1979)).

119. *Bohm*, 38 Fair Empl. Prac. Cas. (BNA) at 509 (Crippen, J., dissenting).

120. *Id.*

121. *Id.*

122. One of the greatest stumbling blocks to separating out the legitimate uses of market factors to structure wages from ones which are a pretext for wage discrimination is the overwhelming amount of rhetoric both sides in the comparable worth debate have thrown at the courts. See *supra* note 60 and accompanying text for a fuller discussion. Courts have perpetuated the problem by paying a parrot-like homage to the language of the briefs they favor. The author examined a series of amicus briefs filed with the Ninth Circuit which the *AFSCME II* court considered in writing its opinion. Their advocacy

linked to other discriminatory practices by the kind of objective analysis courts have repeatedly asked for in this area.

## VI. A NOTE ON SAN FRANCISCO AND COMPARABLE WORTH: A COMPARISON WITH *AFSCME*

On November 5, 1985, the City of San Francisco's voters became the first in the country to defeat comparable worth on the ballot.<sup>123</sup> Proposition E asked voters to repeal a city ordinance granting a five-dollar-a-day "meal allowance" to 7,000 of the city's lowest paid workers,<sup>124</sup> predominantly women and minorities.<sup>125</sup> Dianne Feinstein, San Francisco's current mayor,

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simply found its way undigested into the court's decision. *See, e.g.*, Amicus Brief of Ass'n of Washington Business, at 28, *AFSCME II*; *AFSCME II*, 770 F.2d at 1407-08. The *AFSCME I* court was also guilty of forsaking factual analysis for rhetoric. Although its passion is a welcome element in addressing pay inequity, the court could clearly have done a better job in marshalling the many factual details presented to it by both the plaintiffs. By not doing so, the earlier court left itself open to the *AFSCME II* court's charges that the plaintiffs had presented only "isolated incidents of sex segregation as evidence of a history of sex-based wage discrimination." *AFSCME II*, 770 F.2d at 1407-08 (citing *AFSCME I*, 568 F. Supp. at 860). The plaintiffs had, in fact, presented a detailed portrait of Washington's discriminatory practices beginning at the turn of the century up to and including the Willis studies, Appellee's Petition for Rehearing at 10-11, *AFSCME II* (9th Cir. Sept. 24, 1985). Also crucial to their case was ample evidence that the defendants did not use the results of their own market surveys in structuring wages. *Id.* at *i*. Incredibly, the *AFSCME I* court failed to include this evidence in its finding for the plaintiffs. *AFSCME I*, 568 F. Supp. at 860; *see also AFSCME II*, 770 F.2d at 1405-06.

123. The November fifth city ballot was part of a state-wide election held in 1985. Seven propositions, including Proposition E, were presented to San Francisco voters for their approval or rejection. *San Francisco Chronicle*, Nov. 1, 1985, at 1, col. 5.

124. *San Francisco, Cal.*, Proposition E (Nov. 1985), read in pertinent part:

Section 1. Ordinance No. 170-85, Part II. Salary Standardization Ordinance for Fiscal Year 1985-86, providing a meal allowance for certain City Employees, is hereby repealed. In doing so, the People of San Francisco reaffirm and recognize that the City and County of San Francisco may not provide any compensation to its employees for services rendered except under the San Francisco Charter Sections 8.401 *et seq.* Any reserve of monies designated to implement a meal allowance or other premium payments not authorized by Ordinance No. 164-85 Part I shall be rescinded.

*Id.*

125. The 13 city classes selected to receive the meal allowance were composed of female and minority dominated staff earning less than \$26,000 a year. Walsh, *The Comparable Worth Conundrum*, *San Francisco Bay Guardian*, Oct. 16, 1985, at 11, col. 2. They included the following job classifications: clerk stenographer; data entry operator; licensed vocational nurse; food service workers; dietitian; laundry workers, eligibility worker, social worker; librarian and health worker I-IV. Position Paper from the offices

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placed the measure on the ballot on June 27, 1985.<sup>126</sup> Her decision followed a series of events whose often incomprehensible twists and turns are typical of high stakes political maneuvering.<sup>127</sup>

At first glance, the city's ballot controversy has little in common with Washington's drawn-out court battles. Yet, the inequitable wage practices out of which both controversies grew show a striking similarity. So similar is wage policy in the two jurisdictions that it raises the likelihood of certain endemic patterns of wage discrimination being common to the public sector as a whole.<sup>128</sup> Even more troubling is the relation of these

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of the Hon. Nancy Walker (Sept. 21, 1985) (discussing Pay Equity History and the Memorandum of Understanding reached between the City and SEIU on May 13, 1985) [hereinafter cited as Position Paper]. See also *infra* notes 161-62 and accompanying text.

