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COMPARABLE WORTH—THE THEORY, ITS LEGAL FOUNDATION, AND THE FEASIBILITY OF IMPLEMENTATION

Carin Ann Clauss*


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successful. What progress has been made has been through the legislatures and private negotiation.  

In part, the paucity of litigation can be attributed to the enormous expense of such suits and the withdrawal by the federal civil rights agencies of both financial and legal support. In part, however, the paucity of litigation stems from the inability of the courts—and counsel—to agree on a comprehensive legal theory for resolving wage discrimination claims based on pay disparities affecting dissimilar jobs. Indeed, one jurist only recently remarked that “comparable worth is not a legal concept” but a political and economic movement.

The purpose of this Article is to set forth what the author believes to be a viable approach to wage discrimination suits involving dissimilar jobs. Part I summarizes the development of legislation prohibiting sex-based wage discrimination. Part II(A) begins with a definition of the term “comparable worth.” As noted there, comparable worth can never be an accurate shorthand expression for the elimination of the wage gap between men and women workers. This is so because the reason for the wage gap is not just wage discrimination, nor even wage and job discrimination combined. It would thus be misleading to suggest that effective enforcement of the civil rights laws could ever eliminate this gap. Nor does the term comparable worth mean that every two jobs of equal value must be paid the same.


7. See, for example, the concurring opinion of Judge Schroeder in Spaulding v. University of Washington, 740 F.2d 686 (9th Cir.), cert. denied, 469 U.S. 1036 (1984), where she noted that it was “not possible,” in a suit tried before the Supreme Court’s “historic decision” in Gunther, “for this court . . . to render any definitive ruling on the validity of comparable worth as a tool in employment discrimination cases.” Id. at 710.


9. The Supreme Court in Gunther did “not decide . . . the precise contours of lawsuits challenging sex discrimination in compensation under Title VII.” 452 U.S. at 181.

10. The so-called wage gap refers to the difference in the earnings of full-time female and male employees. In 1984, the earnings of full-time female employees were 64% of the earnings of full-time male employees. BUREAU OF THE CENSUS, U.S. DEP’T OF COMMERCE, CURRENT POPULATION REPORTS: MONEY INCOME OF HOUSEHOLDS, FAMILIES, AND PERSONS IN THE UNITED STATES: 1984, at 2 (1986); see also In Wages, Sexes May Be Forever Unequal, N.Y. Times, Dec. 21, 1986, at E20, col. 3. The combination of factors resulting in the wage gap, including discrimination, are discussed infra note 68. See also B. BERGMANN, THE ECONOMIC EMERGENCE OF WOMEN 66-82 (1986).
usage of the term is to a type of pay system, similar to the one used in the federal service,\textsuperscript{11} and not to any legal theory of discrimination. But comparable worth can be used to refer to a legal theory of discrimination, and in this Article the term describes a wage discrimination claim based on the employer's use of different criteria in establishing the wage rates for male- and female-dominated jobs.

Part II(B) of this Article compares equal work and comparable worth cases and demonstrates how both fit within the disparate treatment model of discrimination. Part II(C) discusses the differences in the problems of proof between an equal work and a comparable worth case. This Part of the Article suggests a number of ways in which the required "intent" element might be established in a comparable worth case, including the use of job evaluation methods and statistical regression techniques. In this connection, the Article explores the difference between the \textit{a priori} job evaluation method, which relies upon an outside expert's view of job worth, and the \textit{policy capturing} job evaluation method, which relies upon the employer's own implicit criteria for establishing job worth. The Article concludes that the policy capturing method is more appropriate for establishing intent because it is based on the employer's own assessment of job worth and not on the court's or an outside expert's.\textsuperscript{12}

Part II(C) discusses the defenses that are typically raised to comparable worth claims, including the assertion that the "market" justifies disparate wage treatment. The Article distinguishes between a wage differential based on differences in the prevailing community wage rates for male and female labor, and wage differentials based on a shortage of available workers trained in a particular skill, or on some other factor unrelated to either sex or job worth. It concludes that differentials based on true labor shortages are lawful, whereas differentials based on the separate prevailing rates for male and female labor are not.

Although it is the central thesis of this Article that Title VII of the Civil Rights Act comfortably accommodates a comparable worth suit, the author recognizes that additional comparable worth legislation is probably inevitable. For that reason, Part III of the Article examines the objectives of this legislation, and the

\textsuperscript{11} See D. TREIMAN, JOB EVALUATION: AN ANALYTIC REVIEW 17-21 (1979) (Interim Report to the Equal Employment Opportunity Commission (EEOC)).

\textsuperscript{12} Both the courts and Congress have expressed a concern that judges and government agencies not base a finding of intentional wage discrimination on their "own subjective assessment of the value of the male and female . . . jobs." Gunther, 452 U.S. at 181; see also 109 CONG. REC. 9197-98 (1963) (statement of Rep. Goodell).
extent to which these objectives are consistent with the general aims of nondiscrimination. The author cautions against any exclusive reliance on affirmative action, pointing out that it is a less appropriate response where the discrimination results from direct employer misconduct and not from the misconduct of some unrelated institution—such as society, the schools, unions, and family.

Part IV of the Article concludes with a discussion of the methods for implementing comparable worth, whether through legislation or some other voluntary pay plan, or through successful litigation. This Part of the Article also responds to the arguments made by the critics of comparable worth that its implementation will result in lower wages for men and reduced employment for men and women, and that the burden of its costs will fall disproportionately on the unskilled and low-paid.

I. AN HISTORIC PERSPECTIVE

Sex-based wage discrimination has been a recognized problem in the United States and Europe for over a century. The

13. See generally Equal Pay Act: Hearings on H.R. 3861 and Related Bills Before the Special Subcomm. on Labor of the House Comm. on Education and Labor, 88th Cong., 1st Sess. 6-57 (1963) [hereinafter 1963 Hearings on H.R. 3861]. For an excellent discussion of the European response to sex-based wage discrimination, see Bellace, A Foreign Perspective, in COMPARABLE WORTH: ISSUES AND ALTERNATIVES 137 (E.R. Livernash 2d ed. 1984). Bellace notes that the problem of women receiving unequal pay for equal work became an issue in Europe about the same time as in the United States. The Trade Union Congress in Great Britain, for example, made equal pay for equal work one of its issues in 1888. Id. at 145. No formal action was taken by the European governments, however, until the 1940’s. In 1946, France adopted a new Constitution, which guaranteed equality between the sexes; later that year, it promulgated a decree eliminating “explicit sex-based differentials in basic wage rates as fixed by collective agreements.” Id. at 153. The 1948 Italian Constitution also provided that women are entitled to equal pay for equal work. Id. at 149. And Great Britain appointed a Royal Commission in 1944 to consider the issue of equal pay, although the government took no action on the Commission’s report until 1955. Id. at 145-46; Equal Pay for Equal Work for Women: Hearings on S. 1178 Before a Subcomm. of the Senate Comm. on Education and Labor, 79th Cong., 1st Sess. 33 (1945) [hereinafter 1945 Hearings on S. 1178].

Two other developments should be noted. In 1951, the Conference of the International Labour Organisation (ILO) adopted ILO Convention No. 100, which states that signatory nations shall “ensure the application to all workers of the principle of equal remuneration for men and women workers for work of equal value.” Equal Remuneration Convention, June 6, 1951, art. 2, para. 1, INTERNATIONAL LABOUR CONVENTIONS AND RECOMMENDATIONS, 1919-1981, at 42 (1982); see Bellace, supra, at 140. Forty-three countries, including eight from Western Europe, had ratified this Convention by January 1, 1963. See 1963 Hearings on H.R. 3861, supra, at 54-55. Even prior to the adoption of Convention No. 100 and its ratification by a majority of members, the ILO had regarded equal pay as one of its basic principles. The Constitution of the ILO states as principle 7 that
United States government's interest dates back to at least 1867, when the Joint Select Committee on Retrenchment was established by Congress to examine existing appointment procedures and salaries in the federal civil service. In conducting this examination, the Joint Select Committee submitted thirty-seven "interrogatories" to various government officers. One of these interrogatories specifically addressed the question of sex-based wage and employment practices, as follows:

Are there any females among your subordinates? If so, state what proportion their compensation bears to that of males for the same service, [and] whether they compare favorably or not with males for diligence, attention and efficiency . . . .


The other major piece of legislation was the Treaty of Rome, which was signed in 1957 by France, Germany, Italy, Belgium, Luxembourg and the Netherlands, and which established the European Economic Community (EEC); the United Kingdom, Ireland, and Denmark joined the EEC in 1973. Article 119 of the Treaty states: "Each Member State shall . . . ensure and . . . maintain the application of the principle that men and women should receive equal pay for equal work." See Bellace, supra, at 141-43.

Although this language would appear more restrictive than the language in the ILO Convention, the Council of the European Communities adopted an Equal Pay Directive on February 10, 1975, which construed the "equal work" language very broadly. Article 1 of the Directive states that the principle of equal pay set out in the Treaty of Rome means equal pay for the same work or for work to which equal value is attributed. . . . In particular, where a job classification system is used for determining pay, it must be based on the same criteria for both men and women and so drawn up as to exclude any discrimination on grounds of sex.

18 O.J. EUR. COMM. (No. L 45) 19 (1975); see Bellace, supra, at 143.

The United Kingdom maintained that the Directive's requirement of equal pay for equal value applied only to employers who had a job evaluation scheme in place. The European Commission (the EEC's secretariat) disagreed, and, in 1979, initiated infringement proceedings against the United Kingdom and others. Id. at 145. The dispute was heard by the European Court of Justice, which concluded, on July 6, 1982, that the United Kingdom had violated its obligations under the Directive "by failing to . . . apply the principle of equal pay for men and women for work to which equal value is attributed and for which no system of job classification exists." Commission of the European Communities v. United Kingdom, 1982 E. Comm. Ct. J. Rep. 2601, 2617-18; see M. RUBENSTEIN, EQUAL PAY FOR WORK OF EQUAL VALUE 46 (1984). Following this decision, the British Parliament enacted the Equal Pay (Amendment) Regulations 1983, which went into effect on January 1, 1984. Id. at 46-49.

15. Id. at 16-18.
16. Id. at 18.
The responses to this interrogatory confirmed that women were paid less than men for equal work.\(^\text{17}\) Some of the reporting officers recommended that such wage differentials be eliminated.\(^\text{18}\) Others suggested that the men be replaced by women, who would work for lower wages, and thus reduce the cost of government service.\(^\text{19}\)

Following the Committee's report, Congress enacted legislation in 1870, which, among other things, adopted the principle of equal pay for equal work in the federal civil service.\(^\text{20}\) This principle was not generally implemented, however, until the Classification Act of 1923,\(^\text{21}\) when Congress established a uniform system of job grades and salaries.\(^\text{22}\) This early legislative response to sex-based pay discrimination was largely limited to the federal sector, although two states, Michigan and Montana, enacted broad equal pay laws in 1919, which applied to private employers.\(^\text{23}\) But the first major application in the private sector of the concept of equal pay for equal work did not occur until the war years.\(^\text{24}\) Although the wage and price controls then in effect gen-

\(^{17}\) Id. at 19, 23, 25, 29, 41.
\(^{18}\) Id. at 23.
\(^{19}\) Id. at 34.
\(^{20}\) Act of July 12, 1870, ch. 251, § 2, 16 Stat. 230, 250. Under the terms of this statute, women could, "in the discretion of the head of any department, be appointed to any of the clerkships . . . authorized by law, upon the same requisites and conditions, and with the same compensation, as are prescribed for men." WOMEN'S BUREAU, U.S. DEP'T OF LABOR, BULLETIN No. 8: WOMEN IN THE GOVERNMENT SERVICE 9 (1920) [hereinafter WOMEN'S BUREAU, BULLETIN No. 8].
\(^{21}\) Ch. 265, 42 Stat. 954 (repealed 1949).
\(^{22}\) Subsequent legislation established for the federal civil service a General Schedule (GS) of 18 grades, with each grade representing increased levels of difficulty, responsibility, and qualification requirements. The salary range for any specific job is determined by its grade assignment. See Classification Act of 1949, ch. 782, 63 Stat. 954. Under this Act, which has remained virtually unchanged, grade assignments should be made on the basis of "equal pay for substantially equal work"; and pay variations should be "in proportion to substantial differences in the difficulty, responsibility, and qualification requirements of the work performed." 5 U.S.C. § 5101(1)(A)-(B) (1982). The Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111, specifies the "merit system principles" that are to govern federal personnel management, including the principle that "[e]qual pay should be provided for work of equal value." 5 U.S.C. § 2301(b)(3) (1982). See generally D. TREIMAN, supra note 11, at 15-17.
\(^{24}\) Two government commissions had previously recommended that the principle of equal pay for equal work govern industrial relations in the United States—the Industrial Commission in 1898 and the Commission on Industrial Relations in 1915. 1945 Hearings on S. 1178, supra note 13, at 30. After the outbreak of World War I, the Chief of the Bureau of Ordinance of the War Department notified all manufacturers with war contracts that "[i]the standards of wages hitherto prevailing for men in the process should not be lowered when women render equivalent service." Id. (quoting General Order No. 13, Nov. 1917).
generally prohibited any wage increases, the War Labor Boards could and did approve wage increments that were designed to correct gross inequities based on sex, race, or age. Their guiding principle was that "[i]f it shall become necessary to employ women on work ordinarily performed by men, they must be allowed equal pay for equal work." This principle was reaffirmed by the National War Labor Board on November 24, 1942, in General Order No. 16, which stated, "Increases which equalize the wage or salary rates paid to females with the rates paid to males for comparable quality and quantity of work on the same or similar operations . . . may be made without approval of the National War Labor Board . . . ."

Based on the experience of the War Labor Boards, a comprehensive federal equal pay bill was introduced in Congress in

27. PROGRAM APPRAISAL AND RESEARCH Div., NATIONAL WAR LABOR Bd., NATIONAL WAR LABOR BOARD POLICY ON EQUAL PAY FOR EQUAL WORK FOR WOMEN (1945) (Research and Statistics Report No. 32) (quoting General Order No. 16, as amended 1944), reprinted in 1945 Hearings on S. 1178, supra note 13, at 41, 41-64; Williams & Bagby, The Legal Framework, in COMPARABLE WORTH: ISSUES AND ALTERNATIVES, supra note 13, at 197, 205-12. During the Korean War, the Wage Stabilization Board (WSB) similarly applied the principle of equal pay for equal work; under Resolution No. 69, the WSB would grant wage increases to equalize wages for comparable quality and quantity of work in the same or similar operations in the same establishment, without regard to sex, race, color, or national origin. Wage Stabilization Board Release No. 140 (Nov. 15, 1951).
28. The War Labor Board summarized this experience in In re General Electric Co., 28 War Lab. Rep. (BNA) 666, 677 (1945), as follows:

1. Where women are working on the same jobs as men or on jobs formerly performed by men or on jobs performed interchangeably by men and women or on jobs which differ only inconsequentially and not in measurable job content from jobs performed by men, the women should receive the same rates of pay as the men unless (a) their output is less in quantity or quality than the output of men or (b) there are ascertainable and specific added costs to the company resulting from the use of women, such as provision for extra helpers or for rest periods not provided in the case of men. In the case of (a) or (b), appropriate adjustment in rates may be made.

2. Intangible alleged cost factors incident to the employment of women (such as absenteeism, lack of qualification for other work to which they are not assigned, relative impermanence in industry, legal restrictions, lack of prior training in industry, necessity of providing sanitary facilities, etc.) cannot legitimately [be used to reduce the rates to which the woman would otherwise] be entitled on the basis of job content.

3. The rates for jobs which have historically been performed by women only and which differ measurably from the jobs performed by men are presumed to be correct in relation to the men's rates in the plant, especially where they are of long standing and have been accepted in collective bargaining.
1945. There were then six states with similar legislation, and there was substantial support from both the government and the public for a federal bill. As proposed, the 1945 bill, S. 1178, provided, "It shall be an unfair wage practice for any employer . . . to discriminate between the sexes—(a) by paying wages to any female employee at a rate less than the rate at which he pays or has paid wages to male employees for work of comparable quality and quantity . . . ." The 1945 legislative effort failed and, although similar bills were introduced in every subsequent session of Congress, it was not until 1963 that an equal pay bill was finally approved. This approval was obtained when the sponsors of the legislation agreed to change the language in the bill from "work of comparable character on jobs the performance of which requires comparable skills" to "equal work on jobs the performance of which requires equal skills."

