

THE USES AND THE LIMITS  
OF COMPARABLE WORTH  
IN THE PURSUIT  
OF PAY EQUITY FOR WOMEN

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### Abstract

Perhaps the most controversial issue in current employment discrimination law and policy is whether an employer should be required to pay comparable wages for jobs that are different in character but comparable in value or worth, at least where the different jobs are predominantly filled by women and men respectively. In the eyes of its proponents, such a measure is indispensable in the achievement of pay equity for women, since the bulk of working women have traditionally been segregated in traditionally "female jobs" whose wages, it is supposed, have been depressed precisely on that account. In the eyes of its critics, comparable worth is a step fraught with peril to the operation of a competitive labor market, because it would require courts to make impossible judgements about the true relative values and "just prices" for entirely different jobs. This paper argues that in principle at least, there is a solution to this valuation problem which is compatible with both the operation of our market economy and the basic themes of our anti-discrimination law; albeit, a solution which would be difficult to implement in our decentralized economic and legal system. At the same time, the actual measured effect upon relative wages of the concentration of women in a distinctive set of jobs has contributed relatively little to the aggregate gender gap in earnings. The ultimate verdict, then, is that we should not now have a law which would create a judicially-enforceable right to comparable worth, but there is a plausible case for pursuing this policy through voluntary affirmative action by public and private employers, through collective bargaining, and eventually through a carefully-tailored contract compliance program under Executive Order 11,246.

## I. Introduction

Perhaps the most notable and the most controversial topic of civil rights law and policy in the 1980's is the notion of "comparable worth," occupying much the same prominent position as did affirmative action in the 1970's. Comparable worth emerged on the political and legal agenda under the auspices of the Carter administration - particularly its activist head of the Equal Employment Opportunity Commission, Eleanor Holmes Norton - as a vehicle for achieving pay equity for women. What was proposed was a new theory of wage discrimination under which employers would be prohibited from paying lower wages to such distinctively "female" jobs as nurse or secretary than they paid for such typically "male" jobs as engineer or electrician; at least if the disparity in pay did not reflect comparable differences in the value or the worth of the work performed.<sup>1</sup> This program received a major boost at the beginning of the 1980's when, in County of Washington

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1. See Pay Equity: Equal Pay for Work of Comparable Value -- Part I: Joint Hearings Before the Subcommittees on Human Resources, Civil Service, Compensation and Employee Benefits of the Committee on Post Office and Civil Service, House of Representatives, 97th Cong., 2d Sess. 40 (1982) (statement of Eleanor Holmes Norton). Norton's proposals sparked widespread debate about the viability of comparable worth theories. See, e.g., Manual on Pay Equity: Raising Wages for Women's Work (J. Grune, ed. 1980); EEOC, Hearings on Job Segregation and Wage Discrimination (1981); Equal Employment Advisory Council, Comparable Worth: Issues and Alternatives (R. Livernash ed. 1980) (study financed by Business Roundtable). Indeed, the EEOC commissioned a study from the National Academy of Sciences on the subject, completion of which resulted in Women, Work and Wages: Equal Pay for Jobs of Equal Value (D. Treiman & H. Hartmann eds. 1981).

Gunther,<sup>2</sup> a closely-divided Supreme Court removed a key legal barrier to finding this kind of pay practice to be a form of "discrimination" prohibited by the Civil Rights Act.

Since then, however, comparable worth has encountered much heavier going. By and large, the lower courts have been reluctant to press very far into the legal opening left by the Supreme Court in Gunther. Their attitude has met with firm approval from the administration of President Reagan, which came to Washington bent on restoring the simpler, more limited conception of civil rights policy of the 1960's. With the President himself dismissing the whole notion as a "cockamamie idea,"<sup>3</sup> Clarence Thomas, the successor to Norton at the EEOC, has just persuaded that body to reject any broad version of this theory of wage discrimination under Title VII of the Civil Rights Act.<sup>4</sup>

In spite of the current politics, and however the Supreme Court might eventually define the scope of present federal law,

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2. 452 U.S. 161 (1981). In Gunther, the Supreme Court held that the requirement of "equal work" set forth in the Equal Pay Act, 29 U.S.C. § 206(d) (1982), was not incorporated into Title VII of the Civil Rights Act, 42 U.S.C. § 2000e et seq. (1982). While the Court took no position on the merits of comparable worth theories, 452 U.S. at 166, its holding permitted litigants to assert pay equity claims outside "equal work" contexts, the precondition to a broader theory.

3. Portland, Maine, Press-Herald, Aug. 17, 1985, at 3. The Reagan-appointed chairman of the U.S. Commission on Civil Rights, Clarence Pendleton, has in the past referred to comparable worth as "the looniest idea since Looney Tunes came on the screen." Lawson, Women in State Jobs Gain in Pay Equity, N.Y. Times, May 20, 1985, at C-12. For a compilation of papers submitted at a conference hosted by the Commission in 1984, see U.S. Commission on Civil Rights, Comparable Worth: Issue for the Eighties (1984).

4. See 37 F.E.P. Cas. 1889 (1985).



comparable worth is not an issue likely to fade away. The Democrats have firmly endorsed the idea, pressing for its adoption from a variety of positions in the Congress,<sup>5</sup> and extensive action along these lines is now taking place at the state level.<sup>6</sup> If and when the political pendulum swings in Washington, one can expect comparable worth to be put squarely on the agenda of the legislative, executive and judicial branches of the federal government.

My own view is that neither the euphoria nor the paranoia typically evoked by comparable worth is at all justified. Indeed, it is high time that we stopped talking about the subject at the rarified, ideological level typically favored by

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5. Democrats in Congress have shown an active interest in the concept of comparable worth. See, e.g., Federal Pay Equity Act of 1984, Hearings Before the Subcommittee on Compensation and Employee Benefits of the Committee on Post Office and Civil Service, House of Representatives, 98th Cong., 2d sess. (1984); Pay Equity: Equal Pay for Work of Comparable Value, Joint Hearings Before the Subcommittees on Human Resources, Civil Service and Compensation and Employee Benefits of the House Committee on Post Office and Civil Service, 97th Cong., 2d Sess. (1983); Women in the Workforce: Pay Equity, Hearings Before the Joint Economic Committee of the U.S. Congress, 98th Cong., 2d Sess. (1984). Democratic support for comparable worth has surfaced at the party level also -- in 1984, the Democratic Party endorsed the concept in its Platform:

"We will insist on pay equity for women. . . . The Democratic Party defines nondiscrimination to encompass both equal pay for equal work and equal pay for work of comparable worth, and we pledge to take every step, including enforcement of current law and amending the Constitution to include the unamended ERA, to close the wage gap."

Report of the Platform Committee to the 1984 Democratic National Convention 32.

6. For a useful review of recent legal and political developments in the area of comparable worth at the state and local level, see BNA, *Pay Equity and Comparable Worth* (Special Rep. 1984).

pundits, politicians, and lawyers (both inside the courts and in other forms). A useful first step in getting closer to concrete reality is to make clear precisely what we are talking about when we tackle this issue. Most people seem to have in mind the rather amorphous objective of "pay equity" for women: not so much statistical equality in earnings with men, but rather the elimination of those components in the overall income gap which are attributable to sex as such. The fact is, though, that even among the latter set of factors, some are traceable to a variety of social, cultural, perhaps even biological factors which shape the somewhat different ways in which women and men prepare for and participate in the labor market. Thus, the notion of "comparable worth" which I shall be addressing here is much more specific in content. The basic thesis is that there are a certain number of jobs predominantly filled by women which come to be viewed as identifiably "women's work"; and, precisely on that account, they are paid less than an array of quite different occupations primarily filled by men and traditionally viewed as "male" jobs. From that comparable worth diagnosis of the gender gap in earnings there flows this legal prescription: if a single employer establishes and maintains such a disparity in the relative pay for such distinctively "female" and "male" jobs, one which it cannot support by corresponding differences in the value or worth of the jobs, the employer is guilty of a form of "sex-based wage discrimination."<sup>7</sup>

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7. Prior to Gunther, the most comprehensive publication advocating this legal claim was Blumrosen, Wage Discrimination,

Unlike the situation in the late 1970's when the idea of comparable worth first burst upon the scene, we are now able to draw upon a considerable body of sophisticated empirical research which gives us a much clearer picture of the overall gender gap in earnings, of the dimensions of that part of the gap which could be tackled by this new policy towards wage discrimination across jobs, and also of the tangible costs which such a program might entail. My aim in this article is to provide a careful canvass of this evidence and the conclusions to which it takes me: first, there is some force to the comparable worth diagnosis of the earnings gap but nowhere near as much as is popularly supposed; however, while the payoff one might hope for does not ultimately justify the risks that a comparable worth law would entail, there are alternative instruments which can and should be used in this quest for pay equity.

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(footnote continued)

Job Segregation and Title VII of the Civil Rights Act of 1964, 12 U. Mich. J.L. Ref. 397 (1979). This piece evoked a spirited critique just a year later, see Nelson, Upton & Wilson, Wage Discrimination and the "Comparable Worth" Theory in Perspective, 13 U. Mich. J.L. Ref. 233 (1980), which in turn was followed by a rejoinder from Professor Blumrosen. See Blumrosen, Wage Discrimination and Job Segregation: The Survival of a Theory, 14 U. Mich. J.L. Ref. 1 (1980). Gunther itself has stimulated sophisticated scholarly discussion. See, e.g., Newman & Vonhof, "Separate but Equal" - Job Segregation and Pay Equity in the Wake of Gunther, 1981 U. Ill. L.F. 269 (arguing for an expansive reading of Gunther); Cox, Equal Work, Comparable Worth, and Disparate Treatment: An Argument for Narrowly Construing County of Washington v. Gunther, 22 Duquesne L. Rev. 65 (1983) (arguing for a narrow reading of Gunther); Bellace, Comparable Worth: Proving Sex-Based Wage Discrimination, 69 Iowa L. Rev. 655 (1984) (staking out a position somewhere in between).

## II. The Unfolding of the Law

### A. The Equal Pay Act

Before undertaking that systematic appraisal of the policy of comparable worth on its own merits, I shall first trace the evolution and the current state of federal civil rights law on the subject. Lawyers and others are naturally interested to know whether the specific form of wage discrimination implied by the comparable worth theory is one which courts can fairly read into the existing law, or whether it must still be debated and adopted in the political branches of government. From a broader perspective, though, the unfolding of the legal response to sex discrimination in pay is a revealing metaphor for our changing views about the appropriate scope and aim of civil rights law generally.

The narrative begins in the early 1960's when the Kennedy administration sent to Congress a proposal to ban sex discrimination in wages "for work of comparable character on jobs the performance of which requires comparable skills," presuming that job evaluation systems were available to assess the comparative worth of different jobs.<sup>8</sup> There was great resistance in Congress to the idea of federal bureaucrats and judges coming into a plant and telling the employer how much its various jobs were really worth.<sup>9</sup> Eventually Congress

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8. See S. 882, 88th Cong., 1st Sess., § 4 (1963).

9. Representative Goodell captured the sentiment of Congress on this score:

"Last year when the House changed the word 'comparable' to 'equal' the clear intention was to

enacted the Equal Pay Act (the EPA), which prohibited sex discrimination only with respect to the wages paid for "equal work": this statute definitely did not contemplate mandatory evaluation and revision of a firm's pay structure across different jobs.<sup>10</sup>

In practice, there has been some play in the joints of the "equal work" standard, especially once it was interpreted by the courts to mean "substantially equal" rather than

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(footnote continued)

narrow the whole concept. We went from 'comparable' to 'equal', meaning that the jobs involved should be virtually identical, that is, they should be very much alike or closely related to each other. We do not expect the Labor Department people to go into an establishment and attempt to rate jobs that are not equal. We do not want to hear the Department say, 'Well, they amount to the same thing; and evaluate them so they come up to the same skill or point . . . we want the private enterprise system to have a maximum degree of discretion in working out the evaluation of the employee's work and how much he should be paid for it.'

109 Cong. Rec. 9197 - 98 (1963).

10. See The Equal Pay Act, 29 U.S.C. § 206(d) (1982). Senator McNamara, Chairman of the Senate Committee on Labor and Public Welfare at the time the Act was approved, characterized the basic purpose of the Act as:

" . . . to insure that those who perform tasks which are determined to be equal shall be paid equal wages. The wage structure of all too many segments of American industry has been based on an ancient but outmoded belief that a man, because of his role in society, should be paid more than a woman even though his duties are the same. This bill would provide, in effect, that such an outmoded belief can no longer be implemented and that equal work will be rewarded by equal wages."

109 Cong. Rec. \_\_\_\_ (1963).

"identical."<sup>11</sup> So, for example, the courts have been prepared to equate the jobs of nurses aides and orderlies, seamstresses and tailors, and of female and male "selector-packers," finding sex discrimination within these pairs despite marginal differences in the tasks performed, differences which the judges felt could simply not account for the disparity in wages.<sup>12</sup>

How far that leaves us, though, from scrutiny of obviously different "female" and "male" jobs, such as the white collar secretary and the blue collar carpenter, is illustrated by what happened in the Gunther case itself.<sup>13</sup> The County of Washington employed women as "matrons" to guard female

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11. See, e.g., Shultz v. Wheaton Glass, 421 F.2d 259 (3d Cir. 1970), cited with approval in, Corning Glass Works v. Brennan, 417 U.S. 188, 203 - 04 n.24 (1974) (applying "substantially equal" test to day shift and night shift inspectors).

12. While it is recognized that applying the "substantially equal" test entails some area of judgment by the courts about the comparative value of differences in job content and pay, see Freed & Polsby, Comparable Worth in the Equal Pay Act, 51 U. Chi. L. Rev. 1078, 1085 - 90 (1984), such judicial discretion is exercised only with respect to small nuclear families of jobs. For example, in Wheaton Glass, the Third Circuit compared "female selector-packers" to "male selector-packers" plus "snap-up boys." See 421 F.2d at 262. See also Brennan v. Prince William Hosp., 503 F.2d 282, 285 - 91 (4th Cir. 1974) (comparing hospital orderlies and hospital aides); Brennan v. City Stores, 479 F.2d 235, 240 - 41 (5th Cir. 1973) (comparing tailors and seamstresses).

13. See Gunther v. County of Washington, 623 F.2d at 1308. The concept would not permit comparison of the relative worth and wages of the matrons and correctional officers evaluated in Gunther v. County of Washington, 623 F.2d 1303 (9th Cir. 1979), nor the nursing and law faculties compared in Spaulding v. Univ. of Washington, 740 F.2d 686 (9th Cir. 1984). See also Becker, Comparable Worth in Anti-Discrimination Legislation: A Reply to Freed and Polsby, 51 U. Chi. L. Rev. 1112, 1113 - 17 (1984).

prisoners and men as "correction officers" to guard male prisoners, and paid the women about 70% of the salary it paid the men. The core functions of each job were essentially the same - guarding prisoners in one section of the county jail. However, the ratio of male prisoners to male guards was much higher than the ratio for females, and this allowed the matrons more time to do clerical work. As a result, even these members of this same "family" of jobs could not be denominated "substantially equal" so as to come within the purview of the EPA. Because as early as the 1960's, there was relatively little aggregate disparity in pay for men and women employed in the same job by the same firm, even perfect compliance with the Equal Pay Act could make little dent in the overall gender gap in earnings.<sup>14</sup>

#### B. Title VII and the Bennett Amendment

Appreciation of this economic fact of life led to the sustained effort to go beyond these narrow confines of the EPA, using the Gunther situation as the vehicle for bringing the problem before the Supreme Court. The legal footing for that effort was Title VII of the Civil Rights Act, enacted by the same 88th Congress in 1964, the year after the EPA.<sup>15</sup>

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14. For early evidence that little of the overall gender gap in earnings was due to sex-based differences in pay for "substantially equal" work, see Buckley, Pay Differences Between Men and Women in the Same Jobs, Monthly Lab. Rev., Nov., 1971, at 36.

15. See Civil Rights Act of 1964 §§ 701 - 718, 42 U.S.C. § 2000e (1982).

Title VII was a much more ambitious, broad-ranging attack on discrimination in employment, extending not merely to wages "but to all compensation, terms, conditions or privileges of employment,"<sup>16</sup> and going on to guarantee an equal opportunity to be hired, promoted and retained in the jobs for which such compensation was paid.<sup>17</sup> The major impetus for this legislation was the historic treatment and current plight of black Americans: indeed, "sex" was added as a prohibited category for employment decisions only in the final stage of consideration of the Civil Rights Act by the House of Representatives.<sup>18</sup> When the Bill went on to the Senate with a ban on sex discrimination now firmly attached, some attention was naturally given to how this new legislation should be squared with the EPA, which was just coming into effect at that time. A product of this concern was an amendment to Title VII, authored by Senator Bennett, which stated that it would not be a violation of the Civil Rights Act for an employer "to differentiate upon the basis of sex in ... the wages and compensation paid ... if such differentiation is authorized by the provisions of the [Equal Pay Act]."<sup>19</sup> The Delphic

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16. See Civil Rights Act of 1964 § 703(a)(1), 42 U.S.C. § 2000e-2(a)(1) (1982).

17. See Civil Rights Act of 1964 §§ 703(a)(1), 703(a)(2), 42 U.S.C. §§ 2000e-2(a)(1), 2000e-2(a)(2) (1982).

18. On the last day of the House floor debate on the Civil Rights Act, Representative Howard Smith of Virginia offered an amendment to insert the word "sex" into Title VII. See Miller, Sex Discrimination and Title VII of the Civil Rights Act of 1964, 51 Minn. L. Rev. 877, 880 - 82 (1978).

19. See Civil Rights Act of 1964 § 703(h), 42 U.S.C. § 2000e-2(h) (1982).



quality of this language is matched only by the brevity of the Senate discussion which it attracted;<sup>20</sup> this absence of legislative guidance permitted the pitched legal battle which closely divided the Supreme Court in Gunther seventeen years later.

C. Did the Bennett Amendment Incorporate "Equal Work" into Title VII?

Two possible readings of the Bennett Amendment were possible. The narrow reading would merely incorporate into Title VII certain specified defenses from the EPA. The broad reading would preclude a court finding a violation of Title VII in a case of sex discrimination in pay unless this practice would also constitute a violation of the EPA (in particular, the latter's crucial "equal work" condition).

The latter reading was favored, of course, by those (such as Justice Rehnquist in Gunther) who wanted to prevent the use of Title VII to outflank the legal limits of the Equal Pay Act.<sup>21</sup> There are powerful arguments in favor of this interpretation, the most important being the fact that this seems closest to the original understanding of Title VII. The legislative history is fragmentary and obscure. However, suppose one presumes as a matter of common sense that the same

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20. The Bennett Amendment was debated for approximately two minutes prior to the Senate's passage of the measure. See 110 Cong. Rec. 13,647 (1964).

21. See County of Washington v. Gunther, 452 U.S. 161, 200 - 01 (1981) (Rehnquist, J., dissenting).

88th Congress which in 1962 and 1963 had vigorously debated the question of the appropriate scope of federal regulation of sex discrimination in wages and had come down four-square in favor of the "equal work" standard, would not casually reverse direction a year later, at least without anyone explicitly saying so: one will find a number of clues in the little that was said in Congress to support the conclusion that the Bennett Amendment was meant to tie Title VII down to the scope of the Equal Pay Act in regulating this subject.<sup>22</sup> In fact, that

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22. Shortly after the Civil Rights Act moved from the House into the Senate, Senator Clark, the bill's chief spokesman in the Senate, responding to a query from Senator Dirksen about the relationship of this new bill to last year's Equal Pay Act, stated that "the standards in the Equal Pay Act for determining discrimination as to wages, of course, are applicable to the comparable situation under Title VII." 110 Cong. Rec. 7217 (1964). To clarify the matter, Senator Bennett offered his amendment on June 12, 1964 (the EPA having come into effect just the day before), with the stated purpose of providing that "in the event of conflicts, the provisions of the Equal Pay Act shall not be nullified." 110 Cong. Rec. 13,647 (1964). When the entire legislative package returned to the House as amended in the Senate, Representative Celler explained the Bennett Amendment to his colleagues as a vehicle designed to "provide that compliance with the [Equal Pay Act] . . . satisfies the requirement of the Title barring discrimination because of sex . . ." 110 Cong. Rec. 15,896 (1964). This was the sum total of the explanation offered in congressional debates about the Civil Rights Act itself.

A year later, though, Senator Bennett told the full Senate that his "amendment means that discrimination in compensation on account of sex does not violate Title VII unless it also violates the Equal Pay Act." 111 Cong. Rec. 13,359 (1965). In the same year, Senator Clark offered a similar view of the Bennett Amendment. While he rejected any suggestion that Title VII's protection against sex-based wage discrimination would not apply to firms excluded from the narrow scope of the EPA (which itself was part of the Fair Labor Standards Act), he endorsed the view that "the Equal Pay Act standards, requiring equal work . . . , would also be applied under the Civil Rights Act." 111 Cong. Rec. 18,263 (1965). In short, Senator Clark's position was that the Bennett Amendment did not affect Title VII's own employment coverage, but did incorporate the equal work standard from the EPA.

was the initial interpretation placed on the Bennett Amendment by the Equal Employment Opportunity Commission in its first Guidelines for the Administration of Title VII as the Civil Rights Act came into effect in 1965.<sup>23</sup> This same interpretation was also the consensus view of the courts when the first cases posing the issue filtered up several years later.<sup>24</sup>

It is important to underline as well that such an accommodation of the two contemporaneous pieces of federal legislation embodied a coherent and appealing principle. On a positive note, the EPA would remove the most flagrant forms of sex discrimination in wages, under which employers use their market power to force women to accept less money than they paid to men for doing exactly the same work, thus reinforcing the traditional stereotype that women were not serious participants in the labor market, needing decent earnings to support themselves and their families. Side by side, the new Title VII would guarantee women equal access to the higher-paid jobs

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23. See EEOC, Guidelines for the Administration of Title VII (1965). The Commission observed:

"Accordingly, the Commission interprets § 703(h) to mean that the standards of (equal pay for equal work) set forth in the Equal Pay Act for determining what is unlawful discrimination in compensation are applicable to Title VII."

29 C.F.R. § 1604.7 (19\_\_).

24. See, e.g., Ammons v. Zia Co., 448 F.2d 117, 120 (10th Cir. 1971); Hodgson v. Brookhaven General Hosp., 436 F.2d 719, 727 (5th Cir. 1970).

traditionally filled by males, where they would be in a position to take advantage of the legal right afforded by the EPA to receive the same pay rate set by the employer for the male incumbents in those jobs.<sup>25</sup> But the law would not go further to try to estimate and fix the appropriate relationship between wages paid for different jobs: not only would this be an inherently subjective administrative and judicial enterprise,<sup>26</sup> but it also threatened to visit unfairly upon particular employers the burden of undoing the historical sex segregation of jobs and the established wage patterns which

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25. " . . . read together, Title VII and the Equal Pay Act provide a balanced approach to resolving sex-based wage discrimination claims. Title VII guarantees that qualified female employees will have access to all jobs, and the Equal Pay Act assumes that men and women performing the same work will be paid equally. This approach provides a mechanism for eliminating sex-based wage discrimination, while, at the same time, assuring that the courts and the federal agencies will not become entangled in adjudicating the wage rates to be paid for dissimilar jobs, a process in which they have little expertise."

Westinghouse Electric Corp., 631 F.2d at 1115 (Van Dusen, J., dissenting).

26. As the dissenting judge in IUE v. Westinghouse Electric Corp., 631 F.2d 1094 (3d Cir. 1980), observed:

"Congress rejected the [comparable work] doctrine at least in part due to the difficulty of ascertaining the worth of comparable work and the difficulty of ascertaining the impact on wages of the supply and demand for labor. The determination of proper wages when equal work did not exist was deemed better left to the market place than to a judicial fact finder."

Id. at 1110 (Van Dusen, J., dissenting) (footnote omitted).  
See also Christensen v. Iowa, 563 F.2d 353, 356 (8th Cir. 1977) (noting difficulty of ascertaining proper wage for a given job by comparing it to wage paid for dissimilar work).

obtained in the outside labor market.<sup>27</sup> Certainly in the early days of federal fair employment policy, securing the limited objective of removing these overt and artificial forms of discrimination in an otherwise fairly functioning market economy seemed a more than sufficient ambition for the law.

D. Did the Bennett Amendment Incorporate Only the EPA Defenses?

Though this broad interpretation of the Bennett Amendment had considerable force, it presented some gnawing difficulties as well. Even if one were concerned to discover precisely what the 88th Congress did enact, the key phrase it used - if such differentials in pay are authorized by the Equal Pay Act - is an undeniably forced way of conveying the notion that a firm's pay structure cannot be a violation of Title VII unless it is

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27. "Under Title VII, an employer's liability extends only to its own acts of discrimination. Nothing in the act indicates that the employer's liability extends to conditions of the marketplace which it did not create. Nothing indicates that it is improper for an employer to pay the wage rates necessary to compete in the marketplace for qualified job applicants. That there may be an abundance of applicants qualified for some jobs and a dearth of skilled applicants for other jobs is not a condition for which a particular employer bears responsibility."