126. The initiative was placed on the City Ballot by Dianne Feinstein, San Francisco's current Mayor, on June 27, 1985.

127. See *infra* notes 173-77 and accompanying text.

128. A recent class action suit brought by the California State Employees Association as well as various individual employees against the State of California offers further proof of discriminatory patterns common to the public sector. The suit is still in the discovery phase. Thus the entire range and variety of the discriminatory practices the plaintiffs allege is not entirely clear.

In their Statement of Factual and Legal Theories presented to the district court in support of class certification, the plaintiffs put forth allegations already familiar from the two *AFSCME* suits and the ongoing controversy in San Francisco. First, the plaintiffs alleged that the "[d]efendants do not now and never have followed the 'market' in setting wage rates." *California State Employees' Association v. California*, No. C-84-7275 MHP 1, 2 n.2. (N.D. Cal. filed May 30, 1985) [hereinafter cited as *CSEA*]. Second, they recited a series of alleged State practices that are almost identical to those practiced in Washington. They include the segregation of California's workforce using "sex-segregated . . . ads, job bulletins, as well as discriminatory restrictions on promotions and transfers . . ." *Id.* at 1. As had happened in Washington, an official report to the State Legislature found an estimated wage gap of 22% to 26% between the State's male and female dominated job classes. *Id.* at 6 (citing Report of the Senate Office of Research (1984)). As in Washington, this report recommended that further study be undertaken to determine how pay equity could be achieved for the State's workforce. *CSEA* at 1. In 1984, the Legislature voted to appropriate \$77 million for the express purpose of eliminating sex-based wage discrimination but the Governor vetoed both the appropriation and 1981 legislation (SB 1701) which would have created a Pay Equity Commission to determine specifically which female-dominated job classes are undervalued. *Id.*

In certifying the class, Judge Marilyn Patel ruled that the *AFSCME II* decision does not preclude causes of action brought under Title VII which allege *intentional* wage discrimination even though such discrimination may have had its origin "in market rates." Memorandum and Order Granting Conditional Class Certification, *CSEA* at 27 n.1. (N.D. Cal. Sept. 13, 1985) (emphasis in original). Judge Patel noted that "[d]iscriminatory motive is the very evil to which Title VII is directed. While plaintiffs may have a difficult time establishing intent, they have made sufficient allegations enabling them to try." *Id.* That is, the fact that a defendant's discriminatory motive is

patterns to the market defense. Recent data show that while both jurisdictions justify an admitted wage can affecting certain job classes by point to market forces, neither sector actually follows the market in setting salaries.<sup>129</sup> In short, both jurisdictions currently use the market defense as a pretext for widespread wage discrimination. A detailed examination of the criteria both the City of San Francisco and Washington State traditionally use reveals how these discriminatory practices have evolved.

#### A. INDEXING IN THE PUBLIC SECTOR

Theoretically, the first step in setting wages in both jurisdictions is a process called benchmarking. Benchmarking is a selection of key job classes within certain occupations. These classes are then surveyed in the market. The survey establishes what employers in the area are paying for each class. This gives an employer a detailed salary range to choose from in paying his or her own workers.<sup>130</sup>

In practice, however, most wages are not set by benchmarking. Instead, a process called indexing is most frequently used.<sup>131</sup> Indexing is a clustering of jobs around a benchmark classification. Its primary purpose in both jurisdictions is to reproduce an internal alignment in each department or agency. The pay for an indexed job results from comparing it to what is paid for a benchmark position. But the recommended salary for the former may vary dramatically from that paid its benchmark.<sup>132</sup> Wash-

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rooted in the market defense does not by itself take his or her actions outside the scope of Title VII. *Id.* The parties filed a preliminary statement to a joint status conference on March 17, 1986. *Id.* The plaintiff reiterated a request to conduct a six-month "comparable worth" job evaluation which included a request to observe classified employees at work. *Id.* at 8. The state declared an intent "to seek a definitive ruling" on the viability of comparable worth and the use of disparate impact to show wage discrimination under Title VII. *Id.* at 3. Given *AFSCME II*, 770 F.2d at 1401, *American Nurse's Ass'n v. Illinois*, No. 85-1766 (7th Cir. Feb. 18, 1986) and the instant case, the *CSEA* outcome promises to both test and shape future Title VII litigation. *See also* 1 *California Women* 1, 3 (California Comm'n on the Status of Women ed. 1986) (summarizing the Task Force's majority and minority reports on comparable worth and job class studies).

129. *See infra* notes 130-42 and accompanying text for an extended discussion.