4. This presumption can be overcome by affirmative evidence of the existence of an intra-plant inequity derived from a comparison of the content of the jobs in question with the content of the jobs performed by men. Some consideration, however, may be given in such cases, in modifying long established rate relationships to the collective bargaining history.

5. In particular cases, under a proper evaluation, there may be women's jobs which warrant a lower rate than the rate assigned to the lowest men's jobs, depending entirely on the circumstances.

6. The determination of proper rates for men's and women's jobs cannot be made by rule of thumb; it calls for judgment; and, wherever possible, it should be made through collective bargaining conducted in good faith.


30. 1945 Hearings on S. 1178, supra note 13, at 9, 39-40. The six states were Michigan, Montana, Washington, Illinois, New York, and Massachusetts. Id.


32. S. 1178, supra note 29, § 2(a), reprinted in 1945 Hearings on S. 1178, supra note 13, at 1.

33. By 1963, 22 states had enacted equal pay legislation. While the language of the state statutes varied considerably ("equal work," "same work," "work of like or comparable character," "comparable work," "type of work," "similarly employed," "equivalent service," "identical work," and "jobs requiring comparable skills"), it was generally assumed that the statutes were limited to an equal work standard. See, e.g., 1 Equal Pay for Equal Work: Hearings on H.R. 8898 and H.R. 10226 Before the Select Subcomm. on Labor of the House Comm. on Education and Labor, 87th Cong., 2d Sess. 42-58 (1962) [hereinafter Equal Pay for Equal Work Hearings] (summarizing state court cases and state laws involving state "equal pay" laws).


35. H.R. 3861, 88th Cong., 1st Sess. § 4, reprinted in 1963 Hearings on H.R. 3861, supra note 13, at 2, 3; see also 108 CONG. REC. 14,771 (1962) (House discussion of proposed amendments to Equal Pay Act). Several articles have examined the legislative history surrounding the substitution of the word "equal" for "comparable." See, e.g., Williams & Bagby, supra note 27, at 209-18; Vladeck, The Equal Pay Act of 1963, in
The amended bill was signed by the President on June 10, 1963, and went into effect on June 11, 1964.

One year later, on July 2, 1964, Congress enacted Title VII of the Civil Rights Act. This Act was a broader statute than the Equal Pay Act and prohibited the "entire spectrum" of discriminatory employment practices, including "discriminat[ion] against any individual with respect to his compensation . . . because of such individual's race, color, religion, sex, or national origin." Although the original Title VII bill did not include "sex" as a protected class, "sex" was added during the last few days of the floor debate in the House. The Senate accepted the amendment, but, at the suggestion of Senator Bennett, added the following language:

It shall not be an unlawful employment practice under [Title VII] for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such em-

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PROCEEDINGS OF NEW YORK UNIVERSITY EIGHTEENTH ANNUAL CONFERENCE ON LABOR 381 (T. Christensen ed. 1966).


No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex.


It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin. . . .

Id.
41. A summary of the legislative history relating to the addition of the word "sex" to Title VII of the Civil Rights Act is set forth in the Supreme Court's decision in Gunther, 452 U.S. at 171-76. See generally Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964, 84 HARV. L. REV. 1109 (1971).
ployer if such differentiation is authorized by the provisions of [the Equal Pay Act].

For the first decade following the enactment of these two statutes, all sex-based wage suits were brought under the Equal Pay Act. Not only were there procedural advantages to filing under the Equal Pay Act, but the Equal Employment Opportunity Commission initially took the position that it would not accept any sex-based wage discrimination claims under Title VII unless they met "the standards of 'equal pay for equal work' set forth in the Equal Pay Act." This restriction was subsequently deleted from the Guidelines in 1972. But the Equal Pay Act, no matter how broadly the courts construed the phrase "equal work," did not apply to jobs that were dissimilar from any of those performed by men. Such jobs had no male counterpart to use for comparison in an Equal Pay Act case, even though the wage rates were demonstrably lower than they would have been if the jobs had been performed by men, as, for example, where the employer had a job evaluation plan in effect that rated the women's and men's jobs the same. Because the great majority of women were employed in female jobs, the Equal Pay Act had very little effect on the discriminatory undervaluation of women's work.

Because of the limited coverage of the Equal Pay Act, women began in the mid-1970's to file wage discrimination suits under Title VII, alleging disparate treatment in the wage rates established for dissimilar male and female jobs. Employers defended these suits under the Bennett Amendment, which they construed as confining Title VII's application to sex-based wage claims that also met the "equal work" standard of the Equal Pay Act. Some courts allowed this defense, and others did not.

It was not until 1981, in County of Washington v. Gunther,

42. The so-called Bennett Amendment is in § 703(h) of the Act, 42 U.S.C. § 2000e-2(h) (1982).
43. See infra note 167.
46. See infra text accompanying notes 132-51; see also infra note 268.
47. B. BERGMANN, supra note 10, at 186.
48. Id. at 186-87; Newman & Vonhof, "Separate but Equal"—Job Segregation and Pay Equity in the Wake of Gunther, 1981 U. ILL. L. Rev. 269; Williams & Bagby, supra note 27, at 201.
49. See supra note 2.
that the Supreme Court resolved this conflict by firmly rejecting the employers' contentions. According to the Court, the purpose of the Bennett Amendment was not to restrict wage discrimination claims to those actionable under the Equal Pay Act, but to incorporate into Title VII the Equal Pay Act's four affirmative defenses.\footnote{Id. at 168-80.}

Except for this limited holding, the Court did not set forth any guidelines for allowable claims under Title VII. It concluded that because the plaintiffs in \textit{Gunther} claimed that they had direct evidence of intentional disparate treatment,\footnote{Id. at 180-81.} it was unnecessary to decide "the precise contours of lawsuits challenging sex discrimination in compensation under Title VII"\footnote{Id. at 181.} or to deal with the "controversial concept of 'comparable worth.' "\footnote{Id. at 166.} Since Gunther, the courts have offered little guidance in handling wage discrimination claims involving dissimilar jobs.

The remainder of this Article explores the question of what those "precise contours" should be.

**II. THE THEORY OF COMPARABLE WORTH AND ITS LEGAL FOUNDATION**

The term "comparable worth" describes a class of wage discrimination claims based on the employer's use of different criteria in establishing the wage rates for male- and female-dominated jobs. Like an equal work suit, a comparable worth claim is based on a disparate treatment model of discrimination, except that without the Equal Pay Act's presumption of discriminatory intent, based on the equal work requirement, a comparable worth claim may require somewhat more evidence for a prima facie case, and may allocate differently the parties' respective burdens of proof. Intent, however, does not have to be established by direct evidence, but can be inferred from the employer's own wage structure; there is no requirement that the employer be motivated by a desire to benefit men at the expense of women.

Finally, a defense based on the lower prevailing wage rates for women in the marketplace is no more valid in a comparable worth suit than it is in an Equal Pay Act suit. The only differ-
ence is that, because a comparable worth suit involves dissimilar jobs, the courts will have to distinguish between wage disparities based on differences in the prevailing rates for men and women workers, which would be illegal,15 and those based on true skill shortages or other factors that legitimately result in wage disparities even among men's jobs, which would be legal.

A. The Meaning of Comparable Worth

A major difficulty in discussing the legal status of comparable worth, as well as its economic cost and administrative feasibility, is that the phrase "comparable worth" is used interchangeably to refer to many different concepts. Comparable worth may mean (1) a requirement that compensation be proportional to the intrinsic worth of the job,56 (2) a pay system under which all jobs of equal value are paid the same,57 (3) a procedure that permits the comparison of job content and compensation across job families (i.e., work that is dissimilar),58 (4) evidence used in a wage discrimination case to demonstrate that the difference in wages is due to sex and not to any difference in job value, (5) a requirement that female-dominated jobs be paid the same as male-dominated jobs of equal value,59 (6) a requirement that the wage rates for female-dominated jobs be established using the same criteria as are used in establishing the wage rates for male-dominated jobs, and (7) a requirement that wage disparities based on sex (or race) be eliminated.60

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57. Scales-Trent, Comparable Worth: Is This a Theory for Black Workers?, 8 WOMEN’S RTS. L. REP. 51 (1984); see also COMMITTEE ON OCCUPATIONAL CLASSIFICATION AND ANALYSIS, NATIONAL RESEARCH COUNCIL, WOMEN, WORK, AND WAGES AT ix, 2, 69 (1981) [hereinafter NRC REPORT].
58. A. COOK, COMPARABLE WORTH: A CASE BOOK OF EXPERIENCES IN STATES AND LOCALITIES 1, 10 (1985).
The important distinction in these various meanings is between an equal value concept (items (1), (2), and (5) above), under which the employer is required to pay the same wage rate for all jobs of equal or comparable value, and a nondiscrimination concept (items (3), (4), (6), and (7)), under which the employer is prohibited from using different standards in establishing the rates for male- and female-dominated jobs, or from otherwise basing wages on sex. Unlike an equal value concept, nondiscrimination does not mandate equal wages for work of equal value but instead prohibits disparate wage treatment on the basis of sex or race.

The legal and moral justifications for these two distinct concepts vary considerably. Most people would probably agree that wage discrimination offends a basic civil liberty and is thus properly dealt with by our legal system—as witnessed by the widespread support for the Equal Pay Act and the nondiscrimi

61. Comparable worth, by requiring an employer to use the same standards in establishing wage rates for women as for men, falls within the disparate treatment model of discrimination, as does the Equal Pay Act. See infra text accompanying notes 124-59. It should be noted, however, that an employer who uses the exact same standard in establishing wage rates for both its men and women employees could still run afoul of Title VII if the particular standard selected—such as a head-of-household allowance or a fixed percent increase over the employee's prior salary—had a disproportionately adverse impact on women and if the use of that standard could not be justified by any legitimate business reason. The Supreme Court has long held in nonpay cases that Title VII prohibits both disparate treatment discrimination and disparate impact discrimination. See, e.g., McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Griggs v. Duke Power Co., 401 U.S. 424 (1971). While some commentators have suggested that wage discrimination cannot be established under a disparate impact form of analysis, see, e.g., U.S. Comm'n on Civil Rights, Comparable Worth: An Analysis and Recommendations 70, 71 (1985) ("Findings and Recommendations"); B. Schlei & P. Grossman, Employment Discrimination Law 480 (2d ed. 1983); L. Lorber, J. Kirb, S. Samuels & D. Spellman, Sex and Salary: A Legal and Personnel Analysis of Comparable Worth 26 (1985), such a construction of Title VII would seem inconsistent both with the purpose and breadth of the Act, and with the developing case law. See Kouba v. Allstate Ins. Co., 691 F.2d 873 (9th Cir. 1982); Bryant v. International Schools Servs., 675 F.2d 562 (3d Cir. 1982); Wambheim v. J.C. Penney Co., 642 F.2d 362 (9th Cir. 1981).

62. Comparable worth, as a theory of discrimination, can also be used to prove disparate treatment in the establishment of wage rates for jobs dominated by particular ethnic, racial, and/or religious groups. International Union of Elec., Radio & Mach. Workers v. Westinghouse Elec. Corp., 631 F.2d 1094, 1096-97 (3d Cir. 1980), cert. denied, 452 U.S. 967 (1981). While there may be few, if any, occupations that are universally identified with any one racial, ethnic, or religious group, such occupations do exist in selected industries and geographic areas, at least for blacks and Hispanics. See Bazemore v. Friday, 106 S. Ct. 3000 (1986); Quarles v. Philip Morris, Inc., 279 F. Supp. 505, 509-10 (E.D. Va. 1968). Thus, while the references in this Article are to female-dominated jobs and to sex discrimination, the same principles would apply to jobs that are dominated by a racial, ethnic, or religious group, and that can be shown to have been undervalued in comparison with jobs dominated by whites.

63. See infra text accompanying note 288.
ination in pay provisions of Title VII of the Civil Rights Act.\textsuperscript{64} By the same token, there are probably very few people who would agree that equal pay for work of equal value (without regard to discrimination) is a basic civil liberty—whatever their view might be as to the fairness of such a system. Indeed, there are a great many compensation systems in both the private and public sectors that do not pay all jobs of equal or comparable value at the same rate, regardless of whether those jobs are male or female. In these systems, male-dominated jobs are paid less than other male-dominated jobs even though the work content of the jobs might be of "equal" or "comparable" value. For example, the average wage for architects is less than the average wage for engineers, although the educational and skill requirements for the two jobs are very much the same.\textsuperscript{65} Similar disparities also exist among female jobs.\textsuperscript{66}

The reasons for such disparities could be several: individual employers, or society as a whole, may reward certain skills more than others (e.g., managerial skills over artistic skills, or technical skills over administrative skills); wages may be inflated by the unionization of specific occupations, or by restrictions on entry into particular occupations; or wages may be influenced by tradition and custom. Whatever the reason, such disparities are commonplace. It is not the wage disparity in jobs of equal value that invokes the charge of discrimination; rather, it is the use of different standards—i.e., disparate treatment—in establishing the wage rates for the male- and female-dominated jobs.

This distinction between an equal value concept and a theory of nondiscrimination is critical, not only because it establishes the legal and moral justification for comparable worth, but also because it answers three of the more common criticisms directed at comparable worth. First, comparable worth does not mandate an "equality of results" for employees in male- and female-dominated jobs. Those individuals who make this argument\textsuperscript{67} suggest that comparable worth proponents want to eliminate the earn-

\textsuperscript{64} Civil Rights Act § 703(a), 42 U.S.C. § 2000e-2(a) (1982); see U.S. Comm'n on Civil Rights, supra note 61, at 71; Statement of Robert E. Williams, 2 U.S. Comm'n on Civil Rights, supra note 60, at 90, 91.

\textsuperscript{65} U.S. Bureau of the Census, Occupation by Industry, 1980 Census 181, 184, Table 2.

\textsuperscript{66} See infra text accompanying note 201.

\textsuperscript{67} Concurring Statement of Chairman Clarence M. Pendleton, Jr., U.S. Comm'n on Civil Rights, supra note 61, at 73, 74; Statement of June O'Neill, 2 U.S. Comm'n on Civil Rights, supra note 60, at 111, 111; Rabkin, Comparable Worth as Civil Rights Policy: Potentials for Disaster, in 1 U.S. Comm'n on Civil Rights, supra note 56, at 187, 192.
ings gap between men and women by compelling employers to increase the wage rates for female-dominated jobs even if these jobs are less skilled or are located in the more marginal firms or industries—what the chairman of the United States Civil Rights Commission calls "reparations for middle-class white women" or a "financial quota system." But comparable worth, as defined here, and as used by litigators and legislators, does not seek to raise the wage rates of less skilled or less productive female jobs to equal those of higher skilled or more productive male jobs, or to ensure that women obtain the same economic benefits from a day's labor as do men. It may be that the high concentration of women in less skilled and less productive jobs is the result of discrimination, but discrimination in employment, not pay. Comparable

68. While pay discrimination substantially contributes to the earnings gap between men and women workers, there are other factors that account for a significant part of this gap: (1) differences in the human capital characteristics of men and women workers—e.g., differences in types of job skills, total work experience, continuous job tenure, etc.; (2) the disproportionate concentration of women in unskilled and less productive jobs; and (3) the disproportionate concentration of women in low-paying industries or, even when employed in the same industry as men, in the more marginal and lower wage firms.

An excellent discussion of the various factors that may explain some of the earnings gap between full-time male and female workers can be found in the papers prepared for the U.S. Commission on Civil Rights in 1984. These papers are published in 1 U.S. COMM'N ON CIVIL RIGHTS, supra note 56, and include: Goldin, The Earnings Gap in Historical Perspective, id. at 3; Beller, Occupational Segregation and the Earnings Gap, id. at 23; Polachek, Women in the Economy: Perspectives on Gender Inequality, id. at 34; England, Explanations of Job Segregation and the Sex Gap in Pay, id. at 54; and Berger, Comparable Worth at Odds with American Realities, id. at 65. See also B. BERGMANN, supra note 10, at 62-82; NRC REPORT, supra note 57, at 13-41; Weiler, The Wages of Sex: The Uses and Limits of Comparable Worth, 99 HARV. L. REV. 1728, 1779-93 (1986).

69. Question by Clarence Pendleton, 2 U.S. COMM'N ON CIVIL RIGHTS, supra note 60, at 119, 127 (Statement of Ray Marshall).

70. While the proponents of comparable worth do not propose a legal remedy that would require marginal firms or industries to match the wage scales of the better paying firms or industries, some have proposed legislation to improve the competitive position of these firms and industries, for the purpose of improving the conditions of the women and minorities who work in these industries. See, e.g., NRC REPORT, supra note 57, at 107-13 (supplementary statement of Gus Tyler and Mary Dunlap). Such concerns are unrelated to any claim of discrimination.