Briggs v. City of Madison, 536 F. Supp. 435 (N.D. Wis. 1982). It is worth noting that this conception of the scope and limits of federal policy towards sex-based wage discrimination is quite consistent with the original individual justice model for Title VII's attack upon racial barriers to employment opportunity, a model which paid considerable deference to such values as autonomy, merit, and achievement, even when these limited the pursuit of actual equality. See Fallon & Weiler, Firefighters v. Stotts: Conflicting Models of Racial Justice, 1984 Supreme Court Review 1, 12 - 18.

also prohibited by the EPA (with the latter's "equal work" condition). As Justice Brennan observed in Gunther,<sup>28</sup> a more natural reading of that language is that, given Title VII's basic and broad prohibition of any form of sex discrimination in compensating employees in any job (whether the same or different), the role of the Bennett Amendment is to incorporate the EPA's affirmative protection of such differences in pay that are "pursuant to (i) a seniority system, (ii) a merit system, (iii) a system which measures earnings by quantity or quality of production, or (iv) a differential based on any factor other than sex."<sup>29</sup>

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28. See County of Washington v. Gunther, 452 U.S. 161, 168 - 69 (1981).

29. Equal Pay Act § 206(d)(1), 29 U.S.C. § 206(d)(1) (1982).

There is a further technical difficulty with the theory that the Bennett Amendment makes the scope of Title VII's prohibition of sex-based wage discrimination co-extensive only with the prohibition in the EPA. While the "equal work" standard is the most important limiting feature of the latter statute, it is not the only one. As part of the Fair Labor Standards Act, the EPA excludes a considerable number of business and employee categories which are otherwise covered by Title VII. As well, the EPA ban on pay discrimination reaches only pay differentials within establishments, not across the entire firm, and applies only to discrimination in wages, not all forms of compensation. For this reason, the EPA might not reach the pension issue treated by the Court under Title VII in Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 703, 712 n.23 (1978). However, to the extent there is any consensus in the original understanding of the Bennett Amendment, it is only about the incorporation into Title VII of the "equal work" condition, not these other limitations. See supra note 23 (colloquy between Senators Clark and Bennett). Indeed, it is hard to imagine any practical reason for superimposing these other constraints upon Title VII's ban on discrimination in compensation. Nevertheless, it is a strained reading of the word "authorized" to find that Congress incorporated into Title VII only one of these limits upon the scope of EPA's prohibition on sex discrimination in pay.

Next, it was easy to imagine cases in which the rigid constraint of Title VII by the "equal work" condition of the EPA would produce highly anomalous results.

(a) Suppose, for example, that an employer faced with the legal requirement that it must now offer equal pension benefits to its male and female employees (notwithstanding the greater longevity and larger costs for the women as a group), simply decided to exclude from the pension plan its largely female clerical and secretarial staff, while maintaining this benefit for its nearly all-male production and maintenance crew. Because the work done by the female white-collar and the male blue-collar employees is obviously different, there would be no legal relief for this blatant discrimination in compensation, even though such a fringe benefit had been and still would be offered on a uniform basis to all the employees covered by the plan, irrespective of any specific differences in their work.<sup>30</sup>

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(footnote continued)

This objection is concededly avoided, however, by a narrower reading of the Bennett Amendment -- that it was intended to incorporate into Title VII just the affirmative defenses set forth in the EPA, rather than its complete substantive content.

30. This scenario is suggested by the Supreme Court's decisions in *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702 (1978), and *Arizona Governing Comm'n v. Norris*, 463 U.S. 1073 (1983), which established that Title VII presumptively bars any gender-based differentials in pension contributions or benefits. However, the Court was not presented in these cases with a situation in which pension benefits differed between men and women who were performing different work; in such a case, a Title VII hamstrung by the constraints of the EPA would offer no relief.

(b) Suppose an employer had two different departments, each performing similar functions, with an almost entirely sex-segregated work force. The pay scale in the "male" department was set sharply higher than the scale in the "female" area. If there were unskilled positions in each department whose work was "substantially equal," the female incumbent would be entitled to have her wage raised up to the corresponding male rate. However, if there were a more specialized and distinctive job in the female department with no male counterpart, the incumbent in that position would have no legal basis for relief. The combination of those two legal conclusions would lead to the absurd practical result that the more skilled female employee would end up earning considerably less money than her unskilled female colleague in the same department.<sup>31</sup>

Reflection on cases such as these highlighted how arbitrary was the limit that the "equal work" condition seemed to place upon

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31. This anomaly is suggested by the facts in *Taylor v. Charley Bros*, 25 F.E.P. Cas. 602 (W.D. Penn. 1981). In that case, the defendant firm traditionally employed only men in its dry grocery warehouse and only women in its health and beauty aids division, and paid the former a significant wage premium which, the Court found, was specifically founded on the basis of sex. Some of the jobs in the two divisions were identical, and thus should have been paid the same rate under the EPA. Other jobs in the female division, however, were not "substantially equal" to functions performed in the male warehouse, and the disparities in pay for these jobs were substantially greater. Only because the trial judge concluded, post-*Gunther*, that he had the authority to remedy this latter, subtler form of sex discrimination in pay for unequal but concededly comparable work was he able to avoid the anomaly suggested in the text; the judge proceeded to raise the wages of jobs in the female division to 90% of the rate paid in comparable male jobs.



the operation of the broad anti-discrimination principle in the area of compensation, a constraint which almost certainly would be considered morally intolerable if applied in cases of racial discrimination. Growing appreciation of this disparity in treatment seemed to provide ample reason for preferring the narrower interpretation of the Bennett Amendment, lest it become a legal badge of discrimination against women in the very statute which was supposed to end that practice.<sup>32</sup>

A much stronger impetus for this reading came from the broader currents of opinions in the early 1970's which were

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32. The implication of failing to correct such discriminatory practices was forcefully put by Judge Higginbotham in *IUE v. Westinghouse Electric Corp.*, 631 F.2d 1094 (3d Cir. 1980), when he argued that such a failure would, in effect:

"permit employers to discriminate against women even though they could not pursue similar discriminatory practices against others on account of race, religion, or national origin. As an example, it is clear that Title VII prohibits an employer from paying more per hour to welders than plumbers if the reason for the employer paying higher wages to the welder is that the majority of the welders are Protestants and that the majority of the plumbers are Catholics. . . . In the absence of explicit statutory language or Supreme Court holdings to the contrary, we are hesitant to conclude that Title VII would allow discriminatory behavior on the basis of sex, when the same behavior would be prohibited if made on the basis of race, religion or national origin."

Id. at 1100. Ultimately, Judge Higginbotham refused to adopt that view, paraphrasing the Supreme Court to say that:

"[I]t would be ironic indeed if [the Equal Pay Act], a law triggered by the Nation's concern over centuries of [sexual discrimination] and intended to improve the lot of those who had 'been excluded from the American dream so long', were to lead to the contraction of their rights under Title VII."

Id. at 1107.

sharply expanding our views about the appropriate reach of civil rights law. No longer was it considered sufficient merely to prohibit immediate, overt acts of discrimination perpetrated by individual employers upon identifiable victims, in the expectation that once these artificial and invidious barriers were removed, a decent level of equality in employment would readily be achieved. Rather, it was now clear that the historical inheritance of discrimination had become too deeply imbedded in our contemporary practices and institutions to give way to such limited measures. Entrenched features of the social and economic landscape drastically limited the ability of most members of historically disfavored groups to take advantage of the new opportunities which the law was supposedly opening up to them.<sup>33</sup> The truth had sunk home that if we wanted to achieve some measure of equality in real condition rather than just in legal entitlement, we would have to extend

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33. An oft-quoted passage from the Report of the House Committee on Education and Labor proposing the major amendments to Title VII contained in the Equal Employment Opportunity Act of 1972 observed that whereas in 1964:

"employment discrimination tended to be viewed as a series of isolated and distinguishable events, due for the most part to ill-will on the part of some identifiable individual or organization, . . . [experience had now taught us that this] is a far more complex and pervasive problem . . . [involving] 'systems' and 'effects' rather than simply intentional wrongs . . . [and the] perpetuation of the present effects of earlier discriminatory practices through various institutional devices . . . [whose] discriminatory nature may not appear obvious at first glance."

Equal Employment Opportunity Act of 1972, Report of the House Committee on Education and Labor, H.R. Rep. No. 238, 92d Cong., 2d Sess. (1972).

some form of preferential treatment to people who exhibited the characteristics that had produced mistreatment in the past.<sup>34</sup>

While the peculiar problem of race in America was the primary moral inspiration for this new philosophy of "affirmative discrimination," by the early 1970's the achievement of economic equality for women had finally gained

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34. Rising to this challenge, the federal courts took a series of key legal steps which gradually recast Title VII jurisprudence in a "Group Justice" mold. In *Hazelwood School District v. United States*, 433 U.S. 299 (1977), the Supreme Court stated that purposeful disparate treatment -- i.e., discrimination in the invidious sense of the term -- could be inferred from mere statistical evidence of disparities between minority representation in a particular firm and minority representation in the relevant job market. See 433 U.S. at 307 - 08; see also *Teamsters v. United States*, 431 U.S. 324, 339 (1977) (holding that such statistical evidence states a prima facie case of disparate treatment under Title VII). Earlier in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), the Court had held that facially neutral employer practices which had a disparate impact on protected groups and which were not related to job performance also amounted to illegal discrimination under Title VII. See 401 U.S. at 429 - 33. Contemporaneously, affirmative discrimination, in the form of private, voluntary racial preferences adopted to reverse the effects of past invidious discrimination, was held permissible under the Civil Rights Act. See *United Steelworkers v. Weber*, 443 U.S. 193, 208 (1979). Indeed, the federal government was permitted to compel affirmative discrimination in private firms by making such action a condition to the award of federal contracts. See *Fullilove v. Klutznick*, 448 U.S. 448, 492 (1979); Executive Order 11246, 3 C.F.R. 339.

While this reformulation of Title VII doctrine prompted the judicial branch of government to begin mandating employment preferences for minorities and women in order to rectify the effects of historical discrimination, the Supreme Court's decision in *Firefighters Local Union No. 1784 v. Stotts*, 104 S. Ct. 2576 (1984), left this aspect of Title VII's evolving jurisprudence on shaky ground. In *Stotts*, the Supreme Court overruled a recent series of lower court decisions that had permitted employment preference orders to prevail over seniority rights in the context of layoffs, and its judgment has cast a cloud over a decade-old judicial consensus favoring such orders in the arena of hiring. See Fallon & Weiler, *Firefighters v. Stotts: Conflicting Models of Racial Justice*, 1984 Supreme Court Review 1, 26 - 27.

recognition as an urgent matter in its own right.<sup>35</sup> How women fared at work would be crucial in that endeavor: not only had female participation in the labor force doubled, but the viability of family life as the alternative was diminishing with major changes in marriage, divorce and fertility

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35. While there is considerable evidence that the category of "sex" was first proposed for inclusion in the Civil Rights Act as a ploy by its opponents to garner some wavering votes for defeat of the entire legislation, see Gold, A Tale of Two Amendments: The Reasons Congress Added Sex to Title VII and Their Implication for the Issue of Comparable Worth, 19 Duquesne L. Rev. 453, 458 - 60 (1981), certainly by the time of the passage of the Equal Employment Opportunity Act of 1972, there could be no doubt that Congress was committed to ending sex discrimination in employment. For example, in reporting its version of the Act to the full Senate, the Senate Committee on Labor and Public Welfare noted:

"While some have looked at the entire issue of women's rights as a frivolous divertissement, this Committee believes that discrimination against women is no less serious than other prohibited forms of discrimination, and that it is to be accorded the same degree of concern given to any type of similarly unlawful conduct. As a further point, recent studies have shown that there is a close correlation between discrimination based on sex and racial discrimination, and that both possess similar characteristics. Both categories involve large natural classes, membership in which is beyond the individual's control; both involve highly visible characteristics on which it has been easy to draw gross, stereotypical distinctions. The arguments justifying different treatment of the sexes were also historically used to justify different treatment of the races. While it is true that the extreme aspects of sex discrimination as it existed in the early part of the twentieth century have been dispelled, and women have not been granted the right to vote and may serve on juries, their status in employment is still subject to blatant discrimination . . . and [this] is regarded by many as either morally or physiologically justifiable."

Equal Employment Opportunity Act of 1972, Report of the Senate Committee on Labor and Public Welfare, S. Rep. No. \_\_\_\_\_, 92d Cong., 2d Sess., [page] (1972).

rates.<sup>36</sup> However the situation of women in the workplace presented a distinctive challenge to the law. There was far greater segregation of jobs by sex than by race, and the visibly "female" cast to so many jobs was potentially conducive to their discriminatory undervaluation and underpayment. As I noted above, the latter phenomenon was clearly outside the reach of the Equal Pay Act with its equal work constraint.<sup>37</sup> Nor did the prospect of occupational integration under the protective umbrella of Title VII (and also the Executive Order) offer all that much consolation. At best, this process would take decades to accomplish, thus bypassing an entire generation

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36. In 1940, approximately 25 percent of women over the age of 13 were in the labor force. Following the influx of women into the labor force during World War II, this percentage increased to 38 percent in 1960. In 1980, fully 52 percent of women over 13 years of age were in the labor force. See J. O'Neill and R. Braun, *Women and the Labor Market: A Survey of Issues and Policies in the United States*, (The Urban Institute, Nov. 1981), reprinted in, Pay Equity: Equal Pay for Work of Comparable Value, Joint Hearings Before the Subcommittees on Human Resources, Civil Service Compensation and Employee Benefits of the Committee on Post Office and Civil Service, House of Representatives, 97th Cong., 2d Sess. 1338, 1344 (1982), Reductions in the time necessary for women to produce household services, declines in fertility rates, increases in divorce rates, and changes in social attitudes about the acceptability of female participation in the labor force have coincided with increased female participation rates. See *id.* at 1345 - 48. One obvious consequence of such increased participation rates is a change in patterns of marriage and child-bearing. As one study has observed, "[u]nderlying demographic changes . . . force women to reduce the importance of marriage in their lives. The prospect is that two-thirds of their adult years will be spent without children in the household and half to two-thirds without a husband." Marshall & Paulin, The Employment and Earnings of Women: The Comparable Worth Debate, in U.S. Comm. on Civil Rights, Comparable Worth: Issue for the 80's 196, 197 (1984), quoting K. Davis & P. van den Oever, The Demographics of Feminism, Wash. Times, July 1, (1982).

37. See *supra* TAN \_\_\_\_ - \_\_\_\_.

of women who had made largely irreversible career commitments in their education, training and work experience. In any event, doubts began to grow about whether it would be an unalloyed social or personal gain to have women move out of such traditional roles as teacher, nurse, or social worker where they could fruitfully draw upon any special female aptitudes for caring for people. Perhaps the more sensible use of civil rights law would be to insure that the occupants of these jobs were paid a salary commensurate with their worth, as compared with the salaries of men who worked in such jobs as accountant or auto mechanic, caring for society's paper and machines.

In response to these coalescing tides of opinion developed the legal view that we should move beyond the narrow equal work constraint in tackling illegitimate pay disparities between men and women. Gradually that sentiment found favor among administrators, the Congress and the lower courts.<sup>38</sup> The

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38. In 1972, the EEOC altered its regulations to eliminate the incorporation in Title VII of the "equal pay for equal work" standard drawn from the EPA and to specify that § 703(h) of Title VII (the Bennett Amendment) meant only that "a defense based on the Equal Pay Act may be raised in a proceeding under Title VII. See 37 Fed. Reg. 6837 (1972). Congress first indicated agreement with this view in enacting the Pregnancy Disability Act of 1977, which reversed the Supreme Court's interpretation of Title VII in *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976). The Senate Report accompanying the Act explicitly stated that the Supreme Court was "not correct" in its apparent belief that "the Bennett Amendment . . . insulates from Title VII all compensation and fringe benefit programs which do not also violate the Equal Pay Act." Pregnancy Disability Act of 1977, Report of the Senate Committee on Labor and Human Resources, S. Rep. No. 331, 95th Cong., 1st Sess., 7 (1977). The Third and Ninth Circuit Courts of Appeals soon after added their judicial voices to this chorus, see *IUE v. Westinghouse Electric Corp.*, 631 F.2d 1094 (1980); *Gunther*

Supreme Court finally faced the issue in Gunther in a factual setting which was quite favorable to such a ruling: two jobs, matrons and correctional officers, within the same occupational family; total sex segregation of the positions, for reasons both practical and legal, precluding access for women to the higher paying job; and an allegation that the employer had deliberately depressed the female matrons' wages below the level indicated by the criteria it used to set the male correctional officers' wages (presumably because the County felt it could recruit enough women to fill the matron job at the lower price).<sup>39</sup> Justice Brennan obliged, writing on behalf of a narrow 5-4 Court majority. From the premise that the Supreme Court must "avoid any interpretation of Title VII that would deprive victims of discrimination of a remedy, without clear congressional mandate,"<sup>40</sup> he refused to construe the legislative history to mean that Congress really did "intend the Bennett Amendment to insulate . . . blatantly discriminatory practices from judicial redress."<sup>41</sup> Instead Brennan adopted the narrower reading that only the defenses in

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(footnote continued)

v. County of Washington, 623 F.2d 1303 (1979), thus setting the stage for the Supreme Court's final verdict in the appeal from Gunther.

39. See County of Washington v. Gunther, 452 U.S. 161, 164 - 65 (1981). Indeed, the plaintiffs in Gunther alleged that the county had set the pay scale for female guards below the rate suggested even by its local labor market surveys. See id. at 165.

40. Id. at 178.

41. Id. at 179.

the EPA were incorporated into Title VII, so that the Civil Rights Act could fulfill Congress' intent "to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."<sup>42</sup>

E. How to Interpret Gunther.

Gunther was the clearest and most appealing kind of case for a Court inclined to take the path that it did. The plaintiffs alleged intentional discrimination against the female matrons specifically on account of their sex. They were prepared to prove their claim by direct evidence, rather than ask a judge to infer such discrimination simply from apparent disparities in wages and job worth vis-a-vis the male correctional officers.<sup>43</sup> One can readily understand why the judges might struggle to read the statute and its history so as to remove a legal barrier that seemed especially artificial in this context.

A much more daunting challenge was presented in Lemons v. City of Denver.<sup>44</sup> The City of Denver used a fairly sophisticated system of job classification and wage surveys under which it matched the prevailing wages paid in the outside

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42. Id. at 180.

43. "[R]espondents seek to prove, by direct evidence, that their wages were depressed because of intentional sex discrimination, consisting of setting the wage scale for female guards, but not for male guards, at a level lower than its own survey of outside markets and the worth of the jobs warranted." Id. at 166.

44. 620 F.2d 228 (10th Cir.), cert. denied, 449 U.S. 880 (1980).



labor market for the same work done by its own employees. The City's nursing staff sued under Title VII alleging that the setting of wages by the City with reference to rates paid by non-municipal hospitals was itself the problem, because the work of nursing, a heavily female profession, had historically been undervalued and underpaid due to the sex of its practitioners.<sup>45</sup> However neutral and non-discriminatory such wage surveys might appear on their face, they simply replicated within the City's own work force the discriminatory patterns exhibited in the outside market; with the result that registered nurses were paid less than auto mechanics or tree trimmers employed by the City. Certainly there was appeal in the nurses' claim that something was wrong with a pay determination system which produced higher salaries for those who looked after the City's cars and trees than for those who cared for the City's sick people. At the same time, though, what judge would not feel reluctant to leave the apparently safe harbor of the marketplace and set out to impose on an employer his own subjective views of the proper relative valuation of the work of nurse and mechanic, for example, with the significant consequences this legal verdict might have for labor costs, recruiting and retention of workers, and so on? Not surprisingly, perhaps, the Tenth Circuit simply refused to "open that Pandora's Box."<sup>46</sup>

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45. See 620 F.2d at 229.

46. *Lemons v. City of Denver*, 17 F.E.P. Cas. 906, 909 (D. Colo. 1978). The trial judge in *Lemons* balked at the plaintiffs' legal claim which he saw as "pregnant with the

One of the luxuries enjoyed by the Supreme Court is that it could duck the difficult practical problems posed by Lemons and choose instead to address the scope of the Bennett Amendment in the more manageable context of Gunther. Justice Brennan could not, however, avoid the technical legal objection pressed by Justice Rehnquist against the majority's interpretation: to read the Bennett Amendment as doing no more than incorporating into Title VII the affirmative defenses of the EPA would appear to reduce the Amendment to pure redundancy.<sup>47</sup> The Equal Pay

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possibility of disrupting the economic system," because it would require that "the job of every person in the United States be evaluated skill-wise, productive-wise, and otherwise to the job of every other person, and then have a completely new pay scale set up by some group of experts or pseudo-experts." Id. at 907, 909. Such a possibility, in his view, created the spectre of "the legendary 1984 as expressed in the book, *The Big Brother* looking over our shoulder who is going to dictate our day-to-day ways of life . . . ." Id. at 914. The Tenth Circuit spoke in somewhat more moderate terms of how difficult it would be for the Court "to reassess the worth of services in each position in relation to all others, and to strike a new balance and relationship," 620 F.2d at 229, of how Title VII could not be interpreted "as requiring an employer to ignore the market in setting wage rates for genuinely different work classifications," id. (quoting *Christensen v. State of Iowa*, 563 F.2d 353 (8th Cir. 1977) and how "the purpose of the legislation" was "to provide equal employment opportunities" for women to get into new jobs where they would enjoy the protection of the EPA against discrimination in favor of males doing the same work, see id. at 230. However, its ultimate verdict was the same: "this would be a whole new world for the courts, and until some better signal from Congress is received we cannot venture into it." Id. at 229. In this respect, the Tenth Circuit echoed the earlier decision of the Eighth Circuit in *Christensen v. State of Iowa*, 563 F.2d 353 (8th Cir. 1977), which refused to consider a Title VII claim involving a comparison of the physical plant and clerical jobs at the University of Northern Iowa.

47. See Gunther, 452 U.S. at 199 - 200 (Rehnquist, J., dissenting). Justice Brennan seemed to answer this objection by arguing that repetition of the Equal Pay Act's four

Act established three specific defenses to pay differentials - that they are due to seniority, merit, or a system which measures earnings by quantity or quality of production - and added a general, catch-all category of "any other factor other than sex."<sup>48</sup> However, even before the addition of Senator Bennett's language, S.703(h) of Title VII itself already contained explicit defenses based on seniority, merit, or piecework systems, and it would seem implicit in the very notion of sex discrimination that the employer had not based its pay differentials on some "factor other than sex."<sup>49</sup> Thus, if one were to interpret the Bennett Amendment as doing no more than adding these EPA defenses to what was already provided by S.703(h) of Title VII, the conclusion is that the Amendment did nothing more than repeat what was already there, in the immediately preceding sentence.

There was a possible legal solution to this objection which would also protect judges from the practical difficulties felt in a Lemons-type situation. Consider what was meant by the charge that the City of Denver was guilty of sex discrimination in its program of wage determination. There was no suggestion

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affirmative defenses within the frame of Title VII would ensure consistent interpretation of the provisions by the courts. See 452 U.S. at 170. In response, Justice Rehnquist quipped: "[T]hat answer only speaks to the purpose for incorporating the defenses in each statute, not for stating the same defenses twice in the same statute. Courts are not quite as dense as the majority assumes." Id. at 200 (Rehnquist, J., dissenting).

48. See 29 U.S.C. § 206(d) (1982).

49. See Civil Rights Act of 1964 § 703(h), 42 U.S.C. § 2000e-2(h) (1982).

that the City had deliberately set out to depress the wages of women as such, by comparison with its male employees. Whatever wage figures were produced by the City's pay survey were then paid to all employees in the particular job classification, female and male alike, as was required by the Equal Pay Act. Rather, the nurses' claim was that since their job was filled almost entirely by women, whereas almost all the City's mechanics were men, a wage survey system which simply relied on the pay differentials found in the outside market, irrespective of whether these corresponded to the true relative value of the work to the employer, had a disparate impact on the female employees. Whatever the subjective good intentions of the City, then, this practice would amount to illegal discrimination under the Civil Rights Act.<sup>50</sup>

That analysis would fit quite comfortably with Title VII jurisprudence dating as far back as the celebrated case of Griggs v. Duke Power Co.<sup>51</sup> That case held that an employer could not establish general job qualifications - such as a high school diploma or a minimum score on an aptitude test - if

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50. As the trial judge in Lemons observed:

"The entire theory of the plaintiffs' case is that the defendant does not discriminate among its own employees, but rather that there is occupational discrimination which has come down through the centuries . . . . [W]hat we are confronted with here today is history. We're confronted with a history which I have no hesitancy at all in finding has discriminated unfairly and improperly against women."

Lemons v. City of Denver, 17 F.E.P. Cas. 906, 908 (1978).

51. 401 U.S. 424 (1971).

these had a disparate impact on minority applicants for the jobs.<sup>52</sup> It is apparent from reading Griggs that the Supreme Court wanted to extend the reach of Title VII that far because the history of racism in America had sufficiently disabled so many blacks from acquiring credentials comparable to those of whites. Thus individual employers would not be able to erect these as barriers to equal employment opportunity unless they could demonstrate that the qualifications were needed to pick the right person for the job.<sup>53</sup>

True, Griggs was decided in the context of an employer practice which determined who would get a particular job. However, it would seem plausible to apply the same approach to employer practices which determined the compensation to be paid for the job, practices which are also governed by the same S.703(a) of Title VII. Thus, when a firm uses a system of outside wage surveys and/or inside job evaluation which turns

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52. 401 U.S. at 431. That absence of discriminatory intent on the part of the employer is irrelevant in such cases was emphasized by the Court when it noted that "good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability." Id. at 432.

53. "The objective of Congress in the enactment of Title VII is plain from the language of the statute. It was to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of white employees over other employees. Under the Act, practices, procedures, or tests neutral on their face, and even neutral in terms of intent, cannot be maintained if they operate to "freeze" the status quo of prior discriminatory employment practices."

Id. at 429 - 30.

out to have a significant depressing effect on the relative wages paid to its female employees, this should be just as questionable under Title VII as would be an employer practice which had a depressing effect on the prospects of female applicants getting the job in the first place.<sup>54</sup> Such a legal position would put the onus on the employer to demonstrate that its pay practices were indeed essential for recruiting a qualified work force and for remaining competitive in terms of labor costs.