130. Appellee's Brief at 27, *AFSCME II*; Report of the Service Employees International Union-City Committee on Comparable Worth to the San Francisco Board of Supervisors, Phase One 1, 21 (Dec. 1984) [hereinafter cited as *SEIU Report*].

131. Appellee's Brief at 27, *AFSCME II*; *SEIU Report*, *supra* note 130, at 21.

132. Appellee's Brief at 27-30, *AFSCME II*. "[T]he . . . recommended salary for the 'indexed' job may be set above, below or at the same level as the selected benchmark."

ington sets ninety-seven percent of its salaries by indexing. San Francisco derives ninety-five percent of its wages the same way. In practice, then, market salaries are largely irrelevant to the wage-setting process. Hence both jurisdictions virtually ignore them.<sup>133</sup>

#### B. UNWRITTEN DISCRETION IN THE PUBLIC SECTOR

Without the check of the outside market, salaries are left to be set using discretionary and often irrational customs deeply rooted within each department or agency. Almost nothing exists in writing, either in San Francisco or in Washington, setting standards or even guidelines to be used either in indexing jobs or in benchmarking. Instead, Washington's personnel boards and San Francisco's Civil Service Commission routinely adjust or abolish benchmarks altogether.<sup>134</sup> They also remove and add jobs clustered around a benchmark.<sup>135</sup> Wages paid for several benchmark jobs are also averaged to arrive at salaries. In Washington, where two personnel boards conduct separate indexing procedures, the same jobs may often be indexed to different benchmarks.<sup>136</sup> Finally, both Washington and San Francisco have wide discretion in deciding whether or not to refer to market rates for the few jobs they have surveyed.<sup>137</sup>

In San Francisco, the City Charter mandates an annual sal-

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*Id.* at 27 SEIU Report, *supra* note 129, at 21-27.

133. Appellee's Brief at 25-35, *AFSCME II*; SEIU Report, *supra* note 130, at 21. In San Francisco, only 60 out of 1600 benchmark classes are even surveyed in the market. SEIU Report, *supra* note 130, at 21. In Washington, "indexing" takes place well before any market surveys are conducted to prevent market rates from influencing the process. Appellee's Brief at 27, *AFSCME II*. In San Francisco, the relation between indexed jobs and the market is more complex. "[Indexed] classifications determined to be out of alignment, based either on the internal market (salary relationships between jobs within the city) or the external market . . . may be moved to a new place on the benchmark or reallocated to a different [one] . . ." SEIU Report, *supra* note 130, at 22.

134. Appellee's Brief at 30-35, *AFSCME II*; SEIU Report, *supra* note 130, at 16, 20, 23.

135. Appellee's Brief at 30, *AFSCME II*; SEIU Report, *supra* note 130, at 24-25.

136. Appellee's Brief at 28, *AFSCME II*. This is true for more than one third of all jobs existing at the two Boards. For example, while DOP pilots are "indexed to the Automotive Mechanic benchmark . . . [HEPB pilots are indexed] to the Research Technologist benchmark." *Id.* Each benchmark pays a different salary. *Id.*

137. Appellee's Brief at 28, *AFSCME II*. Deviations from market rates also occur to preserve historical and internal relationships, within the two state agencies. *Id.* SEIU Report, *supra* note 130, at 22.

ary standardization process using strict formulae based on like work and service. Nevertheless, the city's Civil Service Commission routinely refers to wages being paid in other jurisdictions before deciding its own departments' salaries. Commission staff also compares wages earned by certain city classes to classes in other city departments, adjusting salaries accordingly while apparently ignoring charter formulae.<sup>138</sup>

In both jurisdictions, the foregoing practices perpetuate blatantly sex-based wage gaps. At least some of these gaps result from indexing female dominated jobs to female benchmarks and male to male.<sup>139</sup> The *AFSCME* plaintiffs uncovered startling applications of this policy. It would seem logical, for example, for Washington to index the predominantly female Campus Police Assistant classification to the Security Guard benchmark. But since the latter is a predominantly male benchmark class earning a higher salary, Washington instead indexes the Campus Police Assistants to a clerical benchmark also predominantly female. Even more startling is the fact that State Beauticians are indexed to the same benchmark as State Barbers, ranked two pay ranges below the Barber class; this results in an unexplained pay gap that is totally arbitrary.<sup>140</sup>

Similar indexing maneuvers occur in San Francisco.<sup>141</sup> The most interesting and subtle technique is the Multiple Benchmark System for the city's executives. By tying about 150 top positions to several city benchmarks instead of just one, and averaging the wage earned by each, the city again arbitrarily succeeds in raising a few chosen salaries. Seventy-five percent of these officials are men. Ninety-five percent are white.<sup>142</sup>

### C. THE POLITICS OF KEEPING THE PEACE

Many of the wage practices just detailed have been aptly described as ways of "keep[ing] the peace" within the public sector.<sup>143</sup> Achieving peace is, however, an intensely political pro-

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138. SEIU Report, *supra* note 130, at 22-23.