71. Obviously, this disproportionate concentration of women in lower paying jobs and industries and/or firms could be partly the result of discrimination in hiring, job assignment, promotion, and access to on-the-job training; it could also be partly the result of the employee's choice, although that choice may be influenced as much by institutional socialization and the demands of family responsibilities as by personal preference. Job discrimination, including discrimination in training opportunities, is prohibited by Title VII. Other legislation prohibits discrimination in educational opportunities, Title IX of the Education Amendments of 1972, § 901(a), 20 U.S.C. § 1681(a) (1982), provides counseling to overcome some of the more limiting effects of sex stereotyping socializa-
worth is only concerned with pay discrimination. So, for example, if it were shown that a publishing company had channeled women college graduates into clerical jobs and men college graduates into editorial positions, or that a bank had assigned women applicants to teller positions and men with equivalent education and experience to officer trainee positions, the remedy would be to allow women to transfer into the "male" positions, not to increase the wage rates for clerical and teller positions to equal the wage rates for editorial assistants and officer trainees. On the other hand, if it were shown that the clerical jobs and teller positions were paid less than male-dominated jobs of comparable or lesser value, the remedy would be to reassess the wage rates for the female-dominated jobs using the same criteria as were used in establishing the wage rates for the male-dominated jobs—i.e., equal treatment, not equal results.

Second, because comparable worth is based on a theory of discrimination (disparate treatment) and not on some ill-defined notion of public justice, it does not attempt to eliminate all wage disparities existing within an employing unit, but only those resulting from the application of different standards in establishing the wage rates for female-dominated jobs. Thus, it would not affect any differentials existing between male-dominated jobs, where certain male-dominated jobs are paid more than others of
comparable or equal value. Nor would comparable worth affect any disparities existing between female-dominated jobs of equal value. Such disparities may be the result of market forces or of long-standing custom, or they may just be the result of a random wage structure. But they are not the result of prohibited disparate treatment. The fact that disparate treatment must be based on sex, race, color, religion, or national origin—and not just on custom or chance—should satisfy the frequently expressed concern that comparable worth will open the floodgates to large numbers of suits challenging the relative ranking of jobs.

And finally, because comparable worth is not concerned with just any wage disparity, but only those disparities that are the result of sex-based wage discrimination, the degree of government or judicial intervention into an employer's wage practice will be much more limited than the critics suggest. Bureaucrats and judges would not, for example, be authorized to determine what the fair wage should be for any male-dominated or integrated job. These decisions would all be made by the employer. Nor would the government or courts be able to alter the ranking of these jobs. Comparable worth does not require an employer to pay more to those who perform work of greater value, or less to those who perform work of lesser value; the employer is free to pay all employees the same rate, or to pay different rates for work of equal value. The employer can choose to give greater monetary weight to artistic or creative skills than to managerial skills, or it can give little or no weight to such skills. Similarly, it can give greater weight to responsibility than to skill, or, alternatively, greater weight to skill than to responsibility. The only requirement of comparable worth is that the employer use the

74. For this reason, the concern of the Chairman of the U.S. Commission on Civil Rights, Clarence Pendleton, that comparable worth would "restructure our free enterprise system into a state-controlled economy" is totally unfounded. See Concurring Statement of Chairman Clarence M. Pendleton, Jr., supra note 67, at 74.

75. Of course, it is also possible to challenge under Title VII the employer's selection of criteria for use in establishing wage rates. For example, an employer's decision to give significant wage credit for physical effort, but little or no credit for manual dexterity, total caloric output, or interpersonal skills, might reflect an intentional undervaluation of job characteristics that are commonly found in the employer's female-dominated jobs but not in any of its non-female-dominated jobs. Such cases would not be easy to prove, because there is no uniformly accepted ranking of skill, effort, and responsibility factors. Nonetheless, Title VII can in an appropriate case prevent a flagrant disregard of material job factors that are identified exclusively with female-dominated jobs. Fortunately, the male-dominated jobs for a large employer will typically cover the full range of job characteristics, so that the employer cannot exclude or undervalue specific job characteristics when establishing the pay rates for male-dominated jobs without also adversely affecting the desired ranking for the male-dominated jobs.
same standards in establishing the pay rates for female-dominated jobs, and for black and Hispanic jobs, as it uses in establishing the pay rates for male-dominated and integrated jobs. Where it can be shown that the employer has used different standards, the doctrine of comparable worth requires that the employer adjust the wage rates for the female-dominated jobs so that these jobs will occupy the same relative position that they would have occupied had they been male-dominated or integrated jobs.

There are those who argue that the term "comparable worth" should be abandoned because it "obfuscat[es] the real issue of discrimination." 76 I agree that it has had this result. Because the concept has been portrayed as one that disregards legitimate market forces, and demands results for women that men do not have (see, for example, the wage rates of ministers and musicians), 77 comparable worth, like affirmative action, has been seen by many as "overreaching" on the part of the women's move-

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76. Newman, Newell & Kirkman, supra note 6, at 484.
77. Opponents of comparable worth often refer to the relatively low wages of certain male-dominated occupations (state governors or the President of the United States compared to corporate presidents, musicians or ministers compared to skilled craftsmen, and surgeons compared to athletes) as exemplifying wage anomalies in the labor market that cannot be attributed to sex but that nonetheless ignore the comparability of skill, effort, and responsibility with higher paying occupations. Statement of Alvin Bellak, 2 U.S. COMM'N ON CIVIL RIGHTS, supra note 60, at 47, 49; U.S. COMM'N ON CIVIL RIGHTS, supra note 61, at 34; O'Neill & Sider, The Pay Gap and Occupational Segregation: Implications for Comparable Worth, in IRRA PROCEEDINGS, supra note 59, at 190, 194.

But comparable worth, as a theory of discrimination, see supra text accompanying notes 61-75, does not mandate the establishment of a "fair wage" for each occupation in the labor market; it is concerned only with the pay practices of a single employer. The disparity between the President of the United States and the president of General Motors is not evidence of any discriminatory pay practices by the United States government. The President, consistent with the responsibility of the job, is paid more than any other employee in the federal service. Similarly, surgeons, while paid less than the highest paid athletes, are paid more than other hospital employees. Nor is it evidence of sex-based pay discrimination that the government pays clerical workers more than the average salary of clerical workers in the private sector, see, e.g., Statement of Nina Rothchild, 2 U.S. COMM'N ON CIVIL RIGHTS, supra note 60, at 73, 78, but pays the chief executive less than the average salary of chief executives in the private sector. This kind of pay structure, which is typical of the public sector, simply reflects the difference in the wage objectives of a for-profit enterprise, which may seek to maximize the earnings of its entrepreneurs or controlling managers, and a public enterprise, which typically does not pay any employee so little that he or she must depend on welfare for subsistence, nor so much that he or she receives more than 8 or 10 times the average salary of those taxpayers who support the public payroll. But see Federal Equitable Pay Practices Act of 1985: Hearing on H.R. 3008 Before the Subcomm. on Compensation and Employee Benefits of the House Comm. on Post Office and Civil Service, 99th Cong., 1st Sess. 11 (1985) [hereinafter Equitable Pay Practices Act Hearing] (statement of June O'Neill, Director, Women's and Family Policy Div., Urban Inst.), for an opposing point of view.
ment, and as an attempt to redistribute income from male to female employees. This is not the meaning or intent of the term. While it is highly unlikely that we can now change the vocabulary, which is deeply ingrained in both the literature and case law, it is important to define carefully the term to limit its application to a disparate treatment analysis that is fully compatible with Title VII's traditional definition of discrimination and with our own notion of what constitutes a civil liberty justifying government intervention.

Comparable worth is designed to deal with wage discrimination, not with some other social objective. It does not seek an advantage for women, but the elimination of a wage disadvantage that results solely from sex. While many of the critics of comparable worth argue that women should simply take men's jobs, they seem to forget that when women did take men's jobs they were frequently paid substantially less than their male counterparts for no reason other than sex. In other words, their reduced wage rates were not the result of occupational choice, but of sex. This pernicious form of discrimination was so much part of our wage structure and constituted such an accepted employment practice that it required aggressive legislative intervention at both the federal and state levels, and the full moral sanction of the nation's legal system, before even the most bla-


79. One reason for the popularity of the term may be its nonpejorative nature. It is hard to imagine too many legislatures—or employers—asking a committee or task force to conduct a "discrimination" study, with all of its implications for potential back wage liability. See Wygant v. Jackson Bd. of Educ., 106 S. Ct. 1841, 1855 (1986) (O'Connor, J., concurring). A "comparable worth" study, on the other hand, that focuses on whether there are any sex-based inequities in the classification system, can be viewed as a more typical personnel function. On the other hand, the absence of any finding of "discrimination" may make it more difficult at the time of implementation to persuade a legislature or employer to allocate monies for the necessary corrective changes in the classification and wage ranges for female-dominated jobs.


81. The impact that a law has in changing public opinion is well illustrated by the Equal Pay Act. Although equal pay is now almost uniformly recognized as a fundamental civil right, and has been vigorously enforced by the courts, see Ross & McDermott, The Equal Pay Act of 1963: A Decade of Enforcement, 16 B.C. IND. & COM. L. REV. 1, 6-17 (1974), the Act's original enactment was greeted with a good deal of levity, as is illustrated by the following excerpt from Wirtz v. Basic Inc., 256 F. Supp. 786 (D. Nev. 1966), the first reported decision under the Equal Pay Act:
tant forms of pay discrimination—e.g., contracts establishing male and female rates for the same job—could be eliminated.

Despite what this history tells us about systemic wage discrimination against women, we have reached a point where a large number of policymakers and academics—if not the public at large—believe that the only employment problem for women is job access, and not pay. Thus, in the 1984 “consultation on comparable worth,” conducted by the United States Civil Rights Commission, one of the academic experts, in questioning whether comparable worth advocates are actually addressing a genuine problem, stated that he had “not yet seen a persuasive demonstration that wage rates based on private bargaining and free competition are, in fact, ‘unfair’ to women.”

Several other commentators have noted that there is “little direct evidence” that women’s jobs are paid less because they are performed by women. Even comparable worth’s more friendly

This “foolish” law is now before the Court for interpretation, uninfluenced by the rightness or wrongness of the policy considerations which led to its enactment. The case for the plaintiff was presented by a feminine attorney of the Department of Labor, resisted by a masculine attorney for the Nevada Bar, and considered by a Judge who, for the purposes of this case at least, must be sexless, a possibility not apparent when the oath of office was taken and one which bespeaks the appointment of older judges.

Id. at 787.

82. Public concern for sex-based pay discrimination is evidenced by a number of national and local polls. A 1985 national survey conducted by Marttila and Kiley, a Boston polling firm, found that 69% of U.S. workers think that women are not paid as fairly as men; the reason most frequently cited for this disparity was sex discrimination, and 80% of those surveyed supported the principle of pay equity. This survey was commissioned by the National Committee on Pay Equity and its results were released on February 12, 1985. NATIONAL COMM. ON PAY EQUITY, A NATIONAL OPINION SURVEY: WORKING WOMEN AND PAY DISCRIMINATION (Feb. 1985). Similar results were reported in a subsequently released Harris Poll (Aug. 19, 1985), which found that 70% of those polled believed that women were not paid the same as men for comparable work. The HARRIS SURVEY, WOMEN'S MOVEMENT ON VERGE OF MAJOR COMEBACK (Aug. 1985). A poll conducted by a Wisconsin newspaper, the Milwaukee Sentinel, was published on May 3, 1985, and found that 80% of those surveyed supported comparable worth for state employees. An interesting finding in the Milwaukee Sentinel poll was that 51% of the corporate chief executive officers surveyed also supported comparable worth. A second Wisconsin poll was conducted by the St. Norbert College Survey Center, with almost identical results (80.5% in favor of comparable worth for state employees). See Milwaukee Sentinel, May 3, 1985, at 17, col. 3; Green Bay News-Chronicle, Mar. 28, 1985, at A-1, col. 2. Copies of these surveys are on file with the Journal of Law Reform.


84. Rabkin, supra note 67, at 195.

85. NRC REPORT, supra note 57, at 56; M. RUBENSTEIN, supra note 13, at 4; Hartmann & O'Neill, The Comparable Worth Controversy, New Perspectives, Spring 1985, at 28, 31 (U.S. Comm'n on Civil Rights); Statement of June O'Neill, 2 U.S. COMM'N ON CIVIL RIGHTS, supra note 60, at 113.
opponents view it not as a mechanism for ending wage discrimination, but as a mechanism for redistributing income to women workers that, however well-intentioned, will result in disemployment effects for women and a loss of income for the families of blue collar male workers. 86

These commonly expressed concerns underscore the importance of establishing four basic propositions both in the literature and in a court of law: (1) women have been paid less than they would have been paid had they been men; (2) such sex-based wage discrimination is a separate and distinct problem from occupational segregation that cannot be addressed by removing barriers to job access, but that must be specifically attacked as a wage problem; (3) comparable worth will benefit the actual victims of wage discrimination; and (4) the cost of eliminating sex-based wage discrimination will not be at the expense of minorities or blue collar workers.

Is there in fact a problem of sex-based wage discrimination? Frankly, I find the reservations about the existence of wage discrimination, or, at least, of any direct evidence of discrimination, puzzling. Surely, the existence of a dual wage structure prior to the Equal Pay Act of 1963 should be direct evidence that women's wages were depressed because of sex. In order to deny the empirical value of such evidence, one would have to demonstrate (1) that women were less productive than men, and that the differences in wage rates, where men and women performed the exact same work, were based on differences in productivity; (2) that private bargaining and free competition undervalued women's work only when they performed work that was typically performed by men, and not when they performed work that was typically performed by women; or (3) that any undervaluation of women's work that existed prior to 1963 has been corrected.

1. Evidence of a dual wage structure based on sex—The existence and prevalence of sex-based wage discrimination was extensively documented in evidence presented at the 1962 and 1963 legislative hearings on the equal pay bills. 87 This evidence


87. See 1963 Hearings on H.R. 3861, supra note 13, at 10-57 (statement and data presented by Esther Peterson, Assistant Secretary of Labor); Equal Pay for Equal Work Hearings, supra note 33, at 10-19, 28-35 (statements of Arthur Goldberg, Secretary of
demonstrated that it was a common practice to pay women less than men for the exact same job in the same establishment. For example, one-third of more than 1900 employers surveyed in 1961 by the National Office Management Association admitted that they maintained a "double standard pay scale for male and female officeworkers." In another private survey of salary practices affecting men and women in high-level positions in business, industry, and education, seventeen percent of the respondents admitted that they did not always pay women the same as men when they worked in the same position. The Women's Bureau reported on a 1963 review of job hiring orders in public employment offices in nine cities, which disclosed that a majority of the job orders specified men or women only, and that, of those for either sex, ninety-one specified a lower wage rate for women. A 1962 survey of employment prospects prepared by the Wall Street Journal reported that "[s]tarting salaries for women will . . . lag by $50 to $100 a month behind offers to men for equivalent positions." Union officers similarly testified as to the presence of sex-based wage practices in industries where they had collective bargaining agreements.

The prevalence of a dual wage structure based on sex was further evidenced by the persistence of male and female rates even after the expiration of the Equal Pay Act's delayed effective date. The Department of Labor, in a 1966 Report to Congress, concluded that "continued aggressive . . . enforcement" would be necessary to implement the Act's equal pay requirement.

Labor, and Esther Peterson, Assistant Secretary of Labor); cf. 1945 Hearings on S. 1178, supra note 13, at 9-28 (statements of Frieda Miller, Director, Women's Bureau, Department of Labor); id. at 69-82, 100-03, 130-37 (testimony of Al. Philip Kane, General Counsel, National Fed'n of Tel. Workers). See also some of the early studies of the Women's Bureau documenting dual wage rates for men and women in the federal service and in the street car industry. WOMEN'S BUREAU, BULLETIN No. 8, supra note 20, at 7, 21-23, 28-36 ("old-time" women's rate for clerical service was at "a figure . . . below that which any number of [the] men . . . [would] accept," id. at 21, and, even after the 1870 Act, women have continued to accept salaries that are substantially lower than the salaries paid to the men); WOMEN'S BUREAU, U.S. DEP'T OF LABOR, BULLETIN No. 11, WOMEN STREET CAR CONDUCTORS AND TICKET AGENTS 13 (1921) (noting that women's wages in this industry were "not up to the current market price for male labor").

