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NARROWING THE GAP: THE PROGRESS TOWARD PAY EQUITY

Richard Kirschner* and Martha Walfoort**

Pay equity is rapidly becoming the civil rights issue of the 1980's. Through legislation, collective bargaining, and—unfortunately—litigation, progress toward narrowing the pay gap between the sexes is slowly being achieved. Florida recently took its first step on the path to pay equity when the legislature allocated $300,000 for a study of the state classification and compensation system. In this Article, the authors recount the history of the pay equity movement by public employers, explain how job evaluation studies can document objectively sex-based inequities in pay, and assess the legal theories that undergird this movement. They conclude that pay equity is the latest chapter in the American pursuit of social justice.

If we still lived by the law of Moses, working women would probably be paid thirty shekels of silver for every fifty paid to men. Today, despite laws prohibiting sex-based employment discrimination and requiring equal pay for substantially similar work, a wide pay gap persists: female employees are paid an average of sixty-four cents for every dollar paid to their male counterparts. Not surprisingly, those individuals, organizations, and legislators who believe gender should not affect wages seek a remedy—pay equity.

The concept of pay equity is based on the belief that occupations primarily filled by women are artificially undervalued and

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1. Leviticus 27:3-4.
4. Derived from BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE, SERIES P-60, NO. 146, MONEY INCOME OF HOUSEHOLDS, FAMILIES, AND PERSONS IN THE UNITED STATES: 1983, AT 119-20 (1985). 5. Although the phrase “comparable worth” is often used interchangeably with the phrase “pay equity,” the authors disfavor the expression “comparable worth” because it is associated with other concepts and therefore tends to confuse. The authors use “pay equity” to refer to the principle that wages should not reflect the sex of the jobholder.
undercompensated because of the historical bias against women and "women's work." Because so many fields have been "sex-segregated" due to a variety of historical and sociological factors, wages traditionally have reflected the predominant sex of the jobholder. To achieve pay equity and remedy this longstanding problem, wage differentials based on the sex of the persons who now perform (or who have historically performed) the job must be eliminated.

To those employees who have raised the issue at the bargaining table, in the legislature, and in the courts, pay equity means simply fair pay for the work traditionally performed by women. Just as women have claimed "equal pay for equal work" when they perform jobs that are almost identical to those performed by men, they now seek equal pay for jobs that demand a comparable level of skill, knowledge, and responsibility, and are performed under working conditions comparable to those in male-dominated professions. More particularly, pay equity advocates believe employers should not discount the salaries of certain jobs—secretaries and bank tellers, for example—simply because they are filled primarily by women.

The rationale for pay equity is quite simple: bias against employees on the basis of sex—or race, religion, or national origin—has no place among the practices of any employer, especially a public employer. To the extent that current practices perpetuate the discrimination of an earlier day, those practices should be altered to ensure that such discrimination ceases. We ought not tolerate discrimination in employment even though fair employment practices may disrupt the status quo and may be more costly than discriminatory ones. Although some employers have resisted taking corrective action voluntarily, others have been alert to the benefits of a more equitable wage structure and to the economics of cooperation. In the City of Los Angeles, for example, city officials agreed to negotiate perceived wage inequities with the American Federation of State, County and Municipal Employees (AFSCME). Pay equity, said one official, "was just a matter of fairness."

Similarly, the City of Colorado Springs emerged from voluntary pay equity efforts with its fiscal health intact and the morale of personnel enhanced. In 1981, this conservative city surveyed its wage system and put into place a remedial scheme intended to

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eliminate sex-based wage inequities over four years. Personnel Director Richard Zickefoose explained the city's rationale as "fundamentally a moral issue. [Although] supply and demand would have provided us a clerical force at the lower salaries . . . that market fact was a result of years of discrimination against women workers. We felt we had no right to take advantage of it."

To eliminate sex-based wage inequities from their classification and compensation systems, most states have undertaken some degree of pay equity activity—with positive results. Unfortunately, these legislative efforts have not received the same degree of public attention as has been focused on litigation against pay inequities brought by frustrated employees.

I. PAY EQUITY ACTIVITIES IN THE STATES

As pay equity emerged as "the civil rights issue of the '80's," most states began to evaluate their compensation systems for sex-based wage discrimination; some began to make appropriate budget adjustments; a few avoided the issue entirely. Florida is among those states which have recently collected data on their classification and compensation systems, examining the pay equity efforts of other states, conducting hearings, and establishing committees to study the issue. Like about half the states, Florida has authorized job evaluation studies designed to identify sex bias in compensation policies and practices. As of April 1986, at least a dozen states had gone further, appropriating funds to eliminate or reduce wage disparities attributable to sex discrimination.

At the federal level, the House Committee on Post Office and Civil Service and the Senate Committee on Governmental Affairs asked the General Accounting Office (GAO) to report on options.

10. Id. See supra note 52 and accompanying text.
for conducting a pay equity study in the federal government.\textsuperscript{12} Hearings on the GAO report were held in 1985 and, as a result, the House passed a bill which would have established a Commission on Equitable Pay Practices. The commission would have selected a consultant to study sex, race, and ethnic bias in the federal civil service and would have made recommendations for eliminating unfair pay differentials.\textsuperscript{13} That the federal government, most states, and many local governments are addressing pay equity reflects a combination of concerns: fear of litigation under the Equal Pay Act and Title VII of the Civil Rights Act, recognition of the political power of women's organizations and government employee labor unions, and a desire to treat all employees fairly.\textsuperscript{14}

Fair employment practices make sound social policy. The benefits to government and the taxpayers include higher productivity due to improved worker satisfaction, the ability to attract high quality employees, and less worker turnover. As one state has recognized, "[f]air employment is good business and good government."\textsuperscript{15} Because Congress has prohibited all discrimination in the workplace, pay equity fulfills legal obligations as well.

Although a survey of all state activity in this burgeoning area is beyond the scope of this Article, a closer look at several states should prove instructive. Minnesota, Massachusetts, and Washington have taken different approaches to achieving pay equity in state employment—through legislation, collective bargaining, and litigation. A combination of these approaches is usually necessary.