139. Appellee's Brief at 29, *AFSCME II*; SEIU Report, *supra* note 130, at 26.

140. Appellee's Brief at 29, *AFSCME II*.

141. SEIU Report, *supra* note 130, at 26.

142. *Id.* at 26-28.

143. Appellee's Brief at 29, *AFSCME II*.

cess in both jurisdictions. In Washington, the "politics" of adjusting salaries commences as soon as the preliminary internal adjustment described above ends and staff have reported to personnel board members. Almost immediately a variety of groups approach the board, lobbying its members to drop certain benchmarks, select others and raise salaries of various indexed jobs.<sup>144</sup> Board members, all political appointees, also trade votes with one another in deciding which indexed positions deserve raises:

One former Board member testified that Board members swapped votes on decisions to deviate from the survey, promising support from one job rate in return for support for another . . . one Board member supported an increase for dental hygienists because his daughter-in-law was a dental hygienist and worked hard . . . .<sup>145</sup>

In San Francisco, too, employers, unions, city departments and even other members of the city's civil service approach the Commission's staff all seeking various wage adjustments for certain job classes. About forty to fifty such requests are implemented annually.<sup>146</sup>

Although this Comment has focused on the politics occurring at the administrative level, elected officials in both jurisdictions are involved, thereby increasing political pressures to adjust salaries. Washington personnel boards are empowered to make salary recommendations only some of which the State Legislature may choose to enact. Once this body receives the board's recommendations, therefore, a second round of lobbying begins, this time directed at legislators. In its "cost-justification defense" in *AFSCME I*, the State presented some evidence of the scope of such lobbying efforts in the years immediately prior to the *AFSCME* decision.<sup>147</sup> The State cited promises to the forest industry and its Prison Boards. .

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144. *Id.* at 30. "[O]rganizations' . . . manager[s] . . . and classified employees" are all free to ask for additional salary adjustments at public hearings held by both Boards. Each may then adopt any changes suggested or propose salaries of its own. *Id.* at 30.

145. *Id.* at 31.

146. SEIU Report, *supra* note 130, at 24.

147. *AFSCME I*, 568 F. Supp. at 867.

State officials emphasized budgetary promises to ensure adequate delivery of social services and education to its residents.<sup>148</sup> The State also expressed great concern for achieving a balanced budget and predicted unrest among employees resulting from the Willis studies.<sup>149</sup> The State saw the fiscal priorities as more important than achieving pay equity for its own workforce.

#### D. SAN FRANCISCO: THE CITY CHARTER, "MEAL ALLOWANCES" AND COMPARABLE WORTH

In 1984, one could not have predicted that a year later the city's voters would repeal a comparable worth ordinance passed by the city's Board of Supervisors.<sup>150</sup> Nor could anyone have guessed that Dianne Feinstein, the city's mayor, would be the one to place the repeal initiative on the ballot.<sup>151</sup>

By 1984, two studies had already been conducted showing the high level of job segregation, both by sex and by race, that existed among city and county employees.<sup>152</sup> Feinstein responded sympathetically, for the first time supporting city and union negotiators attempting to draft a pay schedule based on comparable worth principles for all city employees.<sup>153</sup> She appointed a task force to advise her on pay equity issues.<sup>154</sup> At an

148. That court found all justifications to be "without merit." *Id.*

149. *Id.* But see Letter, *supra* note 64 and accompanying text.

150. See *supra* notes 123-24 and accompanying text; see also *infra* notes 158-59 and accompanying text.

151. See *supra* note 123 and accompanying text. SAN FRANCISCO, CAL., ORDINANCE 170-85 (1985-86) (Part II, Salary Standardization Ordinance, repealed 1985) provided a five-dollar-a-day meal allowance to 7,000 City workers (predominantly minority and women).

152. See SEIU Report, *supra* note 130, at 12 (citing WOMEN LIBRARY WORKERS' STUDY, COMMISSION ON THE STATUS OF WOMEN (1978)); see also SEIU Report, *supra* note 130, at 13-15 (citing SAN FRANCISCO COMPARABLE WORTH COMMITTEE REPORT TO THE BOARD OF SUPERVISORS' LEGISLATIVE AND PERSONNEL COMMITTEE (1981)). The 1978 study found that workers in predominantly male classifications earned approximately 74% more per month than those in predominantly female ones. SEIU Report, *supra* note 130, at 12. "[Sixty-nine percent] of city job classifications had no female incumbents . . . . [T]he 1981 Report cited similar patterns, noting that earnings of women and minorities were depressed further by their disproportionate representation among temporary employees . . . ." *Id.* at 14.