89. Id. at 16-17.
90. Id. at 13-15.
91. Id. at 12.
92. Id. at 113-15 (statement of James Carey, Secretary-Treasurer, Industrial Union Dep't, AFL-CIO); id. at 131 (statement of Ben Seligman, Education and Research Director, Retail Clerks Int'l Ass'n).
Specifically, the Department found in a study of some 2500 collective bargaining agreements that 800 contained some provisions differentiating between men and women employees, including many provisions that at least "suggest discrimination strongly enough to warrant and require careful investigation,"\(^{94}\) that more than 100 contracts explicitly provided different starting rates for men and women, and that fifteen percent included provisions for different treatment with respect to pay.\(^{95}\) In addition, equal pay investigations by the government have disclosed violations affecting tens of thousands of employees each year and, although not every litigated case was successfully concluded, approximately ninety-five percent of the investigations were resolved without litigation, and included increases in the wage rates for women, together with back pay.\(^{96}\) As an examination of the reported cases demonstrates, these violations have occurred in every type of business and occupation—further confirming the pervasiveness of the dual wage structure.

Some commentators have suggested that the reason for the dual wage structure was that women were less productive.\(^{97}\) Nothing in the reported cases, or in the historical information concerning the employment of men and women in the United States government, supports this claim. Thus, although the Equal Pay Act provides a defense for higher rates based on the quality or quantity of production,\(^{98}\) not one reported case was successfully defended on this ground. Moreover, the various

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\(^{94}\) Id. (emphasis omitted).

\(^{95}\) Id. at 11. The Department's figures probably understate the extent to which unequal pay rates were contained in the collective bargaining agreements because there could have been a number of female jobs that, although titled differently, would be found on investigation to be "substantially equal" to higher paid male jobs. See, e.g., Laffey v. Northwest Airlines, 567 F.2d 429 (D.C. Cir. 1976) (cabin attendants classified as stewardesses (female) and pursers (male)), cert. denied, 434 U.S. 1086 (1978); Shultz v. Wheaton Glass Co., 421 F.2d 259 (3d Cir.) ("selector-packers" (female) and "selector-packer-stackers" (male)), cert. denied, 398 U.S. 905 (1970); Hodgson v. Allied Supermarkets, 20 Wage & Hour Cas. (BNA) 616 (E.D. Okla. 1972) ("checkers" (female) and "checker-stockers" (male)), aff'd, 22 Wage & Hour Cas. (BNA) 1241 (10th Cir. 1973); Hodgson v. Square D Co., 19 Wage & Hour Cas. (BNA) 752 (E.D. Ky. 1970) (class "B" machine operators and assemblers (female) and class "A" machine operators and assemblers (male)), rev'd on other grounds, 459 F.2d 805 (6th Cir.), cert. denied, 409 U.S. 967 (1972).

\(^{96}\) Ross & McDermott, supra note 81, at 10-11; see Margolin, Equal Pay and Equal Employment Opportunities for Women, in PROCEEDINGS OF NEW YORK UNIVERSITY NINETEENTH ANNUAL CONFERENCE ON LABOR 297, 309-12 (T. Christensen ed. 1967).

\(^{97}\) See, e.g., Goldin, supra note 68, at 8-16.

\(^{98}\) 29 U.S.C. § 206(d)(1)(iii) (1982). Of course, the fact that companies have been unable to explain differences in the base rates for male and female workers on the grounds of quantity or quality of production does not mean that employers could not explain variations for individual workers on those grounds, without regard to sex.
studies of women workers in the federal service, including studies dating back to the 1860's, reported that there were no differences in the productivity or performance of men and women workers in the same job. For example, a production sheet for February 1863, maintained by the Dead Letter Office of the Post Office Department, showed that the average production rates for male and female employees were the same, although the women received an annual salary of from $400 to $700, while the men received an annual salary of from $600 to $900. Similar information was obtained from the Jenckes' interrogatories, with public officials responding that female clerks are "better adapted" to counting currency, notes, and bonds, and "in other employments compare favorably" with male clerks; that women "compare favorably" with men for "diligence, attention, and efficiency"; that "it would take about the same number of males to do the work done" by female clerks; that females are "as diligent and efficient as males"; that females "make better clerks" than males; and that women are "superior to the men in diligence, attention, and efficiency." Again, despite the view that women were performing the same work and were equal in terms of quality and quantity of production, the women were paid only sixty to seventy-five percent as much as the men.

2. The effect of a dual wage structure on all female-dominated jobs—Everything we know about the dual wage structure for male and female employees, in effect at the time of the 1963 Equal Pay Act, confirms that this same wage structure affected

99. U.S. CIVIL SERV. COM'MN, WOMEN IN THE FEDERAL SERVICE 6 (1938). The Civil Service Commission report notes that Congress had set up a separate classification for female clerks in 1853 and that women were to be employed in "subordinate" clerical work or "temporarily" in the duties of the clerk; in fact, however, female clerks were assigned to the same duties as the male clerks, but were paid substantially less. Id. at 4-10.

100. JENCKES REPORT, supra note 14, at 19 (response of J.F. Hartley, Assistant Secretary of the Treasury).

101. Id. at 23 (response of John Wilson, Third Auditor of the Treasury).

102. Id. at 25 (response of C.M. Walker, Fifth Auditor of the Treasury).

103. Id. at 30 (response of N.L. Jeffries, Register of the United States Treasury).

104. Id. at 41 (response of Isaac W. Smith, Assessor of Internal Revenue).

105. Id. at 41 (response of W.L. Burt, Postmaster).

106. Id.; U.S. CIVIL SERV. COM'MN, supra note 99, at 4. Similar examples are noted by Barbara Wertheimer, who points out that in 1898, New York City paid male school teachers $900 per year and female school teachers $600 per year, and that women who were employed as coremakers in the foundries were paid one-half as much as nonunion men and one-third as much as union men doing the same work. B. WERTHEIMER, WE WERE THERE: THE STORY OF WORKING WOMEN IN AMERICA 210, 246 (1977). Another example from Wertheimer is that in 1870 male telephone operators (who were then a majority of the occupation) were paid $75-$100 per month while female telephone operators were paid $30-$50 per month. Id. at 235.
all female-dominated jobs and not just those where men and women were employed on equal work, either in the same job or in two segregated jobs that, although differently labeled, were substantially the same. This is so because the basis for the lower wages for women in equal work jobs was not any difference in the quality or quantity of production, but one of three other factors, or a combination of the three: (1) the lower prevailing wage rate for female unskilled labor; (2) an assumption that women are more costly to employ because of greater turnover, increased insurance rates, etc.; and (3) a belief that men should be paid more than women either because of their family responsibilities or simply because men should be paid more.

As discussed in Part II(C) of this Article, wage rates for different jobs are typically set by the employer in relation to the unskilled labor rates prevailing in the community. In addition, jobs tend to be highly segregated into male and female jobs; indeed, prior to the enactment of Title VII of the Civil Rights Act, jobs were frequently limited to one sex. Accordingly, when rates were set for the female or female-dominated jobs, they were set in reference to the unskilled female labor rate, with appropriate increments for additional levels of skill, effort, and responsibility. The rates for the male or male-dominated jobs were established in the same way, using the unskilled male labor rate. Because the unskilled wage rate for men is higher than the unskilled wage rate for women, the rates for male-dominated jobs were proportionately higher than the rates for female-dominated jobs at comparable levels of skill, effort, and responsibility.

This practice, which could have been either explicit or implicit, is graphically illustrated in *Corning Glass Works v. Brennan*, where the company, in converting its job evaluation points for specific jobs into wage rates, used a different multiplier for male and female jobs, based on the difference in the prevailing wage rates for male and female unskilled labor; the resulting wage disparities between the male and female jobs were then maintained by periodic across-the-board wage increases. The impact of different unskilled wage rates for men and women was also reflected in a 1945 study conducted by the Bureau of Labor Statistics of occupational wage relationships in

110. See infra note 203.
the machinery industries. Using the average wage of an unskilled male occupation (janitor) for its base of 100, the Bureau found that the average wage in these industries for semiskilled male jobs ranged from 105 to 130, while the average wage for semiskilled female jobs ranged from 94 to 125.

Another factor that undoubtedly influenced the establishment and maintenance of a dual wage structure based on sex was the widely held belief that women cost more to employ than men. This was the claim made by the Westinghouse Corporation in an unsuccessful attempt to justify its practice of reducing wage rates for women's jobs by twenty percent because of women’s "more transient character of . . . service . . . , the differences in environment required, the extra services that must be provided, . . . and the general sociological factors not requiring discussion." Of course, under today's law, any disparate treatment based on group cost experience is banned by both the Equal Pay Act and Title VII of the Civil Rights Act. But even without this restraint, there has not been a single reported Equal Pay Act case where the employer was able to show that the total cost of employing women was greater than the total cost of employing men.

The third factor that may explain the early development of a dual wage structure based on sex was the perception of the male role as that of family breadwinner. This factor was explicitly incorporated into the Australian wage-setting process, under which the federal and state wage tribunals based their "award" rates for male and female jobs on the assumption that men would have to support themselves, their wives, and their children, whereas women would only have to support themselves. Although no similar policy was ever legally endorsed in the

113. Newman & Vonhof, supra note 48, at 293 (quoting Westinghouse's Industrial Relations Manual); see infra note 204.
116. In the Midwest Manufacturing and Manhart cases, see supra notes 114-15, the employer established only that certain benefits cost more for women, without also showing that these costs were not offset by other reduced costs for men, or by other additional costs for men.
117. See infra note 205.
United States,\textsuperscript{118} it can be assumed that the belief that women worked only to support themselves, or to supplement the family income (i.e., "for pin money"), influenced the establishment of lower wage rates for women workers in this country as well.\textsuperscript{119} The perceived male role unquestionably led to the use of "head of household" allowances,\textsuperscript{120} and to the practice of paying men more than women for equal work.\textsuperscript{121} Indeed, there is still support in this country for the principle of a family wage, as is apparent from the Winter 1986 issue of Human Life Review, which cites the "collapse" of a de facto family wage system—under which men as heads of households were paid more than women—as a major reason for the breakdown of the traditional American family.\textsuperscript{122}

A variation of this support for a family wage is the notion that men should be paid more than women simply because they are men. I suspect that this view was not uncommon prior to the

\textsuperscript{118} See 1945 Hearings on S. 1178, supra note 13, at 5-6, 15-19.

\textsuperscript{119} See, e.g., id. at 12-19 (statement of Frieda S. Miller, Director, Women's Bureau); 1963 Hearings on H.R. 3861, supra note 13, at 7-11. In support of the Equal Pay Act, Representative Donohue stated: "We all realize that the origin of the wage rate differential for men and women performing comparable jobs is the false concept that a woman, because of her very nature, somehow or other should not be given as much money as a man for similar work." 109 CONG. REC. 9212 (1963).


\textsuperscript{122} Carlson, The Family in America, HUM. LIFE REV., Winter 1986, at 79, 81-83, 85. This concern for the restoration of the family wage is expressed against a background of major change in the wage-earning status of the male head of household. So, for example, in 1958, the male head of household was the sole provider in 52% of all husband-wife families; in 1986, however, the male head of household was the sole provider in only 25% of these families. Telephone conversation with Janet L. Norwood, Commissioner, Bureau of Labor Statistics (Mar. 23, 1987). Stated differently, 70% of all mothers with children between the ages of six and 17 are in the labor force, and 62% of all mothers with children under 18 are in the labor force. B. BERGMANN, supra note 10, at 25, Table 2-3. Carlson, in discussing these changes, states, "[T]he correlation of cultural and economic forces has turned against a family premised on differentiated sex roles, the centrality of children, and the preference for maternal care." Carlson, supra, at 88. This data may also explain the vigorous opposition to the concept of comparable worth by groups associated with the profamily movement. See, e.g., Options for Conducting a Pay Equity Study of Federal Pay and Classification Systems: Hearings Before the Subcomm. on Compensation and Employee Benefits of the House Comm. on Post Office and Civil Service, 99th Cong., 1st Sess. 453 (1985) (statement of Phyllis Schlafly, President of the Eagle Forum, a national profamily organization).
enactment of the Equal Pay Act, and, although it no longer constitutes an acceptable basis for an employer's wage policies, there are still some employers who admit that they will never pay women as much as men. Thus, in one recent case, the employer told one of his women employees that he would never pay "a woman, any damned woman, the same money . . . [as] a man.”

B. Comparable Worth as a Theory of Discrimination

The "discrimination" claim in both an Equal Pay Act case and a comparable worth case is the same—the wage rates paid to women, or to predominantly women's jobs, have been depressed because of sex, and if these jobs were performed by men or were male-dominated they would be paid more. In essence, what the plaintiffs in both these cases claim is that the criteria used in establishing the wage rates for the men or for the male-dominated jobs are not applied equally in establishing the wage rates for the women or for the female-dominated jobs. Thus, the proper paradigm for analyzing either an Equal Pay Act case or a comparable worth claim is disparate treatment. From the perspective of wage discrimination theory, therefore, there is no reason to accord any special status to an Equal Pay Act case. Nonetheless, this special status exists and prominent opponents of comparable worth continue to voice strong support for the principle of equal pay for equal work while characterizing comparable worth as "the looniest idea since Looney Tunes came on the screen."124

Presumably, one reason for this special status is that when Congress enacted the Equal Pay Act of 1963, which prohibited employers from "discriminat[ing] on the basis of sex" by paying lower wages to women for "equal work," it specifically rejected language that would have extended this protection to "work of comparable character."126 Also, there appears to be a common

124. U.S. Court Upsets Pay Equity Ruling for Women, N.Y. Times, Sept. 5, 1985, at A25, cols. 1, 6 (statement of Clarence Pendleton, Chairman, U.S. Comm'n on Civil Rights). Both the Commission and Chairman Pendleton have repeatedly emphasized their support of the Equal Pay Act. See, e.g., U.S. Comm'n on Civil Rights, supra note 61, at 36; Concurring statement of Chairman Clarence M. Pendleton, Jr., supra note 67, at 75.
misconception that equal work cases do not require the courts or others to make any "subjective judgments about the relative worth of different jobs or different job functions," and, moreover, do not involve any substantial disruption to the employer's existing wage structure. While there may be more easy cases involving "equal work" than "comparable worth," not all equal work cases are easy, and not all comparable worth or proportional value cases are hard. In any event, the complexity of prospective litigation hardly seems an adequate reason for excluding some cases from the law's protection.

When one thinks of an equal pay case, one tends to think of an employer who employs men and women in the exact same job (often working side by side), and who, under the terms of a collective bargaining agreement, pays a lower female rate to women and a higher male rate to men. In such a case, the only proof that a plaintiff would need to present would be (1) evidence establishing the existence and payment of a male and female rate—e.g., a copy of the contract and of the payroll slips for the men and women employees—and (2) testimony of the employees demonstrating that their work is exactly the same.

But very few equal pay cases are ever this simple. Many employers do not have fixed wage scales for each job, with set increments for seniority, prior experience, and merit. These employers pay a wide range of rates, often depending on the individual demands of each employee. Wage information is frequently confidential, and employees are unaware of what others are paid. Such pay systems are commonly used for managerial and supervisory jobs, and are also typical for nonsupervisory employees in banking, retail, health care, and higher education. Moreover, in any particular job, there may be some women who are paid more than some men, or at least as much as some men.

When such a random wage structure exists, the plaintiff who asserts a violation of the Equal Pay Act will have to establish (1)
that her rate is lower than it would have been had she been a man, and (2) the extent to which sex has depressed her wage rate. In addition, given the random nature of the employer's wage structure, it can no longer be presumed that any difference in pay is due to sex. There are now other factors that could explain the differential: (1) differences in the individual characteristics of each employee, such as prior job experience, years with the employer, quality of performance, and previous education and training; (2) sheer chance given the randomness of the employer's pay structure; and (3) some unexplained factor other than sex, which is shared by all of the men but by none of the women.