\textbf{A. Minnesota: Pay Equity the Easy Way}

Minnesota—which arguably has done the best job of addressing wage disparities—was the first state to require implementation of pay equity,\textsuperscript{16} and it did so without disrupting the state budget.

\begin{itemize}
\item \textsuperscript{12} \textit{Congressional Research Serv., Econ. Div., Issue Brief No. 85116, Comparable Worth/Pay Equity in the Federal Government} 6 (rev. June 2, 1986). The GAO has reported recently the results of a survey of the pay equity activities in the states. \textit{See supra} note 130.
\item \textsuperscript{13} H.R. 3008, 99th Cong., 1st Sess., 131 CONG. REC. H8521-60 (daily ed. Oct. 9, 1985). After being approved by the House, the bill died in Senate Committee when the 99th Congress adjourned.
\item \textsuperscript{14} \textit{See Ohio Bureau of Employment Servs., Pay Equity in Ohio's State Agencies: Final Report to Governor Richard F. Celeste} 1 (1986) (hereinafter cited as \textit{Ohio Pay Equity Report}).
\item \textsuperscript{15} \textit{Id.} at 2.
\item \textsuperscript{16} \textit{See Who's Working for Working Women?}, \textit{supra} note 8, at 22.
\end{itemize}
Minnesota's road to pay equity began in 1979 with a study of state employees' compensation. Subsequently, a task force on pay equity was established. Following the task force's recommendation that sex-based disparities disclosed by the study be corrected, the legislature amended the state civil service law to require "equitable compensation relationships" between job classifications in the executive branch. By this enactment, the Minnesota Legislature—with virtually no opposition—established "comparability of the value of the work" as the primary consideration in setting salaries in the executive branch.

Minnesota required job classes to be analyzed annually and recommendations for appropriations to adjust salaries appropriately to be submitted to the legislature. Funds thereafter appropriated are to be allocated through the collective bargaining process. The statute included provisions to protect the state, for a limited period, from lawsuits founded on the results of the job evaluation process.

In 1983, the first year of the pay equity adjustments, the legislature appropriated about $22 million for pay equity adjustments over the following two years. After further appropriations, Minnesota has achieved pay equity for nearly 10,000 employees. Following the last of the wage adjustments in 1986, the total cost appeared to be less than the initial estimate of four percent of the state payroll, or $39 million.

Minnesota's efforts did not end there. In 1984, the legislature extended the pay equity policy to local governments. That law requires local governments to develop job evaluation systems and to correct sex-based wage inequities for 150,000 municipal and county employees within three years. Pay equity will cost local governments in Minnesota an estimated one or two percent of existing payrolls.

17. MINN. STAT. ANN. § 43A.01(3) (West Supp. 1986).
18. Id.
19. Id.
23. BNA Special Report No. 5, supra note 20, at 4.
Minnesota’s happy conclusion is that “[i]f you want pay equity to work, it can work very smoothly.” An examination of the results achieved within four years of the initial legislation substantiates this finding. Costs have been reasonable. No wages have been reduced or frozen. No additional layer of bureaucracy was added. No strikes or lawsuits have depleted the public treasury. State employment of women has increased by six percent. Employment of women in nontraditional jobs has increased almost twenty percent. And an outside study has indicated that the program has the support of more than eighty percent of the state workers. The Minnesota model is a convincing example of how a state legislature can methodically reduce sex bias in compensation systems at a reasonable cost.

B. Massachusetts: Pay Equity Through Bargaining

Other states have moved toward pay equity through collective bargaining. Like many states, Massachusetts began pay equity efforts by investigating its classification and compensation system. A reclassification study was authorized to determine which jobs were not paid equitably with “positions of comparable worth.” Legislative committees were also established.

Governor Michael S. Dukakis supported the pay equity concept and endorsed collective bargaining as the best means of achieving it. After the state agreed to discuss the most severe wage inequities before contracts expired, the state and the unions representing state employees reviewed job positions in the state civil service. Pay equity adjustments were negotiated initially for the most grossly undercompensated jobs, which were two classifications of nurses, covering about 1,500 employees, of whom more than ninety percent were women. When the contracts expired, upgrades were negotiated for approximately 7,000 more employees, including clerks, librarians, health care workers, and others in predominantly female jobs.


25. See id.

26. PAY EQUITY AND COMPARABLE WORTH, supra note 8, at 58. Massachusetts Equal Pay Act calls for equal pay for “work of like or comparable character or work on like or comparable operations.” MASS. GEN. LAWS ANN. ch. 149, § 105A (West 1986).

Collective bargaining has been effective elsewhere. Indeed, whether pay equity increases are achieved through legislation, negotiation, or litigation, collective bargaining usually plays a part, frequently in the allocation of appropriated funds between various job classifications. Negotiations between the State of Maine and the union representing state employees, for example, addressed the pay equity issue. In 1982, the parties established a joint committee on pay equity, which commissioned a job evaluation study. The legislature later expanded the role of collective bargaining, enabling the union to negotiate changes in job classification and compensation according to the job evaluation study.28

A similar illustration can be found at the local level. In Los Angeles, AFSCME conducted a job study that disclosed substantial pay inequities affecting its predominantly female clerical and library workers. In a well publicized and lauded agreement, the city and the union negotiated a three-year contract with pay equity raises of ten to fifteen percent, to be phased in over four installments. The cost of pay equity increases was estimated at about one-half of one percent of the city budget.29 Mayor Tom Bradley pledged to achieve pay equity between male and female city workers without legal battles or costly studies.30

More recently, a collective bargaining agreement negotiated for Connecticut’s health care workers—seventy-five percent of whom are women—included a special pay equity fund to provide eight to ten percent wage increases, effective in 1988. The agreement came after a job evaluation study commissioned by the Connecticut Legislature found that health care jobs were undervalued and undercompensated.31

Other jurisdictions should see the appeal of voluntary efforts. Cooperation between public employers and the unions representing their employees can eliminate or reduce pay inequities by the means most feasible in a given situation. The pay gap can be more effectively and satisfactorily resolved by negotiation and agreement than by judicial mandate. However, when public employers have been unwilling to take meaningful corrective action to eliminate

28. BNA Special Report No. 5, supra note 20, at 3-4.
30. Id.
the sex bias in their compensation systems, litigation has proved to be a third method of implementing pay equity.