While the Griggs principle was available, then, to bring apparently sex-neutral pay practices within the scope of Title VII's ban on discrimination, it necessarily left judges with responsibility for deciding whether existing pay differentials between particular "female" and "male" jobs were in fact defensible on some objective basis or other. For anyone uneasy about the capacity of the federal courts to develop and apply their own wage pattern as an alternative to that produced even by a flawed labor market, the Bennett Amendment, even under its narrow interpretation, offered a possible refuge through the fourth affirmative defense: "any other factor other than sex." As Justice Brennan himself observed in Gunther (citing Griggs), "Title VII's prohibition

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54. See Dothard v. Rawlinson, 433 U.S. 321, 329 - 31 (1977). In Dothard, the plaintiff had applied for employment as a prison guard, but had been rejected because she failed to satisfy Alabama's statutory requirement that prison guards weigh a minimum of 120 pounds. Citing Griggs, the Court held that "to establish a prima facie case of [sex] discrimination, a plaintiff need only show that the facially neutral standards in question select applicants for hire in a significantly discriminatory pattern," Id. at 329.

of discriminatory employment practices was intended to be broadly inclusive, proscribing 'not only overt discrimination but also practices that are fair in form but discriminatory in operation.'<sup>55</sup> In cases of alleged wage discrimination on account of sex, though, employers are permitted to defend these charges on the ground that "their pay differentials are based on a bona fide use of other factors other than sex."<sup>56</sup> That meant that "the courts and administrative agencies are not permitted 'to substitute their judgment for the judgment of the employer. . .who [has] established and employed a bona fide job rating system so long as it does not discriminate on the basis of sex.'<sup>57</sup> Such a legal accommodation of Title VII and the EPA would seem to provide a happy resolution of both the legal and the policy puzzles I have mentioned. On the one hand, Title VII would be available to provide relief to the victims of purposeful sex discrimination in setting their wages (the claim that was made in Gunther), even though this discrimination was felt outside the narrow "equal work" compass of the Equal Pay Act. On the other hand, the Bennett Amendment would still play a significant role by excluding from interoccupational wage comparisons the Griggs "disparate impact" theory of illegal discrimination. That would keep the

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55. Gunther, 452 U.S. at 170 (quoting Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971)).

56. Id.

57. Id. at 171 (quoting 109 Cong. Rec. 9209 (1963) (statement of Rep. Goodell, principal supporter of Equal Pay Act, during floor debate on the Act)).

courts out of the economic thicket in which cases such as Lemons promised to entangle them.

While the Gunther judgment did intimate that there might be this significant legal role for the Bennett Amendment, the majority was careful to state that it was not firmly deciding "how sex-based wage discrimination under Title VII should be structured to accommodate the fourth affirmative defense of the Equal Pay Act".<sup>58</sup> That problem was left to the lower courts to grapple with. Since Gunther, the federal judges have almost uniformly refused to adopt or apply under Title VII any strong version of comparable worth: e.g., that the objective disparity between the relative value and the actual wages paid to male and female jobs is sufficient in itself to justify a holding that the employer is guilty of sex discrimination. That reluctance has been exhibited even in cases involving such close families of jobs as the social workers and psychologists employed by the State of New York, the public health nurses and sanitarians working for the City of Madison, and the nursing and law faculties of the University of Washington.<sup>59</sup>

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58. Id.

59. See, e.g., Schulte v. New York, 37 F.E.P. Cas. 1439, 1443 - 44 (E.D.N.Y. 1981) (relying on "substantial representation of the 'minority sex' within" social worker and psychologist job classifications and on existing market pay differentials to award summary judgment to defendant); Briggs v. City of Madison, 536 F. Supp. 435, 444 - 45 (W.D. Wis. 1982) (rejecting comparable worth claim based upon sex-segregation of defendant's public health nurse and sanitation job classifications, and noting that no one "possesses the intellectual tools and data base that would enable them to identify the extent to which the factor of discrimination has contributed to, or created, sex-segregated jobs, and to separate that factor from the myriad of nondiscriminatory



Of course, while such a refusal to apply Griggs-type "disparate impact" analysis to claims such as these seems to some to be an attractive solution to the legal and institutional obstacles to judicial scrutiny of an employer's wage structure,<sup>60</sup> to others it simply adds yet another legal badge to the second-class status long experienced by women in the labor market.<sup>61</sup> But those who are committed to the legal struggle against pay inequities can still deploy another strand

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factors that may have contributed to the same result."); Spaulding v. University of Washington, 740 F.2d 686, 706 (9th Cir. 1984) (holding that "where plaintiffs' sex-discrimination claim is a wide-ranging claim of wage disparity between only comparable jobs [such as the nursing and law faculty positions in the instant case], the law does not go so far as to allow a prima facie case to be constructed by showing disparate impact.").

60. See Gunther, 452 U.S. at 203 (Rehnquist, J., dissenting) (asserting that "Congress balanced the need for a remedy for wage discrimination against its desire to avoid the burdens associated with governmental intervention into wage structures."); Nelson, Opton & Wilson, Wage Discrimination and the "Comparable Worth" Theory in Perspective, 13 U. Mich. J.L. Ref. 233 (1980) (identifying problems with comparable worth theory as a tool for proscribing wage discrimination); Cox, Equal Work, Comparable Worth and Disparate Treatment: An Argument for Narrowly Construing County of Washington v. Gunther, 22 Duquesne L. Rev. 65, 95 - 109 (1983) (same); Note, Sex Based Wage Discrimination Under The Title VII Disparate Impact Doctrine, 34 Stan. L. Rev. 1083, 1101 (contending that "[a]lthough comparable worth impact claims advance the Title VII policies which the judicially created disparate impact doctrine serves, they intrude further into employer prerogatives and labor-management relations than Congress intended.") (1982).

61. See, e.g., Bellace, Comparable Worth: Proving Sex-Based Wage Discrimination, 69 Iowa L. Rev. 618, 655 (1984) (arguing that a limitation of comparable worth cases to disparate treatment analysis "would be to jettison a useful format for probing unlawful sex-based wage discrimination", since "[c]ompensation practices that are fair on the surface may [harbor] . . . hidden sex discrimination.").

within Title VII jurisprudence, under which they would ask the judge to infer that intentional sex discrimination - i.e., "disparate treatment" by the employer - is the real source of these apparent arbitrary differentials in the wages paid for work of comparable value.

The case of Taylor v. Charley Brothers<sup>62</sup> is probably the clearest example, post-Gunther, of how and why some way had to be found to tackle inter-occupational wage discrimination under Title VII. Charley Brothers had engaged in systematic discrimination against its female employees by first creating two segregated divisions within its warehouse and then establishing a pay scale for the "female" health and beauty aids division which was some 30% lower than what it paid to the "male" dry grocery division.<sup>63</sup> Most of the jobs in these two sides of the warehouse operation were identical in content: thus the disparities in pay for this equal work definitely violated the Equal Pay Act. However, there were some jobs in the female division which required somewhat less effort than those of their male counterparts, while a couple of the positions had no counterparts at all.<sup>64</sup> As to these, the plaintiffs adduced expert job evaluation testimony that the rather minor differences in the work done could account for only a fraction of the total gap in pay.<sup>65</sup> Having found

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62. 25 F.E.P, Cas. 602 (W.D. Pa. 1981).

63. See id. at 608 - 09.

64. See id. at 609 - 11.

65. See id. at 612.

intentional sex discrimination on the part of Charley Brothers in initially segregating the jobs and then in paying a lower wage scale to women where they performed the same work as men,<sup>66</sup> it was only logical for the judge to infer that this same motive also explained most of the disparity in pay for the work which was just comparable, not identical in content.<sup>67</sup> To dispose of the litigation, though, the judge did have to use the job evaluation evidence both, to refute any suggestion that it was the different content of these jobs, rather than sex discrimination, which accounted for the differences in pay, and then to estimate the appropriate relative pay for the female jobs in order to provide a remedy for this statutory violation.

However, once that divide was crossed in a clearcut case such as Charley Brothers - the use of unexplained disparities in the relative value and the relative pay for female and male work as one piece in the mosaic of circumstantial evidence from

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66. See id. at 613.

67. The Court concluded:

"Defendant Charley Brothers' failure to pay pack-up persons in Department 2 wages equal to truck loaders in Department 1, even though they do substantially equal work, requiring substantially equal skill, effort, and responsibility, and performed under substantially equal working conditions, constitutes employment discrimination in violation of Title VII. . . .

Defendant Charley Brothers intentionally discriminated against all other women in Department 2 by paying them substantially less than the men in Department 1 because they worked in a department populated only by women, and not because the jobs they performed were inherently worth less than the jobs performed by the men, all in violation of Title VII."

which to determine the existence and influence of intentional pay discrimination by the employer - one would soon confront the more difficult cases epitomized by AFSCME v. State of Washington,<sup>68</sup> where just about the entire case for inferring "disparate treatment" consisted in this kind of job evaluation material. Apparently, in the early 70's the State of Washington hired an outside consultant to do a comprehensive evaluation of its wage structure, and he reported that distinctively "female" jobs were paid on average about 20% less than comparably valued "male" jobs.<sup>69</sup> Among the pairs of largely sex-segregated jobs which the evaluator rated as essentially the same in value, registered nurses were paid about 30% less than the corresponding highway engineer group, secretaries III just about the same amount less than electricians, and the almost entirely female laundry worker group approximately 30% less than the male truckdrivers.<sup>70</sup> The initial reaction of the then Republican Governor Dan Evans was to include in his proposed budget some money to begin the process of bringing these female jobs into line with their male counterparts.<sup>71</sup> However, Evans' Democratic successor as Governor - ironically, a woman, Dixie Lee Ray - removed that item from the state budget, to some extent because she believed

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68. 578 F. Supp. 846 (W.D. Wash. 1983).

69. See id. at 861.

70. See USA Today, Sept, 6, 1985, at 6A.

71. See AFSCME, 578 F. Supp. at 860.

this program would prove far too costly.<sup>72</sup> Having failed in the political process, the employees and their union went to court. Eventually, a federal district judge agreed that by continuing this existing pay structure - indeed, by granting annual percentage increases on this base which actually widened the dollar disparity - the State "failed to rectify an acknowledged discriminatory disparity in compensation" and thereby "treat[ed] some employees less favorably than others because of their sex, and this treatment is intentional".<sup>73</sup> The result of his verdict was that the State of Washington faced a Title VII order which would have required some \$200 million more in annual wages, and a potential back pay award of more than half a billion dollars.<sup>74</sup>

One factor which was arguably distinctive in the State of Washington case is that the Evans' administration did seem to "acknowledge" the discriminatory character of the State's existing wage pattern as revealed by the job evaluation study; the implication was that future use of that system by Governor Ray and her successors for compensating state employees thereby

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72. See id. at 862.

73. Id. at 867.

74. See Yoshihashi, Los Angeles Backing Equal Pay For Jobs of 'Comparable Worth', N.Y. Times, May 9, 1985, at A-1, A-27. In raises and retroactive compensation, the total cost of the AFSCME ruling to the State of Washington was estimated to be \$838 million. Each additional year would cost the state \$200 million in greater compensation. See \_\_\_\_\_. The discounted present value of this liability, at a discount rate of 10 percent, is \$2 billion.

amounted to deliberate sex discrimination.<sup>75</sup> Suppose, as happened in American Nurses Association v. The State of Illinois,<sup>76</sup> that another state commissions its own comprehensive job evaluation study which reveals the same wage pattern. However, this time no one officially endorses the accuracy of the study and the existing wage relationships are simply maintained for the future. At the same time, no one responsible offers any tangible criticism of the validity of that job evaluation nor any defense of the current salary structure. Surely if the events in Washington were sufficient to impute intentional discrimination to that state government on the grounds that, with full knowledge of the apparently unjustified disparities in wage rates between secretaries and electricians, for example, it continued to follow this pattern

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75. The district court in AFSCME focused on a press conference held in December 1974 in which then-Governor Dan Evans discussed the results of the state's recent job evaluation effort. Evans concluded that "there is, indeed, a general relationship which results in an average of about twenty percent less [pay] for women than for males doing equivalent jobs." AFSCME, 578 F. Supp. at 861. Though she eventually reversed her position, Evans' successor as Governor, Dixy Lee Ray, likewise acknowledged the discriminatory character of the state's compensation structure early on in her administration. In a communication to the state legislature in January, 1980, Ray remarked that the state's survey

"revealed an average salary difference of 20 percent, favoring men over women for work of similar complexity and value. . . . The dollar cost of [bringing women's salaries up to men's] will be high; it probably cannot be achieved in one action. But, the cost of perpetuating unfairness, within State government itself, is too great to put off any longer."

Id. at 862.

76. 37 F.E.P. Cas. 705 (1985).

in compensating its employees in the future, precisely the same judgement should hold true for the State of Illinois; notwithstanding that no one there purported to "acknowledge" the validity of its study (presumably that had something to do with the fact that officials in Illinois realized what had happened in Washington).

One can understand, of course, that a judge might be disinclined to hold that disregard of a study's results is sufficient to constitute illegal discrimination, if only out of fear that "such a rule would create a disincentive to employers to conduct job evaluation studies at all":<sup>77</sup> that would deprive us of material that could be used as the basis for voluntary, gradual and economically-feasible steps toward pay equity for women. If that is the concern, though, there is a ready answer. If the employers won't engage in systematic job reevaluation, let the employees and their union commission and conduct the studies themselves and then present the results to their employers.<sup>78</sup> This action would fix the employer with the knowledge that its wage structure does seem to operate in a way that unfairly depresses the compensation of its female

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77. Id. at 708.

78. This has thus far occurred in at least two states. In 1980, the Pennsylvania state employees union commissioned a university research study to determine the extent of sex discrimination in salaries for comparable state jobs. See Cook, Comparable Worth: The Problem and States' Approaches to Wage Equity 61 - 64 (1983). Similarly, the Communications Workers of America in 1984 initiated a study to assess sex-based wage discrimination in Texas's compensation system. See CWA Leads Pay Equity Battles in Texas and Ohio, CWA News, Dec. 1984, at 9.

employees. If the employer just ignores the job evaluation, if it offers no substantial criticism or alternatives to the study (responses which themselves could be evaluated in turn), and continues its present pay policy in conscious disregard of the policy's evident impact on the female employees, that employer would do so at its own peril.

The more forceful response to this entire line of analysis is that even if an employer knows that its pay structure involves a divergence in the comparative value and the comparative pay of female and male jobs, this does not necessarily mean that the employer intends - in the sense that that is its purpose - to discriminate against its female employees.<sup>79</sup> An alternative explanation (and one which does appear to be true of the State of Washington)<sup>80</sup> is that its wage structure is the way that it is because this employer is simply following the prevailing wages in the outside labor market, as disclosed by the regular wage surveys conducted by the its personnel agency. Of course, the employees would

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79. Cf. Personnel Administrator of Massachusetts v. Feeney, 442 U.S. 256, 279 (1979). In Feeney, which concerned an Equal Protection challenge to Massachusetts's system of employment preferences to veterans (who, as a group, were predominantly male), the Court observed that:

"'Discriminatory purpose' . . . implies more than intent as volition or intent as awareness of consequences. . . . It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group."

Id. (citations and footnotes omitted).

80. See AFSCME v. State of Washington, 578 F. Supp. at 860.



respond that the Supreme Court has held in Corning Glass Works v. Brennan<sup>81</sup> that such an appeal to the market could not justify a pay differential in the "substantially equal" work of male and female inspectors:

"The differential arose simply because men would not work at the low rate paid to women inspectors, and it reflected a job market in which Corning could pay women less than men for the same work. That the Company took advantage of such a situation may be understandable as a matter of economics, but its differential nevertheless became illegal once Congress enacted into law the principle of equal pay for equal work."<sup>82</sup>

But the consensus verdict of the lower courts is that the market does provide a good legal answer to comparable worth allegations of wage discrimination across different jobs. In line with that view, a panel of the Ninth Circuit has just overturned the one important judicial breakthrough apparently secured for comparable worth in the State of Washington case:

"That concept [the linkage of intent to culpability] would be undermined if we were to hold that payment of wages according to prevailing rates in the public and private sector is an act which, in itself, supports the inference of a purpose to discriminate. Neither law nor logic deems the free market system a suspect enterprise. Economic reality is that the value of a particular job to an employer is but one factor influencing the rate of compensation for that job. Other considerations may include the availability of workers willing to do the job and the effectiveness of collective bargaining in an particular industry... We recognized in Spaulding that employers may be constrained by market forces to set salaries under prevailing wage rates for different job classifications. . . We find

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81. 417 U.S. 188 (1974).

82. Id. at 205.

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 demand or to prevent employers from competing in the labor market."<sup>83</sup>

#### F. Beyond Title VII

That Ninth Circuit judgment is the latest, though certainly not the last word about how this new comparable worth theory of pay discrimination will be treated under standard Title VII doctrine. We are just now embarked on what Cardozo once called "the process of elucidating litigation" about this subject. But while lawyers are naturally fascinated by these nuances of Title VII jurisprudence, it is a grave error to suppose that these are the be-all and the end-all of civil rights policy. There are a considerable number of other instruments which could be deployed in the cause of pay equity for women. At the federal level, for example, besides episodic lawsuits seeking mandatory orders and penalties under the Civil Rights Act, one could also use the positive incentive of federal contracts which are conditioned on systematic affirmative action to eliminate workplace discrimination.<sup>84</sup> Recognizing that, in its dying days the Carter administration proposed a comparable worth gloss to Executive Order 11246 which would likely have

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83. *AFSCME v. State of Washington*, \_\_\_\_ F.2d \_\_\_\_, \_\_\_\_ (1985).

84. See Executive Order 11246, 3 C.F.R. 339 (1967); see also Public Works Employment Act of 1977 § 103(f)(2), 42 U.S.C. § 6705(f)(2) (1982) (minority business enterprise set-asides for federal grants made by Economic Development Administration).

proven a more powerful weapon than even the most far-reaching judicial interpretation of Title VII.<sup>85</sup> True, that proposal was killed by the Reagan administration shortly after it took office,<sup>86</sup> but the same option would be open to a future administration with a different inclination on this subject.

At the moment, though, all the positive action is taking place at the state and local level. Quite a few states have been persuaded to implement pay adjustments for their own employees based on comparable worth-type analysis of their salary structures, and a number of other states are now engaged in systematic job evaluation as a prelude to such action.<sup>87</sup>

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85. The Carter Administration's Office for Federal Contract Compliance proposed in late 1980 the following addition to Executive Order 11246:

"§ 60-20.5(a) Wages. The contractor's wage schedules must not be related to or based on the sex of the employees."

Special Report, Pay Equity and Comparable Worth (BNA) 43 (1984). The Administration stated that the language was to be far-reaching in effect:

"While the more obvious cases of discrimination exist where employees of different sexes are paid different wages on jobs which require substantially equal skills, effort, and responsibility and are performed under similar working conditions, compensation practices with respect to any jobs where males or females are concentrated will be scrutinized closely to assure that sex has played no role in the setting of levels of pay."

Id.

86. See id.

87. Idaho, Iowa, Massachusetts, Minnesota, New Mexico, New York, and Washington have already begun adjusting the salaries of female state employees in accordance with the conclusions of comparable worth analysis of their pay structures. See Libr. of Cong., Cong. Res. Serv., Summary of Pay Equity/Comparable Worth Activities by State Governments 4 (March 12, 1985) (A.

On the basis of this experience, one state, Minnesota, has recently enacted a law requiring its local governments to comply with the same policy,<sup>88</sup> though no state has yet ventured to do the same for private firms within its borders.<sup>89</sup> Ironically, though, there are on the statute books of a good many states decades-old equal pay and fair employment laws whose explicit wording does ban discrimination in pay as between comparable, not just equal jobs (by contrast

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Ahmuty analyst) (Iowa, New Mexico, Minnesota, and Washington); id. at 8 - 9 (Idaho); [Globe Article] (Massachusetts); [NYT Article] (New York). Legislatively mandated studies are now underway as a prelude to such action in California, Connecticut, Hawaii, Maine, New Jersey, Oregon, and Wisconsin. In Pennsylvania and Texas, state employee unions commissioned these studies themselves when state governments were reluctant to do so; the unions are most likely taking this action as a prelude to litigation. See Libr. of Cong., Cong. Res. Serv., supra, at 5 - 20.

As far as federal employees are concerned, although the House of Representatives in June 1984 approved the Federal Pay Equity and Management Improvement Act, which would have required a study of federal job classifications and pay structures to see whether they discriminated against women, the Senate failed to follow suit. See Special Report, Pay Equity and Comparable Worth (BNA) 46 - 54 (1984); Libr. of Cong., Cong. Res. Serv., Comparable Worth/Pay Equity in the Federal Government 4 - 5 (April 22, 1985) (A. Ahmuty analyst).

88. See generally Libr. of Cong., Cong. Res. Serv., Summary of Pay Equity/Comparable Worth Activities by State Governments 13 (March 12, 1985) (A. Ahmuty analyst); A. Cook, Comparable Worth: The Problem and States Approach to Wage Equity (1983).

89. However, statutes in Alaska, Arkansas, Georgia, Idaho, Kentucky, Maine, Maryland, Massachusetts, North Dakota, Oklahoma, Oregon, South Dakota, Tennessee and West Virginia prohibit public and private employers alike from compensating unequally male and female employees performing comparable work or work of a comparable character. V. Dean, P. Roberts, & C. Boone, Comparable Worth Under Various Federal and State Laws, in Comparable Worth and Wage Discrimination 238, 240 - 47 (H. Remick ed. 1984).

with the federal Equal Pay Act).<sup>90</sup> While these state laws are not pre-empted by federal civil rights legislation, there is no reported instance of any of them having been applied in the manner sought by the dozen or so Title VII actions in the last decade.<sup>91</sup> Depending on the course of the law in the federal courts, though, one can certainly anticipate test cases being launched to obtain favorable rulings from the more receptive state courts in the not too distant future.<sup>92</sup>

In sum, whatever its short-term legal and political future in Washington, comparable worth is not likely to fade from the policy agenda. It will continue to raise the hopes of some and the hackles of others in the legislative, executive and judicial branches of both the federal and state governments. Lurking beneath the surface of these strongly-voiced opinions is some view or other of the possible benefits and burdens of such a venture. We have seen fragments of these concerns in

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90. See supra note 89.

91. Even in Minnesota, where the state legislature has taken affirmative action to promote comparable worth, state courts have been reluctant to accept the implications of the concept. For example, in *Bohm v. L.B. Hartz Wholesale Corp.*, 38 F.E.P. Cas. 496 (Minn. Ct. App. 1985), a divided court of appeals declined to interpret the Minnesota Human Rights Act, Minn. Stat. § 363.03(1)(2), which had earlier been adjudged coextensive with Title VII, as providing a comparable worth remedy. Contrary action would have given the Minnesota courts a measure of freedom from restrictive interpretations of Title VII emanating from the federal courts.

92. Thus far, only in Alaska has litigation been launched to test out the meaning and force of this language, which is facially broader than the language in the Equal Pay Act. See V. Dean, P. Roberts, & C. Boone, Comparable Worth Under Various Federal and State Laws, in Comparable Worth and Wage Discrimination 238, 240 - 47 (H. Remick ed. 1984).

this narrative account of how comparable worth emerged out of our existing civil rights law and philosophy, and it is time now to confront these claims on their respective merits.

### III. How Feasible Is Comparable Worth?

Appraisal of a proposal such as comparable worth involves two lines of inquiry. The first concerns the practical benefits which might flow from such a policy; in particular, the contribution it could make to "pay equity" for women. The second concerns the feasibility of the program: not just whether it is "doable" in its own right, but whether it could be implemented without unacceptable costs to the background economic institutions we want to preserve. Ultimately, of course, these questions are connected because the more urgent the problem, the more promising a particular solution, the greater the side effects one might be prepared to tolerate. For ease of presentation, though, I shall postpone to the next section a systematic review of the empirical evidence about the nature and sources of the gender gap in earnings, which tells us the potential gains from comparable worth if it were successfully implemented. Here I shall address the question of whether such an enterprise is workable at all.

#### A. Can Comparable Worth Fit With a Functioning Labor Market?

The cause of pay equity does strike a responsive chord with its theme that employees should be paid on the basis of the value of the work they perform, so as to insure that such

illegitimate factors as gender or race can play no role in their earnings. At least two serious concerns have made the federal judiciary reluctant to enlist in that cause, notwithstanding its appeal. One understandable source of unease about such a legal program is the apparent absence of any visible, objective scale of job worth to which a court could resort if it wanted to second guess the employer's decision about the relative pay for such entirely different jobs as secretaries and electricians, for example.<sup>1</sup> That immediate concern is reinforced by the more radical skepticism of the economist about the entire thesis that jobs have any intrinsic value at all in a competitive labor market; such that if one could only discover their true ranking, one could then use this as the standard for fixing a fair rate for the work traditionally performed by women.<sup>2</sup> That claim seems to smack

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1. See, e.g., *Spaulding v. University of Washington*, 740 F.2d 686, 701 (9th Cir. 1984) (asserting that judicial application of comparable worth would require "standardless supervision" of employer's wage scale); *American Nurses Ass'n v. State of Illinois*, 37 F.E.P. Cas. 705, 708 (N.D. Ill. 1985) (arguing that acceptance of comparable worth thesis would require courts to "impose a particular wage system on the employer, or . . . determine the relative worth of the job in question by a comparison of it to other jobs in the employer's establishment.").