Our simple equal pay case now presents many of the same issues raised by the comparable worth debate; the one distinction, at least on the basis of the instant hypothetical, is that none of the pay difference between men and women employees could be explained by a difference in job content because, by definition, all of the jobs are "equal." What the plaintiff can do in this kind of case is prepare a regression analysis of the men's and women's wages, which is controlled for sex, and for such individual characteristics as prior job experience, years with the employer, etc. Information concerning these characteristics can be obtained from the employer's personnel files. If the salary line for the women employees is the same as it is for the men employees, after adjusting for these individual characteristics, the plaintiff will be unable to establish the existence of a sex-based wage disparity even if her own wage is unusually low; if, on the other hand, there are two salary lines, a higher one for men and a lower one for women, the plaintiff will have established the existence of a sex-based wage disparity even if her particular wage is

130. Formal regression analyses are not always required. It is often sufficient to summarize in chart form the wage histories, experience, and performance of randomly paid workers where such charts will graphically demonstrate the existence of sex-based wage disparities between male and female employees who are performing equal work. In such cases the district court will simply find an average sex-based wage differential for employees at each of different experience or performance levels (e.g., those with less than one year of experience, those with one to five years of experience, and those with over five years of experience) and order as relief that the wages of each female employee be increased by the amount of the relevant average differential. See, e.g., City Stores, 479 F.2d at 242; Marshall v. J.C. Penney Co., 464 F. Supp. 1166, 1181-92 (N.D. Ohio 1979); Hodgson v. J.M. Fields, Inc., 335 F. Supp. 731, 734-737 (M.D. Fla. 1971), rev'd in part on other grounds sub nom. Brennan v. J.M. Fields, Inc., 488 F.2d 443 (5th Cir. 1973), cert. denied, 419 U.S. 881 (1974); see also Barnett, Comparable Worth and the Equal Pay Act—Proving Sex-Based Wage Discrimination Claims After County of Washington v. Gunther, 28 WAYNE L. REV. 1669, 1685-86 (1982).
relatively high. In this connection, the plaintiff may want to introduce the testimony of a statistical expert that the disparity between the male and female lines is too substantial, or too consistent, to have been caused by chance. She would not, however, be required to negate the existence of some unknown factor that might explain the differential, although the employer could of course raise some additional explanatory factor as part of his defense.

Moreover, most equal pay suits do not involve men and women who work on the exact same job. Even where the primary duties of both men and women are the same, one or both may have additional tasks that the other sex does not perform. For example, both men and women may be employed as inspectors on a production line, or as machine operators, but the men may spend ten to twenty percent of their time performing additional duties, such as routine maintenance work, mechanical repairs, or material handling, while the women continue their work on the line. Or, although both men and women spend most of their time on routine patient care duties, the women may work one day a week in the records room on clerical tasks, and the men may spend one day a week riding with the ambulance driver. In other cases, men and women may work in jobs that have separate job titles, are performed in different locations, and involve duties that, although similar in kind—i.e., operating machinery, assembling parts, conducting tests, supervising employees, or teaching high school students—are not interchangeable and require their own individualized training and experience. Are the wage differentials that exist between men and women in these cases due to sex, or to the differences in their job du-

131. The method for computing an appropriate remedy in this kind of case is discussed in text accompanying notes 320-26. It is sufficient to note here that the employer should not be required to pay the same rate to all employees performing equal work, with adjustments for experience, seniority, merit, etc. As in comparable worth, the Equal Pay Act does not fix a fair rate for any specific job, nor does it require the employer to pay all employees engaged in equal work the same; the only requirement is that any difference in pay may not be based on sex. Accordingly, the function of an appropriate remedy would be to remove the sex bias and not the randomness of the employer's wage structure.

ties? This, of course, is the same question that must be answered in a so-called comparable worth or proportional value case. And while conceptually it may be easier to answer that question where men and women are both performing work that has some basic similarity or identity in the underlying job tasks, the type of evidence needed to furnish that answer is fundamentally the same.

The approach developed by the courts in the Equal Pay Act cases for determining whether job differences, and not sex, explain a challenged wage differential is instructive of how the courts would approach a comparable worth case, and is fully responsive to the concerns of those who question the institutional competence of the courts to deal with these issues. In the simplest type of equal work case it may be sufficient for the employees to describe in detail the core tasks performed by both the men and the women, as well as the secondary and tertiary tasks that are performed by only one sex; to testify as to how much training and experience is required for each task, how much effort is needed, and what the consequence would be of any errors; and to state how much time is spent on each of the various job tasks. In more difficult cases, the parties, and the courts, may want the help of an expert job evaluator who, after observing the jobs and interviewing the men and women employees, could testify as to the relative levels of skill, effort, and responsibility of the various job tasks under question, as well as to the similarity of working conditions. If the skill, effort, and responsibility levels of the core tasks and of the secondary and tertiary tasks are the same—or "substantially equal"—the disparity between the wages of the men and women employees will not have been explained by the differences in job duties, and the plaintiff would prevail on her equal pay claim.

But what about a case where the secondary or tertiary duties require a greater level of skill, effort, and/or responsibility? Because the language of the Equal Pay Act—"equal work on jobs the performance of which requires equal skill, effort and responsibility"—has been interpreted as requiring only "substantially" equal skill, effort, and responsibility, this fact would

139. E.g., Wheaton Glass, 421 F.2d at 265; see supra text accompanying note 137.
not result in the automatic dismissal of the plaintiff's Equal Pay Act claim. Its significance would depend on how much more skill, effort, and/or responsibility was required, how often, and whether the frequency and degree of increased amounts of skill, effort, and/or responsibility were sufficient to justify the higher male rate.

We are now faced with the principal question that concerns the critics of comparable worth: Who determines what value, if any, should be attributed to specific increments in skill, effort, and/or responsibility? The courts' answer, at least in the Equal Pay Act cases, is that the employer's own wage structure does. So, for example, if some of the men in the job under comparison do not perform the secondary and tertiary duties, but still receive the higher male rate, the clear inference is that the higher rate is based on sex, and not on the additional duties. Or if employees in another job category, who perform the secondary duties as their full time job, are paid significantly less than the men under comparison, the rate similarly could not be explained on the basis of the secondary and tertiary duties. On the other hand, if the employer pays higher wages to those men who perform the secondary duties as their primary job—e.g., paramedic duties performed by the orderly on the one day during the week when he rides with the ambulance driver, or machine repairs by the production line employee—the pay differential for the male employees will be sustained.

These principles are well illustrated in a number of Equal Pay Act cases. In Shultz v. Wheaton Glass Co., the male glass bottle inspectors (called "selector-packer-stackers") received $2.355 per hour in contrast to the female glass bottle inspectors (called "selector-packers") who received $2.14 per hour. The women

140. This assumes of course that the difference in duties is not enough to destroy the essential similarity of the two jobs—the "equal" work requirement of the Act—which requirement must be met in addition to establishing that the men's job and the women's job require substantially equal skill, effort, and responsibility, and are performed under similar working conditions.


spent 100% of their time on the assembly line performing inspector duties, while the men spent from ten to eighteen percent of their time on various utility tasks that required some additional amount of physical effort over the lifting and handling work required in the inspector job. In finding that the wage differential between the male and female inspectors was based on sex, and not on any difference in job duties, the court emphasized that the men who did the utility work on a full-time basis (called "snap-up boys") were paid only $2.16 per hour—19.5 cents per hour less than the rate paid to male inspectors.\footnote{Id. at 261, 263.} Moreover, those male inspectors who did little or no utility work were also paid the full $2.355 per hour.\footnote{Id. at 263-64.}

Another case was Shultz v. American Can Co.,\footnote{Id. at 360-61.} where the men and women operated a number of machines used to make paper cups; in addition, the men spent from two to seven percent of their time lifting heavy paper rolls and inserting them into the machines. There was no question that the men exerted significantly greater effort for short periods of time (lifting paper rolls weighing several hundred pounds). But an examination of the employer's pay system showed that men who spent their entire time performing such heavy work were paid significantly less than the machine operators whose primary duties were the same as the women's; it also showed that men machine operators who did none of the heavier work still received the higher rate.\footnote{Id. at 360-62.} On the basis of this evidence, the court found that the wage disparity between the men and women machine operators was based on sex.\footnote{Id. at 361.}

Of course, finding out that these employers placed greater weight on skill and responsibility than on effort would not have helped any women stenographers who might have been employed,\footnote{The example here is purely hypothetical and not based on any reported facts about the Wheaton Glass Company or the American Can Company.} even if they had been paid the same hourly rate as the women inspectors and women machine operators—which would have indicated that the employer valued the stenographer and inspector or machine operator jobs equally, and that their relative ranking below the lowest paid male (snap-up boy or utility worker) was because of sex and not because the employer placed greater value on the various job duties involved in the men's

\footnote{Id. at 261, 263.\textsuperscript{145}Id. at 263-64.\textsuperscript{146}Shultz v. American Can Co.-Dixie Prods., 424 F.2d 356 (8th Cir. 1970).\textsuperscript{147}Id. at 360-61.\textsuperscript{148}Id. at 360-62.\textsuperscript{149}}
jobs. It would not have helped because the "equal work" limitation requires a male comparator who is employed in the same kind of work.\footnote{As noted in the legislative hearings, the Equal Pay Act would not permit the comparison of wages paid to "the clerk-typist or the stenographer in the business office and the drill press operator in the shop." \textit{1963 Hearings on H.R. 3861, supra} note 13, at 240 (statement of Rep. O'Hara).} The work of the male inspectors or male machine operators would have been too different to permit a comparison under the Equal Pay Act. As a result, the women stenographers would not have been able to protest their pay rates even though it had been demonstrated that the employer weighed skill and responsibility more highly than effort, and that the employer had previously valued the female inspector (or machine operator) job and the female stenographer job equally, having paid them the same.

Title VII, on the other hand, contains no "equal work" limitation and, if it can be demonstrated that an employer values a female job more highly or as highly as one performed by men, but pays the female job less, the employee affected should be able to establish that her wage rate has been depressed because of sex, and not because of any differences in the job content of her work. Consider for example the following hypothetical case. An employer has prepared a job evaluation plan for his employees, under which maintenance workers (all male) are awarded 200 job worth points; production workers (predominantly male), 250 points; clerical workers (all female), 250 points; industrial nurses (all female), 300 points; auditors (predominantly male), 300 points; lead foremen (all male), 300 points; and the production supervisor (a male), 450 points. At the same time, the employer announces a new pay schedule under which maintenance workers receive $200 per week; production workers, $250 per week; clerical workers, $167 per week; industrial nurses, $200 per week; auditors, $300 per week; lead foremen, $300 per week; and the production supervisor, $450 per week. Under this schedule, the jobs that are male or predominantly male are paid $1 for every job worth point, whereas jobs that are female are paid $0.667 for every job worth point.

Do we have wage discrimination? Yes. What if we added another female job to our hypothetical, that of the personnel director who, with job worth points of 350, is paid $233 per week? Does it matter that there is no male job rated at 350 points or, in other words, no male comparator—what I call a proportional
value case?\textsuperscript{152} Of course not. And, indeed, these hypotheticals follow very closely the fact patterns in \textit{County of Washington v. Gunther}\textsuperscript{153} and \textit{International Union of Electrical, Radio & Machine Workers v. Westinghouse Electric Corp.},\textsuperscript{154} where the Supreme Court and the Third Circuit, respectively, ruled that the plaintiffs, on the basis of similar allegations, had stated causes of action under Title VII and should be permitted to proceed with their proof.\textsuperscript{155} Or what about a case where the employer tells a woman manager, who is paid less than any of the men who manage other departments, that if she had been a man she would have been paid $2000 a year more?\textsuperscript{156} Obviously, in a case of this type, a job evaluation of the several managerial jobs is unnecessary because the employer's own statement has established (1) that the woman was paid less because she was a woman and (2)

\textsuperscript{152} Another kind of proportional value case would be where the higher paid male and the lower paid female perform "equal" work within the meaning of the Equal Pay Act, but the man has more seniority, or is required to work a less desirable shift. The woman can still establish a violation of the Act if she can demonstrate that only part of the wage disparity can be explained by these other factors—as, for example, where the employer has a companywide shift differential, or a well-established increment for each additional year of seniority, and the pay disparity between the male and female worker exceeds these amounts. See, e.g., Brennan v. Owensboro-Daviess County Hosp., 523 F.2d 1013, 1030-31 (6th Cir. 1975), cert. denied, 425 U.S. 973 (1976); Herman v. Roosevelt Fed. Sav. & Loan Ass'n, 432 F. Supp. 843, 851 (E.D. Mo. 1977), aff'd, 569 F.2d 1033 (8th Cir. 1978).

\textsuperscript{153} 452 U.S. 161 (1981). In \textit{Gunther}, the county had conducted an evaluation of the female and male prison guard positions, and a survey of wage rates, to determine what these positions should be paid. According to the plaintiffs, the county adhered to the results of the survey in setting the wage rates for the male guard positions, but set the wage rates for the female guard positions at only 70\% of the male rates, despite the fact that the job evaluation and survey indicated that female guard positions should be paid 95\% as much as the male guard positions.

\textsuperscript{154} 631 F.2d 1094 (3d Cir. 1980), cert. denied, 452 U.S. 967 (1981). In \textit{Westinghouse}, the evidence established that prior to the enactment of Title VII, the company paid the female labor grades less than the corresponding male labor grades, even though the company's own job evaluation plan had rated the male and female jobs in each corresponding grade the same. After Title VII, the company, rather than simply combining the five female labor grades with the five corresponding male labor grades and paying the same rates, expanded the number of labor grades from nine to thirteen, and placed the women's jobs at the bottom of the new scale, in grades one through five, and the old male jobs, which had been in male labor grades one through five, in new grades five through nine, thus perpetuating the historic wage disparity between the male and female jobs.

\textsuperscript{155} \textit{Gunther}, 452 U.S. at 168; \textit{Westinghouse}, 631 F.2d at 1096-97. What the courts did not specifically decide (given the procedural posture of each case) was whether such facts, standing alone, could satisfy the "intent" requirement of Title VII. \textit{See infra} text accompanying notes 210-33.

\textsuperscript{156} See, e.g., Roesel v. Joliet Wrought Washer Co., 596 F.2d 183 (7th Cir. 1979) (comparing the pay and work of a woman manager with the pay and work of another woman manager whom the employer had previously admitted had been underpaid by a stated amount because of her sex).
the precise amount by which her wage rate was devalued because of her sex.

Another more or less simple "comparable worth" case would be where the male and female jobs in question are closely similar although not equal. An example of such a case is Briggs v. City of Madison, where the city's public health nurses (all female) claimed that the difference between their salary and the salary of the health sanitarians (all male) was based on sex and not on any difference in job content. The jobs were not "equal" because the basic function of the health sanitarian was to use his knowledge of science and disease to identify health hazards in public places, whereas the function of the public health nurse was to use her knowledge of science and disease to care for those who were ill, and to counsel members of the community in preventive health care. But the training and educational requirements for the two jobs were almost the same, and both involved similar degrees of responsibility; moreover, both the nurses and the inspectors regularly drove to several locations each day where they carried out their duties. The court held that the jobs were so similar in terms of skill, effort, responsibility, and working conditions that the disparity in wages between the female nurses and male inspectors raised a prima facie case of disparate treatment discrimination.

As we move away from these easy examples of disparate treatment and attempt to show sex-based wage discrimination in the rates paid to female-dominated jobs by an employer who does not have a formal job evaluation plan, or who does not have a single plan covering both predominantly male and predominantly female jobs, we face additional problems of proof, but we do not in any way alter our theory of discrimination. That theory remains the same: the employer is using different standards in establishing the wage rates for women or for women's jobs than it uses in establishing the wage rates for men or for men's jobs.