C. Washington: Pay Equity the Hard Way

The State of Washington, in which some of the earliest significant pay equity initiatives occurred, took perhaps a torturous road to pay equity. Although the result reached in late 1985 brought the state closer to pay equity, the preceding decade was marred by a series of failures. In 1973, the state conducted a pilot job study after the Washington Federation of State Employees, an affiliate of AFSCME, objected to perceived discrimination against women in the state’s compensation system. That study found clear indications that pay differences between male and female workers were not wholly attributable to job worth. It recommended further study to correct the problem. Governor Daniel J. Evans then commissioned the first major pay equity study in the public sector. Completed in 1974, this study revealed that women were paid about twenty percent less than men.

Governor Evans authorized a follow-up study in 1976 and included in his final budget the funds to begin implementing pay equity. However, his successor, Governor Dixie Lee Ray, reneged on her campaign commitment to pay equity and deleted the appropriations from the state budget.

Through intensive lobbying, AFSCME convinced the legislature to require that the state’s biennial salary survey include salary adjustments to eliminate wage inequities between comparable positions, or those involving “similar responsibilities, judgment, knowledge, skills, and working conditions.” Such data have been submitted in alternate years since 1977. In addition, another fol-

33. A detailed description of this groundbreaking study is provided in Remick, Major Issues in a priori Applications, in COMPARABLE WORTH AND WAGE DISCRIMINATION: TECHNICAL POSSIBILITIES AND POLITICAL REALITIES 102 (H. Remick ed. 1984) [hereinafter cited as Applications].
34. AFSCME, 578 F. Supp. at 861.
35. Id. at 861-62; see also Applications, supra note 33, at 103.
36. AFSCME, 578 F. Supp. at 862; see also Applications, supra note 33, at 103-04. Gov. Ray remarked that comparable worth was like “comparing apples, pumpkins, and cans of worms.” Id. at 104.
37. WASH. REV. CODE ANN. §§ 41.06.160(5), 28B.16.110(5) (1986); see AFSCME, 578 F. Supp. at 862; see also Applications, supra note 33, at 104.
low-up study was conducted in 1980.\textsuperscript{38} The union took additional steps as well, filing a charge of sex-based wage discrimination with the Equal Employment Opportunity Commission in 1981 and suing in federal district court in Washington the following year.\textsuperscript{39}

In 1983, the legislature committed the state to achieving pay equity within a decade and appropriated $1.5 million to get started.\textsuperscript{40} In that same year, the district court issued a ground-breaking decision that held the state liable for intentional sex discrimination and ordered injunctive relief and back pay to affected employees.\textsuperscript{41} However, that decision was later reversed by a three-judge panel of the United States Court of Appeals for the Ninth Circuit.\textsuperscript{42}

Facing further appeals, the state entered settlement negotiations with the union. The legislature provided an additional inducement: if the parties could negotiate a settlement by the end of 1985, approximately $42 million would be appropriated to initiate pay equity adjustments.

While the plaintiffs sought an en banc rehearing, the union and the state reached a $101 million settlement specifying pay adjustments to be phased in between 1986 and 1992.\textsuperscript{43} Thus, the ultimate resolution of the pay equity issue in Washington was made not by the courts, but by the parties. Had the state adopted a policy of voluntary cooperation a decade earlier, the same result might have been achieved without years of litigation.

\textbf{D. Florida: Initiating the Process}

Florida has recently addressed the problem of comparable worth by attempting to identify pay inequities between state workers. Spurred into action by Representative Helen Gordon Davis,\textsuperscript{44} the House of Representatives first authorized action on the issue. After the Senate failed for several years to support the pay equity proposals of the House, Representative Davis took the unusual step of enlisting the aid of a coalition of women's groups and other organizations to raise private funds for a job evaluation study.

\textsuperscript{38} AFSCME, 578 F. Supp at 862; see also Applications, supra note 33, at 104.
\textsuperscript{39} See infra text accompanying notes 87-123.
\textsuperscript{40} AFSCME, 578 F. Supp at 862; see also Applications, supra note 33, at 104-05.
\textsuperscript{41} See infra text accompanying notes 87-92.
\textsuperscript{42} AFSCME v. Washington, 770 F.2d 1401 (9th Cir. 1985).
\textsuperscript{44} Dem., Tampa.
These funds were used in 1986 to retain the consulting firm of Hubbard and Revo-Cohen, Inc., to analyze a representative sample of 300 job classes of the state Career Service System to determine whether any sex-based discrimination could be found. The study was designed to measure "what is currently valued implicitly within the State, thus allowing for pay adjustments to reduce any gender or race bias without radically altering the State of Florida's basic philosophy of pay." The method sought to capture the non-discriminatory policies underlying the compensation system while factoring out bias on the basis of sex.

The Hubbard and Revo-Cohen study found "substantial under-valuation of female- and minority-dominated classes in the Florida Career Service System." According to the study, the annual salaries of exclusively female jobs were about $3,495 lower than those of jobs equally valuable to the state being performed primarily by men. The evaluators estimated that adjustments to achieve pay equity would require expenditures of $75.5 million over a five-year period.

Some of the differential found by the consultants was attributed to undervaluation of certain factors associated with female- and minority-dominated jobs, such as unfavorable working conditions, client contact, and communication with the public. The study also revealed that the state periodically had adjusted salaries for reasons, such as recruitment and retention, unrelated to job content. In addition, the state had responded to agency requests for selective re-evaluation. While adjustments were based on "reasonable and very common justifications," alterations were far from systematic, and thus, certain job classes were "out of alignment."

Following completion of the Hubbard and Revo-Cohen study, and during the final hours of the 1986 Regular Session, the Florida Legislature took action. It authorized $300,000 for a comprehensive study of the state classification and compensation system, under the aegis of the State University System. The legislature contemplated a multi-year program to establish "competitive, fair and eq-

45. The Hubbard & Revo-Cohen study also evaluated Florida's system for possible race-based inequities. HUBBARD & REVO-COHEN, INC., FINAL REPORT OF THE FLORIDA CAREER SERVICE SYSTEM PAY EQUITY STUDY i-ii (1986).
46. Id. at ii.
47. Id.
48. Id. at 23.
49. Id. at ii.
50. Id. at 22.
51. Id. at 17.
suitable” salary levels. Priority in salary adjustments was assigned to the female-dominated classes of nurses, clericals, and food service workers. This type of full-scale classification and compensation study is the primary tool now in use for identifying pay inequities.