2. See, e.g., G. Hildebrand, *The Market System*, in *Comparable Worth: Issues and Alternatives* 83 - 84 (R. Livernash ed. 1980). A cursory examination of the literature of advocates of comparable worth seems to provide some basis for this uneasiness of the skepticism of the economist. For instance, one comparable worth proponent recently observed that:

"[b]y traditional yardsticks [such as special skills or training requirements and responsibility for other workers or money] . . . child care will not be viewed as comparable in worth to, say, dentistry. But if one considers the worth of these two jobs by another

of the long-discarded medieval notion of a "just price" for money, which we now assume bears an interest rate that depends on overall supply and demand, on the riskiness of different investment instruments, rather than on the purpose for which the money is to be spent (e.g., corporate takeovers as opposed to low income housing). Similarly, while we all know that water is infinitely more valuable to human beings than diamonds, we acknowledge that the latter will be much more expensive because of their limited supply. So also in the labor market, the price for someone's services is a function of their usefulness to the firm which wants to employ them and the number of people who are ready and willing to do that work at the price offered. Any individual employer, such as the State of Washington, learns through its wage surveys what these market rates are for different occupations, and then must meet

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yardstick -- such as what would happen in our society if nobody engaged in child care versus what would happen if nobody engaged in dentistry -- then clearly the women's work of child care is of greater worth to society."

L. McArthur, Social Judgment Biases in Comparable Worth Analysis, in Comparable Worth: New Directions for Research 53, 65 (H. Hartmann ed. 1985).

For more scholarly developments of the theme that comparable worth is intrinsically incompatible with a competitive labor market, see G. Hildebrand, supra note \_\_\_\_; Lindsay & Shanor, County of Washington v. Gunther, 1982 Sup. Ct. Econ. Rev. 185 (1982); J. O'Neill, An Argument Against Comparable Worth, in U.S. Comm. on Civil Rights, Comparable Worth: Issue for the 80's 177 (1984); Women in the Workforce: Pay Equity, Joint Economic Committee of the U.S. Congress, 98th Cong., 2d Sess., at 89 (1984) (statement of M. Killingsworth).



these rates in its own pay structure for its own employees. While some might find these relative market values to be strangely amoral, even unfair, there is no reason to suppose that sex discrimination is their source. For example, while the largely male job of mail carrier pays more than does that of the predominantly female registered nurse, mail carriers also earn more than does the clergy, an equally male-dominated profession.<sup>3</sup>

Putting it more positively, a freely-functioning labor market operates to allocate labor to the places where it has its highest marginal productivity, and pays workers for what they are able to contribute to the goods and services which the people in the community want to have and to use. An individual firm must accept these market rates in order to recruit and retain the workforce which it needs to produce goods or services at a price which its customers are willing to pay. This does not exclude the possibility of the community taking certain steps to provide a decent level of income for an individual or family to live on (just as, for example, it can subsidize the interest cost on low income housing). But to intervene directly in the wage determination process to establish a high - and, in this view, artificial - price for certain specifically female jobs will inevitably produce

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3. Members of the clergy have average weekly earnings of \$284, while registered nurses and mail carriers have average weekly earnings of \$332 and \$406 respectively. See Rytina, Earnings of Men and Women: A look At Specific Occupations, Monthly Lab. Rev., April, 1982, at 25, 26 - 27.

distortions in the supply and recruiting of labor, the competitiveness of those firms specially affected (whose higher costs of production will squeeze their profit margins or raise their prices), and so on.<sup>4</sup> As the government is led to take further action to respond to these side effects of its original intervention, we are lead inexorably down what one author has called "the feminist road to socialism."<sup>5</sup>

There is some validity to this picture of the marketplace for the purchase and sale of labor. The market sets some limits to the floor price which must be offered to induce people to work rather than to play, to work in unpleasant rather than attractive surroundings, to invest years in education and training rather than start immediately to earn what often seems to be a lucrative wage for a young person. The market also sets a ceiling on wages based on the productive value of the workers to a firm which ultimately must sell its products to customers who are free to buy from other firms that might have lower labor costs reflected in the prices they charge. If pressed too far, though, the view that there is a smoothly functioning labor market which sets a determinate wage based on the marginal productivity of labor is incompatible not simply with the policy of comparable worth, but with any form

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4. See M. Gold, A Dialogue on Comparable Worth 55 (1983); G. Hildebrand, supra note \_\_\_, at 105 - 06.

5. Levin, Comparable Worth: The Feminist Road to Socialism, Commentary, Sept. 1984, at 13, 13. John Bunzel, one of the Reagan appointees to the Civil Rights Commission, has published a popular, more restrained critique of comparable worth, but nevertheless in the same vein. See Bunzel, To Each According to Her Worth, 67 Pub. Interest 77 (1982).

of equal pay or fair employment legislation. Thus, consistent devotees of this view find little reason to suppose there is much good performed by any such legislation, at least in the non-union, private sector.<sup>6</sup>

However, the historic prevalence of lower wage scales for women and exclusion of blacks from desirable firms and jobs are not the only documented features of the real world which are irreconcilable with this simple, text-book model of the labor market. Modern macro-economic theory, for example, begins with the peculiar fact that when the demand for labor drops relative to supply - i.e., when there are considerably more people looking for work than jobs available - wages do not fall. Instead, they remain stable or even rise in accordance with previous practice, in stark contrast to what happens to the prices of money or commodities which are determined in an auction type of market.<sup>7</sup> The fact is that most workers tend

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6. Levin, supra note \_\_\_\_, at 16 - 19. From essentially the same perspective, Professors Freed and Polsby attack the assumptions of the Equal Pay Act, see Freed & Polsby, Comparable Worth and the Equal Pay Act, 51 U. Chi. L. Rev. 1078 (1984), while Professors Heldman, Bennett and Johnson launch the same attack on the entire array of legal regulation of the labor market, see Heldman, Bennett, & Johnson, Deregulating Labor Relations (1981).

7. See L. Thurow, Dangerous Currents: The State of Economics 173 - 215 (1983). For illuminating discussions of the special qualities of the employment relationship, and their ramifications for macroeconomic analysis, see A. Okun, Prices and Quantities 81 - 133 (1981); M. Weitzman, The Share Economy: Conquering Stagflation (1984). Two noted commentators have used these labor market characteristics to argue persuasively for application of comparable worth principles. See R. Marshall & B. Paulin, The Employment and Earnings of Women: The Comparable Worth Debate, in U.S. Civil Rights Comm'n, Comparable Worth: Issue for the 80s 196 (1984).

to make their careers with firms which establish compensation practices that largely insulate wages from the vagaries of the external market. Thus, rather than cut wages the firm will lay off some of its work force and refuse to hire others who would be willing to accept much less pay.<sup>8</sup> True, if things get bad enough, ultimately there will be wage cuts; but such "concession bargaining," as has recently been seen in the auto or airline industries,<sup>9</sup> is sufficiently exceptional and noteworthy that it really serves to illustrate the rule.

At the micro-economic level, a theoretically troublesome but equally well-documented fact is the wide dispersion in the rates paid by firms, even in the same locality, for comparably qualified employees doing exactly the same work.<sup>10</sup> There are

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8. See id.

9. See Daily Lab. Rep. (BNA), at A-7 (Nov. 8, 1983) (agreement between American Airlines and Airline Pilots Association); Wage Highlights, Current Wage Devs., Nov. 1983, at 1 (Bureau of Labor Statistics, U.S. Dep't of Labor publication) (agreement between Boeing Co. and Machinists Union).

10. As an illustration, there is a revealing table in D. Treiman & H. Hartmann, supra note \_\_\_, at 49, which shows that in the Newark metropolitan area in January 1980, actual rates of pay for electricians and machinists ranged from \$6.40 to \$14.00 and \$5.60 to \$11.80 an hour respectively, while for Class A secretaries and registered industrial nurses, the respective ranges were \$5.71 to \$13.14 and \$5.14 to \$13.71 an hour, see id. (calculations for secretaries and nurses derived from reported weekly salaries, assuming a 35 hour work week). This data provided helpful support to the authors' thesis that institutional factors in the labor market produced a far greater spread in wage rates than would ever be supposed from marginal productivity theory, thus leaving ample room for socio-economic discrimination to have an impact on pay. However, it is worth noting that while the median earnings for the male jobs of electrician and machinist (\$8.63 and \$9.05 respectively) were significantly higher than that for the female jobs of secretary and nurse (\$7.16 and \$8.83

sharp differences in the average rates of pay between firms in different product markets,<sup>11</sup> between firms with high and with low capital-labor ratios,<sup>12</sup> and most important of all, between the bigger firms and the smaller firms.<sup>13</sup> One would not expect the larger, more profitable firms to pay more for the money they borrow or the oil they consume, but they do systematically pay a good deal more for the workers they hire (even after controlling for the quality of labor provided or the conditions under which the work is performed).<sup>14</sup> To some extent this is due to the fact that workers are a special kind of "commodity": one which can band together in unions to demand more for their services (on average, a relative wage effect of 20% or so).<sup>15</sup> But even non-union firms operating in an industry where there is no meaningful threat of being

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respectively), this gap, the target of the comparable worth strategy, was much smaller than the interfirm spread which obtained within the same occupation. If it were to turn out to be the case that there is also a pronounced tilt in the sexual distribution of workers across industries and firms, see infra TAN \_\_\_\_, this evidence of the real life distribution of wages would provide much less support for comparable worth in practice than it might seem to promise in theory.

11. See J. Dunlop, The Task of Contemporary Wage Theory, in The Theory of Wage Determination 3 (J. Dunlop ed. 1957).

12. See id.

13. C. Brown & J. Medoff, The Employer Size Wage Effect (1984).

14. See C. Brown & J. Medoff, supra note \_\_\_\_, at \_\_\_\_.

15. See R. Freeman & J. Medoff, What Do Unions Do? (1984) (discussing influence of collective bargaining on employee wages and other terms and conditions of employment).

organized feel compelled to follow the same policy.<sup>16</sup> The reason is quite simple. Workers know what they have been paid, how this compares with the pay of other workers whom they consider to be their reference group, and they develop strong expectations about how their employers should treat them in the future. Any firm which disappoints these expectations (at least without good and apparent reason) does so at its own peril, because this will directly effect the productivity for which it is paying, both in terms of individual effort and joint cooperation in the work team.<sup>17</sup> The inescapable fact, then, is that far from being simply a "price taker" in the labor market, most employers are, to some extent at least, "price setters": they can and do make a conscious decision about what position they will occupy in the overall wage structure in the community.

The fact that there is such a dispersion between high-paying and low-paying industries and firms is itself of considerable importance in understanding the gender gap in earnings and the potential value of comparable worth, as I will explain later on in this article.<sup>18</sup> More pertinent to the present discussion, though, is the fact that the leeway which the firm enjoys extends not only to the average level of

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16. See id.

17. See A. Okun, supra note \_\_\_\_, at 81 - 133; L. Thurow, supra note \_\_\_\_, at 173 - 215.

18. See infra TAN \_\_\_\_.

compensation it will pay, but also to the distribution of these funds between one job category and another.<sup>19</sup> Some of these jobs will be quite idiosyncratic to the individual employer, others will have obvious counterparts outside. Some firms will develop their pay scale in a largely intuitive, rough-and-ready fashion, others will use sophisticated specialists in job classification and evaluation. In either case, rarely will a single wage rate be dictated by the operation of an impersonal market (recall, there is no single wage rate to be found in that market).<sup>20</sup> Instead, the outcome inevitably rests on someone's all-too-human judgment.

An interesting example is to be found in the Lemons' litigation itself.<sup>21</sup> While the major focus of that case was a comparison of the wages paid to nurses as a group with that paid to such male jobs as auto mechanic or tree trimmer, Mary Lemons herself was the Director of Nursing, and her case raised a more specific issue. The City of Denver included her position in the overall family of nursing jobs on the basis that these were the people whom she supervised: though that judgment exposed Lemons to the same depressing effect on her

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19. Of course, the employer also enjoys substantial leeway in allocating compensation between take-home pay and various fringe benefits.

20. See supra TAN \_\_\_\_.

21. A further illustration of this point might actually be seen in a hypothetical case often used by economists as part of the argument against comparable worth. See sources cited supra note 2. Suppose a firm employing both Spanish-English translators, who are primarily male, and French-English

wages as was experienced by the nurses generally. On the other hand, the City placed the position of the Director of Environmental Health (who happened to be a man) in the

(footnote continued)

translators, who are primarily female, decides to pay the former a higher wage in the Miami area. Though there appears to be no difference in the "value" of the work performed by the employees, the difference in wages would not be evidence of sex discrimination on the part of the employer but simply of the greater demand for Spanish translation in Miami. The case supposedly illustrates the point that it is the play of market forces, not some supposed intrinsic job worth, which dictates the price of labor: presumably, the market would also generate a higher relative pay for French translators in New Orleans.

Even assuming the validity of this price-auction view of the labor market, there is no reason to suppose that Spanish translators will inevitably receive a higher rate of pay in Miami. While the demand for their services will likely be considerably higher in Miami, so also will be the supply. Only a short-term jump in demand which outpaces local supply can put upward pressure on the pay rate for Spanish translators. In the long run, assuming that there is no difference in the training required to develop French and Spanish translation skills and that translation in the two languages is of equal difficulty, one would expect the compensation rates for these two jobs to move together.

Indeed, even in the short-run, an individual firm will not inevitably respond to a change in demand for Spanish translators in Miami by adjusting rates of pay. Assuming the employer is a large, multi-location, multi-language organization with a sophisticated personnel department, it may realize that by raising pay for Spanish translators in Miami it might damage the morale and reduce the productivity of translators working in other languages and in other cities -- these other translators may believe that the earlier parity in pay was equitable because of the similar work all translators perform. Moreover, the firm may decide that it need not risk the increased costs that would be occasioned by a raise in pay because it believes that its relative position in the community pay spectrum leaves it well able to recruit sufficient Spanish translators in Miami without altering its pay structure. In short, there is no simple logic of supply and demand that explains the operation of the labor market; rather, the labor market is shaped by a complex, often counterintuitive set of principles that ultimately depends on the vagaries of human reaction to market constraints.



considerably better-paid General Administrative category which was based on educational qualification and the employee's supervisory responsibility. Lemons, though, as Director of Nursing satisfied each of these criteria to at least the same degree as the Director of Environmental Health.<sup>22</sup> One could hardly describe the City of Denver as just a price-taker, rather than also a price-setter, in determining the relative salaries which it would pay for these two jobs. In a microcosm, this specific decision in Lemons illustrates the broader point that real world labor markets leave a good deal of leeway for countless such managerial judgments about how to classify, value and pay some jobs in comparison to others.

The existence of such room for discretion by the firm makes possible, though not inevitable, sexual discrimination in its exercise. Two decades ago, our actual historical experience persuaded us that stereotyped views of women at work had unfairly depressed their pay for doing the same work as men, so as to require enactment of the Equal Pay Act. A similar history of segregation of women into a limited range of jobs which were considered appropriate for them led to their inclusion under the protective umbrella of Title VII's equal employment opportunity policy. Given this background, it would

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22. See Pay Equity: Equal Pay for Work of Comparable Value, Joint Hearings Before the Subcommittees on Human Resources, Civil Service, Compensation and Employee Benefits of the Committee on Post Office and Civil Service, House of Representatives, 98th Cong., 1st Sess., 831 (1983) (statement of Craig Barnes, counsel for plaintiffs in Lemons).

seem rather farfetched to suppose that the market would suddenly assert itself with sufficient force as to rule out any such illegitimate influence upon the rates of pay for those distinctive jobs into which women have, by and large, been channeled. This is not to deny the real levels of competition which do obtain in different labor and product markets, which place definite economic constraints upon the ability of firms to engage in discriminatory employment practices; not just in this new legal terrain of comparable worth, but also in the area long-governed by Title VII and the EPA. My point, simply, is that whether or not sex-discrimination has had a sufficiently depressing effect upon the wages paid for women's work to warrant some public policy response is a matter to be resolved only by detailed empirical investigation,<sup>23</sup> not by a priori judgments about what a "market" must entail.

B. The Uses and the Limits of Job Evaluation.

In principle, then, there is nothing inherently incompatible between a functioning labor market and a policy of comparable worth. This is not to deny that there are some inescapable economic limits to such a program, as I shall sketch shortly.<sup>24</sup> Nevertheless, if the City of Denver had been somewhat more sensitive to the issue of pay equity for women than it appeared to have been in the mid-70's, it could

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23. See infra Section IV.

24. See infra TAN \_\_\_\_.

readily have established a rather different relationship between the salaries paid to its Director of Nursing and its Director of Environmental Health without encountering any serious difficulties in recruiting and retaining qualified personnel at an acceptable level of labor costs. In fact, a number of firms are now engaged in systematic review of their job evaluation programs and existing wage scales to respond to this felt concern on the part of their female employees: not just the more highly-publicized examples of state governments but in the private sector as well.<sup>25</sup> So far, however, this activity is taking place on a voluntary basis at the individual firm level. The tougher challenge for the proponents of comparable worth is whether that concept could be translated into a mandatory legal rule enforceable in the courts, either through the interpretation of existing statutes, such as the post-Gunther Title VII, or the enactment of new ones. The question, then, is not whether this is a meaningful but rather whether it is a manageable task for our legal system to perform?

Certainly we have grown accustomed to far more legal regulation of the employment relationship than we might have imagined two decades ago when Congress debated and adopted the

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25. See Sape, Coping With Comparable Worth, Harv. Bus. Rev., May-June 1985, at 145, 151 - 52 (discussing approach of one firm in the chemical industry); Cong. Res. Serv., Lib. of Cong., Pay Equity - The Comparable Worth Issue: Equal Pay for Work of Equal Value; By What Standards and By What Means? 20 - 21 (1983) (A. Ahmuty, analyst) (discussing use of job evaluations in telecommunications industry).

quite limited Equal Pay Act.<sup>26</sup> But however important are the human problems addressed by legislation such as the Occupational Safety and Health Act,<sup>27</sup> the Employee Retirement Income Security Act,<sup>28</sup> state workers' compensation laws, even the pursuit of equal employment opportunity under the Civil Rights Act and Executive Order 11246, these are all rather peripheral to the core economic function of setting the price to be paid for labor. Thence the appeal in the inherent limits in the reach of the Equal Pay Act. Rather than permit judges or bureaucrats to second-guess the employer about the substantive content of its wage scale, the Act leaves the firm free to decide how much it wants to pay for certain work and the law does no more than insure that the same rate is paid to women as to men for performing that work.

This is not to suggest that even the process of wage determination is entirely immune from legal control. We have long had fair labor standards legislation which sets a minimum

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26. In this vein, state courts show far more willingness today than twenty years ago to "rewrite" at-will employment contracts with a view toward implying terms governing the employee's discharge. See Note, Protecting Employees At Will Against Wrongful Discharge: The Public Policy Exception, 96 Harv. L. Rev. 1931 (1983); Note, Protecting At Will Employees Against Wrongful Discharge: The Duty to Terminate Only in Good Faith, 93 Harv. L. Rev. 1816 (1980).

27. 84 Stat. 1590, 5 U.S.C. §§ 5108, 5314 - 15, 7902, 15 U.S.C. §§ 633, 636, 18 U.S.C. § 1114, 29 U.S.C. 553, 651 - 78, 42 U.S.C. § 342-1, & 49 U.S.C. App., § 1421 (1982).

28. 88 Stat. 1869, 5 U.S.C. 5108 - 09, 18 U.S.C. § 664, 1027, 1954, 26 U.S.C. § 37 et seq., & 29 U.S.C. § 441 et seq. (1982).

wage (albeit at a very modest level which directly touches only a small proportion of the work force),<sup>29</sup> and occasionally have experienced wage controls as part of anti-inflation programs.<sup>30</sup> But these programs, with whatever economic dislocations they entail, are worlds removed from an effort by the law actually to fix the wage rates which would be paid for the bulk of the jobs in the economy. Not only would a comparable worth program have to apply to the occupations which are predominantly filled by women, but because the essence of the claim is inequity in comparative wage rates, the earnings in predominantly male jobs would have to be controlled as well.<sup>31</sup> Since it is clearly impossible to undertake this task with a single, legislated wage standard or scale which could fit the vast array of jobs and firms in different industries and regions of our always-changing national economy, the best one can do is enact (or interpret) a law that expressed the general principle that relative wages within a

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29. See Fair Labor Standards Act § 206, 29 U.S.C. § 206 (1982).

30. See A. Weber and D. Mitchell, *The Pay Board's Progress* (1978) (discussing President Nixon's wage and price control program instituted in the early 1970s under the authority of the Economic Stabilization Act of 1970, 84 Stat. 799, 12 U.S.C. § 1904 (1982)). Typically, such controls simply restrain the rate of wage increases for a brief period of time and express the restraint in percentage terms, thus leaving unaffected the underlying structure of wage rates.

31. Likewise, in school integration programs, the government must regulate the assignment of white as well as black children.

firm cannot be influenced directly or indirectly by the sex composition of particular jobs. Administrators and judges would be left to decide how this principle would be implemented in particular cases.

Would this involve the "standardless supervision" feared by the trial judge in American Nurses Association v. State of Illinois?<sup>32</sup> To a considerable extent, this turns on whether or not it is feasible to construct a model for wage determination which would enable us to set the relative pay for entirely different jobs in a way that was purified of any historic underevaluation of women's work. When comparable worth first emerged on the scene, its proponents placed great stock in the possibilities of job evaluation. This is a practice by which firms break down even their most idiosyncratic jobs into a small number of common elements - typically skill, effort, responsibility and working conditions - carefully study and score each job along these several dimensions, and then weight these scores in terms of the relative value to the firm of each such factor. The point of the exercise is to produce a rank ordering of the different jobs in the firm's operations. Since most large employers in the economy already use some more or less sophisticated version of this procedure to determine for themselves the comparative worth of jobs as a basis for setting relative wages,<sup>33</sup> there

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32. 37 F.E.P. Cas. 705, 708 (1985).

33. See D. Treiman & H. Hartmann, *Women, Work, and Wages: Equal Pay for Jobs of Equal Value* 71 (1981). For a

might seem nothing that farfetched about turning this into a public program. All one would need is a consensus among the professional practitioners in this field about what are the most neutral, scientific, sex-blind techniques for job evaluation. These could serve as the model for those employers who were voluntarily inclined to achieve greater pay equity for their female employees, and be a standard for judicial scrutiny of those employers who were recalcitrant. Indeed, in its initial enthusiasm for comparable worth, the EEOC commissioned a study by the National Academy of Sciences which was supposed to tell us how this was to be done.<sup>34</sup>

Unhappily, the final report of the NAS, together with reflection on the subject by skilled practitioners and students, tells a rather different story: far from being an independent standard of value which could be superimposed on the labor market, job evaluation, even in its most sophisticated form, is heavily tied into and dependent upon the values set by the market. There are at least two important reasons why this is so.

First, any sizable firm likely has several distinct job evaluation programs: perhaps one for the production and maintenance workers in the plant, another for the clerical and

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still useful description of the origins and original uses of the system of "evaluated rate structures" (as the authors called it), see S. Slichter, J. Healy, & R. Livernash, *The Impact of Collective Bargaining on Management* 558 (1960).

34. See id.

administrative staff in the office, and a third for higher-echelon managers and professionals.<sup>35</sup> This has always seemed only sensible to practitioners of the art. They have to compare the physical effort expended or know-how required in two quite different jobs, judge how much these requirements are ultimately worth to the firm, and communicate these findings not just to the personnel manager but also to the workers affected: that is a somewhat less difficult challenge if one is dealing with smaller, more homogeneous clusters of jobs, all performed in a common work environment where a somewhat greater level of shared assumptions is likely to obtain. Yet if, as is likely to be the case, most women are employed in the office while men predominate in the jobs in the plant and in the executive suite, the presence of separate job evaluation plans is no help to the cause of comparable worth. They will provide no underlying basis for appraising the pay differentials between typically male and typically female work in accordance with a single, common set of job elements.

Thus one major change which comparable worth would require in job evaluation is the development of comprehensive systems that apply to all work performed for the employer.<sup>36</sup> Of course, that also leaves a serious risk of misjudgment about the ranking of particular jobs, because of the much higher

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35. See id. at 78 - 80.

36. See Hills, Comparable Worth: Implications for Compensation Managers, Compensation Rev., No. 3, at 33, 38 (1982).



level of abstraction at which the evaluator is inevitably operating. Even ignoring that practical difficulty, one then encounters a basic conceptual problem: what is the source of the weights to be given to those evaluation factors which have been discerned in varying degrees in whatever set of jobs are being examined? How does one know, for example, that "accountability" is an element which is worth a lot more than "working conditions" in setting the level of pay for two jobs? However scientific a procedure job evaluation might seem to be in producing a precise numerical ranking of each job,<sup>37</sup> ultimately these numbers rest on certain value judgments. And as it turns out, conventional job evaluation derives these numbers from, rather than imposes them upon, the labor market.