158. Id. at 445. The court subsequently found that the city had articulated a legitimate nondiscriminatory reason for the differential—based on the need to compete with the state for an inadequate number of health inspectors—which warranted the higher rate, and that the plaintiffs had failed to rebut that showing. Id. at 447-49.
C. Comparable Worth Under Title VII of the Civil Rights Act

Although both the equal work and the comparable worth cases are based on a claim of disparate treatment, there are material differences in the way that these two types of cases are tried. An equal work case, if it involves sex-based wage disparities, would typically be tried under the Equal Pay Act.\footnote{159} Unlike Title VII, the Equal Pay Act establishes a presumption of discrimination once the plaintiff has shown that (1) a man and a woman are employed in "equal work" (2) in the same establishment, and that (3) the woman is paid less.\footnote{160} The effect of this presumption is two-fold: first, it relieves the plaintiff of having to show discriminatory intent; and second, it shifts to the employer the burden of proving that the wage disparity is not due to sex,\footnote{161} but to some "other factor other than sex."\footnote{162}

A comparable worth case, or an equal work case involving wage disparities based on race, color, religion, or national origin, would be tried under Title VII of the Civil Rights Act.\footnote{163} Because Title VII creates no presumptions for wage discrimination, the plaintiff would have to establish the requisite "intent" to discriminate. A number of commentators have mistakenly assumed that this intent requirement can only be established by some showing of malice or prejudice, or at least by a showing of a conscious decision to depress certain wage rates because of sex or race. In fact, Title VII does not require the plaintiff to unearth evidence of overt discrimination; it is enough to show that there is disparate treatment based on sex or race, and sufficient circumstances from which "intent" can be inferred.\footnote{164}

\footnote{159. See supra note 80.}
\footnote{160. Of course, an employer could also challenge the plaintiff's prima facie case, contending either that the jobs are not equal, are not performed under similar working conditions, are performed in different establishments, or the women are not paid less than the men. If the employer simply contests the prima facie case, the burden of persuasion remains with the plaintiff. But if the employer attempts to justify the wage differential on some other ground, the burden of proof, including both the burden of production and of persuasion, shifts to the employer.}
\footnote{161. Corning Glass Works v. Brennan, 417 U.S. 188, 196-97 (1974); see also infra note 165.}
\footnote{162. 29 U.S.C. § 206(d)(1) (1982).}
\footnote{163. 42 U.S.C. §§ 2000e to 2000e-17 (1982).}
\footnote{164. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973); Segar v. Smith, 738 F.2d 1249, 1265-66 (D.C. Cir. 1984), cert. denied, 471 U.S. 1115 (1985); see also Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981).}
In other words, the principal effect of the "intent" requirement is on the quantum of evidence required to establish a prima facie case. If the plaintiff has evidence of overt discrimination, very little other evidence need be introduced. On the other hand, if the plaintiff has no direct evidence of discrimination, he or she will have to make a stronger showing to establish a prima facie case based on circumstantial evidence. The "intent" requirement in Title VII thus results in two differences from the Equal Pay Act litigation: (1) the plaintiff will, in certain types of cases, have to introduce considerably more evidence to establish a prima facie case; and (2) where such a case has been established, the plaintiff will nonetheless retain the burden of persuasion if the employer asserts a nondiscriminatory reason for the wage differential. 165

The effect of the "intent" requirement on the plaintiff's prima facie case can be seen by examining a variety of different fact situations. For example, take an equal work case involving black employees, in which the plaintiffs establish that the blacks, although employed under a different job title, perform work that is substantially equal in job content to work performed by white employees, and that the black employees are paid substantially less. While "intent" is required for Title VII, it seems clear from 165. Because the Equal Pay Act creates a presumption that any pay differential between men and women performing equal work is discriminatory, an employer who disputes the plaintiff's claim, not on grounds that the work is unequal, but on grounds that the differential is based on a factor other than sex, assumes both the burden of persuasion and production. This is so because the presumption of discrimination converts the employer's attempt to explain the disparate payment into an affirmative defense. See Corning Glass, 417 U.S. at 196-97; Belton, Burdens of Pleading and Proof in Discrimination Cases: Toward a Theory of Procedural Justice, 34 VAND. L. REV. 1205, 1250-52 (1981). In a Title VII case, however, there is no presumption of discrimination. As a result, the employer's assertion of a nondiscriminatory explanation attacks the adequacy of the plaintiff's prima facie case; it is not an affirmative defense, and the burden of persuasion therefore stays with the plaintiff. Burdine, 450 U.S. at 252-56.

While there is some language in County of Washington v. Gunther, 452 U.S. 161 (1981), that might suggest that the effect of the Bennett Amendment is to incorporate the Equal Pay Act's allocation of the burdens of proof into all Title VII sex-based wage cases, id. at 170-71, it is far more likely that the Court intended the burden of persuasion to shift to the employer only in those Title VII cases where the jobs were "equal" within the meaning of the Equal Pay Act. See, e.g., Kouba v. Allstate Ins. Co., 691 F.2d 873, 875 (9th Cir. 1982); Briggs v. City of Madison, 536 F. Supp. 435, 443-46 (W.D. Wis. 1982). But cf. EEOC v. Sears, Roebuck & Co., 628 F. Supp. 1264, 1329-32 (N.D. Ill. 1986) (finding that the Bennett Amendment does not incorporate the Equal Pay Act analysis regarding the burden of proof into Title VII). Any other construction of the Bennett Amendment would mean that the allocations of the burden of proof would vary in a Title VII wage discrimination case depending upon whether the alleged discrimination was based on sex, or on race, color, religion, or national origin. It would seem quite obvious that Congress did not intend the Bennett Amendment to have any such effect. For the text of the Bennett Amendment, see supra text accompanying note 42.
the case law that a court would find that the black employees had made out a prima facie case on the basis of these facts.\textsuperscript{166}

There would be no need for the plaintiffs to introduce any evidence of employer malice, such as a statement by the employer that he would never pay blacks as much as whites, or a written instruction directing the reduction of wage rates of black employees by twenty percent because of their increased absenteeism rate, or because of a belief that blacks lack a proper work ethic. It is enough that the employer pays blacks less than whites for equal work. It is inconceivable that the courts would require more evidence in an unequal pay for equal work case simply because the blacks must file suit under Title VII whereas the women can file suit under the Equal Pay Act.\textsuperscript{167} Indeed, any suggestion that the black plaintiffs would have to show more than the equality of work and the disparity in pay is totally inconsistent with the Supreme Court's decision in \textit{McDonnell Douglas Corp. v. Green},\textsuperscript{168} which held that a black plaintiff had made out a prima facie case of a discriminatory refusal to hire when he established that he had applied for the job, that he was qualified, and that he was rejected for the job, which was then left open until a white was subsequently hired.

In both these cases—where the employer pays blacks less than whites for equal work, and where the employer refuses to hire a qualified black for an advertised job vacancy—it is reasonable to assume, absent some showing to the contrary, that the employer's behavior was motivated (even unconsciously) by race. For the same reason, the presumption created by the Equal Pay Act is entirely rational, and consistent with responsible legislative action. But how good would such a presumption or inference be if the claim of wage discrimination was based on the fact that the women were paid less than the men when employed in dissimilar jobs, or that four applicants with equivalent qualifications (one black and three whites) applied for a vacant job at the same time, and one of the whites was selected? Obviously, in these cases, more evidence is needed before any inference of a discriminatory intent can be made.


\textsuperscript{167} There are some procedural hurdles that must be met before suit can be filed under Title VII—deferral to any state fair employment agency, a prior notice to the EEOC, and the receipt of a right-to-sue letter—but these additional requirements do not in any way diminish the basic substantive protection against wage discrimination.

\textsuperscript{168} 411 U.S. 792 (1973).
When women are paid less than men for equal or similar work the most obvious explanation for the difference is sex. But when women are paid less than men for dissimilar work there are other possible explanations that must be examined. One explanation for the lower pay could be that the women are employed in less skilled or less productive jobs. The fact that these jobs are dominated by women, and that the more skilled or more productive jobs are dominated by men—particularly if combined with evidence that the women had the same qualifications as the men when first hired and were assigned to the lower paying jobs—may be very good evidence of discrimination in job assignment. But it is not very good evidence of wage discrimination.

There needs to be some evidence from which to infer that sex, and not the difference in job content, is the basis for the wage differential. This other evidence, in the most simple application of a comparable worth theory, would be testimony from the employees or from a job evaluation expert that the female-dominated jobs are comparable in skill, effort, and responsibility to the male-dominated jobs. The difficulty with this evidence is that it fails to focus on the employer's disparate treatment because it only substantiates that this particular expert would value the jobs the same; it does not explain anything about the employer's standards. Evidence of how a third-party expert would value the female-dominated jobs is difficult to fit into a disparate treatment framework. But if job evaluation can be used, not to express the value system of a third party, but to expose the employer's own pay criteria, and to demonstrate that the employer has failed to apply the same criteria in establishing the pay rates for the female-dominated jobs, it will constitute very substantial evidence of discrimination.

This distinction between the kind of evidence needed for an equal work case and for a Title VII disparate treatment case is reminiscent of a similar distinction recognized by the National War Labor Board in administering wage controls during World War II. Typically, the Board granted wage increments if it were shown that such increments were necessary to eliminate sex-based wage differentials. In deciding these cases, the

169. The National War Labor Board was established in 1942 to administer the wage stabilization program imposed during World War II to minimize increases in wage rates. The guiding principle for the wage stabilization program was to maintain wages at the existing scale, except that wage increments could be awarded to eliminate "inequalities" and substandard living conditions. PUBLIC ADMINISTRATION AND POLICY DEVELOPMENT 781-91 (H. Stein ed. 1952); see also supra text accompanying notes 25-28.

Board carefully distinguished between two categories of cases: (1) "equal pay for equal work" cases where women worked "within the same occupations" as the men, either interchangeably or as replacements for men,\textsuperscript{171} or where "women were performing work of 'comparable quality and quantity' to work performed by men on 'similar operations,'"\textsuperscript{172} and (2) "intra-plant inequality" cases where women did not work within the same or similar jobs or occupations as the men, but where "there may be a dispute over [the] correctness of [the job's] wage rate in relation to rates for other jobs in the same plant."\textsuperscript{173}

In the first category—"equal pay for equal work"—the mere existence of a wage differential established the discrimination.\textsuperscript{174} But in the second category, the Board "presumed" that the rates for the women's jobs were correct in relation to the rates for the men's jobs, although "[this] presumption [could] be overcome by affirmative evidence of the existence of an intra-plant inequity derived from a comparison of the content of the jobs in question with the content of the jobs performed by men."\textsuperscript{175} In other words, once it was established that women worked in the same jobs as men for lower wages, discrimination was presumed. But where women worked in different jobs, the Board asked the same question that the courts must ask in a Title VII case: If women were rated by the same standards as those used for men, where would they rank in the general wage schedule? If they would rank higher, their wage rates were adjusted upward to correct for the existing sex discrimination.\textsuperscript{176}

Although some critics have questioned the technical competence of the courts to decide discrimination claims involving dissimilar jobs, it is clear that standard job evaluation and statistical regression techniques can be used to identify the criteria employed in establishing the pay rates for male-dominated and integrated jobs and, in addition, to determine whether the same criteria were applied in establishing the pay rates for female-dominated jobs. In other words, by using these techniques, any final determination of discrimination is based on the employer's own value system and not on the court's or a third party expert's.

\textsuperscript{171} Id. at 668.
\textsuperscript{172} Id.
\textsuperscript{173} Id. at 669.
\textsuperscript{174} Id. at 677.
\textsuperscript{175} Id.
\textsuperscript{176} Id. at 692.
Before examining how job evaluation can be used to demonstrate disparate treatment, it is helpful to have some basic understanding of the job evaluation process. Job evaluation is a procedure that is used to rank groups of jobs on the basis of a common set of job factors. These job factors describe the generic characteristics or dimensions of the work being compared. Although the actual factors used in any particular job evaluation may differ somewhat depending on the industry and the range of jobs being compared, and on the person or firm doing the evaluation, they will typically include some variant of skill, effort, responsibility, and working conditions. In the recently completed Wisconsin pay equity study, for example, the factors selected were: knowledge required, consequence of error, effect of action, job complexity, amount of discretion, contacts, hazards, time demands, physical effort, surroundings, personal authority, and personnel supervised. The first ten factors were common to all jobs; the last two were only used to measure supervisory and managerial jobs.

Once the job factors have been selected, they are divided into a number of levels, with each level representing increased degrees of worth. The job evaluation instrument usually defines each of these factor levels, and often includes detailed guide language identifying the factor level for particular occupations. Thus, in the Wisconsin study, the definition for “knowledge required, level 1” was “[l]anguage skills sufficient to follow oral instructions” and “[s]kills necessary to perform simple manual tasks or operate simple types of equipment in repetitive operations.” The guide language for this level included the following: “Performs general maintenance and custodial work. Loads and unloads and moves furniture and similar items.” The definition for “knowledge required, level 9” was “[m]astery of a field of work or study and sufficient comprehension to perform authoritative work in conceiving and implementing programs, or advancing new hypotheses or theories,” and the guide language

177. NRC REPORT, supra note 57, at 71; D. TREIMAN, supra note 11, at 1. While job evaluations were not commonly used in the private sector until the 1940's, they were used by the United States Civil Service Commission prior to the turn of the 20th century. Id. at 1, 17. It is now estimated that 75% of all major employers use a job evaluation system. See COMPTROLLER GEN. OF THE U.S., supra note 5, at 26; NRC REPORT, supra note 57, at 71; D. TREIMAN, supra note 11, at 49-50.

178. NRC REPORT, supra note 57, at 1; D. TREIMAN, supra note 11, at 6, 32.

179. REPORT OF WISCONSIN'S TASK FORCE ON COMPARABLE WORTH 34, 179 (Jan. 1986) [hereinafter WISCONSIN TASK FORCE REPORT].

180. Id. at 196.

181. Id.
included, as one example, "[p]hysicians responsible for performing highly specialized procedures or work requiring Board certification."\textsuperscript{182}

The next step is to establish weights for each factor because not every factor contributes equally to the establishment of wage rates.\textsuperscript{183} Some factors will be more valued than others, and this will vary from industry to industry.\textsuperscript{184} It would, however, be fairly typical for increased levels of skill to receive greater monetary recognition than increased levels of effort. Indeed, some indirect weighting occurs even in the selection of job factors and in the design of the levels for each factor, because factors with more subfactors, or with more levels, will generally receive more total points.\textsuperscript{185} It is also at this point that appropriate distinctions can be made between verbal and scientific skills. Thus, if scientific skills are valued more highly than artistic or managerial skills, these skills will be assigned to higher levels in each of the relevant factors.

The final step in the job evaluation process is to analyze the employer's jobs in terms of the selected factors, and to decide which factor level accurately describes each job.\textsuperscript{186} This analysis is performed by the job evaluator, or personnel director, or by a job evaluation committee.\textsuperscript{187} Information on the various jobs can be obtained through a variety of means, including position de-

\begin{footnotesize}
\begin{enumerate}
\item[182.] Id. at 204.
\item[183.] D. TREIMAN, supra note 11, at 6-7; WISCONSIN TASK FORCE REPORT, supra note 179, at 34, 48.
\item[184.] NRC REPORT, supra note 57, at 73-74; D. TREIMAN, supra note 11, at 13-15.
\item[185.] For example, in the Wisconsin study there were two factors associated with skill—knowledge required and job complexity—and only one factor associated with physical effort. Moreover, there were 10 levels for knowledge required and seven levels for job complexity, but only five levels for physical effort, which would mean that, even without any weights, skill would be three times more important than effort in establishing the relative job rankings. See WISCONSIN TASK FORCE REPORT, supra note 179, at 196-210, 222-24.
\item[186.] D. TREIMAN, supra note 11, at 1; WISCONSIN TASK FORCE REPORT, supra note 179, at 35, 41-44.
\item[187.] It is not uncommon to use pay evaluation committees composed of labor and management employees for this stage of the evaluation process. As recognized in the Comptroller General's Report, their involvement can be important to the accurate evaluation of the jobs. COMPTROLLER GEN. OF THE U.S., supra note 5, at 29. The Wisconsin study used three job evaluation committees, composed of six voting members and one nonvoting member. The voting members included two employees, two supervisors, a classification expert, and a union representative. The nonvoting member was an equal opportunity specialist. The individuals for these committees were selected from names recommended by both management and labor. The committees were trained in the job evaluation system by the consulting firm that had designed it, and representatives from that firm were available to assist the committees with their determinations. WISCONSIN TASK FORCE REPORT, supra note 179, at 41-45.
\end{enumerate}
\end{footnotesize}
scriptions, written questionnaires, job interviews, and/or actual on-site inspections. The point total for each factor is multiplied by the applicable factor weight, after which the total points for each job would be recorded, and the jobs ranked in accordance with their point totals.188

If the job evaluation has been conducted by an employer for the purpose of establishing a uniform pay policy, there may need to be changes in the existing wage structure that would affect male-dominated jobs, integrated jobs, and female-dominated jobs. If, on the other hand, the sole purpose of the evaluation is to identify any disparities based on sex, the employer will not need to be concerned with the existence of varying wage rates for jobs of equal value, so long as those variations are not based on sex. To make that determination, the employer would typically plot the wage rates for male- and female-dominated jobs at each point level, and draw a line of best fit (using regression procedures) for the salaries paid to the male-dominated jobs and integrated jobs, and a line of best fit for the salaries paid to the female-dominated jobs. If the two salary lines overlap, there would not be any evidence of a sex bias. If, on the other hand, the two lines are separate and distinct, there is substantial evidence that the existing pay structure is tainted by sex.189

As is clear from this description, there are several points at which inaccuracies and individual biases could affect the validity of the job evaluation process: (1) relevant job factors could be omitted; (2) jobs could be inaccurately described; (3) jobs could be assigned to the wrong factor level; and (4) the selection of factor levels and weights might vary substantially from the employer's own determination of value, and thus falsely indicate a

188. NRC REPORT, supra note 57, at 71; D. TREIMAN, supra note 11, at 1, 3-4; WISCONSIN TASK FORCE REPORT, supra note 179, at 35.
189. See, e.g., COMPTROLLER GEN. OF THE U.S., supra note 5, at 45-46; WISCONSIN TASK FORCE REPORT, supra note 179, at 52-54. A typical pattern of the scatter diagram in a salary study would be something like this:  

![Diagram](attachment:image_url)
bias based on sex where no such bias exists. Item (2) should not be cause for any real concern. While it is certainly true that there can be inaccurate job descriptions, the legal system is well suited to resolving issues of this kind; courts can easily assess the accuracy of individual job descriptions through an examination of the employees and their supervisors, or through an actual visual inspection of the work in question.