II. JOB EVALUATION STUDIES: IDENTIFYING THE PROBLEM

“Job evaluation” is the term used to refer to methods of analyzing job content for purposes of wage assessment. Such methods range from an employer's informal hierarchy of jobs in a small enterprise to highly sophisticated studies by consultants using a variety of well-developed techniques for job content analysis. Although job evaluations have been used historically as a rationale for established pay structures, they also are useful in challenging such structures.

A. History of Job Evaluations

Before allocating pay, an employer must consider a variety of factors—financial health, unionization, industry standards, and the value to the employer of a particular job relative to other jobs within the organization. Another frequently cited factor is the free market, which theoretically sets the price of labor according to supply and demand. Since the late nineteenth century employers have used job evaluations to compare their wage schedules to those in the marketplace.

Businesses did not generally use formal job evaluations until the National Labor Relations Act validated collective bargaining in 1935. After passage of the Act, unions were able to pressure employers to explain and defend salary structures. There were, however, some earlier attempts to standardize the relationship between wages and job worth. For example, wage rates in white-collar fed-

54. Id.
57. The first attempt to establish a comparable worth policy occurred in 1838. See NATIONAL RESEARCH COUNCIL, INTERIM REPORT TO THE EQUAL EMPLOYMENT OPPORTUNITY COM-
eral jobs were systematically classified by statute in the 1920's. Currently, almost all federal employees are covered by job evaluation plans, as are most state and large county governments and the majority of firms with more than 250 employees. Historically, job evaluations were performed to add rigor to wage setting as firms and government work forces grew in size. Following World War II, unions began seeking contract provisions to guarantee equal wages for jobs demanding similar skills. Job evaluations became tools for employers and labor organizations to prove conflicting claims; they were a key to building a consensus within groups of competing workers and between labor and management. As long as the credibility of the evaluation process remained high, the studies facilitated labor peace and worker unity.

Plainly, the use of job evaluations in the American workplace is not a new phenomenon. Although the uninitiated may claim that comparing one job to another is like comparing "apples and oranges," they no doubt overlook the historical use of such evaluations in industrial relations. Although research on job evaluation has been published throughout this century, it has assumed new prominence with the current groundswell of interest in pay equity. Job evaluations for pay equity are much like those used more than a century ago; they simply have found a new application. Pay equity analysis adds gender to the internal equity consideration, but the methodology remains substantially the same.

B. The Methodology of Job Evaluations

There are four basic job evaluation systems: ranking and grading classifications, usually identified as qualitative methods; and factor comparison and point factor methods, the more quantitative forms. Among the four standard systems, the point factor method has become the most popular in the private sector, representing sixty-five percent of the systems used for evaluating nonsupervisory jobs and forty-four percent of those used for professional or

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58. Id.
59. Id. at 49 n.1.
60. Analysis and Recommendations, supra note 56, at 27.
managerial evaluations. The General Schedule (GS) for federal white-collar employees is typical of such plans. The eighteen grades of the GS system represent the sum of values weighted for employee qualifications, job responsibility, and job difficulty. The system reflects congressional intent that employees receive “equal pay for substantially equal work” and that pay vary “in proportion to substantial differences in the difficulty, responsibility, and qualification requirements of the work performed.”

Recently, state and local governments have begun to adopt the more quantitative methods of job evaluation. To identify sex bias, Minnesota used the Hay Guide Chart Profile Method, a simplification of the relatively complex factor comparison method, which analyzes job classifications according to four factors: “know-how” (the knowledge and skills required for the job), problem-solving, accountability, and working conditions. Each factor is further divided into subfactors. Points are then assigned for each subfactor and totaled. The pay levels of predominantly male and predominantly female jobs with equivalent point totals can then be compared. Assuming that in an equitable system point totals will correspond to pay levels without regard to the sex of the employees, disparities between pay levels can be scrutinized.

63. An Analytic Review, supra note 57, at 50.
64. Id.
65. Id. at 17.
66. Id.
68. This method was used, for example, by Minnesota in its efforts to identify sex bias in its compensation practices. Other states have used point factor evaluation systems as well. In March 1986, Ohio completed its final report on pay equity in state agencies based on a study using both quantitative and qualitative methods. Ohio Pay Equity Report, supra note 14, at 9-11.
70. Id. at 9. Within “know-how” there are three components: substantive, managerial, and human relations. Problem-solving is rated by degree of difficulty. Accountability is measured by the amount of discretion, potential financial impact, and directions of impact. Working conditions takes into account physical effort, hazards on the job, and the general nature of the working environment.
C. Reliability of Job Evaluation

Although job evaluations are sufficiently reliable to be extremely useful to employers, users should recognize the potential for subjectivity in a job evaluation process. Even ardent proponents of this technique urge its continued improvement. Pay equity advocates are particularly eager to see additional research in factor selection and factor weighting, and on the potential for bias within the evaluation process itself. For example, sexual stereotyping and undervaluation of characteristics associated with jobs predominantly performed by women have been noted in evaluation systems. 71

Both observers and practitioners have proposed ways to reduce subjectivity. One recent suggestion is to reduce cultural stereotyping of “women’s work” by taking into account all relevant conditions under which a job is performed. 72 Because job evaluation plans were first developed for manufacturers, they fail adequately to consider the particular conditions under which many women work.

For example, the loud noise and intense heat of open-hearth manufacturing would readily register as stressful or even hazardous, but the constant noise of telephones, typewriters, and printers, and the frequent interruptions to which many clerical workers are subjected, might not be so readily measured. Moreover, the prevalence of the video display terminal (VDT) has spawned a new appreciation of the hazards to which operators are exposed. 73 These elements of a job should be recognized as adverse working conditions. In addition, special motor skills, such as those needed for typing and nursing procedures, may be chronically underestimated. 74

Existing systems can be adjusted to reflect the results of continued research. For example, Minnesota modified its job evaluation system to represent more fairly typical working conditions for women by adding points for jobs requiring repetitive small muscle movements, such as those used in word processing operations and many other clerical jobs. 75 Similarly, Ohio included traits of both

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73. Id. at 8.
75. Id. at 10.
male- and female-dominated occupations in the surroundings factor. "Contact with disagreeable substances," for example, occurs frequently in many female-dominated health care jobs and historically has been overlooked by evaluators.76

Although no system is perfect, job evaluation is a valuable way to identify sex-based inequities and is continually being improved. Pay equity should not await the development of the perfect paradigm for identifying the problem or implementing the remedy. Indeed, if an employer unreasonably resists taking voluntary action to correct sex-based inequities, aggrieved employees may resort to the courts for redress.