The reason that is so is that the evaluator customarily begins with a small number of key, benchmark jobs within the firm. These jobs may involve relatively standardized skills for which there is a visible external market (e.g., an electrician or a legal secretary), or they may serve as a "port of entry" into the firm for people with relatively little skill who are hired into labor or clerk classifications where they

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37. For instance, the State of Washington study produced precise numerical scores of 348 points for registered nurses and 362 points for senior architects. See State of Washington Comparable Worth Study Phase II 10a - 10f (1976), reprinted in Pay Equity: Equal Pay for Work of Comparable Value - Part II, Joint Hearings Before the Subcommittees on Human Resources, Civil Service, Compensation and Employee Benefits of the Committee on Post Office and Civil Service, House of Representatives, 97th Cong., 2d Sess. 1538 - 43 (1982).

will be trained and progress up the job ladder.<sup>38</sup> The assumption is that the firm must remain competitive in its pay for these jobs at whatever point it has chosen to occupy in the community pay spectrum. Thus, these positions are first analyzed into their constituent elements and assessed in terms of whatever factors are considered important in determining a job's worth. Then the existing wage relationships for this set of jobs are used as the peg from which to derive the implicit values for these different factors.<sup>39</sup> In other words, the test of the adequacy of the tentative job evaluation scheme is whether the weighted factor scores for these key jobs can be used to "predict" the wage structure for these jobs.<sup>40</sup> Once that exercise is complete, the program is then capable of being used to evaluate the variety of more or less specialized positions in the firm: it can serve to establish a decent level of coherence and equity within the employer's internal labor market while at the same time respecting the real cost and recruiting constraints imposed by the external labor market.<sup>41</sup>

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38. See D. Treiman & H. Hartmann, Women, Work, and Wages: Equal Pay For Jobs Of Equal Value 76 (1981).

39. See id. at 75 - 76.

40. D. Schwab, Job Evaluation and Pay Setting: Concepts and Practices, in Comparable Worth: Issues and Alternatives 49, 63 (R. Livernash ed. 1980); D. Treiman & H. Hartmann, Women, Work, and Wages: Equal Pay For Jobs of Equal Value 72 (1981).

41. Among the better treatments of the current practice of job evaluation, and the promise and the problems this presents for comparable worth are R. Beatty & J. Beatty, Some Problems With Contemporary Job Evaluation Systems, in Comparable Worth and Wage Discrimination 59 (H. Remick ed. 1984); A. Bellak,

Once one appreciates that job evaluation entails some such procedure as this, that ultimately it "captures the policy of the market" (even as it does a good deal to improve the quality of the judgments made within the leeways left by that market), one must concede that this procedure cannot readily serve as a benchmark from which to scrutinize the performance of that market, as a program of comparable worth requires. If, as the case for comparable worth supposes, a major source of the disparity in male-female earnings is the fact that such female jobs as secretary or filing clerk have historically been underpaid relative to such male jobs as electrician or shop laborer, a job evaluation system that might use these existing wage relationships as the starting point for analysis has to be considered part of the problem, not part of the solution.<sup>42</sup>

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Comparable Worth: A Practitioner's View, in U.S. Civil Rights Comm'n, Comparable Worth: Issue for the 80s 75 (1984); D. Schwab, Using Job Evaluation to Obtain Pay Equity, in U.S. Civil Rights Comm'n, Comparable Worth: Issue for the 80s 83 (1984); D. Schwab, Job Evaluation and Pay Setting: Concepts and Practices, in Comparable Worth: Issues and Alternatives 81 (R. Livernash ed. 1980); R. Steinberg, Identifying Wage Discrimination and Implementing Pay Equity Adjustments, in U.S. Civil Rights Comm'n, Comparable Worth: Issue for the 80s 99 (1984); D. Treiman, Job Evaluation: An Analytical Review: Interim Report to the EEOC (1979).

42. See D. Treiman & H. Hartmann, Women, Work, and Wages: Equal Pay For Jobs Of Equal Value 76 (1981); Hills, Comparable Worth: Implications for Compensation Managers, Compensation Rev., No. 3, at 33, 38 (1982). An interesting piece of research by Professors Schwab and Grams shows how the market can exert its influence upon job evaluation even unconsciously. See Schwab & Grams, Sex-Related Errors in Job Evaluation: A "Real World" Test, J. Applied Psych. (forthcoming 1985). Schwab and Grams presented to a group of experienced compensation practitioners (both male and female) three detailed descriptions of jobs in a financial institution

Does that mean that the judges would inevitably have to take the responsibility of making their own "value judgments. . .[about] criteria of pay equity,"<sup>43</sup> or even worse, delegate that role to "some group of experts or pseudo-experts"?<sup>44</sup> Understandable uneasiness about steps such as these accounts for much of the judicial reluctance to embark on this particular quest for pay equity for women. There is another conceivable answer to this conundrum, though. Suppose one selected as benchmark jobs only those which were either integrated or distinctively male in their composition,

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and asked them each to evaluate and set the rates of pay for the three jobs. When they varied the sex composition of the incumbents in those positions, this produced no effect on the relative jobs ranking and pay, irrespective of the sex of the evaluators. This confirmed the results of some other research, see Schwab & Grams, supra (citing studies), that sex does not have a significant influence on contemporary job evaluation, contrary to the inference often drawn from psychological studies that the tasks typically performed by women are undervalued in our society, see Blumrosen, supra note \_\_\_, at 415 - 21 (citing studies). However, when the existing wages paid to the three jobs were varied, a pronounced effect on the ultimate evaluation occurred, thus testifying to the human tendency of even experienced practitioners to respond to the cues of an existing salary scale whose validity they are supposed to be scrutinizing. The significance of that finding is that if the current pay for women's work is depressed - whether because of overt wage discrimination in the past, or because of the market effect of crowding a greater supply of women into too limited a number of jobs which were available to them, or whatever - this shortfall can exert an inertial effect on future pay evaluation for these jobs long after anti-discrimination law may successfully have removed its source.

43. American Nurses Ass'n v. State of Illinois, 37 F.E.P. Cas. 705, 708 (N.D. Ill. 1985).

44. Lemons v. City & County of Denver, 17 F.E.P. Cas. 906, 909 (D. Colo. 1978).

on the assumption that wages for these jobs are unlikely to have been infected by sex discrimination. Using statistical analysis, one would try to derive the implicit values placed by the firm upon the factors for which it was rewarding these jobs. At least given a sufficiently broad range of blue collar and white collar positions with ample numbers of male incumbents, one should then be able to use this set of sex-neutral factors and weights to systematically appraise the remaining female jobs. For example, it is sometimes suggested that employers overvalue the degree of physical exertion or the unattractiveness of working conditions associated with predominantly male jobs in the plant as compared to the training and skill required for largely female jobs in the office. To resolve this issue under the approach suggested here, the judge would not have to impose his or her own view, or those of a hired job evaluator, about the "true" relative worth of those factors (as seems to have occurred in the AFSCME case).<sup>45</sup> Instead, the focus of inquiry would be the implicit

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45. Actually, in the AFSCME case, while the Willis study assumed a maximum award of 280 points for knowledge and skills, 140 points for mental demands, and 160 points for accountability, the study awarded only 20 points for working conditions (which included the risk of injury or death). See State of Washington Comparable Worth Study (1974), reprinted in Pay Equity: Equal Pay for Work of Comparable Value - Part II, Joint Hearings Before the Subcommittees on Human Resources, Civil Service, Compensation and Employee Benefits of the Committee on Post Office and Civil Service, House of Representatives, 97th Cong., 2d Sess., 1496 - 1500 (1982). To the extent that the latter factor is likely to be significant mainly in the male-dominated, blue-collar jobs, and the labor market in fact requires a somewhat higher compensating wage differential to attract workers to jobs with those kinds of risks or unpleasant conditions, see infra TAN \_\_\_\_, one might be able to understand why the job evaluation ranking differed from what the wage surveys disclosed about the market rates.

economic evaluation which this particular firm placed on educational credentials versus the risk of injury, for example, insofar as these values are revealed by what it paid such plant jobs as electrician as compared to what it paid the predominantly male administrative or professional jobs such as engineer. Whatever the reward structure one found to underly this entire array of male or integrated jobs could then be used to determine whether the employer was paying the same price for these same characteristics when they were displayed in identifiably female positions such as secretary or nurse.<sup>46</sup> Indeed, in that sense this approach actually would track quite closely the basic theme of the Equal Pay Act itself.<sup>47</sup>

I recognize, of course, that there is a world of practical difference between a judge undertaking the exercise I have just sketched and simply requiring a firm to pay its established and visible wage rates to its male and female employees performing

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46. This conceptual solution to the problem of evaluating women's work is developed in D. Treiman, H. Hartmann, & P. Roos, Assessing Pay Discrimination Using National Data, in Comparable Worth and Wage Discrimination 137, 149 - 52 (H. Remick ed. 1984), and D. Treiman & H. Hartmann, Women, Work and Wages: Equal Pay for Jobs of Equal Value 82 - 90 (1981).

47. I might add that the approach that I am suggesting here would not confine the analysis just to the kinds of job characteristics which are the focus of conventional job evaluation. For example, if the employer were able to show that unionization or labor shortages were significant variables in explaining the relative pay within its range of non-female jobs, these would also be legitimate factors in scrutinizing what it paid for identifiably women's work. Just as under the Equal Pay Act, the point of the exercise is not to superimpose upon American employers any positive vision of what is the "just price" for work, but rather simply to insure that the sexual composition of an occupation is not a factor which is influential in determining its pay.

the same duties in the same job. Even under the Equal Pay Act, judges often do encounter a serious problem in deciding whether there has been sex discrimination in the manner in which a firm uses educational qualifications, performance appraisals and so on to slot its male and female employees within the pay range for a particular position. The complex statistical analysis involved in such litigation often seems to stretch the adjudication process to its outermost limits.<sup>48</sup> It would be a vastly more daunting exercise for a judge to have to use regression analysis to identify the economic value judgments which underlie the firm's entire wage structure for its array of different jobs. In addition, such an approach to legal job evaluation is even possible only in those firms whose undertaking and employment is sufficiently large and diverse that its range of non-female jobs will provide a representative sample of the characteristics which are typically found in female jobs so as to provide a fair test of their relative evaluation there.

However, there is a danger in saying, as so many do, that comparable worth simply cannot be done. The fact is that something of that sort is being done, whether on a voluntary basis by some American employers (particularly, certain state governments)<sup>49</sup> and also by specialized administrative agencies in other countries that have adopted some version of

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48. For an extreme example of a trial judge grappling with the statistical complexities of employment discrimination litigation, see *Vuyanich v. Republic National Bank of Dallas*, 505 F. Supp. 224 (N.D. Tex. 1980).

49. See supra note \_\_\_\_.

comparable worth into law.<sup>50</sup> We do not as yet have any critical appraisal of the soundness of the approaches adopted in these settings: so far as I can tell, rather than follow something like the procedure sketched above, they seem ultimately to rely just on someone's a priori judgments about what the value of different job factors ought to be? At the present time, then, our judges would not be able to draw on a body of reliable experience with which to scrutinize the claims made by the parties and their hired experts in litigation undertaken to implement an enforceable legal right to comparable worth. Having said that, I remain satisfied that this approach to pay equity for women makes sense in principle. Contrary to the contentions of its detractors, comparable worth need not entail a search for the "just price" for labor, but only a requirement that the implicit evaluation a firm places on those factors for which it actually rewards its employees working in male jobs should be applied uniformly and fairly in setting the wages for women's work as well.

### C. Comparable Worth as a Polycentric Problem

Let us assume for the moment that the legal system could solve the immediate issue in implementing comparable worth - how to identify the degree to which female jobs are underpaid in terms of the factors for which the employer is presently

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50. For instance, Canada has approved a law implementing comparable worth with respect to workers under the jurisdiction of the Canadian federal government. See R. Cadieux, Canada's Equal Pay for Work of Equal Value Law, in Comparable Worth and Wage Discrimination 173 (H. Remick ed. 1984).



rewarding its male jobs. The natural reaction would be that once that hurdle was surmounted, all the judge need then do is order that the wage rates for female jobs be raised to the male level, and then retire from the case. Unfortunately, the policy difficulties would just be beginning.

First of all, substantial amounts of money are likely to be involved (even excluding any consideration of back pay). If the experience of Minnesota and Washington is any indication, the additional annual wages ordered for all the incumbents in the female jobs (women and men alike) would be in the range of 5% or so of total payroll.<sup>51</sup> Indeed, since the relative pay of women to men in the state governments is already much higher than it is in the private sector,<sup>52</sup> that is a conservative estimate for the latter. There is no reason to expect that such a judicial order would be accompanied by any appreciable increase in work force productivity. Thus, because payroll costs typically amount to around 75% of overall costs of

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51. See N. Rothchild, Overview of Pay Initiatives 1974 - 84, in U.S. Comm'n on Civil Rights, Comparable Worth: Issue for the 80s 119, 125 (1985) (noting that cost of comparable worth as a percent of state payroll exceeds 4 percent, and that estimates of the liability of Washington under AFSCME are considerably higher).

52. In general, the relative wages of female workers, after controlling for a variety of human capital variables, are sharply higher in the state governments than they are at the local or federal level, with the exception of the United States Postal Service, and in every stratum of the private sector, with the exception of the agricultural industry. See Asher & Popkin, The Effect of Gender and Race Differentials on Public-Private Wage Comparisons, 38 Ind. & Lab. Rel. Rev. 16, 20 (1984).

production in the economy,<sup>53</sup> there would inevitably be a squeeze on the employer's prices or profit margins (or, in the public sector, upon levels of services or taxes). Because neither the firm's customers nor its investors will be bound by a legal edict directed solely at the employer's wage structure, these substantial added costs of production threaten serious dislocation in the latter's business. One might respond, of course, that the employer was guilty of wrongful sex discrimination and thus has no legitimate grounds for complaint about the plight in which it now finds itself. The difficulty is that if the employer's business declines, so also will its employment, especially within the very female jobs whose relative price has now been raised by judicial order.<sup>54</sup>

One can easily imagine a solution to this financial concern. The court should simply adjust the rates in the male jobs downwards at the same time as it is revising the female job rates upwards, so that the two meet at the appropriate intermediate point where the employer's total wage bill will remain roughly the same. That form of judicial order might also seem justifiable in principle, since the essence of a

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53. For example, during the period from 1970 to 1983, compensation of employees averaged 75 percent of total national income. See Bur. of Census, U.S. Dep't of Commerce, Statistical Abstract of the United States 438 (1985) (Table 728).

54. See G. Hildebrand, The Market System, in Comparable Worth: Issues and Alternatives 79, 105 - 06 (R. Livernash ed. 1984); J. O'Neill & H. Sider, The Pay Gap and Occupational Segregation: Implications for Comparable Worth 11 - 12 (1984) (unpublished paper prepared for presentation at the 1984 Winter Meetings of the Industrial Relations Research Association).

comparable worth claim is that the female jobs are relatively, not absolutely, underpaid. In an economy with some limits on the amount that can be earned and spent by labor, it is the fact that women workers have taken less that has enabled men to take a greater share of the pie. Assuming that the policy of comparable worth were to be applied across the entire economy, a reduction in the real value of male earnings would be the result even of a policy which seemed to do no more than increase female wages and leave the nominal male rate alone.<sup>55</sup> In the final analysis, a secretary, for example, can earn a higher relative salary only if the earnings in such jobs as electrician are to drop in real terms.<sup>56</sup> Suppose that will be the ultimate macro-economic result of comparable worth: why not apply the policy on that same theory, then, case by case, firm by firm, and thus avoid a financial squeeze on individual employers and the harmful dislocations this could trigger among those whose economic welfare is dependent on these employers?

That path has some large pitfalls, though. The first and most obvious is the deep negative reaction which would be evoked among the incumbents in the male jobs. Workers

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55. Of course, this real reduction in the value of male wages would result from a complex cycle of wage and price inflation. An increase in total wages occasioned by comparable worth adjustments for women would increase aggregate costs and demand in the economy, thus increasing prices. Wages for males, if held relatively constant in nominal terms, would thus decline in real terms.

56. Just as, for example, the real prices of some other commodities had to decline in order to make it possible for oil to command its much higher price level over the last decade.

traditionally display great resistance to actual reductions in their wages even when their own employer and their own jobs seem in dire economic straits: that is why two-tier wage systems have been so prominent a feature of recent concession bargaining.<sup>57</sup> Even greater resentment would likely be engendered by judicially-ordered wage cuts to try to end employment discrimination. The question which naturally will be asked is why this group of "innocent" employees should have to pay the price of undoing the harm caused by the guilty employer through its discriminatory wage structure.<sup>58</sup> Essentially the same refrain has long been heard in the debate about affirmative action for historically-disadvantaged groups versus the seniority rights of innocent white males. Just as seniority rights are given statutory protection under the Civil Rights Act, so also the existing wage rates for male workers are explicitly safeguarded from any reduction in the enforcement of the anti-discrimination policy of the Equal Pay Act.<sup>59</sup> That same principle would seem equally pertinent

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57. See Note, Two-Tier Wage Discrimination and the Duty of Fair Representation, 98 Harv. L. Rev. 631, 632 - 34 (1985).

58. This question gains additional force from the fact that it can now be put on behalf of an increasing number of young women who are now occupants of traditionally male jobs. See A. Beller, Occupational Segregation and the Wage Gap, in U.S. Comm'n on Civil Rights, Comparable Worth: Issue for the 80s 23, 27 - 28 (1984) (noting that the sex segregation of traditionally male occupations has declined considerably from 1972 to 1981).

59. See Civil Rights Act of 1964 § 703(h), 42 U.S.C. § 2000e-2(h) (1982); see generally Fallon & Weiler, Firefighters v. Stotts: Conflicting Models of Racial Justice, 1984 Sup. Ct. Rev. 1.

under Title VII, whose resources, post-Gunther, are now to be marshalled in the struggle against broader forms of sex-based wage discrimination.

Besides these equitable concerns, there is an additional economic obstacle to any reduction in the wage rates for the male jobs. Recall that the reason for considering this measure was the need to avoid sharp increases in the employer's labor costs in order to preserve the firm's competitive position vis-a-vis its customers and its investors. But the firm subjected to a comparable worth order would still have to recruit and/or retain employees to work in its male jobs in a labor market in which people are free to decline such judicially-ordered wage rates if they can find a better offer elsewhere. Such offers would be forthcoming from other employers who have not been touched by such comparable worth litigation and enforcement.

This was the actual problem posed in Christensen v. State of Iowa.<sup>60</sup> The University of Northern Iowa had commissioned and implemented a comprehensive job evaluation of all its non-professional positions, inter alia, to try to eliminate some of the disparity in pay between its all-female clerical department and its mostly-male physical plant department. Apparently the University encountered some difficulty in recruiting employees for the physical plant jobs under this new internal pay structure, in the face of somewhat higher wages

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60. 563 F.2d 353 (8th Cir. 1977).

paid for these jobs in the outside labor market. Accordingly, the University modified its plan so as to start new employees in physical plant jobs at a point somewhere up the pay scale for the position, a scale which was supposed to depend on length of service.<sup>61</sup> Because that same option was not made available to new clerical employees who could be recruited at the bottom rung of their new salary ladder, a lawsuit charged the University with sex discrimination. In its decision rendered prior to Gunther, the Eighth Circuit refused to find a prima facie violation of Title VII from the fact that "employees of different sexes receive disparate compensation for work of differing skills that may, subjectively, be of equal value to the employer, but does not command an equal price in the labor market."<sup>62</sup> The court felt that such a doctrine would "ignore economic realities. The value of the job to employers represents but one factor affecting wages. Other factors may include the supply of workers willing to do the job and the ability of workers to band together to bargain collectively for higher wages."<sup>63</sup> In the final analysis, the Court was simply unwilling to read Title VII in a manner which might "abrogate the laws of supply and demand and other economic principles that determine wage rates for various kinds of work."<sup>64</sup>

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61. See id. at 354.

62. Id. at 356.

63. Id.

64. Id.

Christensen has been vigorously criticized on the ground that the whole point of civil rights law is to rectify the operation of a labor market which in the past was badly flawed by race and sex discrimination. As I noted earlier, the Supreme Court held in Corning Glass Works v. Brennan<sup>65</sup> that the fact that the market might enable an employer to recruit women to perform at lower pay the same work as men would not justify the disparity under the Equal Pay Act.<sup>66</sup> Now that the Court has held in Gunther that Title VII is available to rectify sex-based wage discrimination across different jobs, its proponents assert that the same principle should be equally applicable in the latter context.<sup>67</sup>

Careful reflection on the circumstances of a case such as Christensen, though, indicates that the problem is far more

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65. 417 U.S. 188 (1974).

66. Id. at 205.

67. For example, Winn Newman and Christine Owens have recently argued that:

"Few would publicly suggest that Title VII permits an employer to exploit black workers by paying them lower wage rates than whites simply because the black unemployment rate is so tragically high and the supply of blacks is so much greater than the demand."

W. Newman & C. Owens, Race and Sex-Based Wage Discrimination is Illegal, in U.S. Comm'n on Civil Rights, Comparable Worth: Issue for the 80s 131, 133 (1984). They continued:

"Why, then is there not similar outrage at the notion that the market for women workers should determine their wage rates, especially in view of the fact that it is in large measure past and present employer discrimination . . . that has created this tragic market situation for women."

Id. at 143.

complex than that. First of all, only the most attenuated form of sex discrimination could possibly be imputed to the employer there. Certainly the University had not set out deliberately to depress the wages of its female employees, to subject them to invidious disparate treatment specifically on account of their sex. Indeed the University's broader aim was quite to the contrary, as evidenced by its change from a pay determination system based solely on surveys of outside wages to its new job evaluation scheme. The most one could assert is that the policy of starting only physical plant employees (who in fact did include some women) above the base of the new salary ladder had a disparate impact on the female component of its work force, because the latter was employed predominantly in the clerical section which was not given that option. That could possibly amount to discrimination only in the extended Griggs sense of that term; and it is not obvious that market factors must be entirely ruled out of consideration in deciding whether such behavior should be deemed illegal, simply because we will not countenance any such defense to pay differentials based on sex (or race) as such.<sup>68</sup>

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68. Indeed, under the Canadian "equal pay for work of equal value" law, an "internal labor shortage in a particular job classification" can be a legitimate ground for a pay differential even if this produces a disparity in pay for a comparable "female" classification. See Canadian Equal Wage Guidelines (Canadian Human Rights Commission 1981); R. Cadieux, supra note 50, at Appendix II; see also Ontario Ministry of Labour, Equal Pay for Work of Equal Value: A Discussion Paper 38 (1976) (observing that "[i]t will not always be the case that the internal relative wage differentials suggested by a job evaluation exercise are in conformity with the wage differentials between similar jobs in the external labour market," and that "[r]econciliation of these conflicts may



Why might an employer feel it necessary to adopt such a pay policy, whether one labels it legally discriminatory or not? The difficulty comes from the fact that its comparable worth reevaluation and upgrading of the pay for traditionally female relative to male jobs has taken place in the context of a single employer.<sup>69</sup> While the most appealing form of wage adjustment would be just to raise the pay for the female clerical jobs and to keep the male plant rates at the same level they were before, the fact of limited economic resources severely constrains that option. Whether achieved through immediate cuts in nominal wage rates or delays in future increases, a real cut in the wage rates for the plant jobs will have to occur. That action reduces the employer's ability to compete for workers to fill those positions in the face of higher wages that are still being offered by the firms who have not yet engaged in any comparable worth revision of their pay structures.<sup>70</sup> At the same time,

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(footnote continued)

initially require certain 'adjustments' to be made to internal wage differentials").

For a comprehensive discussion of the implementation of pay equity initiatives in Sweden, Australia, and other countries, see J. Bellace, A Foreign Perspective, in Comparable Worth: Issues and Alternatives 137 (R. Livernash ed. 1980).

69. This would hold whether the policy was implemented voluntarily, as in Iowa, or mandated by judicial order, as in Washington.

70. See Cost of Equal Pay, Employment & Productivity Gazette, Jan. 1970, at 4 - 6, noted in Ontario Ministry of Labour, Equal Pay for Work of Equal Value: A Discussion Paper 58 (1976) (discussing study which concluded that equal pay for work of equal value policies exact competitive costs on firms forced to comply).

the employer is paying substantially more than it needs to pay to remain competitive in filling its clerical positions. True, once there is a sufficient critical mass of comparable worth activity that generally improves the wages in female-dominated clerical positions, that would force other firms to make some relative adjustments in their own pay scale to fill these jobs. However, right now any such market pressure is considerably diluted by the rapid rise in female labor force participation rates, which has maintained a ready supply of candidates for such clerical jobs.<sup>71</sup>

The broader lesson from this analysis is that a major obstacle to implementing comparable worth in this country is the highly-decentralized character of both our wage determination and legal enforcement systems. We do not have the luxury of being able to pursue pay equity on an across-the-board basis, whether through a national, economy-wide collective agreement as in Sweden,<sup>72</sup> or by a concerted pattern of federal and state arbitration awards as in Australia.<sup>73</sup> Instead we would have to proceed case by case, firm by firm, with the inevitable result that those employers who were targeted early would be placed at a considerable competitive disadvantage vis-a-vis

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71. See A. Beller, Occupational Segregation and the Earnings Gap, in U.S. Comm'n on Civil Rights, Comparable Worth: Issue for the 80s 23, 28 (1984) (citing "continued tendency for women to enter the clerical occupations").

72. See J. Bellace, A Foreign Perspective, in Comparable Worth: Issues and Alternatives 164 - 67 (R. Livernash ed. 1980).

73. See id.

those fortunate enough not yet to be reached. Of course, such a plight is felt only as a matter of degree, with large public employers supported by robust economies being the least likely to feel any such pinch. But overall, the Catch-22 of implementing comparable worth is that it is likely to dampen employment prospects (especially for women) in precisely those firms where it does achieve a tangible improvement in the wage rates for female jobs.<sup>74</sup>

It is also likely that there would be some economic dislocations produced by comparable worth wage adjustments even if these could be introduced comprehensively, once-and-for-all. The experience in Australia provides some revealing evidence. That country took a major step towards pay equity in the early 70's, when it eliminated an explicit 25% sex differential in the national pay structure.<sup>75</sup> As one might anticipate, this step produced a significant increase in the

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74. See supra note 50.