The other three items present more fundamental concerns and raise again the question of how value is to be determined and by whom. Standard job evaluation practices recognize two principal methods for selecting job factors and for developing factor levels and weights. One is the *a priori* method under which someone—job evaluator, consultant, expert, or employer—selects a set of factors and factor weights that reflect that person’s conception as to what factors should be remunerated and by how much. The second is the policy capturing method; this method uses the employer’s current pay structure to determine, through multiple regression analysis, which factors will predict existing wage rates, and how much each factor contributes to explaining those rates.¹⁹⁰

The only problem with this second method is that, without some adjustment, it would replicate any existing sex bias. Therefore, to eliminate any such bias, the multiple regression analysis is used to relate factors only to those jobs that are either male-dominated or integrated.¹⁹¹ Moreover, to avoid similar problems in defining each factor level, the definitions and guides are also based on examples of male-dominated jobs and integrated jobs.¹⁹² The “worth” of the female-dominated jobs is then determined by applying the same factors and factor-weights to the job content information collected for each of the female-dominated jobs.

Individuals on both sides of the comparable worth debate have expressed concern over this phase of the job evaluation process.¹⁹³ Those who support comparable worth believe that the selection of factor levels for each of the female-dominated jobs can be tainted by bias; those who oppose comparable worth argue that the selection of these factors is inherently subjective and therefore cannot serve as a reliable basis for pay deci-

¹⁹¹. *Id.* at 48; *NRC Report*, *supra* note 57, at 72, 80, 82-88; D. *Treiman, supra* note 11, at 7, 25, 31.
In fact, however, the assignment of factor levels to each individual job can be performed with a high degree of reliability, as had been demonstrated in a number of comparable worth studies.

For purposes of Title VII litigation, the advantage of the policy capturing method—at least in establishing pay rates for the male-dominated and integrated jobs—is that it is not based on some third person's notion of what would be a fair value for the different job factors, but on the employer's own determination of what should be paid for each job characteristic. In other words, the policy capturing method simply makes explicit what are already the employer's implicit criteria for establishing the wage rates for non-female-dominated jobs.

As a result of these findings, the definitions and guidelines for several of the factors were revised and clarified prior to the final study. The factor of stress was replaced with the factor of "time demands," which more accurately defined the job information being sought, and the questionnaire was changed to use limited-choice questions, as opposed to open-ended questions, so as to enhance their ability to elicit precise, valid, and consistent job information for six factors—contacts, hazards, time demands, surroundings, personnel authority, and personnel supervised. The revised definitions and new questionnaires were then field tested for reliability. Moreover, in the final study, each evaluation committee, instead of rating one-third of the jobs for all of the factors, rated all of the jobs for only two factors; in addition, each evaluation team member determined the proper factor levels independently of the other committee members. When the results of the committee members were compared, they had arrived at the same conclusions in applying the "knowledge required" factor 96% of the time, "job complexity" 94% of the time, "amount of discretion" 93% of the time, and "effect of action" 92% of the time. The other factors, "consequence of error (A)," "consequence of error (B)," and "physical effort," had reliability ratings of 81%, 82%, and 86%, respectively. Wisconsin Task Force Report, supra note 179, at 34-46.
While the *a priori* method may be entirely appropriate when it is the employer who wishes to use it, the policy capturing approach is otherwise preferable for Title VII analysis. It identifies the criteria that are currently being used by the employer in establishing pay rates for the male-dominated and integrated jobs, and thus enables the court to determine whether these same criteria are being consistently applied to female-dominated jobs. As a result, any final determination of sex-based wage disparities is based on the employer's own criteria and not on the court's. And finally, such an approach leaves in place the relative wage rankings for male-dominated and integrated jobs, just as it does for female-dominated jobs. Male jobs that were paid more than other male jobs will continue to be paid more (whatever a third person might think), and female jobs that were paid more than other female jobs will likewise continue to be paid more, although the female jobs as a group will receive higher wages as the result of the elimination of the sex-based wage disparity.

Those who question the value of this kind of evidence make four arguments: (1) Title VII does not require employers to pay their employees in accordance with the comparable worth of their various jobs; (2) the resulting differential between the wage rates for male-dominated/integrated jobs and female-dominated jobs—what they refer to as the "unexplained" differential—may be based on something other than sex; 196 (3) the regression analysis does not provide any evidence of direct discrimination, but only evidence of indirect discrimination, which is not the result of any employer practice, but of well-entrenched social customs that have resulted in the uniformly low ranking of female-dominated jobs; and (4) the regression analysis disregards the marketplace, which is the only objective basis for establishing wage rates and which must be followed to avoid severe dislocations in the labor market and for employers.

1. The requirement of comparable worth—There is absolutely nothing in the foregoing disparate treatment analysis that requires employers to pay employees in accordance with the comparable worth of their jobs, or to pay every two jobs of equal value the same. 197 Although most employers increase the wage

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196. U.S. Comm'n on Civil Rights, supra note 61, at 34, 36, 70; O'Neill, An Argument Against Comparable Worth, in 1 U.S. Comm'n on Civil Rights, supra note 56, at 173, 181; Statement of Alvin Bellak, supra note 77, at 68; Statement of Brigitte Berger, supra note 86, at 29; Statement of Claudia Goldin, 2 U.S. Comm'n on Civil Rights, supra note 60, at 2, 8.

197. The courts are thus quite correct in stating that plaintiffs cannot base a claim of discrimination on the employer's failure to pay employees in accordance with their com-
rates of both male and female jobs as the worth of those jobs increases, Title VII does not mandate this result. An employer can pay his least valuable job the most, or he can pay all jobs the same, regardless of their worth. Or the employer can disregard job content altogether, and base pay on some other factor—such as seniority, or some other individual characteristic, or by the first letter of the employee's last name. All that Title VII requires is that the same system—whatever it is—be used in establishing the wage rates for both the male-dominated and female-dominated jobs. Thus, if the evidence establishes that the male-dominated jobs are paid in accordance with job worth, with their pay rates increasing as the worth of their job increases, the female-dominated jobs must also be paid in accordance with job worth. Moreover, job worth for each group of jobs must be determined under the same criteria, so that, for example, math skills are given equal weight regardless of whether those skills are found in a male-dominated job or in a female-dominated job.

2. The "unexplained" factor—The multiple regression analysis used in a comparable worth study, which is undertaken to expose the employer's implicit pay structure, adjusts both for job content and for human capital characteristics such as seniority, prior experience, quantity and quality of production, and merit. As already noted, when the salaries for the male-dominated, integrated, and female dominated jobs are plotted on a graph, and a line of best fit drawn for the male-dominated and integrated jobs, and a second line drawn for the female-dominated jobs, there is a substantial gap between the two lines. The proponents of comparable worth contend that this gap is due to sex, because any differences in job content (including surroundings and working conditions) or human capital characteristics have already been adjusted for by the regression analysis. The opponents of comparable worth argue that there is some other unidentified factor, not included in the regression analysis, that can explain the gap. Significantly, the opponents to comparable

parable worth. See, e.g., American Nurses' Ass'n v. Illinois, 783 F.2d 716, 723-24 (7th Cir. 1986).

198. Similarly, the Equal Pay Act does not require that an employer pay all employees engaged in equal work the same wage. The employer may use a random rate structure, or may pay within a fixed range of rates, so long as his compensation policies do not result in women being paid less than men with comparable levels of seniority, and quality and quantity of performance.


200. Alternatively, the regression analysis can use the minimum rate for each job (or the entry rate), which would make it unnecessary to adjust for variations in the human capital characteristics of those who at any given time are employed in those jobs.
worth are unable to suggest what this unidentified factor might be.

The existence of any such factor is highly unlikely and certainly too speculative to rebut the prima facie showing of disparate treatment established by the regression analysis. In the first place, this unexplained or unknown factor would have to be one that is not correlated with any of the identified factors, including sex. In other words, it would have to be a factor that was present in almost all of the male-dominated or integrated jobs, but in almost none of the female-dominated jobs. Thus, while there are factors other than job content and human capital that affect wage rates, such as supply and demand imbalances, unionization, tradition, and "creaming" to fill specific jobs with individuals who are overqualified, none of these factors are correlated with sex. They explain the differences in the pay rates that exist among male-dominated and integrated jobs of equal value, just as they explain the differences that exist among female-dominated jobs of equal value. For example, in the Wisconsin study, three of the male-dominated jobs with 953 job worth points received annual salaries of $19,500, $22,000, and $24,500, whereas two of the female-dominated jobs with 953 job worth points received $15,000 and $15,500. At 1336 job worth points, the two female-dominated jobs received $19,000 and $24,000, whereas the three male-dominated jobs received $27,000, $27,500, and $32,500. Thus, while there were annual disparities in the wage rates for jobs of equal value performed by the same sex, which ranged from $500 to $5500, there were additional sex-based wage differentials in the average salaries paid to the male- and female-dominated jobs at each of these two point values, over and above any other variations, that ranged from $6750 to $7500.201

In the second place, the "unidentified factor" theory simply ignores the long history of direct discrimination in the establishment of wage rates for women.202 Not only was it common practice to pay women less than men for the exact same work, but employers regularly used lower entry-level rates in establishing their female wage structure (as at Corning Glass),203 reduced the

201. WISCONSIN TASK FORCE ON COMPARABLE WORTH, FOR WHAT IT'S WORTH (May 1985), reprinted in WISCONSIN TASK FORCE REPORT, supra note 179, at 117.
202. See supra text accompanying notes 87-106.
203. The sex-based wage differential for the inspector jobs at the Corning Glass plants originated in 1925, when men, who were employed to work on the night shift, refused to do inspection work at female rates. Corning Glass Works v. Brennan, 417 U.S. 188, 191 (1974). The differential continued even after Corning implemented a job evalu-
rates to be paid to women by some fixed percentage designed to compensate for the assumed special needs of women workers (as at Westinghouse and General Electric), or paid them less because it was assumed that women have fewer dependents (as in Australia). Moreover, in every case where a job that was once performed by men became female-dominated, it lost both in wages and in its relative ranking with other male-dominated jobs. These practices resulted in the almost universal under-

| 204. In International Union of Electrical, Radio & Machine Workers v. Westinghouse Electric Corp., 631 F.2d 1094 (3d Cir. 1980), cert. denied, 452 U.S. 967 (1981), the lower rates for the women's jobs had their origin in a compensation system that paid women less than men for jobs rated equally under the company's job evaluation plan and assigned to the same labor rate. The company justified this system on "the more transient character of the service of the [women], the relative shortness of their activity in industry, the differences in environment required, the extra services that must be provided, overtime limitations, and the general sociological factors not requiring discussion herein." Newman & Vonhof, supra note 48, at 293 (quoting Westinghouse's Industrial Relations Manual).

205. Australia has state and federal wage tribunals that set minimum rates of pay for almost all occupations. Gregory & Duncan, Segmented Labor Market Theories and the Australian Experience of Equal Pay for Women, 3 J. Post KEYNESIAN Econ. 403, 404 (1981). Until 1975, the sex of the occupation was a relevant factor in the institutional wage-setting process. Id. at 406. Originally, tribunals categorized occupations as either male or female. When an occupation was determined to be male, the minimum was set so as to support a man, his wife, and their children; when the occupation was determined to be female, the minimum was set so as to support a single woman. The result of this process was that female-dominated occupations were paid considerably less than male-dominated occupations that were determined by the tribunals to have the same work value. Id. Over time the tribunals began to use a percentage of the equivalent male rate in establishing the rate for female occupations with the same work value. During the period before World War II, the minimum rates for female occupations were generally set at 54% of the equivalent male rate. Id. at 407. After World War II, the tribunals began to set the minimum rates for female occupations at 75% of the male wage equivalent. Then in 1969 the federal tribunal established the principle of equal pay for equal work, and in 1972 it adopted the principle of equal pay for work of equal value, which was to become fully effective in June 1975. Id. at 407-08. While the actual rates paid by most employers substantially exceed the minimum rates set by the tribunals, the average pay rates for male- and female-dominated occupations reflect the same relative relationships as were established by the tribunals' minimums. Id. at 404, 408. As a result, the gap between the wage rates for male- and female-dominated occupations of equivalent value has narrowed considerably since 1975. Id. at 408-12.

206. A good example of this phenomenon was uncovered in the EEOC's investigation of AT&T. AT&T had 23 operating companies prior to its break-up. In all but one of these companies the job of "Frameman" was performed by men; it was a craft job and
valuation of wage rates for female-dominated jobs, which was then perpetuated by uniform annual wage increments,\textsuperscript{207} by job segregation\textsuperscript{208}—which made it unnecessary to make any wage adjustments when the Equal Pay Act was passed—and by area wage surveys, which report separate and lower rates for female labor.\textsuperscript{209}

3. The "innocent" employer—Contrary to the notion implicit in this argument, it is not necessary in a disparate treatment case to establish any evidence of malice or prejudice. What has to be shown—through either direct or circumstantial evidence—is that the disparate treatment is intentional—i.e., that there is disparate treatment based on sex.\textsuperscript{210} The opponents of comparable worth argue that if the employer does not have a formal job evaluation plan that establishes the disparate treatment (as in \textit{Corning Glass} or \textit{Westinghouse}),\textsuperscript{211} or that is sex-

was paid at craft rates. At Michigan Bell, however, the work was assigned to a female job classification, entitled "Switchroom Helper," and was paid a clerical rate rather than the higher craft rate. See EEOC Prehearing Analysis and Summary of Evidence, A Unique Competence, A Study of Equal Employment Opportunity in the Bell System, \textit{In re} Petitions filed by the Equal Employment Opportunity Commission Before the Federal Communications Commission, No. 19143, at 32-64 (1972), \textit{reprinted in} A. Babcock, A. Freedman, E. Norton & S. Ross, \textit{Sex Discrimination and the Law} 288 (1975).

207. Cf. Bazemore v. Friday, 106 S. Ct. 3000, 3006 (1986) (finding a Title VII violation where present pay disparities between black workers and white workers were a lingering result of prior segregation).


209. \textit{See} Blumrosen, \textit{supra} note 108, at 441-45; Newman & Owens, \textit{supra} note 60, at 144 n.64. These authors note that the U.S. Bureau of Labor Statistics and the U.S. Bureau of the Census report national and area wage data by sex and occupation. See also N. Tolles & R. Raimon, \textit{Sources of Wage Information: Employer Associations} (3 Cornell Studies in Industrial and Labor Relations, 1952), which describes the wage surveys conducted by 120 employer associations; a large number of these surveys reported separate salary data by sex, including separate wage rates for male and female unskilled labor.

210. \textit{See supra} text accompanying note 164. One district court has explained the required element of "intent" as follows:

\begin{quote}
Despite the many analyses of the wide variety of discrimination cases, the outcome of all of them inevitably depends on the element of intent, and a causal relation between that intent and the consequence complained of. The "intent" referred to is not by any means confined to actual, subjective, individual intent of a purposeful nature. It refers to the legal concept of intent which also embraces subconscious ... intent as well as an intent inferred from purposeful ... action . . . .