III. THE STATE OF THE LAW ON PAY EQUITY

Not surprisingly, legal actions challenging employers' compensation practices on the basis that they undervalue and undercompensate jobs of women have been brought primarily under the most comprehensive of the federal anti-discrimination statutes, Title VII of the Civil Rights Act of 1964.77 Title VII makes it unlawful "to discriminate against any individual with respect to his compensation, terms, condition, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."78 Title VII also prohibits discrimination in hiring, promotion and discharge, and in two areas usually implicated in pay equity disputes: classification and assignment.79

Although Title VII may appear sufficiently broad to encompass claims of sex-based compensation discrimination, its application initially proved controversial because of a deceptively simple "technical amendment" added two days before passage.80 The so-called Bennett Amendment permits employers to pay men and women different wages if the Equal Pay Act authorizes differentiation.81 Before 1981, federal courts had reached conflicting conclusions about the effect of the Bennett Amendment on the relationship between Title VII and the Equal Pay Act,82 which had been

76. OHIO PAY EQUITY REPORT, supra note 14, at 16.
78. Id.
79. Id. § 2000e-2(a)(2).
82. The Equal Pay Act, 29 U.S.C. § 206 (d)(1) (1982), provides that "[n]o employer . . . shall discriminate . . . between employees on the basis of sex by paying wages . . . at a rate
added to the Fair Labor Standards Act a year earlier. At issue was the relatively narrow question of whether the Bennett Amendment, by its reference to the Equal Pay Act, restricted Title VII's prohibition against sex discrimination in claims of equal pay for equal work.

A. County of Washington v. Gunther

In *County of Washington v. Gunther*, the United States Supreme Court examined the language of the Bennett Amendment and the Equal Pay Act. The Court concluded that the Amendment was intended to incorporate into Title VII only the four affirmative defenses in the Equal Pay Act—not the equal work standard. Consequently, as long as an allegedly discriminatory compensation practice is not based on seniority, merit, quantity or quality of production, or “any other factor other than sex,” it can be challenged under Title VII even though no employee of the opposite sex is being paid more for substantially similar work.

The plaintiffs in *Gunther* were four female guards in an Oregon county jail that was divided into a men's section and a women's section, staffed by guards who also were segregated by sex. Although the male and female guards shared many of the same duties, the district court concluded that the female guards' jobs were sufficiently different to defeat the plaintiffs' Equal Pay Act claim. The jail matrons also claimed in the alternative, however, that the disparity in pay was due in part to intentional wage discrimination and, as such, was actionable under Title VII. The plaintiffs presented a county survey indicating women should be paid about ninety-five percent of what the male guards were paid. Although the county paid the male guards the full evaluated worth of their jobs, it paid the female guards only seventy percent of the male guards' salaries. The plaintiffs alleged that the difference was a result of intentional sex discrimination. The Supreme Court held the allegations were sufficient to state a cause of action under Title VII.

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83. *452 U.S. 161 (1981).*
The Court emphasized that the case was one of intentional discrimination and rejected any suggestion that the case raised the "controversial concept of 'comparable worth.'" Though the Court declined to define "the precise contours of lawsuits challenging sex discrimination in compensation under Title VII," it indicated that cognizable claims would arise where an employer admits that a woman's salary would be higher were she a male, or where an employer uses a thinly veiled, sex-biased system for determining wages, or where women are required to pay more into a company's pension plan than are men.

The outcome of pay equity cases after Gunther has depended largely on whether the plaintiffs can establish discriminatory intent, and on whether the employer can successfully assert the "market defense." Both issues were prominent in a landmark case from Washington.

B. AFSCME v. State of Washington

The most publicized pay equity challenge after Gunther was American Federation of State, County and Municipal Employees v. State of Washington (referred to as AFSCME). In AFSCME, the plaintiff unions and individual employees alleged that the State of Washington discriminated against women by undercompensating jobs that were at least seventy percent female. After nearly a decade of extra-judicial attempts to resolve the claim, the federal court finally decided the case. Finding that the state's pay practices violated Title VII, the district court awarded sweeping injunctive relief and back pay to some 15,000 affected employees. The court concluded that the state's compensation system, though facially neutral, had a disparate impact on employees in predominantly female job classifications. The court also likened the case to Gunther, finding it "a straightforward 'failure to pay' case." It found intentional discrimination by the state, relying on the plaintiffs' evidence that: (1) the state deliberately paid workers in fe-
male-dominated job classifications twenty percent less than it paid workers in predominantly male job classes assigned the same number of job evaluation points; (2) as the percentage of women in a job classification increased, wages for that classification decreased; (3) subjective standards were utilized that had a disparate impact on female-dominated jobs; (4) state officials admitted that employees in predominantly female occupations were paid lower wages; and (5) the state established the worth of the plaintiffs' jobs, and then failed to pay the plaintiffs salaries commensurate with the evaluated worth of their positions.\textsuperscript{90}

The job studies commissioned by the State of Washington figured prominently in \textit{AFSCME}.\textsuperscript{91} Finding the state's failure to eliminate discrimination to be evidence of bad faith, the court observed that by requiring comparable worth studies to be submitted to the legislature, the state obviously knew that it would have to pay its workers the evaluated worth of their jobs, and could not, therefore, argue that it was "surprised, confused or misled" as to the legal implications of conducting studies.\textsuperscript{92}