75. Bellace characterizes the Australian program as more akin to an "equal pay for equal work" policy than a comparable worth initiative. See J. Bellace, A Foreign Perspective, in Comparable Worth: Issues and Alternatives 164 - 67 (R. Livernash ed. 1980). While it is admittedly unclear whether the Australian program represents a move toward equal pay for equal work, or for work of equal or comparable value, for my purposes here that does not matter.

For an interesting discussion of the economic effects of the Australian experience, see Gregory & Duncan, Segmented Labor Market Theories and the Australian Experience of Equal Pay for Women, 3 J. Post-Keynesian Econ. 403 (1981); Gregory, McMahon & Whittingham, Women in the Australian Labor Force: Trends, Causes and Consequences, 3 J. Lab. Econ. 293 (1985). A more negative gloss is placed on similar data from the Australian experience in Women in the Workforce: Pay Equity, Hearings Before the Joint Economic Committee of the U.S. Congress, 97th Cong., 2d Sess., 89 (1984) (statement of M. Killingsworth).

female share of the nation's wage bill and in the ratio of female to male earnings. But when the price of female labor was so raised, this correspondingly reduced the amount demanded: there was an immediate but fairly small increase in female unemployment and a reduction by one-third in the expected rate of growth in female employment for the rest of the decade.<sup>76</sup> Not surprisingly, the great bulk of these employment effects were felt in the private manufacturing industries, rather than in the sheltered government or service sectors of the economy.<sup>77</sup> And as expected, the wage gains for women came almost entirely at the expense of males employed in these manufacturing industries.<sup>78</sup>

While critics of comparable worth are wont to point to this evidence as a telling argument against the policy, in my view it is nothing of the sort. While we cannot hold out comparable worth as an unqualified boon for women - certainly, it is no panacea for the "feminization of poverty" - the fact is that when one sums up both the wage and the employment effects, there was a sharp net improvement in the condition of Australian women as a whole.<sup>79</sup> And to the extent this policy was designed to

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76. See Gregory & Duncan, Segmented Labor Market Theories and the Australian Experience of Equal Pay for Women, 3 J. Post-Keynesian Econ. 403, 424 - 25 (1981). One would expect that this decline primarily affected the more marginal, unskilled female workers.

77. See id. at 426.

78. See id. at 427.

79. Since 1969, relative earnings of Australian women have increased 30 percent. Total employment of women increased by 42 percent, and the measured unemployment rate of women declined relative to that of males in Australia. See id. at 427.

eliminate sex discrimination in the pay structure (as apparently was the case in Australia), the distributional consequences of the policy arose simply from the fact that the law had now removed a subsidy which women previously had been forced to give employers through the artificially depressed price of their labor. That could hardly be said to be a minus entry in the balance sheet for pay equity.

#### D. Conclusion

The economic theory of comparable worth is just as plausible as that of the Equal Pay Act. Even competitive labor markets as we find them in the real world leave some room for discrimination in setting women's wages for the work that they do. Since apparently that practice was sufficiently widespread in cases where women were doing substantially the same work as men to justify passage of the EPA, there can be no a priori reason to suppose that the same attitudes would not affect women's pay in the far greater number of cases in which they were performing distinctively "female" work. Nor does the remedy for any such illegitimate disparity in wages for female and male jobs imply that one must find an intrinsic value - a "just price" - for these jobs. The principle of comparable worth implies only that whatever valuation a particular employer happens to place upon the factors for which it rewards the male or integrated jobs in its operation (and this could even include a factor for shortages in supply), these values should be applied uniformly in setting the pay for positions filled primarily by women.

The difficulty with comparable worth consists not so much in its theory as in its implementation. One problem is the identification of the existence and dimensions of discriminatory underpayment of the female jobs. By contrast with the EPA where there can be visibly different male and female wages rates for the same job, comparable worth requires a subtle form of regression analysis to discover the factors and their weights which implicitly explain the wage structure for quite different jobs. Often that analysis would have to be undertaken in firms whose pay practices are pretty crude and erratic even with respect to male work. Even if that identification problem could be resolved, one must then tackle the question of the appropriate wage adjustment. While the immediate focus of the legal enquiry would be the level at which a particular firm compensates its traditionally female jobs, that is just one component of a complex economic equation which also includes the prices that customers are willing to pay for the products, the capital that investors are willing to risk with the firm, and the wages that must be paid the employees in other jobs to recruit and retain them. If, as the proponents of comparable worth assert, there is substantial underpayment of women's work (again by contrast with the EPA experience with equal work), the attempt to cure that problem in the context of a single firm poses some severe risk to the viability of this enterprise and those dependent upon it.

Of course, these problems are a matter of degree. They will depend to some extent on the features of the immediate employment setting: for example, whether the employer already

hase a formalized job evaluation system permitting easy identification of unfairness in its application to female jobs; or whether it enjoys a protected market position which permits it to readily absorb the added costs of increases in its female wage rates. More generally, the key variable is the process through which we propose to implement comparable worth. If primary reliance were placed on voluntary action by the individual firm, many of the difficulties could probably be minimized. After all, the employer on the inside is in the best position to know or to learn what is its true reward system for male and for female jobs. It also has the flexibility to phase in any adjustments in light of the resources available, to "red circle" the rates for apparently overpaid male jobs while avoiding difficulties in recruiting, and so on. The greater dangers would come from the effort to implement comparable worth through a mandatory legal rule, one which creates legal entitlements that are enforceable in the courts. The litigation process, with its trial by hired statistical experts, is prone to error in second-guessing from the outside the employers' relative evaluation of different jobs. And whether correct or not, any judicial order which ordains that a single firm must sharply increase the price that it pays for traditionally female jobs, without being able to offer the firm any relief in the other prices which it pays or receives, could easily do serious damage to that business (and thence to its female employees whose real wages are supposedly being improved).

I appreciate, of course, that what voluntary employer action seems to gain in smoothness of implementation, it loses in the incentive to try. After all, or so it would be argued, if one could really rely on the benign intentions of American employers, pay equity for women would be the present reality, not a distant goal. The fact, then, that there are serious risks in embodying comparable worth in the law of employment discrimination is not a sufficient reason to dismiss the proposal out of hand. The ultimate verdict must also take account of the dimensions of the social and economic grievances which that program is supposed to address. In the next section I turn to this other side of the inquiry.



#### IV. How Worthwhile Might Comparable Worth Be?

##### A. The Earnings Gap

As was apparent in my earlier account of the emergence of comparable worth, the positive case for the idea rests on these several claims. First, there is a major gap in earnings between male and female workers. Next, that gap cannot be explained by reference to acceptable factors in wage determination; instead it is attributable to illegitimate sex discrimination. However, such discrimination is not of the kind which can be dealt with by an Equal Pay Act which limits its reach to ensuring equal pay for equal work, because historic legal and social barriers have channeled most women into distinctively "female" jobs. The same kinds of factors which have produced such sex segregation in job allocation naturally carried over into the process of wage determination, so that jobs predominantly filled by women have been undervalued and underpaid relative to those filled primarily by men. The implication, then, is that only if we were fairly to reappraise the relative value of "female" and "male" jobs, and pay the former the wage rates which are proportionate to their worth, can we hope to make a major contribution to the closing of the gender wage gap.

How well do the ingredients of this case stand up to critical scrutiny? Certainly the first claim, about the scope of the male-female wage gap, would seem to be unassailable. For decades, the earnings of women employed full-time year-round have averaged only about sixty percent of the

earnings of their male counterparts,<sup>1</sup> almost as though the labor market were destined to follow the precepts of the Bible.<sup>2</sup> Indeed, the stubbornness<sup>3</sup> of the problem is indicated by the fact that this ratio actually dipped somewhat from the 50's to the 70's,<sup>4</sup> notwithstanding the enactment in 1963 of the Equal Pay Act to deal specifically with sex discrimination in wages, followed by the Civil Rights Act in 1964, whose Title VII was supposed to prohibit all forms of sex discrimination in employment, including compensation. And the fact that the gender gap in earnings poses a distinctive challenge to equal employment policy is accentuated by the success of both Title VII and the Executive Order in substantially narrowing racial differences in earnings among

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1. Each year from 1975 through 1981 the median earnings of females working full-time, year-round was between 59 and 60 percent of the median earnings of their male counterparts. See Bur. of Census, U.S. Dep't of Commerce, Current Population Report: Consumer Income, Series P - 60, at Table 37 (1983).

2. "[T]he following scale shall apply: if it is a male from 20 to 60 years of age, the equivalent is fifty shekels of silver by the sanctuary weight; if it is a female, the equivalent is thirty shekels." Leviticus 27:1 - 4.

3. Actually the ratio is not quite as fixed as that. Professor Goldin estimates that female workers earned something in the range of 30 to 40 percent of male workers in the early 19th century, about 50 percent in 1850, and almost 60 percent in the period 1890 - 1920. The ratio has since remained steady at that level. See C. Goldin, The Earnings Gap in Historical Perspective, in U.S. Comm'n on Civil Rights, Comparable Worth: Issue for the 80s 3, 8 - 10 (1984).

4. Female earnings reached as high as 64 percent of male earnings in 1955, then started their slide to as low as 57 percent in 1972, before moving up to about 59 to 60 percent by the start of the 1980s, See C. Goldin, supra note 3, at 10. As I note later, see infra TAN \_\_\_\_, the ratio of female to male earnings has quite recently jumped once again, from 59 percent in 1981 to 64 percent in 1983.

male workers, and almost entirely eliminating the race factor among female workers'.<sup>5</sup>

There is an important complication in measuring the gender wage gap, though, one which is typically ignored in popular and legal discussion of this issue. In actual fact, the real ratio of the average earnings of all working women and working men is around 50%, not the 60% figure usually mentioned. The reason is that the total working population includes both full-time and part-time workers, and women are much more likely to be included in the latter category, with the resulting depressing effect on the average earnings of their sex.<sup>6</sup> It is generally conceded, though, that in judging whether women are underpaid for the work that they actually do, one must adjust for their part-time status: hence the usual reliance upon data about full-time workers where the ratio has hovered around 60 percent. However, the full-time/part-time distinction is not the only respect in which time worked is relevant to this issue. Even among full-time workers, there are differences in

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5. Treiman and Hartmann show that while the ratio of the earnings of white women to white men declined from 63 percent in the late 1950s to 59 percent in the late 1970s, the ratio of black male to white male earnings increased from 61 percent to 75 percent, and of black women to white women from 58 percent to 95 percent. See D. Treiman & H. Hartmann, *Women, Work and Wages* 16 (1981) (computation from Table III).

6. In 1981 and 1982, the average earnings of all females who worked in those years was 48 percent and 50 percent, respectively, of male earnings, whereas the earnings of all females working full-time, year-round was 59 percent and 62 percent of their males counterparts. That 11 to 12 percentage point differential is due to the fact that a much higher proportion of the male than the female all-earner group works full-time, year-round. See *Current Population Report: Consumer Income, Series P-60* (1982) (computation from Table 37).

the number of weeks worked per year, in the number of hours worked per week, in overtime or second jobs, and so on. These differences would influence the perceived gender gap in year-round earnings if men typically worked more hours than women. In fact, when one adjusts the usual annual or weekly earnings ratios by some estimate of the difference in hours worked, as well as the impact of premiums for especially long hours at work, it turns out that the true ratio in base pay for the hours actually worked by women and men is closer to 75% than the 60% figure usually assumed in popular discussions (or the actual aggregate ratio of 50% for all workers).<sup>7</sup>

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7. The Bureau of Labor Statistics surveys of usual weekly earnings of full-time wage and salary workers consistently find a female-male ratio of 3 to 4 percentage points higher than the Bureau of Census surveys of annual earnings. See E. Mellor, Technical Description of the Quarterly Data on Weekly Earnings from the Current Population Survey, Bureau of Labor Statistics Bulletin 2113 (1982). There are no comparable series for the basic hourly earnings of men and women. However, there is considerable evidence that full-time male workers regularly work longer hours than females. Goldin, for instance, reports that from 1914 to 1936, the ratio for hourly wages in manufacturing was more than 10 percent higher than that for weekly or annual earnings, because of the smaller number of hours worked per week by women. See C. Goldin, The Earnings Gap in Historical Perspective, in U.S. Comm'n on Civil Rights, Comparable Worth: Issue for the 80s 3, 9 (1984). Other studies have observed that female employees work substantially fewer hours per week and per year than males. See Cohen, Sex Differences in Compensation, 6 J. Hum. Res., 434, 442 - 43 (1971) (finding that in 1969 full-time female employees worked an average of 275 hours less per year than did males, about 13 percent less in a standard 2,080 working-hour year); O'Neill, The Trend in the Male-Female Wage Gap in the United States, 2 J. Labor Econ. 91, 95 (1984) (estimating that full-time men work 8 to 10 percent more hours per week than full-time women). When ordinary weekly earnings are adjusted for differences in the hours worked by full-time men and women, the ratio of female to male earnings approaches 72 percent, See id. at 97 (computation from Table 3 using 1983 wage data); see also Corcoran & Duncan, Work History, Labor Force Attachment, and Earnings Differences Between the Races and Sexes, 14

Some might respond that it is not fair to adjust in this way for hours actually worked, because the latter may not be a sex-neutral phenomenon: i.e., employment discrimination may be the reason why women do not have the opportunity to work in jobs which have longer regular hours and chances for overtime at premium rates.<sup>8</sup> That may well be so, but even if true it is not relevant to the strategy of comparable worth. The reason is that this would be a problem of discrimination in employment opportunity -- in access of women to jobs which are considered more attractive because they carry with them longer hours and thus higher annual earnings. It is not a problem of discrimination in wage determination, the target of comparable worth, because it is perfectly legitimate to pay more to people who must work longer than to those who enjoy more leisure. If that reasoning is correct, then the maximum potential scope for the comparable worth strategy is a wage gap of closer to 25% than to 40% in hourly earnings.

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(footnote continued)

J. Hum. Res. 3, 8 (1979) (finding with respect to 1975 data that the ratio of the natural logarithms of white female to white male hourly earnings was 75 percent, and the log ratio of black female to black male earnings was 79 percent).

8. See A. Beller, Occupational Segregation and the Earnings Gap, in U.S. Comm'n on Civil Rights, Comparable Worth: Issue for the 80s 23, 24 - 25 (1984); Cohen, Sex Differences in Compensation, 6 J. Hum. Res. 434, 436 - 37 (1971); Rytina, Occupational Segregation and Earnings Differences By Sex, Monthly Lab. Rev., Jan. 1981, at 49, 52; cf. Sieling, Staffing Patterns Prominent in Female-Male Earnings Gap, Monthly Lab. Rev., June 1984, at 29, 29 ("staffing patterns bring to mind the barriers to women's entry and promotion in higher paying occupations").

(b) Human Capital and Working Conditions

Of course, it is of little consolation to those concerned about pay equity for women to show that there is "only" a 25% disparity in base hourly earnings. A gap of that size would seem to be a more than sufficient reason to consider some fairly serious measures to address that problem.

Are there other factors, though, which explain some further portion of the gender wage gap, short of employment discrimination? It is apparent that the quantity of time worked is by no means the only relevant consideration in determining the amount of money an employee is paid. Equally important is the quality of labor which is being provided during this working time. The more productive the employee, the more valuable are his or her services to the employer, and thus the higher the wages that will be paid.

In the typical social system of modern industry, it is difficult to measure and compare the actual contribution to production of different workers.<sup>9</sup> The alternative pursued by

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9. However, Goldin has reported data from the 1890s concerning the actual comparative productivity of males and females engaged in individualized piece work in factories. Of the then-existing 40 percent gender gap in earnings in those factories, 23 percentage points (or 58 percent of the gap) was due to measured differences in actual product from men and women of the same age group doing the same work in the same factory. See Goldin, The Earnings Gap in Historical Perspective, in U.S. Comm'n on Civil Rights, Comparable Worth: Issue for the 80s 3, 16 (1984). Somewhat more contemporary findings were made by Langwell when she discovered that in 1977 self-employed women physicians saw 38 percent fewer patients per hour than did their male counterparts (after controlling for specialty, experience, and other relevant factors); this more than explained the 22 percent gap in their hourly earnings. See K. Langwell, Factors Affecting the Income of Men and Women Physicians, 17 J. Hum. Res. 261 (1982). Nor

econometric research is to make indirect estimates of relative productivity by comparing actual differences in the "human capital" embodied in the workers in question.: in particular, their education, their general experience in the labor force, and their tenure with their current employer.<sup>10</sup> Working women have roughly the same amount of education as working men,<sup>11</sup> so that cannot be an important source of their differences in earnings (except to the extent that there are characteristic sex differences in the type rather than the amount of education which are relevant to what men and women

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(footnote continued)

was this difference due to women doctors having fewer patients to fill their time; actually, there was a longer waiting period to see the women, and they charged a higher fee for office calls. Langwell speculated that the explanation might lie more in the fact that male doctors were considerably more likely than the females to be the sole or major source of income for their families. See id.

10. See, e.g., O'Neill, Earnings Differentials: Empirical Evidence and Causes, in Sex Discrimination and Equal Opportunity 71 (Schmid & Weitzel eds. 1984). As O'Neill observed

"True worker productivity is difficult to observe or measure. A large volume of theoretical and empirical research has, however, identified many of the characteristics associated with higher pay, and, presumably, higher productivity. Many of these characteristics involve investments in 'human capital' which improve the worker's market value."

Id.

11. In 1983, men and women in the labor force had each completed, on average, 12.7 years of schooling. See O'Neill, The Trend in the Male-Female Wage Gap in the United States, 2 J. Lab, Econ, 91, 99 (1984). In 1952, women held a 1.6 year edge over men in years of schooling, but this advantage gradually eroded over the next 20 years. Id.

are able to command in the labor market). However, there are significant differences in labor force experience and tenure of men and women.<sup>12</sup> The more recent and more sophisticated studies which have been able to measure actual length of time in the work force do find that this key difference in human capital will explain nearly half the observed sex differential in earnings.<sup>13</sup>

However important it is in a market economy, relative productivity is not the only relevant factor in comparing workers' pay for jobs, no more than is nutritional value all that counts in comparing different foods. Working conditions and environment are also important factors which must be taken

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12. Working women tend to have substantially fewer years of experience in the labor force and generally have briefer periods of tenure, relative to their male counterparts, with their individual employers. See J. O'Neill, The Determinants and Wage Effects of Occupational Segregation 29 (1983) (finding that in a 1980 sample, working women had 79 percent of the level of labor force experience of working men); J. O'Neill & R. Braun, Women and the Labor Market: A Survey of Issues and Policies in the United States (1981) (showing that in 1978, women on average had only slightly more than half the tenure with their current employers as did males, with the differences being especially pronounced in the 35 - 44 year-old group), reprinted in Pay Equity: Equal Pay for Work of Equal Value, Joint Hearings Before the Subcommittees on Human Resources, Civil Service, and Compensation and Employee Benefits of the House Committee on Post Office and Civil Service, 97th Cong., 2d Sess., 1338 (1982).

13. The most detailed empirical test available of the "human capital" model found that differences in "work history" produced the lion's share of the portion of the gender gap in earnings explained by differences in human capital. See Corcoran & Duncan, Work History, Labor Force Attachment, and Earnings Differences Between the Races and the Sexes, 14 J. Hum. Res. 3, 10 (1979) (computation from Table 1). The study concluded with the proposition that human capital variables would explain 44 percent of the total gender gap in earnings. When applied to observed wage rates, the adjusted female hourly wages approached 84 percent of those of males. See id.



account of in determining wages. Suppose two employees each have the same level of education, experience and tenure, yet one works in a pleasant office environment within walking distance of home while the other labors in a remote location under unpleasant and hazardous conditions. To recruit and retain employees prepared to work under such unattractive conditions, the second job will have to pay an additional premium - a "compensating wage differential" as it is called.<sup>14</sup> As it happens, the somewhat fragmentary data we have indicates that the work done by men scores significantly lower on this "working conditions" dimension than does the work done by women,<sup>15</sup> and this accounts for some additional part

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14. For an interesting and comprehensive discussion of the concept of compensating wage differentials, see K. Viscusi, *Risk By Choice* (1983).

15. Fuchs has found that employees who were able to work at home or walk to work earned one quarter less than those who could not, and that women were twice as likely as men to have that advantage. Conversely, men were twice as likely to have to travel to work in a different city or county than that of their residence. See Fuchs, Differences in Hourly Earnings Between Men and Women, Monthly Lab. Rev., May 1971 at 9, 10. In the same vein, O'Neill and Braun reported that on average, working males spent 3.9 hours a week commuting to and from work, versus 2.8 hours for the working woman. See J. O'Neill & R. Braun, supra note 12, at 1449 (computation from Table 8).

As to workplace hazards, Cohen found that of workers surveyed in 1969, 42 percent of men versus 27 percent of women reported dangerous or unhealthy on-the-job conditions. See M. Cohen, Sex Differences in Compensation, 6 J. Hum. Res. 434, 438 (1971). O'Neill provided further evidence of the existence of this differential: in her study, see J. O'Neill, The Determinants and Wage Effects of Occupational Segregation 29 (1983), men were found to be two and one-half times as likely to work outdoors, twice as likely to be exposed to physical hazards, nearly twice as likely to experience excessive noise, and 20 percent more likely to be exposed to noxious fumes, odors, or dusts.

of their differences in earnings.<sup>16</sup> Taking into consideration all three factors which should and do influence earnings - the hours of work on the job, the length of experience in the labor force, and the location, hazards and other conditions of work - it would appear that the maximum level of wage gap to be explained by sex discrimination, and which might thereby be closed by a comparable worth strategy, is in the order of 10 to 15 percent.

(c) The Marriage Gap

There are two ways of looking at that figure. On the one hand, a gender gap of 10 to 15 percentage points is a considerably less serious problem than one in the 35-40% range. On the other hand, even the smaller figure seems to imply a substantial injustice in its own right, as this simple calculation might suggest. In 1983, there were more than 53 million working women, who earned an average of over \$8,000 &

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16. The one systematic piece of research on this factor is found in Filer, Male-Female Wage Differences: The Importance of Compensating Differentials, 38 Ind. Lab. Rel. Rev. 426 (1985). Filer studied a sample of hourly-paid male and female workers from the 1977 Quality of Employment Survey (for a detailed description of the Survey, see R. Quinn & G. Staines, The 1977 Quality of Employment Survey (1979)) and corroborated the earlier evidence that men experienced longer commutes and greater risks of illness or injury from their jobs. He also found that the women tended to benefit from such softer variables as easier relations with supervisors and co-workers, flexibility in getting time off, and so on. See id. at 430 (Table 2). After controlling for human capital, which accounted for 48 percent of the gross wage difference between the men and women in this sample, Filer found that the differences in working conditions as a whole explained an additional 17 percent of the gender wage gap here, nearly half of which was due to the work hazard factor alone. See id. at 433 - 34 (Table 3).

year.<sup>17</sup> If their work was undervalued by just 10%, that means that American women as a whole are being short-changed in this economy by over \$40 billion a year. If that annual shortfall is due to a legacy of sex discrimination, that would seem to be a challenge worth tackling with an instrument such as "comparable worth," notwithstanding the difficulties the latter might entail.

That position assumes two things: first, that the smaller wage gap we have not been able to explain through standard labor market factors is largely due to employment discrimination; and second, even if it is, that this discrimination takes a form which comparable worth is capable of dealing with. In this section and in the next I shall suggest that neither of those claims is obviously supportable.

As a logical matter, of course, it does not follow from the fact that econometric analysis of standard wage determination variables fails to explain all the differences in male and female earnings that the remainder is due to employment discrimination. All one is entitled to conclude from the premise is that there are some as yet unmeasured or undetected factors in the background - which might, but might not, include discrimination - which have generated the observed differences in earnings. A fair rejoinder is that we do know that there has been considerable employment discrimination on account of sex in the past, the reported cases and some research show

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17. See Bur. of Census, U.S. Dep't of Commerce, Current Population Reports: Consumer Income, Series P - 60, at Table 37 (1983).

there is still some discrimination in the present, and in the absence of some better candidate, it is safe for the makers of legal policy to act on the assumption that discrimination is a key contributor to current wage disparities (and thus that comparable worth is an appropriate antidote). One answer to that challenge is that there is in fact another candidate - the marriage gap.

A quick look at the basic statistics discloses that almost all the wage gap obtains between men and women who are or have been married. Among those never married, women have historically earned nearly as much if not more than their male counterparts, whereas married women with a spouse present, even if they work full-time, year-round, have actually earned less than 40% of what married men earn.<sup>18</sup> It is possible, of course, that these crude figures might disguise the fact that single women tend to have more "human capital" than single men. However, when one controls for the standard variables, the adjusted wage gap for married workers is still more than three times what it is for the single, never-married.<sup>19</sup> The

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18. Polachek reports that in 1970 married women with their spouses present in the household earned only 38.4 percent of what married men earned in the same year, whereas women who were never married earned fully 97.6 percent of what their male counterparts earned. See S. Polachek, Women in the Economy: Perspectives on Gender Inequality, in U.S. Comm'n on Civil Rights, Comparable Worth: Issue for the 80s 34, 43 (1984) (Table 7).