153. See SEIU Report, *supra* note 130 at 1 app.B (citing OFFICE OF THE MAYOR, SAN FRANCISCO, POSITION ON EQUAL PAY FOR COMPARABLE WORTH (1984)).

154. SEIU Report, *supra* note 130, at 1. See also OFFICE OF CONTROLLER, SAN FRAN-



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annual Conference of Mayors, Feinstein successfully lobbied fellow delegates for an endorsement of comparable worth at the national level.<sup>155</sup> Her efforts gave her new credibility as a feminist.<sup>156</sup> Since then, however, she and the city's Board of Supervisor's have been deadlocked in a public and increasingly bitter controversy about how to implement comparable worth.

Unlike the legal battle in Washington, which focused on the Legislature's actions, the San Francisco disagreement is based on varying interpretations of the City Charter. It revolves around the ability of the Kleh Act<sup>157</sup> to override the Charter by creating a legislative mandate to set municipal and county sala-

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CISCO, COMPARABLE WORTH ESTIMATES 1, 2 (Sept. 7, 1984) (acknowledging significant wage disparities but concluding that the cost of full implementation of comparable worth will make achieving parity difficult).

155. SEIU Report, *supra* note 130, at 1 app. C (citing U.S. Conf. of Mayors Res. (June, 1984)), resolved:

that the U.S. Conference of Mayors urges cities and other governmental jurisdictions to undertake their own efforts to address any existing pay inequities within their jurisdictions . . . [and] . . . that the U.S. Conference of Mayors calls upon the Congress, the Administration, the States and the Courts to study further the issues raised by 'comparable worth' with particular attention to ways any existing pay inequities can be addressed in a prompt, orderly and fiscally responsible manner.

*Id.*

156. The resolution passed a month before the 1984 Democratic Convention, during which Geraldine Ferraro became the first female vice-presidential candidate in the nation's history. Feinstein had also been a serious contender for the nomination. *Morrow, Why Not a Woman?*, TIME, June 4, 1984, at 18-19. *See also Doermer, The Pride of San Francisco*, TIME, June 4, 1984, at 26-27. The backing of feminist leaders was thus crucial to her candidacy.

157. CAL. GOV'T CODE §53248 (West 1983) provides:

No local agency shall adopt or continue in effect an ordinance or policy which prohibits consideration of comparability of the value of work as one of the factors which may be used during the collective-bargaining process to negotiate salaries. Existing memoranda of understanding, presently in effect, would continue to control until they expire. Thereafter, there shall be negotiations in accordance with this article.

*Id.* The preceding section of the same code also provides that:

As used in this article, "local agency" means any county, city, city and county, including any charter county, city or city and county, and any district, school district, municipal or public corporation, political subdivision, or public agency of the state, or any instrumentality of one or more of any such agencies.

*Id.* Cf. SAN FRANCISCO CITY CHARTER §§8.400(a)-8.407.

ries using a comparable worth standard.

On March 18, 1985, the Board of Supervisors passed a Salary Standardization Ordinance based on comparable worth principles. The measure has become widely known as the "meal allowance" proposal.<sup>158</sup> Even before asking the city's voters for repeal of the ordinance, the mayor had already made known her displeasure by twice vetoing it.<sup>159</sup> The reasons for the mayor's dramatic shift of position merit further attention.

### 1. "Meal Allowance" or Pay Equity Funds

In her campaign against the Salary Standardization Ordinance, the Mayor always identified the Board of Supervisors as its authors.<sup>160</sup> But in fact, the idea of using a meal allowance to achieve pay equity belongs to the Civil Service Commission. The Commission raised the proposal with the mayor in a letter from John Walsh, the Commission's General Manager for Personnel.<sup>161</sup> Walsh described the meal allowance to the mayor as one of three options legally available to her and the Board for achieving pay equity without a formal amendment to the Char-

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158. SEIU Report, *supra* note 130, at 4 app. B (citing SAN FRANCISCO, CAL., ORDINANCE 170-85 (1985-86) (Part II, Salary Standardization Ordinance, repealed 1985)). The latter provides in pertinent part:

#### Section I. Meal Allowance

All full time employees in classifications related to the benchmarks set forth below and in classifications 2585, 2586, 2587 and 2588, having a salary schedule of 44.7 or less, shall be paid a \$5.00 per day meal allowance in addition to their regular salary. This allowance shall be paid to the employee as a part of his/her regular paycheck. If, for whatever reason, the City is not able or permitted to make these payments, the City agrees to set aside or reserve \$8,800,000 in FY 1985-86 for the purpose of making payments to these classifications in some fashion at a later time. This provision shall be subject to the budgetary and fiscal limitations of the Charter.