The Ninth Circuit disagreed with the district court's conclusion on both the impact and treatment theories. Making short shrift of the plaintiffs' disparate impact claim, the court held that, because the state's decision to set wages according to the competitive market rather than to a comparable worth theory involved factors that were not readily ascertainable, the challenged practice defied disparate impact analysis.\textsuperscript{93}

\begin{itemize}
\item \textsuperscript{90} \textit{Id.} at 864.
\item \textsuperscript{91} Although plaintiffs may prefer, as a practical matter, to use job studies authorized by the employer as part of their proof of wage discrimination, these studies are not always available nor are they absolutely necessary. See Taylor v. Charley Bros. Co., 25 Fair Empl. Prac. Cas. (BNA) 602 (W.D. Pa. 1981) (defendant's failure to undertake job evaluation study, coupled with other purposeful and unfavorable treatment of women, allows inference of intent to discriminate).
\item However, courts uniformly reject suggestions that courts should conduct independent evaluations of unrelated jobs. See, \textit{e.g.}, Plemer v. Parsons-Gilbane, 713 F.2d 1127, 1133 (5th Cir. 1983); Power v. Barry County, Mich., 539 F. Supp. 721, 726 (W.D. Mich. 1982); \textit{cf.} County of Washington v. Gunther, 452 U.S. 161, 181 (1981) (claim did not require court to make subjective assessment of the value of the male and female jobs at issue).
\item \textit{AFSCME}, 578 F. Supp. at 870.
\item \textsuperscript{92} \textit{AFSCME}, 770 F.2d at 1406. That conclusion had been reached by other courts, including the Ninth Circuit, prior to the \textit{AFSCME} decision. In Spaulding v. University of Washington, 740 F.2d 686 (9th Cir. 1984), \textit{cert. denied}, 105 S. Ct. 511, (1984), faculty members of the School of Nursing sued under the Equal Pay Act and Title VII, alleging they were paid less than male faculty members in other departments of the university who performed equivalent work. The court rejected the plaintiffs' claim that the university's facially neutral practice of setting wages according to market prices had a disparate impact on fe-
\end{itemize}
The court also found that plaintiffs had failed to demonstrate intentional discrimination. Though acknowledging that comparing wages of dissimilar jobs “may be relevant to a determination of discriminatory animus,” the court concluded that statistics and evaluation studies alone were insufficient to establish the requisite discriminatory motive.  

This observation was not particularly novel and should not have been dispositive, for the plaintiffs did not rely exclusively on Washington’s job evaluation studies for proof of intent to discriminate. The court essentially ignored the plaintiffs’ extensive evidence concerning the state’s classification and compensation practices, the statistical significance of wage disparities which unduly favored male employees, and the admissions of executives and officials that the wage system was biased against women. It established an unreasonably stringent standard of intent virtually unknown in Title VII cases.

1. The AFSCME Court’s Standard of Intent

According to the AFSCME court, plaintiffs alleging wage discrimination must prove that the challenged wage differentials are the product of an employer’s improper motivation, or “discrimination against female employees. The plaintiffs’ case “simply [did] not fit into the disparate impact model.”

Id. at 707. In the court’s view, that model was not suited to cases involving “wide-ranging allegations challenging general wage policies.” Id. The court declared, “[W]e cannot manageably apply the impact model when the kernel of the plaintiff’s theory is comparable worth.” Id. at 708. The court relied on Pouncy v. Prudential Ins. Co., 668 F.2d 795 (5th Cir. 1982), to support its conclusion. In Pouncy, black employees used a disparate impact theory to attack their employer’s promotion practices. The Fifth Circuit concluded that “[t]he discriminatory impact model of proof...is not...the appropriate vehicle from which to launch a wide ranging attack on the cumulative effect of a company's employment practices.” Id. at 1271-72.

Under the Pouncy/Spaulding analysis, wage differentials between the sexes cannot be challenged with the disparate impact model unless the differentials can be attributed to a specific practice of the employer. However, another approach, not mentioned by the Spaulding court, was taken in Segar v. Smith, 738 F.2d 1249 (D.C. Cir. 1984), cert. denied sub nom. Meese v. Segar, 105 S. Ct. 2357 (1985). There, plaintiffs alleged that a governmental agency had discriminated against black employees in salary, promotions, initial assignments, and other practices. The Segar court applied the disparate impact analysis because the plaintiff had demonstrated substantial statistical disparities. The court found that a rule forcing plaintiffs to identify all the causes of observed disparities would permit “challenges only to readily perceptible barriers” and thus undercut Title VII’s purpose. Id. at 45-46.

94. AFSCME, 770 F.2d at 1407 (citations omitted).

In other words, the plaintiffs had to show not "merely" that the employer's wage differentials were attributable to sex rather than other legitimate factors, but that a particular policy was chosen precisely because it discriminated.96

This test contravenes Title VII law which does not require a showing of animus or ill will. That an employer may simply be taking advantage of economic reality by paying some employees inferior wages because they will work for less is not the appropriate focus. The dispositive feature is that the lower wages are paid according to the race or sex of the employee, or take into account the race or sex of the employee.

Other courts confronted with sex discrimination in compensation have not adopted a standard as stringent as that applied by the AFSCME court. In a case decided the same year as Gunther, the United States Court of Appeals for the Fifth Circuit considered a claim that a university had a pattern of discrimination in pay for female employees.98 The Fifth Circuit reversed the district court judgment in favor of the employer, holding that the plaintiffs were required to establish, by a preponderance of the evidence, that sex-based wage discrimination was the university's standard practice—not simply an aberration.99 Rejecting other claims, the court concluded that only those plaintiffs employed in the academic division of the professional and administrative staff were presumptively entitled to relief, subject to the university's showing that its compensation practices were not based on a policy of discrimination.100 The plaintiffs had based a prima facie case of discrimination on the following facts: (1) a significant number of women were paid less than the university minimum for their job levels; (2) four employees in the academic division were paid more than the maximum for their job level—all were men; (3) some women's positions had been reclassified into lower levels, yet no male employee had been similarly treated; and (4) the university's pay plan had been designed to correct its sexually discriminatory compensation practices.101 Conspicuously absent from the successful plaintiffs' case was any evidence of discriminatory animus.

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96. AFSCME, 770 F.2d at 1407.
97. Id. at 1405, 1407.
99. Wilkins, 654 F.2d at 407.
100. Id. at 410-11 (citation omitted).
101. Id. at 406-07.
A similar formulation for a prima facie showing of discrimination was required by a district court in Briggs v. City of Madison. A district court in Briggs v. City of Madison. In that case, public health nurses challenged the city's practice of paying higher wages to sanitarians, all of whom were men. The court held that to shift the burden of demonstrating a legitimate and nondiscriminatory basis for allegedly illegal employment practices to the employer, the plaintiff must establish that she belongs to a protected class and is employed in a sex-segregated job classification paid less than a male-dominated job classification. She must also show that "the two job classifications involve work that is similar in skill, effort, and responsibility." A plaintiff need not prove discriminatory animus.