19. See Polachek, Potential Biases in Measuring Male-Female Discrimination, 10 J. Hum. Res. 204, 215 - 16 (1975) (finding that 97 percent of the gender gap in earnings can be explained by differential life-cycle expectations of labor force participation); see also J. O'Neill, The Determinants and Wage Effects of Occupational Segregation 65

reason is that every decade of marriage increases the earnings of the married man over the never-married man by 4%, while it decreases the relative earnings of the married women by 3%; and the addition of each child enhances the male's earnings by another 3% while depressing that of the woman by fully 10%.<sup>20</sup> Another way of expressing these data is that in the early 70's, marriage appeared to produce a \$3,000 premium in the yearly earnings of the male (over the comparable single male), while the status of being single earned a woman a \$625 annual premium over the comparable married woman.<sup>21</sup>

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(footnote continued)

(1983) (finding that being married had a significant positive effect on the earnings of a sample of 24 to 34-year-old males, and a negative effect on the earnings of a comparable sample of females);

An earlier piece, which studied Census data from 1959, found that, after adjusting annual earnings by age, education, and hours worked, married women (with spouses present) earned only 50 percent of what married men earned, but single never-married women earned from 91 to 96 percent of single men. See Gwartney & Stroup, Measurement of Employment Discrimination According to Sex, 39 Southern Econ. J. 575 (1973). Interestingly, upon analyzing the impact of marriage within the same gender, they discovered that the adjusted earnings of married women were just about the same percentage below those of single women as the earnings of married men were above those of single men.

20. See Polachek, Potential Biases in Measuring Male-Female Discrimination, 10 J. Hum. Res. 204, 215 - 16 (1975).

21. See S. Polachek, Women in the Economy: Perspectives on Gender Inequality, in U.S. Comm'n on Civil Rights, Comparable Worth: Issue for the 80s 34, 40 (1984). One might counter by arguing that the experience factor has been accounted for directly in econometric studies and found to be responsible for a significant part, but still less than half of the wage gap. See Corcoran & Duncan, Work History, Labor Force Attachment, and Earnings Differences Between the Races and the Sexes, 14 J. Hum. Res. 3 (1979). The rejoinder of those like Polachek, who adopt the "expectations" version of the human capital

When one reflects on these breakdowns of male-female earnings ratios, it is apparent that simple notions of discrimination in employment on account of sex will not readily explain the patterns in the gender wage gap: how could the impact of such invidious employer motives and practices be borne almost entirely by women who are married, especially those who have children? Clearly, a major role is being played by the institution of marriage itself as it intersects with the operation of the labor market. Participation in the work force is highest for married men, lowest for married women, with single men and single women at roughly the same point somewhere in between: women, of course, are likely to have substantial interruptions in their employment during their child-bearing years. These patterns correlate closely with what we know about the wage gap.

(footnote continued)

school, is that such studies measure only what was the actual experience in the labor market of the women studied, not what the latter expected to be their future experience when they were making their crucial initial decisions about education or additional job training. The difference between the two measures is starkly illustrated in data presented by Goldin. In a 1975 work, Goldin recounts that the 1968 National Labor Survey asked young women aged 14 to 24 whether they expected to be working when they were 35 years old. Only 29 percent of the white females responded in the affirmative, which was very close to the percentage of their mother's generation who worked at that age, but far less than the more than 60 percent of respondent's cohorts who are actually working in the early 1980s. See C. Goldin, The Earnings Gap in Historical Perspective, in U.S. Comm'n on Civil Rights, Comparable Worth: Issue for the 80s 3, 18 (1984). Polachek argues that if one controls for these male-female differences in future life-cycle expectations, almost all of the wage gap of the early 1970s can be accounted for. See Polachek, Differences in Expected Post-School Investment as a Determinant of Market Wage Differences, 16 Int'l Econ. Rev. 451, 466 (1975).

Nor can one ignore the other side of the equation. Recall that the marriage premium among men is actually five times what it is among women. This is likely due to the division of labor and responsibility in the home. Married men are relieved of some considerable part of the burden of looking after their domestic needs, while at the same time they are motivated to work longer and harder to support a larger household: the converse is true of the impact of marriage on the career prospects and earnings of the female spouse.<sup>22</sup>

I do not mean to imply that these phenomena are the product only of sex-neutral free choice. To some extent they are due to the distinctive physical, psychological and social features of the relationship between women and children. To some extent they are due to the fact that individual couples, facing a situation in which for a variety of historical and personal reasons it looks like the male will earn more than the female, decide upon a division of labor in the home and at work which gives priority to the advancement of the male's career: e.g.,

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22. Becker reports survey research from 1975 and 1976 which found that married men working full-time spent just 12 hours per week doing work around the home, while their spouses working full-time spent an average of 25 hours doing housework. Spouses working part-time spent an average of 34 hours doing household chores. Not only does this division of labor in the home free up the male to spend a greater quantity of time in market work - an average of 44 hours a week actually at work and 4 hours commuting, versus 36 hours at work and 3 hours commuting for the married woman employed full-time - but, Becker argues, it influences the comparative intensity and commitment to one's job and the readiness to invest in job training and job tenure, See Becker, Human Capital, Effort and the Sexual Division of Labor, 3 J. Lab. Econ. 533, 553 (1985). All of this has important long-term implications for relative earnings within the household, and thence upon the aggregate gender gap in earnings.

in deciding whose promotional opportunity will warrant relocation of the family home. To some further extent, they are due to the organization of the modern workplace which does not provide all that much flexibility to permit women to combine employment with child-rearing (this being a responsibility which society now assigns almost exclusively to women). My point, simply, is that to the extent it is the interaction of marriage with the labor market which is the source of the bulk of the gender wage gap, one cannot thereby infer that the jobs predominantly filled by women are inherently undervalued and underpaid. The policy implication from this alternative diagnosis is that rather than pursue a "comparable worth" strategy of altering the relative wages paid to "male" and "female" jobs (many of the occupants of the latter being either single women or men), one should tackle the problem of the impact of marriage upon work prospects directly: e.g., by expending the available funds upon such strategies as better day care facilities, flexible work schedules, and so forth.<sup>23</sup>

(d) The Occupational Gap

While this alternative "marriage" explanation of at least a substantial part of the difference in average earnings of men and women seems plausible on its face and also has a good deal of empirical support, it remains controversial and subject to

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23. For a recent argument that public policy must focus much more attention on the implications of marriage for the career of a working woman, see Barrett, Obstacles to Economic Parity for Women, 72 Am. Econ. Rev. 160 (1982).



considerable scholarly criticism.<sup>24</sup> Let us turn, then, to the alternative theory which seeks to explain much of the wage gap in terms of sex segregation in the workplace. The core of the theory is quite simple. Men and women tend to work in very different jobs. The kinds of jobs in which women predominate are paid considerably less on average. The inference is that the wages paid for female jobs are depressed precisely because employers tend to undervalue and underpay the work typically performed by women. If that be true, the only technique which can readily deal with this specific form of sex discrimination is one which directly tackles the comparative evaluation of jobs.

There is no question that men and women tend to work in very different occupations. One just has to look around to see that almost all secretaries or bank tellers, for example, are women, almost all electricians and truck drivers are men. If one wants to measure the overall degree of occupational

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24. See, e.g., Corcoran & Duncan, Work History, Labor Force Attachment, and Earnings Differences Between the Races and Sexes, 14 J. Hum. Res. 3, 17 (1979) ("Contrary to our initial expectations, the group of [labor force] attachment variables explained very little of the earnings differences between white men and black men or women of both races largely because attachment, as measured in this study, had a negligible impact on wages."); Corcoran, Duncan & Ponza, A Longitudinal Analysis of White Women's Wages, 18 J. Hum. Res. 496, 515 (1983) ("the rapid rebound of wage losses after labor force withdrawals means that the wage losses associated with these withdrawals cannot explain much of the male/female wage gap."); England, The Failure of Human Capital Theory to Explain Occupational Sex Segregation, 17 J. Hum. Res. 358 (1982). I should add, though, that my own reading of the research by Corcoran, et al. and by England suggests that it is designed primarily to refute the attempt to explain occupational sex segregation through the influence of marriage upon "human capital," rather than to dispute the observed effect of marriage and family upon the wage gap.

segregation in the work force there is an index which calculates how many women would have to switch jobs to produce a perfectly integrated occupational distribution. In the mid-70's, that index stood at more than 65%, and it had remained stubbornly at around that level during the previous twenty years when female participation rates had risen so sharply, notwithstanding the fact that both legal and social changes were producing marked reductions in the segregation of jobs by race.<sup>25</sup> Women tended to be much more heavily represented in the clerical and service jobs, men in craft or

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25. In 1976, the index of occupational sex segregation, if one uses a breakdown of jobs into 400 occupational categories, was at 66.1 between white women and white men and 69.3 between black women and men. See D. Treiman & H. Hartmann, Women, Work, and Wages 27 (1981). Over the past several decades, this index has held at a relatively constant level. See id. at 25. Concurrently, occupational segregation by race has declined substantially, although segregation indices by race are still high. Using the same 400-occupation breakdown, one observes that the race segregation index stood at 37.9 between black and white men and 35.8 between black and white women in 1976.

If one goes back a bit in time, for which purpose one must use less detailed occupational classifications (which, because of aggregation effects reveal less segregation), one can assess trends in occupational segregation by both sex and race. One discovers that occupational segregation between white men and women actually rose from 43 to 44 percent between 1950 and 1970, see id. at 27 (Table 7), a period during which female labor force participation rates rose from 29 to 43 percent, see C. Goldin, The Earnings Gap in Historical Perspective, in U.S. Comm'n on Civil Rights, Comparable Worth: Issue for the 80s 3, 5 (1984). Blau, using a somewhat different but quite detailed classification basis, found that the ratio stood at exactly the same 66 percent figure in 1970 as in 1950, this being the end result of a slight increase in sex segregation in the 1950s which was matched by a corresponding decline in the 1960s. See Blau, Equal Pay in the Office 11 - 12 (1977). Interestingly, this latter decline was due to a greater diffusion of males across a broader spectrum of jobs, not to any decrease in female concentration in their traditional jobs. See id. At the same time, the race segregation index dropped among men

operative positions.<sup>26</sup> Even in broad occupational categories such as "professional" which apparently were much more integrated, that illusion disappeared when one looked inside the category and found women clustered as nurses and teachers, men as lawyers, doctors and engineers.<sup>27</sup> The bottom line was that in the detailed breakdown of jobs into 553 categories in 1970, 310 of these were filled 80% or more by male incumbents, 50 had 80% or more female incumbents, and 70% of the men and 50% of the women worked in these "single sex" occupations."<sup>28</sup>

The fact of sex segregation in the workplace is obvious on its face, but the claim that this factor has produced underpayment of the female jobs is not. However there are a number of pieces of circumstantial evidence from which one

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from 43 in 1940 to 30 in 1970, while among women it dropped much faster, from 62 in 1940 to 30 in 1970. See D. Treiman & H. Hartmann, supra, at 27 (Table 7). Later, I will depict the trends in occupational segregation since 1970. See infra TAN \_\_\_\_.

26. See Rytina, Earnings of Men and Women: A Look at Specific Occupations, Monthly Lab. Rev., April 1982, at 25, 26 - 29 (Table 1). Rytina sets out both the 1981 average weekly earnings and the percent female in 250 occupations comprising 95 percent of the total wage and salary workforce.

27. See Rytina, Earnings of Men and Women: A Look at Specific Occupations, Monthly Lab. Rev., April 1982, at 25, 26 - 26 (Table 1). The percent female figures for the professions of nurse and non-university teacher were 95.8 and 67.1 respectively, while the figures for the professions of lawyer, doctor, and engineer were 21.5, 23.2, and 17.8 respectively. See id.

28. See D. Treiman & H. Hartmann, Women, Work, and Wages 27 (1981) (Table 7); see also Rytina, Earnings of Men and Women: A Look at Specific Occupations, Monthly Lab. Rev., April 1982, at 25, 26 - 29 (Table 1).

might readily make that inference: historically, there has been a good deal of discrimination in the assignment of women to certain jobs rather than to others; the implication is that such sex discrimination would carry over into the setting of the wage rates for these jobs; this is corroborated by some highly-publicized examples;<sup>29</sup> and systematic job evaluation of a wide range of occupations of a number of public employers indicates that the typically "female" jobs earn roughly 20% less than the "male" jobs.<sup>30</sup> All this would seem to make it reasonable to explain some significant portion of the gender wage gap by the practice of underpaying work done primarily by women.

However, one need not speculate about the point. Modern econometric analysis enables us to test out what is the actual importance of the female representation in a particular job in influencing the wages paid relative to other jobs. We now have a considerable body of research which addresses that issue. On the surface it does appear that there is a significant depressing effect of the proportion of incumbents who are

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29. For instance, such practices were well-documented in the electrical manufacturing industry at such firms as General Electric and Westinghouse. See Newman & Vonhof, "Separate But Equal" - Job Segregation and Pay Equity in the Wake of Gunther, 1981 U. Ill. L. Rev. 269, 292 - 97.

30. See State of Washington Comparable Worth Study 20 (1974), reprinted in Pay Equity: Equal Pay for Work of Comparable Value - Part II, Joint Hearings Before the Subcommittees on Human Resources, Civil Service, and Compensation and Employee Benefits of the Committee on Post Office and Civil Service, House of Representatives, 97th Cong., 2d Sess., 1486, 1518 (1982) (concluding that female-dominated positions in Washington civil service are compensated at a rate 20 percent less than male-dominated positions).

female upon the wages paid for the job, and that this would seem to explain a considerable share of the wage gap.<sup>31</sup> It is nonetheless misleading to consider this factor just by itself, because it is likely to be associated with other factors which affect wage determination, especially those we have seen to be specifically related to sex: e.g., differences in the experience of the employees and in the environmental conditions of the job.<sup>32</sup> When the more sophisticated research studies go on to control for these factors, they find that much of the significance of the "percent female" variable evaporates. Another way of putting that result is that even if a comparable worth strategy were entirely successful in eliminating the effect of this suspect factor, the total gender wage gap would drop by only a couple of percentage points.<sup>33</sup>

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31. This is true at least if one uses a large number of narrow job classifications. For example, Treiman and Hartmann found that only 7 percent of the wage gap can be explained by percent female if one uses the twelve major occupational categories, but that fully 37 percent is explained if one uses the detailed 479-subdivision classification scheme. See D. Treiman & H. Hartmann, *Women, Work, and Wages* 34 - 35 (1981). One way of grasping the implication of this latter figure is that for each additional percent female in a job in the early 1970s, a female incumbent earned \$16 less per year and a male incumbent fully \$30 less per year. See *id.* at 28 - 29. See also England, Chassie & McCormack, *Skill Demands of Earnings in Female and Male Occupations*, 66 *Sociology and Soc. Res.* 147, 159 (1982) (presenting nearly identical conclusions). This implies that a woman would appear to lose \$1,600 a year by working in an almost entirely female job, while a male would lose \$3,000 a year, See England, Chassie & McCormack, *supra*, at 159.

32. See *supra* TAN \_\_\_\_.

33. A number of empirical studies have attempted to estimate this crucial variable in the context of the comparable worth debate. While each study applied quite different

(e) The Industry Gap

That same body of research shows that there is another facet to this issue which accounts for much more of the male-female difference in earnings. Men and women are

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methodologies to quite different statistical samples of the earnings of male and female workers, they all reached similar conclusions with respect to the portion of the gender gap explained by discrimination which would be addressed by comparable worth policies. See J. O'Neill, The Determinants and Wage Effects of Occupational Segregation 36 (drawing upon a 1980 Current Population Survey sample of all workers 16 and over and concluding that the percent female variable explains 11.6 percent of the total gender gap in earnings); England, The Failure of Human Capital Theory to Explain Occupational Sex Segregation, 17 J. Hum. Res. 358, 366 (1982) (analyzing a 1967 National Labor Survey sample of young white employees with results which indicate that the percent female in an occupation explains 4.6 percent of the total gender gap in earnings) (see S. Polachek, Women in the Economy: Perspectives on Gender Inequality, in U.S. Comm'n on Civil Rights, Comparable Worth: Issue for the 80s 34, 40 (1984), who calculates this figure from England's regression results); Roos, Sex Stratification in the Workplace: Male-Female Differences in Economic Returns to Occupation, 10 Soc. Science Res. 195, 216 (1981) (evaluating NORC surveys of the earnings of white employees from 1974 to 1977 and concluding that 7 percent of the wage gap can be explained by differences in percent female).

One study which explicitly focuses on the this issue deserves particular mention. Using May 1978 Current Population Survey data, this study concluded that the percent female in an occupation reduced the average earnings of incumbent females by 9 percent and those of males by 17 percent. See G. Johnson & G. Solon, Pay Differences Between Women's and Men's Jobs: The Empirical Foundations of Comparable Worth Legislation 15 (1984). Since the percent female variable has a greater depressing influence on the earnings of male than female incumbents in "female" jobs, the variable is actually responsible for only 7 percent of the overall wage differential. Putting it another way, if comparable worth were able to eliminate this effect entirely, the aggregate gender gap in pay (which was 33.7 percent in the Johnson and Solon sample) would decline by just two percentage points (to 31.8 percent). See id.

segregated not just in the jobs they perform but also in the industries and the firms for which they work, whatever the jobs

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Work by Buchele and Aldrich, which examined 1978 National Labor Survey data respecting the earnings of young, white, full-time workers, strongly implies that there is little net impact upon female earnings from being employed in a female job after one controls for such factors as education, experience, or job tenure. See Buchele & Aldrich, How Much Difference Would Comparable Worth Make?, 24 Indus. Rel. 222, 231 (1985). Interestingly, these authors do find that the percent female in an occupation exerts a strong negative effect on the rate of return women obtain from such human capital factors, whether women work in an integrated or sex-segregated job.

Using a somewhat different methodology, a study by Treiman, Hartmann, and Roos concluded that percent female was responsible for only about one-third of the observed relationship, see supra note 12, between the sex composition and the pay in a broad range of occupations, and the remainder was assumed to be largely due to sex discrimination. See D. Treiman, H. Hartmann, & P. Roos, Assessing Pay Discrimination Using National Data, in Comparable Worth and Wage Discrimination 137, 147 - 48 (H. Remick ed. 1984). Even if one were to accept that latter implication (and this research did not attempt to control for the effects of marriage, see supra section (c), or industry, see supra section (e), on sex disparities in earnings), the fact is that this entire apparent relationship between the percent female and the pay in a job is still able to account for only two to three percentage points in the overall gender wage gap, which they were analyzing.

One explanation for this apparently surprising fact is that in this, as in most of the studies, the depressing effect of working in a female job upon the relative return to human capital is felt much more by the male than the female incumbents. True, by definition there are a lot more women than men who suffer from that effect of working in "female" jobs. However, when one calculates what would happen if a comparable worth policy were to be totally successful in eliminating any relationship between percent female and net earnings, these two factors counteract each other somewhat, leaving room for only a fairly marginal contribution to the closing of the overall gap in male and female earnings. My assumption, of course, is that for both legal and practical reasons, any comparable worth improvements in the pay for "female" jobs such as nurse or secretary would have to be offered to the male as well as the female incumbents (and vice versa for any downward adjustments in the real rates of pay for "male" jobs).

they occupy.<sup>34</sup> This latter form of segregation is powerfully correlated with disparities in earnings.<sup>35</sup> Again, if one just visually inspects the relevant statistics, one finds that industries such as textile production, retail clothing stores, and banking or non-banking credit services rank at or near the top in the female composition of their workforce, but near the bottom in their average wage scales.<sup>36</sup> On the other hand,

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34. See Pay Equity: Equal Pay for Work of Comparable Value, Joint Hearings Before the Subcommittees on Human Resources, Civil Service, and Compensation and Employee Benefits of the Committee on Post Office and Civil Service, House of Representatives, 97th Cong., 2d Sess., 51, 58 - 61 (Statement of Janet Norwood, Commissioner, Bureau of Labor Statistics) (Table 1).

35. The crude inverse relationship between female representation in an industry and its average earnings is visible in the tables presented in the statement of Janet Norwood, Commissioner of the Bureau of Labor Statistics, during the Joint Congressional Hearings on Pay Equity. See id. The econometric analysis performed by Johnson and Solon, which controls for other factors, indicates that the industry in which women worked explained more than half of the gap in female earnings, far more than is explained by mere occupation as such. See G. Johnson & G. Solon, Pay Differences Between Women's and Men's Jobs: The Empirical Foundations of Comparable Worth Legislation 22 (1984) (Table 2).

This relationship can be observed at the firm as well as the industry level. For instance, one study found a remarkably high level of segregation by firm in white collar jobs in Boston, New York, and Philadelphia in the mid-1970s, and again found a strong inverse relationship between the proportion of women employed by a firm in these jobs and the average pay level of that firm for both its female and its male employees. See F. Blau, Equal Pay in the Office 79 - 81 (1977); see also Buckley, Pay Differences Between Men and Women in the Same Jobs, Monthly Lab. Rev., Nov. 1971, at 36. Needless to say, there is a high degree of overlap between the distribution of firms and the distribution of industries in terms of both pay level and percent female.

36. In July 1982, the "apparel and other textile products," "apparel & accessory stores," "banking," and "credit agencies other than banks" industries had workforces which were 81.9, 70.0, 70.8, and 69.7 percent female respectively. Out of



the very highest paying industries, such as mining or construction, have the smallest proportion of women in their employ.<sup>37</sup> When one controls these crude ratios for human capital variables, segregation by industry and by firm does explain far more of the gap in earnings than does segregation by type of occupation.<sup>38</sup> However the policy of "comparable worth," at least when implemented through a legal focus on "wage discrimination," is able at most to deal with the disparity in wages paid for different jobs in the same firm, not the disparity in levels of pay across different firms and different industries. Thus quite a different strategy would be needed to make a major dent in the latter much more important factor in the overall gap in male-female earnings.

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51 industries ranked in terms of average hourly earnings, these industries ranked 50th, 51st, 46th, and 43rd respectively. See Pay Equity: Equal Pay for Work of Comparable Value, Joint Hearings Before the Subcommittees on Human Resources, Civil Service, and Compensation and Employee Benefits of the Committee on Post Office and Civil Service, House of Representatives, 97th Cong., 2d Sess., 51, 58 - 61 (1982) (statement of Janet Norwood, Commissioner, Bureau of Labor Statistics) (Table 1).

37. For instance, in July 1982 the "bituminous coal & lignite mining," "heavy construction contracting," "metal mining," and "general building contractors" industries had workforces which were 5.1, 7.2, 9.7, and 11.7 percent female respectively; their industry rankings in terms of average hourly compensation were 1st, 5th, 3rd, and 10th respectively. See id.

38. See G. Johnson & G. Solon, Pay Differences Between Women's and Men's Jobs: The Empirical Foundation of Comparable Worth Legislation 22 (1984) (Table 2).

## F. Conclusion

What is the ultimate verdict, then, about the initial empirical claims made in the case for comparable worth? Certainly there does appear to be a huge gender gap in earnings: in the order of 50% between all working women and men, and 40% among those working full-time. At first blush, this differential also seems attributable to the high degree of occupational sex segregation in the workplace, with women visibly concentrated in lower paying jobs than are men.

When one sifts through all the evidence, though, the case is not so compelling. Assuming that one's earnings from a job are legitimately influenced by the amount of time worked, the productive human capital deployed and the conditions under which the work is performed, the residual earnings gap is closer to 10% than the 40% figure in popular currency. One must immediately acknowledge that a gap in earnings even of that much smaller magnitude, if produced by sex discrimination, is a very substantial problem in its own right, justifying serious measures to deal with it. However, comparable worth as a specific form of anti-discrimination policy focuses on the supposed underevaluation of certain occupations which is attributable to the concentration of women in that kind of work. When carefully tested, though, it turns out that the female representation in a job has only a relatively small influence on female earnings, an effect which is dwarfed in size by the concentration of women workers in lower-paying firms and industries. Assuming that its proponents do not contemplate the kind of major legal intervention in the economy

which would be necessary to alter the latter aspect of the wage structure (e.g., between big firms and small firms or between the banking and the mining industries), comparable worth is capable at best of making only a small dent in the overall gender gap in earnings.

That will not suffice for a final verdict on the idea. Even granted that comparable worth would give us only a limited purchase upon the aggregate differential in earnings between men and women, if it turns out that some tangible part of the gap is due to the undervaluation of identifiably women's work, this would seem to be a form of sex discrimination which civil rights law should clearly label as wrong in principle and then provide a remedy to those who are victimized by it in practice.

To respond to that position, one must return to the analysis of the previous Section. In its typical form, the underpayment of women's work is at most an attenuated form of discrimination on the part of an individual employer which confronts an inherited wage structure in the outside labor market. Neither the firm nor the legal system can readily tell how much of these differentials are legitimate and how much are not, and it is even more difficult to deviate significantly from the market structure in individual cases, even where that does seem warranted. If I am right in supposing that there is relatively little tangible good to be accomplished from all that, it is sensible to judge that the law should not embark on this novel and rather risky venture.

## V. Alternative Paths

### A. Equal Employment Opportunity Policy

Does that mean that women are fated to remain at the lower echelon of the wage scale, denied any help from the law in their quest for pay equity? It is clear that the idea of comparable worth gained real impetus in the late 70's within the political, legal and scholarly milieus when both crude statistics and sophisticated research found little or no positive effect of the policy instruments of the 60's upon either job integration or pay equity. As I recounted earlier, both the sex segregation index and the earnings ratio did no more in the 70's, under the auspices of the Equal Pay Act, Title VII, and the Executive Order, than recover the ground which had been lost from the early 50's.<sup>39</sup> Since this was also a time during which female participation in the labor force was nearly doubling, the apparent inability of women to break out of their low-paid "pink ghetto" seemed more and more intolerable, and thus the new-fangled idea of comparable worth well worth trying.

Events do move on, though. The most recent research exhibits a somewhat more optimistic picture of the operation of the current law and labor market. For the last decade, sex segregation in employment has dropped quite sharply,<sup>40</sup> as

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39. See supra TAN \_\_\_\_.