*Id.*

159. *Id.* at 2, 6-8. The mayor vetoed the ordinance on March 29, 1985 and August 22, 1985. The Board of Supervisors overrode her veto on April 11, 1985. *Id.* at 5; *see also infra* notes 161-68 and accompanying text for a fuller discussion. On June 27, 1985, The mayor placed Proposition E, asking for the ordinance's repeal on the fall ballot.

160. *Id.*

161. *See* Position Paper, *supra* note 125 (citing Letter from John J. Walsh, General manager, Personnel, to the Hon. Diane Feinstein, Mayor, 1 (Feb. 28, 1985)) (suggesting several means of achieving pay equity without violating the City Charter).

ter.<sup>162</sup> His proposal included the passage of a resolution favoring pay equity which the mayor signed,<sup>163</sup> but the Commission refused to implement.<sup>164</sup>

The Commission's letter set off a new round of negotiations between the city employees and the city. On March 8, the Service Employee's International Union (SEIU) proposed a five percent salary increase for 7,000 of the city's female and minority workers for 1985-86, and an additional five percent salary increase for 1987. The city responded by proposing the meal allowance as a way of granting the raises. By March 11, union and city negotiators agreed to convert the five percent increases to a dollar amount to be paid as a meal allowance.<sup>165</sup> But on March 12, George Agnost, City Attorney, decided the allowance was illegal under the City Charter.<sup>166</sup>

In response to the City Attorney's ruling, contract negotiators deleted the allowance from the tentative agreement between the city and the union substituting a pay equity fund instead. On June 27, 1985, Proposal E went on the ballot;<sup>167</sup> on September 18, 1985, the SEIU filed an injunction in San Francisco Superior Court seeking to stop Proposition E from going on the fall ballot. The union argued that in reality the mayor wanted voters to reject the pay equity fund agreed upon between it and the city, rather than the meal allowance, which all parties seemed to agree was unworkable.<sup>168</sup> Reluctant to interfere with an electoral

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162. Letter, *supra* note 161. Walsh advised the Mayor to consider amending Section 1-30 of the Annual Salary Ordinance (allowing free meals to certain employees while on duty) to include "certain female-dominated classes or classes below a certain salary level by providing a dollar amount benefit, such as \$2.00 per day meal supplement allowance while on duty." *Id.* (emphasis added).

163. *See id.* at 2, for an excellent summary of what occurred; *see also* Beasley, Cutler & Kurtz, Mayor's Ballot Measure; Letter to San Francisco Board of Supervisors 1, 1-2 (Aug. 20, 1985) (excellent background analysis).

164. *See* Letter, *supra* note 161, at 2.

165. *Id.*

166. *Id.*

167. *See* San Francisco, Cal., Proposition E (November 1985). *See also supra* note 123 for relevant language.

168. *See* Amicus Curiae Brief of Equal Rights Advocate and San Francisco Women Lawyers' Alliance, *SEIU v. Feinstein*, No. 845-936, at 8-11 (S.F. Superior Court, Sept. 18, 1985). Amici argued that the measure, calling for the repeal of a non-existent "meal allowance" proposal, could be easily confused with \$8.8 million pay equity fund (part of a valid contract between city workers and the Board of Supervisors) by an electorate unaware the latter had replaced the controversial "meal allowance" idea. They also char-

matter, the court denied the injunction.<sup>169</sup> Thus, comparable worth reached San Francisco's voters disguised as a meal allowance no one seemed to want and a contractual entanglement between a municipal union and city managers which is also headed for the courts.<sup>170</sup>

This impending court battle illustrates just how fragmented the issue of salaries can become and is a good example of what one comparable worth analyst has called the "stakes of the actors."<sup>171</sup> The same author related the "arrival" of comparable worth to a reform movement within the civil sector that began at the federal level but has also had impact on city government.<sup>172</sup> She linked this trend within the civil sector to the highly politicized manner in which social change generally occurs in this country. She conceived of such change as the product of various coalitions and interest groups who come together to trade support for various legislative and administrative reforms, making their implementation an often piecemeal affair.<sup>173</sup> Her insights help explain the mayor's seemingly contradictory positions on comparable worth.