Similarly, in American Nurses Association v. Illinois, a district court dismissed a complaint charging Illinois with discrimination against nurses and other state employees in female-dominated jobs as "fundamentally dependent on recognition of the concept of comparable worth." The complaint was based in part on a 1983 study conducted by Illinois which found sex-based wage disparities.

Observing that "[c]omparable worth is not a legal concept, but a short-hand expression for the movement to raise the ratio of wages in traditionally women's jobs to wages in traditionally men's jobs," the United States Court of Appeals for the Seventh Circuit agreed with the AFSCME court and others that a Title VII violation could not rest solely upon allegations that an employer failed to implement recommendations of a job study it had commissioned. The court acknowledged that a job evaluation study could be relevant to the question of intentional sex discrimination, as such a study may force the employer to declare its policy toward female employees. However, the court cautioned that failure to

102. 536 F. Supp. 435 (W.D. Wis. 1982).
103. Id. at 443, 445. The Briggs court found that the public health nurses' jobs "required skill, effort and responsibility at least equal to, and possibly in excess of, that required of sanitarians by their jobs, and that the jobs were performed under similar working conditions." Id. at 442. The court also found that the plaintiffs had established their prima facie case. Id. at 445. However, the court ruled that the city successfully rebutted plaintiffs' case through its "market evidence" that higher salaries were needed to recruit and retain qualified sanitarians. For a discussion of the market defense, see infra text accompanying notes 115-23.
104. 606 F. Supp. 1313 (N.D. Ill. 1985), rev'd, 783 F.2d 716 (7th Cir. 1986).
105. Id. at 1315.
106. American Nurses Ass'n, 783 F.2d at 719.
107. Id. at 720.
108. Id. at 721.
implement a comparable worth study would not by itself give rise to Title VII liability. Such failure would trigger liability only if it were motivated by sex discrimination—if, for example, officials believed that men should be paid more than women using similar skills or effort. 109

These observations present a far more accurate view of the standard of intent applicable to Title VII actions than that rendered by the AFSCME court. Moreover, the AFSCME court disregarded the plaintiffs’ statistical proof, requiring “independent corroborative evidence of discrimination.” 110 The Court thereby read into Title VII a mandate that plaintiffs produce some unspecified amount of direct proof of discrimination. The court’s ruling not only ignored the direct evidence adduced by the plaintiffs—including the job evaluation studies, admissions by officials, and sex-based job advertising by the state—it also contravened well-settled Title VII law that intent can be shown by statistical and circumstantial evidence alone. 111 Indeed, discriminatory intent “can in some situations be inferred from the mere fact of differences in treatment.” 112 In short, discrimination can be established in Title VII cases if the plaintiff’s statistical evidence demonstrates that the challenged practice is more likely based on sex than on other, nondiscriminatory factors. The AFSCME court, however, substituted a standard of intent that is virtually insurmountable.

2. The AFSCME Court’s Analysis of the Market Reliance Defense

The Ninth Circuit’s determination that an employer can insulate itself from Title VII liability by basing wages on the market is also flawed. Indeed, the court’s analysis of the market reliance defense is notable more for its fervor than its intellectual rigor:

Neither law nor logic deems the free market system a suspect enterprise. . . . We find nothing in the language of Title VII or its legislative history to indicate Congress intended to abrogate fundamental economic principles such as the laws of supply and de-

109. Id. at 726.
110. AFSCME, 770 F.2d at 1407. See generally Appellees’ Petition for Rehearing and Suggestion for Rehearing En Banc, AFSCME v. Washington, 770 F.2d 1401 (9th Cir. 1985) [hereinafter cited as Appellees’ Petition].
112. Id. at 335 n.15.
mand or to prevent employers from competing in the labor market.\textsuperscript{113}

The court's conviction that reliance on the market alone establishes a lack of discrimination is misguided in a number of respects.

First, the focus on the market reliance defense in the court's analysis is not warranted by the facts of the case. The state, for instance, did not consistently pay prevailing market rates. Plaintiffs showed that market surveys were conducted for only a few jobs. Other jobs were indexed to those surveyed, and jobs predominantly filled by one sex usually were indexed to other jobs predominantly filled by that sex. In addition, administrative boards frequently tampered with the indexing and discarded proposed wage adjustments in favor of more easily administered, across-the-board percentage increases which maintained the status quo.\textsuperscript{114} In other words, the state barely followed the market and often departed from market standards. Under the circumstances, the court appears to have grossly exaggerated the role of the free market while downplaying evidence of intent produced by the plaintiffs. Equally important as a matter of legal theory, it is far from clear that reliance on "the market" is a valid defense to a charge of discrimination.

3. The "Free" Market and the Market Reliance Defense

The market is commonly envisioned as a maintenance-free mechanism for the exchange of goods and services. This mechanism embraces two labor markets, external and internal, neither of which operates alone to determine wages. The external market exists outside the walls of the employer's enterprise; the internal market operates within. The external market forces of supply and demand have little direct effect on the internal market rules controlling compensation and job assignment because, employers argue that "the effects of external demand and supply are sufficiently imperfect to leave room for discretion."\textsuperscript{115} The market reliance defense is intellectually dishonest; it belies the market theory upon which it is supposedly based. For one thing, wages are

113. \textit{AFSCME}, 770 F.2d at 1407.
114. \textit{See generally Appellees' Petition, supra} note 110, at 7.
not as responsive to supply and demand as are prices for commodi-
ties. Put simply, "[w]hen the supply of applicants increases, the
salaries paid to incumbents do not fall; and when the supply of
applicants declines, salaries do not notably increase."\textsuperscript{116} Besides
overlooking this phenomenon, the market reliance defense ignores
employers who depart from market prices. For example, before the
landmark pay equity litigation in \textit{AFSCME}, the State of Wash-
ington gathered external market information on wage setting. How-
ever, the state largely disregarded the information, choosing in-
stead to follow its own traditions and to use legislatively imposed
budget ceilings.