40. Beller has demonstrated that from 1972 to 1981, her measure of the sex segregation index dropped from 68.3 to 61.7, and that the annual rate of decline during the 1970s was nearly three times what it was in the 1960s. See A. Beller,

affirmative action programs have begun to display tangible results in moving women into less traditional jobs.<sup>41</sup> True, that pattern is much more evident among college-educated professionals and white collar occupations than in the blue collar production or craft jobs;<sup>42</sup> though that may be due more to female aspirations than male resistance or legal weakness. The more important fact, though, is that an optimistic extrapolation of the trends of the 70's into and

(footnote continued)

Occupational Segregation By Sex and Race, 1960 - 81, in Sex Segregation in the Workplace 11, 14 - 16 (B. Reskin ed. 1984); see also Beller, Changes in the Sex Composition of U.S. Occupations, 1960 - 81, 20 J. Hum. Res. 234, 238 - 40 (1985).

41. Beller, for instance, has found that the legal policy of Title VII and the Executive Order by itself increased the likelihood of a woman being employed in a "male" job by 8.3 percent between 1967 and 1977, and reduced the net differential by a slightly greater percentage. See A. Beller, Occupational Segregation By Sex and Race, 1960 - 81, in Sex Segregation in the Workplace 11, 14 - 16 (B. Reskin ed. 1984); see also Beller, Occupational Segregation By Sex: Determinants and Changes, 17 J. Hum. Res. 370, 371 - 375 (1982). The most substantial study we have of the overall effects of "affirmative action" programs corroborates these findings. See Leonard, The Impact of Affirmative Action on Employment, 2 J. Lab. Econ. 439 (1984). Leonard detected a significant effect of the Executive Order from 1974 through 1980 on the employment of women, though less than that for blacks. Interestingly, the benefits of affirmative action were most pronounced of all for black women, presumably because by hiring a black woman a federal contractor can move toward satisfying its obligations both to hire women and to hire blacks.

42. Beller reported that the sex segregation indices in her study declined by a greater than average percentage in the professional occupations, from 59.4 to 50.6, and that the greatest declines occurred for workers with college educations, from 46.1 to 35.6. See A. Beller, Occupational Segregation By Sex and Race, 1960 - 81, in Sex Segregation in the Workplace 11, 14 - 16 (B. Reskin ed. 1984).

through the 80's points to quite remarkable progress toward greater job integration over those two decades.<sup>43</sup>

A similar favorable trend has occurred in connection with the wage gap. After two decades of being stuck at or below 60, from 1981 to 1983 the ratio of earnings of women working full-time, year-round suddenly spurted up 5 percentage points to the 64 level,<sup>44</sup> the farthest and fastest jump in this ratio on record (and recall again that this does not adjust for hours worked). The biggest gains have been recorded among the younger cohorts, those whose aspirations began to change in the early 70's and who have benefited from the opening up of new job opportunities with the gradual sexual integration of the workplace.<sup>45</sup> In retrospect, it now appears that far from

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43. Beller and Han extrapolated from sex segregation trends over the period 1971 - 77 to produce three alternative estimates of sex segregation over the period 1977 - 90. These were a "pessimistic" scenario, in which the sex segregation index would fall only to 57.2, a "moderate" scenario in which the index would fall to 50.1, and an "optimistic" projection under which the index would fall to 42.2 -- all of which deserve comparison with the 68.3 figure which actually existed in 1972. See A. Beller & K. Han, Occupational Sex Segregation: Prospects for the 80s, in Sex Segregation in the Workplace 91, 95 (B. Reskin ed. 1984). Since the actual trend from 1977 to 1981 was quite promising, it is clear that a major impetus toward job integration is now well underway.

44. See Bureau of the Census, Current Population Reports: Consumer Income, Series P - 60, at Table 37 (1983); Bureau of the Census, Current Population Reports: Consumer Income, Series P-60, at Table 37 (1982); Bureau of the Census, Series P - 60, at Table 37 (1981); see also J. Smith & M. Ward, Women's Wages and Work in the Twentieth Century (1984) (noting the increase in the relative earnings of women in 1983 and discussing the extent to which trends in relative wage ratios in previous decades influenced this recent upsurge).

45. I observed earlier, see supra note \_\_\_, that National Labor Survey compilations of the late 1960s indicated that the

being a help in closing the wage gap, the huge influx in female employment from the early 50's to the late 70's was actually a major hindrance to changing the overall ratio of the average earnings of women and men. The addition of so many new women to the labor force reduced the average levels of education, experience, and tenure of women in comparison to men.<sup>46</sup> By itself, this would have produced a considerable drop in relative female earnings: thus, the changes in social attitude and legal policy of the last two decades actually did have a significant effect in simply keeping that ratio fairly stable. Now that the major escalation in female labor force participation has largely worked itself through, the natural growth in average experience of this cohort of female workers promises by itself to make a large dent in the gender wage gap (even ignoring the further effect of this new reality upon the aspirations, education, and choice of jobs and training of young women).

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work expectations of young women were far out of line with what they would actually be doing in the 1980s. However, the surveys in the early 1970s showed remarkable changes in the expectations of young women. See C. Goldin, The Earnings Gap in Historical Perspective, in U.S. Comm'n on Civil Rights, Comparable Worth: Issue for the 80s 3, 18 (1984). Only now are those social changes starting to favorably influence the actual work and earnings of that group, and it will take some considerable time yet for this to make a pronounced difference on the relative averages of female earnings as a whole.

46. As more and more women entered the work force during the 1950s, 1960s, and 1970s, the average work experience of women participating in the labor force at any given time tended to decline, even though the average length of experience in the labor force of the population of women as a whole tended to increase. To illustrate, in 1930 the average 40-year-old woman had 6.7 years of work experience; in 1950, 8.1 years; in 1980,

## B. Collective Bargaining By and For Women

The most recent trends provide considerably greater grounds for optimism, then, about the long-term prospects for integrating the workplace and reducing the gap in male and female earnings. At the same time, one cannot turn a blind eye to the limits of equal employment policy (even if it is abetted by an aggressive affirmative action program, which has not been the leitmotiv of the Reagan administration). The prime beneficiaries of that effort inevitably will be the younger, better-educated, more highly-qualified women. Another sizable group is destined to remain in traditionally female jobs, whether by reason of inclination, socialization, education, or earlier career commitments. In any event, most people would agree that the work of nursing, for example, is just as important as engineering, and thus society would not be better off if women were to decide, en masse, that such a profession was no longer for them. To the extent, then, that there is

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11.4 years. But the average 40-year-old who was presently participating actively in the labor force had experience of 15.4, 14, and 14.4 years at those same points in history. See J. Smith & M. Ward, Women's Wages and Work in the Twentieth Century xi - xii (1984). Since it is the average experience level of women at work, not women as a whole, which influences the average earnings of women, it is not so surprising, then, that average relative wages remained so stable in the post-war period. With the leveling off of female labor force participation, the increasing experience of women as a whole is finally starting to be reflected in the average for working women as such. The experience level for women at work is projected to jump by fully 5.2 years by the year 2000 (to 19.6 years experience as compared with 14 years in 1950 and 14.4 years in 1980), and this one increase by itself can be expected to lop fully 10 percentage points off the overall wage gap. See id. at ixv - xv.



some degree of discriminatory underpayment of such occupations, are not the incumbents also entitled to call on civil rights law to help them?

There is an intriguing note to that familiar refrain. Thirty years ago, one would not automatically have assumed that the fact that workers had a felt and valid grievance meant that it was the responsibility of government to solve it. Many would have supposed, instead, that this was a good reason for the workers to come together to try to solve their problem themselves: to organize themselves into a union through which they could identify its source, voice their concerns, and wield some meaningful bargaining power to move their employer to respond to them. The primary job of the government and the law was to protect this fundamental right of workers "to engage in concerted activities . . . for their mutual aid and protection."<sup>47</sup>

These observations are pertinent to the specific issue of pay equity for women. It is plain to the naked eye that many of the jobs which are of special concern to proponents of comparable worth--e.g., clerical and secretarial work--are almost all nonunion.<sup>48</sup> The same is largely true of the

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47. National Labor Relations Act § 7, 29 U.S.C. § 157 (1982).

48. See R. Freeman & J. Leonard, Union Maids: Unions and the Female Workforce (Unpublished Manuscript, National Bureau of Economic Research, 1984) (analyzing current and projected trends in unionization rates of men and women); Freeman & Medoff, New Estimates of Private Sector Unionism in the United States, 32 Indus. & Lab. Rel. Rev. 143 (1979) (detailing industrial and occupational distribution of union representation); see also Adams, Changing Employment Patterns

industries which have a low-paid, heavily female workforce, such as banking or retail clothing.<sup>49</sup> Overall statistics tell us that unionized women earn, on average, twenty percent more than non-union women and that the pay disparity between unionized men and women twenty-five years and older is fully ten percentage points lower than it is in the non-union sector.<sup>50</sup> True, much of this differential disappears when one controls for other variables. However, unionization of white collar workers (a sector which comprises a high proportion of the female-concentrated jobs which a comparable worth policy would be addressing) turns out to have five times the net relative wage effect for women as for men.<sup>51</sup> It should come as no surprise, then, that in the economy as a whole the difference in unionization rates explains just as much of the aggregate wage gap between men and women as does the percent female in the occupations within which they

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of Organized Workers, Monthly Lab. Rev., Feb. 1985, at 25 (updating data on industrial and occupational distribution of union representation, though in far more general categories).

49. See Adams, Changing Employment Patterns of Organized Workers, Monthly Lab. Rev., Feb, 1985, at 25; Freeman & Medoff, New Estimates of Private Sector Unionism in the United States, 32 Indus. & Lab. Rel. Rev. 143 (1979).

50. See Bureau of Labor Statistics, Employment and Earnings 210 (1985) (detailing relative earnings of union and non-union female and male workers in 1984).

51. R. Freeman & J. Leonard, Union Maids: Unions and the Female Workforce (Unpublished Manuscript, National Bureau of Economic Research, 1984) (detailing union wage effects for female and male white collar workers).

work.<sup>52</sup>

In principle, collective bargaining might seem to be the preferred instrument through which to pursue pay equity for women. Rather than call upon the law to try to regulate the market from the outside, one would try to reconstruct the operation of the market so that women would be better able to address the issue from the inside. Through union representation, the employees in traditionally female jobs can get expert technical assistance in identifying the actual degree of undervaluation of their work in their own particular workplace. If they get no satisfaction, they can bring some group pressure to bear so as to force their employer to respond. At the same time, this process would force those immediately affected, men and women alike, to be sensitive to the limits of available resources, to be pragmatic in the manner and pace at which the wage structure is revised so as to ease the adjustment in the expectations of affected workers in other jobs, and to be flexible in altering even this new, more equitable pay scale as economic conditions change (including changes in the sex composition of different jobs). These are the virtues of voluntary action at the individual firm level which earlier I contrasted favorably with judicial orders issued from the outside. What collective bargaining adds, though, is both meaningful participation by women in the process and the necessary motivation to get it underway. And

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52. See G. Johnson & G. Solon, Pay Differences Between Women's and Men's Jobs: The Empirical Foundations of Comparable Worth Legislation 9 - 12 (1984).

recall that to the extent that the source of the gender gap in earnings is the concentration of women in certain firms or industries rather than in certain occupations, collective bargaining is the only mechanism available for this effort, because a law designed to prohibit sex discrimination within a particular firm simply will not apply.

I do not mean to imply that collective bargaining would be a panacea for the gender gap. Even when the practice is established, it encounters some major obstacles in trying to advance the cause of pay equity for women. To the extent that the problem is the undervaluation of specifically female occupations--e.g., the clerical employees in the office vis-a-vis the production employees in the plant--there will be political hurdles to persuading the latter to support the appropriate revision in the wage structure: it is hard to imagine, though, that the women will be better off by staying outside the unit or the union. To the extent that the problem is the concentration of women in certain low-paying industries--e.g., textiles as contrasted with autos--the product market imposes serious economic constraints upon any substantial closing of that wage gap:<sup>53</sup> again, though, there are other equally female, non-union industries, such as banking, which can hardly point to the rigors of foreign competition to explain their low-pay position.

The more fundamental difficulty with relying on collective action by female employees is the limited availability of union

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53. See supra TAN \_\_\_\_.

representation itself. The fact is that women are much less likely than men to be unionized; indeed, less than half as likely in the private sector where just ten percent of all female workers are in a union.<sup>54</sup> The natural response, of course, is that women simply do not like unionization which they see as a "male" institution: certainly, it should not be the function of the law to foist it upon them. However, there are a number of facts which are not easily squared with that hypothesis. While women overall are fifty percent less likely than men to be in a union, national surveys indicate that women are fifty percent more likely to want union representation.<sup>55</sup> Over forty percent of all non-union women would be prepared right now to vote for collective bargaining if they had the chance. That expressed desire is corroborated by the evidence of public sector employment where female workers are just as likely as men to be in a union, and a traditionally female occupation like teaching has become one of the most heavily-unionized in the entire economy.<sup>56</sup>

A somewhat different story seems to fit better with all these facts. It was in the 50's that women started to enter

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54. See R. Freeman & J. Leonard, Union Maids: Unions and the Female Workforce (Unpublished Manuscript, National Bureau of Economic Research, 1984).

55. See R. Freeman & J. Medoff, What Do Unions Do? (1984) (analyzing results of surveys comparing the appeal of collective bargaining to non-union men and women).

56. See Finch & Nagel, Collective Bargaining in the Public Schools: Reassessing Labor Policy in an Era of Reform, 1984 Wis. L. Rev. 1573, 1580. Adams, Changing Employment Patterns of Organized Workers, Monthly Lab. Rev., Feb. 1985, at 25.

and stay in the labor market in greater and greater numbers. At that time, the blue collar jobs in key male industries-- mining, construction, steel and autos--were heavily unionized and had established a significant wage advantage. One might have anticipated that since women were beginning to display a more serious, long-term commitment to their jobs, they would also exhibit much greater interest in collective bargaining as a means of improving their position (as we did see occur in teaching). However, this was the very same time at which private sector firms began to display more and more resistance to the adoption of union representation by their non-union employees: whether that resistance took the form of hard-fought but legal campaigns or unlawful discrimination and intimidation. The fact is that whatever an individual female worker might say to a pollster, it is now something of a threatening prospect for a group of them to become visibly active in organizing a union, getting it elected and securing a first collective agreement.<sup>57</sup> True, this can be done, as the highly-publicized struggle of the Yale clerical workers has shown. However, that seems to be the exception which proves the rule; and may be due in large part to the special features of the university as an employer which puts considerable moral constraints upon the tactics which it can employ. At the same time, that pattern of employer resistance has also had the

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57. See generally Weiler, Striking a New Balance: The Prospects for Union Representation, 98 Harv. L. Rev. 351 (1984); Weiler, Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA, 96 Harv. L. Rev. 1769 (1983).

effect of steadily but sharply squeezing the level of union representation of male, private sector workers.<sup>58</sup> But for our purposes here, the key fact is that women in the fast-growing and distinctively female white collar occupations and service industries have never really had the chance to use collective bargaining to alter the wage structure established by unionization for largely male blue collar workers in the manufacturing industries.

There is something of an irony in the current situation. The very same private sector employers who have stubbornly resisted the efforts of their own women workers to use the facility of a reconstructed market to address their concerns about pay equity within the firm are those who lament the use by women of their strength in the political arena to pursue this goal through legal and administrative regulation from the outside. Be that as it may, the trade is not a favorable one for our overall political economy. While the opponents of comparable worth as a mandatory legal doctrine may well be right in their fears that this would be a cure worse than the disease, they are wrong when they imply that the current regime of wage determination by management (loosely constrained by the labor market) is perfectly healthy. For my own part, I am

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58. See Weiler, Promises to Keep: Securing Workers' Rights to Self-Organization Under the NLRA, 96 Harv. L. Rev. 1769, 1772 (1983) (Figure 1). The obstacles to and legal instruments for getting American unions sufficiently interested in the gender earnings gap among their own membership to initiate corrective action are reviewed in a fine student paper on file at the Harvard Law School. See Narrowing the Earnings Gap: Is the Unionization of Clerical Workers the Answer? (unpublished student paper on file at Harvard Law School 1981).

satisfied that collective bargaining by and for women would be the most sensible instrument with which to deal with inequities in pay where these do exist. One implication from that diagnosis is that at least some of the political resources being expended on this single issue of inter-occupational wage differentials might well be redirected to the cause of labor law reform: in the hope that the right to a collective voice about all their concerns in the workplace (including comparable worth) would be truly available to those doing women's work as, historically at least, it has been a meaningful option for those doing men's work.

#### VI. Conclusion

At the present time, though, union representation is a rather faint prospect for the women who are concentrated in traditionally female occupations and industries. It is simply not realistic, then, to hold out collective self-help by workers themselves as a sufficient alternative to legal help from the government in advancing the cause of pay equity. Thus I must return to the question with which I began: should one read the current law, should one advocate the enactment of a new law, to provide that apparently unjustified disparities in what an employer pays for identifiably female and male work is a type of wage discrimination?

Contrary to Clarence Pendleton, the current chairman of the U.S. Civil Rights Commission, this is certainly not the "looniest idea since Looney Tunes": it does not fly in the face of our free enterprise economy. Indeed, it is hard to see how



someone could be comfortable with the responsibility for an Equal Pay Act that assumes that women have been denied equal pay for equal work, and for a Civil Rights Act which assumes that women have been segregated within different jobs than men, and yet still believe that sex discrimination in the economy and the society could not have influenced the pay for work which is identifiably "female" in appearance. It seems to me, in principle at least, that one must assume at least some potential for pay inequity across job lines, within whatever competitive constraints the real world labor market does impose on the firm.

The true debate must be joined, then, not at the level of abstract ideology but of practical policy. Can the law actually do an acceptable job in dealing with this problem? What is the potential payoff from the comparable worth strategy in improving the relative earnings of women, and what are the dimensions and distribution of the price which would have to be paid?

When I first began to think seriously about this topic, my initial inclination was that inter-occupational wage disparities did contribute a considerable share of the overall gender gap in earnings, but one would likely encounter nearly insurmountable obstacles to implementing any legal program to cure that problem. In particular, I wondered how one could possibly determine the proper relative value of two jobs whose price was heavily influenced by the forces of supply and demand.

As my argument in this article has revealed, my judgments on each of these scores is now somewhat reversed. On the one

hand, I do believe that there is a conceptually sound solution to the valuation problem within comparable worth: one should first derive the implicit values for relevant job factors which underlie this employer's pay structure for its array of non-female jobs, and then use these values as the benchmark for assessing how the employer actually pays for these same factors when they are displayed in its female-dominated jobs. That procedure would simply track the fundamental principle of the Equal Pay Act, that the price the employer in fact pays for male work should be the standard for what it should pay for comparable female work.

I do not mean to downplay the real difficulties in translating this conceptual framework into operational procedures for sex-neutral analysis of existing wage structures. So far as I know, as yet there is no successful example of this approach, one which, in effect, would try to capture a particular firm's pay policy in its male jobs in order to evaluate the pay for its distinctive female jobs. Instead, proponents of the comparable worth program have usually been content to form a committee and hire an outside consultant and leave it to them to decide, a priori, what are the proper weights for such job factors as mental demand as compared to dirty and dangerous work. Too many examples of that kind of process seem simply to have discredited the whole idea even among those who otherwise might be sympathetic to the cause. Additionally, even if a good economist could devise the type of statistical methodology which is required to do comparable worth properly, there is considerable risk of

harmful judicial error in employing those procedures through litigation, firm by firm, in our highly decentralized economic and legal system.

Of course, one cannot adequately assess the risk in doing something without also knowing what are the consequences of doing nothing. Many people are attracted down the path of comparable worth because they believe, even while acknowledging its difficulties, that there is a large and unjustified disparity in female earnings which this program would substantially rectify. As I explained, though, one must not assume that the potential payoff for comparable worth is anything like the total gender gap of 35 to 40 percentage points, nor even the gap of 10 to 15 percentage points which remains after one controls for hours worked, previous experience, working conditions and other legitimate factors which inevitably lead to wage differentials in a labor market. By its very nature, comparable worth is capable of influencing only that portion of the total gender gap which is specifically attributable to differences in pay for distinct male and female jobs within the same firm. The current consensus from the half dozen econometric studies of this factor, studies which use different data bases and methodologies, is that even if comparable worth were totally successful in eliminating any influence of the "percent female" in a job upon the pay for that job, this achievement would reduce the overall male-female disparity in earnings by no more than two to three percentage points. When appreciation of this fact sinks in, it does put a somewhat different gloss on how one might want to strike the

policy balance between the risks and the gains from comparable worth.

Of course, one's judgment about that statistical finding, as about any statistic offered in a debate about legal policy, depends very much upon the perspective with which one approaches the problem. I suspect that those who are wholeheartedly committed to the cause of pay equity would assert that, even if comparable worth could reduce the pay gap by only 2 to 3 rather than 20 to 30 percentage points, this should not ultimately matter. Whatever the form sex discrimination happens to take, whatever the setting in which it occurs, whatever the particular group of women whom it happens to harm, our civil rights law must deal with it by standing fast to moral principle, rather than just pragmatically balancing the benefits and the burdens.

My own reaction to that stance is that to a large extent it depends on what we mean by "discrimination." If what we understand by employer discrimination is the kind of purposeful, invidious treatment of women workers which was evident in the Charley Brothers case, then I agree that this should certainly be illegal. Women who are channelled into low-paying "female" jobs or departments whose pay is deliberately depressed on that account should have a legal remedy even if that does require some degree of subjective judicial appraisal of the relative value of jobs; the guilty employer must simply bear the risk that the judicial estimate might be somewhat off the mark. Surely if Gunther means

anything, the employment practices depicted in the Charley Brothers decision must now be illegal under federal law.

However, the typical case appearing in the courts, both before and after Gunther, is very different in flavor. What one usually finds is that, while a particular employer has adopted and maintained a structure of wage rates that seems to undervalue the women's jobs in light of the pay scale utilized for predominantly male jobs, the reason is not any subjective prejudice against women, but rather that the employer is following the established pattern it finds in the outside labor market. Some of that pattern is likely due to a history of deliberate discrimination against women at work. Some of it is due to social and cultural factors which put women at some disadvantage in the labor market. Some part is also due to conscious choices which women workers (and male workers as well) may make about the time, location and type of occupation they prefer, choices which are perfectly legitimate and which the law should honor. The proposed role for civil rights law in these cases, then, is not to prevent the prejudicial harm imposed by Charley Brothers upon its employees. Rather, Title VII would require an employer such as the University of Washington, for example, to revise its pay structure as between the nursing and the law faculties, because the history of these two professions has left the largely female profession of nursing at a residual earnings disadvantage vis-a-vis the predominantly male profession of the law. I have sketched, in conceptual terms, at least, a more sex-neutral procedure for the relative evaluation of these two occupations. I would also

surmise that the academic labor market does leave some room for a single, large state university to channel a somewhat greater share of its salary budget to the nursing faculty and correspondingly less to law (or medicine, or philosophy, or other largely male disciplines), while still maintaining viable faculties or departments. These judgments notwithstanding, my own view, on balance, is that this is a legal enterprise upon which we should not now embark.

However, that is not necessarily the final verdict about what one ought to do. It is a mistake to suppose that we are locked into just two, mutually exclusive positions: either the underlying theory of comparable worth is coherent in principle and therefore it must be embodied in our mandatory anti-discrimination laws; or, because we are reluctant to take that latter step, we must therefore dismiss comparable worth entirely as a "cockamamie idea". To me the more sensible position is probably somewhere in-between. While there is likely some validity to the comparable worth diagnosis of the current pay situation of workers in identifiably female jobs, there is not sufficient basis to prescribe a legal remedy with the definite risk of side effects which this would entail. Instead we should be looking to try out more moderate forms of treatment.

What are the options one might consider? An obvious candidate is voluntary "affirmative action" by individual employers along these lines. As I have emphasized a number of times, a particular employer is in the best position to understand its own pay system, to locate any sex-based

disparities within it, and to introduce the necessary pay adjustments in a manner which cushions everyone as much as possible from the economic side effects. Certainly that should be a viable option in the public sector at least. If women were to have sufficient interest in and political clout about this subject to persuade a government to enact a law which imposes comparable worth on other employers, surely they should find it that much easier to induce the government to take this step for its own work force alone. In my own view, there would be great value if the federal government, in particular, were to undertake a comprehensive re-evaluation of its own pay structure; and to do it properly (not as was done in the State of Washington) in the hope that this would serve as a demonstration project from which others could learn.

Women might be pardonably skeptical about whether the mere example of government action for its own work force would move the private sector to follow (and the latter is the place where the greater sex disparities in earnings are to be found). However, if policy incentives are to be provided, I much prefer the positive "carrot" of government contracts to the negative "stick" of judicial orders. Suppose one were to add this comparable worth dimension to the affirmative action program in Executive Order 11246. That approach would permit much more careful tailoring of the program to those firms and industries whose size and market position would let them minimize the dislocation from pay adjustments, and would also permit sufficient administrative flexibility to any one employer to try out a number of options in seeking to eliminate the

residual relationship between the proportion of females in, and the amount that it pays for, particular occupations.

At a minimum, a sensible program for comparable worth would go through this series of policy measures, taking advantage of the learning curve at each successive step of the way, before even entertaining the idea of expressing this concept in a judicially-enforceable right under the general anti-discrimination law. My hope is that we would find that we did not really need to take that final step. Affirmative efforts undertaken by the large and somewhat sheltered public and private employers would slowly but surely reshape both the sociology and the economics of pay relationships. Eventually, the smaller private firms which have to compete to recruit workers for these traditional "female" jobs (in a labor market which was also giving women much greater access to non-traditional jobs) would have to revise their pay scales as well. Certainly it would be gratifying to learn that this country could accomplish as vital a goal as pay equity for women without having to rely primarily on the law in the courts.