A close look at city politics in San Francisco in the months before Proposition E went on the ballot shows the two parties with the most to gain from the defeat of the comparable worth ordinance to be the mayor and the Civil Service Commission. The mayor's interest in defeating the Board of Supervisors' pay equity measure is closely linked to her budget responsibilities under the City Charter. By law, the mayor is responsible for submitting a balanced budget for each fiscal year.<sup>174</sup> Feinstein began focusing on this fact months before her repeal measure went on the ballot. Both of her vetoes of the Board's pay equity package raised the theme of her fiscal responsibilities to the

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acterized Proposition E as an "unconstitutional attempt to breach a valid contract." *Id.* at 14.

169. *SEIU v. Feinstein*, No. 845-936 (S.F. Superior Court, Sept. 18, 1985) (*injunction den.*, Sept. 24, 1985).

170. See *supra* notes 164-68 and accompanying text for sources of confusion.

171. E. JOHANSEN, *COMPARABLE WORTH: THE MYTH AND THE MOVEMENT* 67 (1984). See also *id.* at 52-55.

172. *Id.*

173. *Id.* at 16-19.

174. *San Francisco Chronicle*, Sept. 25, 1985, at 16, col. 4.

city's voters.<sup>175</sup> Later, the mayor revealed that, after enjoying a \$150 million surplus for two years, the city was now facing a \$76 million dollar deficit.<sup>176</sup>

Shortly thereafter, the mayor began blaming the Board's pay equity package for the deficit. She predicted that massive layoffs of city workers were imminent without the repeal of the comparable worth ordinance.<sup>177</sup> By tying the deficit problem to comparable worth, the mayor turned a serious embarrassment to her advantage. She accomplished this by persuading voters that in voting for repeal, they were voting against massive layoffs and for a balanced budget.

On September 4, 1985, the Ninth Circuit handed down *AFSCME II*.<sup>178</sup> While the mayor expressed regret at the ruling, George Agnost, City Attorney, told reporters that he was pleased. He also predicted that the Ninth Circuit ruling would make it easier for the mayor to repeal the Board's pay equity measure.<sup>179</sup> More interesting, however, is the City Attorney's conception of the City Charter as a kind of accordion, flexible in some respects, while extremely rigid in others. Thus, while it allows a wide latitude in making internal salary adjustments to the Commission staff, the Charter forbids any consideration of a comparable worth standard in setting wages for city workers,<sup>180</sup> according to Agnost.

175. SEIU Report, *supra* note 130, 4 app. B. at 2, 6-8; The mayor proposed a \$2 million pay equity plan as an alternative to the measure, which she estimated would cost \$28 to \$30 million. *Id.* See also San Francisco Chronicle, *supra* note 174.

176. San Francisco Chronicle, Sept. 25, 1985, at 1, col. 1. The mayor made the announcement on September 25, 1985. Given the budget crisis, the mayor characterized the measure as "the height of fiscal responsibility." SEIU Report, *supra* note 130, at 4 app. B at 7.

177. *Id.* The same day, Feinstein told the press that "[t]here is no way to avoid \$28 million . . . in layoffs with the comparable worth package still in effect . . ." *Id.* at 1, col. 1. The city's Budget Analyst predicted at \$29 million deficit by 1986-87. In August, an update to the report enlarged that figure to \$45 million, predicting the deficit by 1986 unless spending were curbed or new revenue found. *Id.* at 16, col. 4.

178. *AFSCME II*, 770 F.2d at 1401.

179. San Francisco Chronicle, Sept. 6, 1985 at 7, col. 4.

180. 85-2 Op. City Att'y 1 (1985) [hereinafter cited as *Opinion*]. The opinion concluded: (1) that a charter amendment would be necessary to implement comparable worth and (2) that CAL. GOV'T CODE § 53248 (West 1983) did not apply to the City and County of San Francisco because it did not set wage through collective bargaining and also had "plenary authority" over wage-setting. *Opinion*, at 1.

The City Attorney repeatedly cited section 8.047 of the City Charter. That section sets out the procedures to be followed in setting wages for San Francisco's Miscellaneous Employees, who comprise the majority of the city's labor force.<sup>181</sup> All 7,000 employees affected by the Board of Supervisor's pay equity ordinance, for example, are considered Miscellaneous Employees.<sup>182</sup> Agnost argues that section 8.047 provides detailed and rigid surveying procedures for arriving at the Miscellaneous Employees' salaries. Thus, each survey must consider wages prevailing among other Bay Area county governments as well as the area's private employers for "like work and like service."<sup>183</sup> The intrinsic worth of these employees' work to the city is therefore totally irrelevant and cannot be considered.<sup>184</sup>

According to the City Attorney, the same provision of the Charter does permit the Commission staff much discretion in choosing benchmarks, shifting certain occupations from one benchmark to another, raising the salaries of certain indexed jobs, and any other changes necessary to produce an internal alignment of salaries within each city department.<sup>185</sup> Although Agnost claims that the *merits* of comparable worth are not at issue,<sup>186</sup> it is clear that detailed formulae comparing the worth of certain occupations would substantially interfere with the Commission's traditional freedom in wage-setting. In an important

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181. See generally SAN FRANCISCO CITY CHARTER § 8.407.