The \textit{AFSCME} court's acceptance of the market reliance defense
was ill-considered. That other employers engage in discriminatory
practices should not insulate any employer from liability. Granted,
market considerations reflecting factors other than sex bias may be
relevant. Nondiscriminatory factors affecting market prices include
the availability of workers, recruitment and retention needs, and
the effectiveness of collective bargaining. But these factors should
not always result in higher wages for male-dominated jobs, nor can
they account for a direct, proportional decrease in pay for every
increase in the percentage of women in a job.\textsuperscript{117} When that result
occurs, as it did in Washington, a reasonable inference is that the
market price for jobs was based significantly on the sex of the pre-
dominant jobholder. If an employer perpetuates market discrimi-
nation, that employer should be liable.

The \textit{AFSCME} court's view is not unanimously shared. The Su-
preme Court has ruled that reliance on an external market wage is
not a "factor other than sex" under the Equal Pay Act\textsuperscript{118} and
therefore cannot justify a wage differential between men and
women.\textsuperscript{119}

The market reliance defense also has fared poorly in race dis-
crimination cases. The Fifth Circuit recognized that "paying the
'open market' rate can violate Title VII if the market places differ-
ent values on black and white labor."\textsuperscript{120} The Seventh Circuit also

\begin{itemize}
  \item \textsuperscript{116} Free Market Supply and Demand? Ha!, \textit{PAY EQUITY TRENDS}, Jan.-Feb. 1985, at 5.
  \item \textsuperscript{117} See Appellees' Petition, \textit{supra} note 110, at 10.
  \item \textsuperscript{118} 29 U.S.C. § 206(d) (1983).
  \item \textsuperscript{119} Corning Glass Works v. Brennan, 417 U.S. 188, 205 (1974).
  \item \textsuperscript{120} Pittman v. Hattiesburg Mun. Separate School Dist. 644 F.2d 1071, 1075 n.2 (5th Cir. 1981).
\end{itemize}
rejected the market reliance defense where the market discriminates on the basis of race.121

A recent race discrimination case of particular significance is Bazemore v. Friday.122 There the Supreme Court unanimously held that employers are obligated to eliminate even those race-based salary disparities that existed before Title VII, reasoning that "[t]o hold otherwise would have the effect of exempting from liability those employers who were historically the greatest offenders of the rights of blacks. . . . To the extent that this [prior] discrimination was perpetuated after [Title VII], liability may be imposed."123 If this rule were applied to sex-based salary disparities, employers could be liable for engaging in discriminatory practices they did not create but were willing to perpetuate.

Taken together, sex- and race-based discrimination cases suggest that employers taking advantage of historical, systematic discrimination in their current job classification systems risk exposure to protracted litigation and ultimate liability. Employers would be wise to read the writing on the wall and voluntarily take remedial action.

4. Fearing a Cure Worse Than the Problem: Other Pay Equity Misconceptions

In addition to misconceptions about the market, courts may have a covert wariness concerning the relief sought to eradicate or diminish sex-based pay inequities. Without confidence that pay equity can be achieved in a systematic, well-reasoned way, courts, employers, and legislators alike may fear that this remedy can lead to economic chaos.

Employers who want to set wage rates in a nondiscriminatory manner need not completely dismantle their existing wage structures or use a single table to determine all wages. Re-aligned wages would resemble those which might exist in a discrimination-free labor market.124 Jobs could be grouped into sets (within companies) according to worker qualifications, and a single wage scale applied to all workers in a particular qualification group, regardless of sex. Re-alignment would parallel the process now used to re-

122. 106 S. Ct. 3000 (1986).
123. Id. at 3006.
evaluate job classifications, involving the evaluation of jobs according to levels of training, degrees of responsibility, and working conditions.\textsuperscript{125} Thus, by using the same procedures—but without the sex factor—employers could achieve a sex-neutral compensation system with little disruption.

Among the misconceptions about pay equity is that it will spawn new bureaucracies, followed by “government invasion of every workplace” and “massive restructuring of the economy.”\textsuperscript{126} This perceived threat has little foundation in reality. No monolithic wage scale for every employer, based on the intrinsic worth of all jobs, is necessary or desirable. In Minnesota, for example, three years after the pay equity policy was implemented, the state’s Pay Equity Coordinator could boast that “[t]here [was] no creation of a new bureaucracy to manage the process.”\textsuperscript{127} This absence of bureaucracy is because pay equity does not—as some opponents contend—necessitate a transition to a managed market where wages are set by a central agency.\textsuperscript{128} The government would need to enforce the policy and prescribe remedies for discovered discrimination,\textsuperscript{129} but it could perform these duties with existing agencies.

\textbf{IV. \ Conclusion}

Pay equity is neither moot nor dormant; it is the principal labor management/social policy/collective bargaining issue of the 1980’s. Those who take comfort from the apparent rejection of pay equity in \textit{AFSCME} and \textit{American Nurses Association} may have acquired a false sense of security. The concept of pay equity must be addressed and resolved in a socially responsible fashion, for it is not likely to disappear.

Nearly one-half of the labor force in this country is female. That constituency demands a responsible remedy for discrimination. It will not—and should not—settle for anything less. Recent victories herald an awareness by legislators as well as rank-and-file union members of both sexes that the time is right and the climate conducive for an enlightened solution to an intolerable inequity too long extant.

\textsuperscript{125} For a discussion of job evaluation studies, see \textit{supra} text accompanying notes 53-76.
\textsuperscript{126} Bergmann & Gray, \textit{supra} note 124, at 168.
\textsuperscript{127} Watkins Remarks, \textit{supra} note 24, at 5.
The price will be high for those legislators who persist in believing that women must remain mired in a subordinate status. It is a price that will be paid on election day, or a price that will ultimately be paid by the public in terms of litigation costs that inevitably will flow from any failure to rectify sex-based pay inequities.

The public sector has become the standard bearer in the battle for pay equity. Of the growing number of states with policies on pay equity, the majority have established these policies by legislation. Other states have relied on administrative policy or executive order. The driving force behind enactment of the policies has been generally attributed to the governors, the legislatures, unions, and women's rights groups.130

The Florida Legislature's authorization of a study of state employee job classifications and compensation, which is supposed to result in a report in April 1987, is a step in the right direction. It is, however, only the first step in what must be a brisk march to an ultimate resolution. While an administrative policy or executive order may suffice on a short-term basis, these would be merely "quick fixes" for a fundamental problem which demands the permanency of legislative redress. Now that sex-based wage discrimination with its concomitant pay inequity has been identified and the need for legislative action highlighted, the question remains: Will the Florida Legislature follow the course of a sound and enlightened social policy that has been so clearly charted?