182. SEIU Report, *supra* note 130, at 17. The miscellaneous employee classification does not include registered nurses, however. *Id.*

183. See *Opinion*, *supra* note 180, at 5-6.

184. Section 8.407 has the purpose of determining a generally prevailing wage from surveyed jurisdictions for like work and like service. The value or worth of the work or service is not a criterion that governs the collection of information from the survey jurisdictions except in an incidental way as reflected in the surveyed rates. Since worth or value of the services to the City is an internal factor that has no relationship to the generally prevailing rates found in the surveyed jurisdictions, it cannot be considered by the Civil Service Commission when making internal salary adjustments to achieve a generally prevailing wage.

*Id.*

185. See *Opinion*, *supra* note 180, at 1. See *supra* notes 134-42 and accompanying text for an extended discussion of that body's discretionary powers in deciding city and county salaries.

186. San Francisco, Cal., Proposition D (amending San Francisco Charter) (June, 1986). Under the initiative, for example, section 2.203-2 of the Charter, providing for Reappointment of the Employee Relations Director by the Board of Supervisors, would be deleted.

sense, then, his argument stands for an effort by city managers to preserve a civil sector free of all restrictions in many of its internal procedures, rather than a direct opposition to the principles of comparable worth.

Events following the November 1985 elections show that efforts to preserve and even widen the Commission's discretionary powers are intensifying. An initiative due to be placed on the June, 1986 ballot, for example, seeks to streamline that part of the Charter dealing with employee relations. If passed, the initiative would shift the supervision of all grievance procedures from the Board of Supervisors to the mayor's office. The initiative would also allow the General Manager for Personnel to make a large number of other decisions affecting employees without going to the voters as presently provided.<sup>187</sup>

The initiative effort is not unique to San Francisco, but is part of a current, nationwide trend to streamline the civil sector by giving its managers unprecedented freedoms.<sup>188</sup> San Francisco provides an important example of how such efforts are colliding with attempts to introduce pay equity for women and minorities. The city's opposition to comparable worth also dramatizes the peculiar nature of the public sector, where officials act both as employers and as implementers of social policy.

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187. Sections 3.662- .663 of the Proposition would establish a Department of Personnel Administration, whose director would be appointed by the mayor. The former and his staff would regulate recruitment, promotion and transfer of city employees; he or she would also "establish procedures to review and resolve allegations of discrimination on the basis of race, religion, sex, national origin, ethnicity . . . ." *Id.* The director would also conduct "a comprehensive investigation and survey of basic pay rates . . . in other government jurisdictions." *Id.* at 6. The mayor, rather than the Board of Supervisors would provide any "working condition benefits for employees covered" under section 8.407 and section 8.401. *Id.*

188. See Borjas, *Wage Determination in the Federal Government: The Role of Constituents and Bureaucrats*, 88 J. POL. ECON. 1110, 1143 (1980). Borjas points to the 1978 Civil Service Reform Act as beginning the trend in "relax[ing] . . . the stringent rules imposed by the civil service regulations concerning promotion and dismissal of federal workers. The new law [gave] . . . federal agencies wider powers in initiating either adverse or favorable personnel actions . . . and should increase the flexibility of bureaucratic managers to create . . . wage differentials." *Id.* Borjas also argues that such differentials may also result from the political influence or "clout" of the particular agency with the constituents it serves. *Id.* at 110; see also Los Angeles Times, October 14, 1985, at A-4, col. 1, for a Defense Department proposal "to revamp the federal service system by replacing the pay and grade scale with a pay-for-performance approach." *Id.*

## VIII. CONCLUSION

Cases such as *Bohm v. Hartz*, which arise in the private sector are important in showing what actually motivates some employers conducting market surveys. Such cases are also ideal for analysts interested in understanding how several discriminatory acts work together to depress the wages of a smaller workforce. With painstaking attention to detail, the *Bohm* dissent proved the majority's superficial analysis of Hartz's pay scale and concluded that neither it nor the market survey justifying it were legitimate. The dissent's methodology may prove a more subtle and reliable supplement to statistical data in separating legitimate uses of market surveys from those violative of Title VII.

The two *AFSCME* cases and the current debate in San Francisco are important for other reasons. They show that in the public sector, pay equity is often lowest in a scale of priorities which highlights budgetary concerns. They also illustrate the two faces of discrimination: how a set of private traditions silently becomes public policy, and how the public arena twists that policy even further, often to the detriment of women.

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