The legal concept of "intent" is to be distinguished from "motive" . . . . Forbidden discrimination in employment may be the consequence of the highest and most salutary motives, but the legal "intent", not the motive, is what controls.
\end{quote}


211. \textit{See supra} notes 203-04.
biased in design,212 the disparity in treatment disclosed by the regression analysis is not based on any conscious (or unconscious) decision by the employer to treat the female-dominated jobs less favorably, but simply reflects the historic ranking of male- and female-dominated jobs in the community. In other words, the employer, in adopting the prevailing community wage rates for each of his male- and female-dominated jobs, is not responsible for any discrimination that results from the adoption of these rates. Indeed, the suggestion is made that the employer would not even know about the disparate treatment unless he conducted his own job evaluation study and regression analysis, and that while his lack of knowledge would not negate a disparate impact claim (where no intent is required), it does negate a disparate treatment claim.213

There are at least two problems with this kind of argument. The first is that it rests upon an erroneous interpretation of the intent requirement in Title VII disparate treatment litigation. The second is that, contrary to the arguments made by comparable worth's opponents, an employer's pay structure is always the result of conscious pay decisions made by the employer and not just the result of the employer's having passively accepted the prevailing wage rates in the community. But even if this were not so, the employer can hardly be said to have no involvement in the establishment of discriminatory wage rates. The market is not an institution driven by factors entirely outside of the employer's control. On the contrary, the market is in large part determined by the collective wage behavior of all employers in the community. In addition, because there is no single rate in the market for each occupation, the individual employer must still decide what specific rate to pay. Thus, it could be argued that just this act of selecting a discriminatory wage rate, even if the rate were one established by another—e.g., the market—violates the employer's duty of nondiscrimination under Title VII. This conduct would be like the employer conduct involved in Arizona Governing Committee v. Norris.214 In that case, the employer disclaimed any responsibility for the discriminatory terms on which the tax deferred annuities were offered to its employees by the insurance companies it had selected, on the ground that all of the annuities available in the open market were based on sex-segregated actuarial tables. In holding that

212. NRC Report, supra note 57, at 73; D. Treiman, supra note 11, at 13-15, 34.
the employer was guilty of intentional discrimination, the Court stated: "Since employers are ultimately responsible for the ‘compensation, terms, conditions, [and] privileges of employment’ provided to employees, an employer that adopts a fringe-benefit scheme that discriminates among its employees on the basis of . . . sex . . . violates Title VII regardless of whether third parties are also involved in the discrimination." Clearly, the employer’s responsibility for nondiscriminatory compensation extends as well to the selection and establishment of the wage rates paid to their employees.

a. The meaning of the “intent” requirement—Title VII’s requirement of “intent” does not mean that the plaintiff has to show that the employer knew the exact extent of the disparate treatment, or that he initiated the disparate treatment. It is enough if it can be inferred from the plaintiff’s evidence that the employer must have known that its pay system undervalued the female-dominated jobs in relation to the male-dominated jobs. The employer may well have believed that this undervaluation—i.e., disparate treatment—was justified by the prevailing market rates or by some other factor. But such a belief does not negate the existence of intentional disparate treatment; on the contrary, it concedes the disparate treatment but then attempts to explain it, in the same way that an employer might try to justify unequal pension benefits or restrictive hiring rules.

The employer does not need a regression analysis to know if the female-dominated jobs are undervalued. Although the employer may not be able to specify the characteristics he values with mathematical exactitude, he certainly has some general idea as to which characteristics he values the most, how much he pays the male-dominated, integrated, and female-dominated jobs, and what the general characteristics of each of these jobs are. The regression analysis is for the trier of fact who typically would not be in a position to know what job content characteristics—many of which would be unique to a particular industry or employer—were present in the different jobs, or how these content characteristics were generally valued by a specific employer in his male-dominated and integrated jobs—skill over effort, scientific skills over verbal skills, skill over responsibility, responsibility over skill, etc.

The notion that conscious or unconscious disparate treatment is not the same as intentional disparate treatment is based on several misconceptions. The first, discussed previously, is that

215. Id. at 1089.
the element of intent requires a showing of malice. This seems to be the view expressed by Judge Posner in dicta in *American Nurses’ Association v. Illinois*,216 where he wrote that the intent required by Title VII “implies more than . . . [an] awareness of consequences;”217 it requires that the employer “select[] . . . a particular course of action at least in part ‘because of,’ not merely ‘in spite of,’ its adverse effects upon an identifiable group,” or, in the case of a sex-based wage claim, “by a desire to benefit men at the expense of women.”218 In support of this statement, Judge Posner relied on *Washington v. Davis*219 and *Personnel Administrator v. Feeney.*220 But neither of these cases was tried under a disparate treatment theory. On the contrary, the employers in both cases used the exact same criteria in considering women and minorities for employment and promotion. In other words, these were cases of identical treatment, not disparate treatment. But the effect of these criteria—exam scores in *Davis*,221 and veterans’ preference points in *Feeney*222—was to disqualify disproportionately women and minorities—i.e., to have a disparate impact. Although it would have been possible to invalidate such criteria under a Title VII disparate impact analysis, assuming that the use of such criteria was not necessary to the accomplishment of legitimate business purposes,223 the *Davis* and *Feeney* suits were brought under the fourteenth amendment to the United States Constitution, and “intent” to achieve the disparate results was an additional requirement.224

In a disparate treatment case, however, the intent to achieve different results can be inferred from the disparate treatment itself, which in wage cases consists of the use of different criteria in establishing the wage rates for male- and female-dominated jobs. It is not necessary also to show that the employer wanted the different result as part of a scheme to benefit one group over another. Thus, the courts have found intentional discrimination in a number of cases where there was no finding or suggestion that the employer’s policy of disparate treatment was designed to injure or disadvantage women. So, for example, in *City of Los

216. 783 F.2d 716 (7th Cir. 1986).
217. Id. at 722 (quoting Personnel Admin. v. Feeney, 422 U.S. 256, 279 (1979)).
218. Id. (quoting Feeney, 422 U.S. at 279).
221. 426 U.S. at 234-35.
222. 442 U.S. at 260, 263, 265, 267-69.
224. *Davis*, 426 U.S. at 238-44; *Feeney*, 442 U.S. at 274-75, 279.
Angeles Department of Water & Power v. Manhart, the employer, in requiring women to make greater monetary contributions to the pension fund than similarly situated men, simply adopted the "common practice" of using sex-based actuarial tables; in other cases, the employer excluded women from certain jobs because of a belief that the work was too arduous for women, or too dangerous to unborn children. Despite the absence of any evidence that the employer was motivated by malice or prejudice, the courts found a violation of Title VII based on the disparity in treatment.

Of course, it is axiomatic that the disparate treatment has to be based on sex—and not on some factor other than sex. As already discussed, it is this element of "intent" that must be established in the plaintiff's prima facie case. But the argument advanced by comparable worth's opponents seems to confuse the employer's knowledge of the disparate treatment (whether specific or general) with his knowledge that a violation has occurred (which the employer may not have because of the way in which he interprets the law) or with his knowledge concerning the extent of the injury (i.e., which jobs are affected by the disparate treatment, and by how much). Obviously, knowledge of each of these facts is quite different, and the intent requirement refers only to the existence of disparate treatment based on sex, and not to a knowing violation, or to a violation of some specified amount. Indeed, one of the more common reasons for treating women differently from men is the employer's belief that women are unable to perform the job, or at least cannot perform it safely, and that as a result the disparate treatment is authorized, under either the bona fide occupational qualification exception, or as a business necessity. Nor does an employer typically know the full extent of his liability once a violation has been established. Liability questions are often quite complex, and the courts have typically bifurcated a Title VII proceeding.

226. Id. at 710.
227. E.g., Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228 (5th Cir. 1969).
228. E.g., Wright v. Olin Corp., 697 F.2d 1172 (4th Cir. 1982).
They determine first whether a violation has occurred and then, if that question is answered affirmatively, schedule additional and often lengthy proceedings in which to determine the extent of the employer's liability. 232

Nor is it necessary that the employer actually initiate the challenged disparate treatment. It is enough that the employer continues or maintains a pay system based on disparate treatment even though that system might have been introduced by a predecessor employer or by earlier management. In other words, while Title VII does not impose any liability for actions that occurred prior to the Act's effective date, or that are protected by the Act's short statute of limitations, wage discrimination is a continuing violation. As a result, the employer's failure to correct a discriminatory wage structure once an employee has complained or once the business has come under the employer's control is as much a violation of Title VII as is the action of a new employer who establishes a discriminatory pay system for the first time. 233

b. Institutional or direct discrimination?— The other broad response to the "innocent employer" argument is that the employer—whether considered generically or individually—is not in fact so innocent. The premise underlying the "innocent employer" argument is that the employer makes no discriminatory pay decisions himself, but simply adopts the prevailing wage rates determined for each job by cultural and psychological factors having nothing to do with the employer. 234 In other words, any undervaluation in the establishment of pay rates for female-dominated jobs is the result of institutional discrimination, and not direct employer discrimination. 235

234. As expressed by Judge Posner in American Nurses' Association v. Illinois, 783 F.2d 716, 720 (7th Cir. 1986):
   An employer (private or public) that simply pays the going wage in each of the different types of jobs in its establishment, and makes no effort to discourage women from applying for particular jobs . . ., would be justifiably surprised to discover that it may be violating federal law because each wage rate . . . [has] been found to be determined by cultural or psychological factors attributable to the history of male domination . . .
235. A variation of this argument is that women are paid less than men because of the occupations they are in and not because of wage discrimination. Those who make this argument acknowledge that women have not always been able to select the occupation of their choice. They contend, however, that unless the employer himself has been guilty of job discrimination, he "should not be held accountable for the discrimination of others, including employers who discriminated in the past, State legislators who enacted State protective legislation, and educators who discriminated or continue to discriminate." U.S. COMM'N ON CIVIL RIGHTS, supra note 61, at 71. In other words, there is no
The weakness of this argument is apparent. Pay decisions are not like employment decisions, where an employer's effort to locate and hire women for particular occupations can be frustrated by institutional misconduct, as well as by employer bias. For example, the schools or union apprenticeship programs may have excluded women from the courses or training programs required for them to qualify for particular occupations. Or the now-repealed state protective laws\textsuperscript{236} may have made it impossible for employers to hire women for any jobs where they would be re-

wage discrimination; there is only job discrimination. And women are paid less than similarly qualified men, either because of the difference in the job content of their occupations (with women working in the less productive jobs), or because of the overcrowding of the female-dominated occupations, which has lowered the pay rates. This argument is easily refuted. First, when women selected male jobs they were paid less than the men (at least until the Equal Pay Act of 1963), so that historically a primary reason for lower female rates has been sex and not occupational choice. Second, women who are employed in female-dominated occupations are typically paid less than the lesser valued or less productive male-dominated jobs, as demonstrated by the female "selector-packers" in Shultz v. Wheaton Glass Co., 421 F.2d 259 (3d Cir.), cert. denied, 398 U.S. 905 (1970), who were paid less than the male snap-up boys, \textit{see supra} text accompanying notes 144-46, or the female jobs in \textit{Corning Glass} and \textit{Westinghouse}, \textit{see supra} notes 203-04. And third, female-dominated jobs that were in short supply (e.g., nurses and stenographers), while they were paid more than other female-dominated jobs of comparable or equal value, were generally paid less than male-dominated jobs of comparable or equal value, including those that were not in short supply.\textsuperscript{236}

The so-called protective laws existed in every state and were not finally repealed or nullified until the 1970's, after the enactment of Title VII of the Civil Rights Act. \textit{See, e.g.}, General Elec. Co. v. Hughes, 454 F.2d 730 (6th Cir. 1972); Rosenfeld v. Southern Pac. Co., 444 F.2d 1219 (9th Cir. 1971); LeBlanc v. Southern Bell Tel. & Tel. Co., 333 F. Supp. 602 (E.D. La. 1971), aff'd, 460 F.2d 1228 (5th Cir.), cert. denied, 409 U.S. 990 (1972). These laws prescribed the number of hours per day and days per week women could work, the time of day women could work, the number and length of rest periods required for women workers, and the maximum amount of weight that women could lift (ranging from 15 to 35 pounds, depending on the state). Other laws barred women from jobs requiring night work, heavy lifting, or constant standing. Women were also prohibited from entering certain occupations, which typically included bartending, mining, and smelting. A few states also precluded women from engaging in a longer list of occupations, including bellhop, gas or electric meter reader, pin setter in a bowling alley, crossing watchman, section hand, jitney driver, freight handling and trucking of any kind, or from working in poolrooms, bar rooms, and saloons that catered to male customers exclusively. \textit{See, e.g.}, Ohio Stat. Ann. § 1008-1 (Baldwin 1948). Other laws stated that "no female shall . . . be employed in any place detrimental to her morals, her health or her potential capacity for motherhood." \textit{Mich. Comp. Laws} § 750.556 (1948); \textit{see Pa. Stat. Ann.} tit. 43, § 107 (Purdon 1952); \textit{Wis. Stat.} § 103.65 (1949); \textit{Wyo. Comp. Stat. Ann.} § 58-105 (1951). For a discussion of the state protective laws, see generally \textit{J. Baer, The Chains of Protections: The Judicial Response to Women's Labor Legislation} 42-67 (1978); E. Fisch & M. Schwartz, \textit{State Law on the Employment of Women} 9 (1953).

In employment discrimination cases, the influence of the now-repealed state protective laws, and of various other institutional factors, on the number of women in particular occupations, is measured by reference to the employer's applicant pool or to labor force availability data. \textit{See, e.g.}, Hazelwood School Dist. v. United States, 433 U.S. 299 (1977); Davis v. City of Dallas, 777 F.2d 205 (5th Cir. 1985), cert. denied, 106 S. Ct. 1972 (1986);
quired to go underground, to lift more than fifteen or twenty pounds, or to stand on their feet for longer than two hours. And, finally, society's role conditioning, which will have affected women almost from the moment of their birth, may have deterred women from either seeking or accepting certain types of jobs. In contrast, wage decisions are not directly affected by the behavior of institutions like schools, unions, and family—except of course to the extent that their restrictive entry requirements or socializing pressures may have increased or decreased the supply of workers for certain occupations. These decisions are always made by the employer, either through negotiations with the union, or by the establishment of a company wage scale, or by making individual pay decisions at the time of each employee's hire and/or promotion.

Even if the employer has based these pay decisions on the "market," they are still his decisions. If these decisions reward job characteristics differently when performed as part of female-dominated jobs than when performed as part of male-dominated jobs, they constitute disparate treatment based on sex. The reasons that the employer has for making these decisions—e.g., a claimed need to remain competitive—do not alter the fact of disparate treatment, any more than do the reasons behind an employer's decision to exclude women from specific jobs. Whether these reasons justify the disparate pay treatment for female-dominated jobs is a separate issue that is discussed in the next section. What needs to be shown here is the employer's direct involvement in the disparate pay treatment.

Moreover, it is difficult to see how the market can be viewed as a separate institution distinct from the employer. The market is what employers pay; together, they make up the demand side of the market wage formula. If employers have consistently undervalued job characteristics when performed as part of female-dominated jobs, that undervaluation is reflected in the existing market rates. And, indeed, if one employer is large enough, or the exclusive employer of a particular occupation—e.g., cable splicer, telephone operator, archivist—then one employer, and not some remote institutional entity, will have established the market rate for that particular occupation. While Judge Posner argues that "[k]nowledge of a disparity is not the same thing

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237. See infra note 243.

238. See N. TOLLES & R. RAIMON, supra note 209, at 246; Marshall & Paulin, supra note 60, at 205.
as intent to cause or maintain it,” citing Feeney and Davis, there is a substantial difference between basing employment decisions on neutral factors over which the employer has no control—e.g., educational qualifications, height, veteran status, exam performance—even with knowledge that the factor will have a disproportionate impact on a sexual or racial group, and basing employment decisions on a factor that is tainted by the combined impact of employer discriminatory behavior. It was not the market that created a dual wage structure based on sex. It was the employers—although they may have been urged to do so by the unions representing their male employees, and although their ability to maintain the dual structure may have been facilitated by state laws and other institutional practices that restricted women to a limited number of occupations. The market is merely a reflection of this past and continuing discriminatory behavior on the part of employers.

In addition, the notion that it is the market, and not the employer, that sets wage rates suggests that there is a single entry-level rate for each occupation, determined by the automatic

239. American Nurses' Ass'n v. Illinois, 783 F.2d 716, 722 (7th Cir. 1986).
243. Some commentators have suggested that the lower wages paid to female-dominated jobs result not from any undervaluation or disparate application of the employer's criteria for establishing pay, but from the "crowding" of women into a few occupations, which caused a surplus of available workers and resulted in reduced wage rates for female-dominated jobs. See B. Bergmann, supra note 10, at 125-26. But this argument does not explain why women were paid less when employed to do the same work as men or when employed in male-dominated jobs (because the supply factor for the men and women would be the same). Nor does it explain why female-dominated jobs with serious shortages of qualified workers are paid less than male-dominated jobs—albeit more than other comparable female-dominated jobs—that require equivalent levels of skill, effort, and responsibility but that have an abundant supply of available workers. While the repeal of the state protective laws and the prohibition of discrimination in hiring and job assignment may give women an alternative when faced with an unreasonably low wage offer—assuming they can afford the time and money required to qualify for different work—these changes in the law have done very little to change the relative pay status of female-dominated and male-dominated jobs.
244. Several authors have noted that, historically, organized labor did not want women on an equal footing with men. See, e.g., C. Lytle, Job Evaluation Methods 68, app. A at 287 (1946); Benge, Can We Pay Women Same Wage Rates as Men?, reprinted in C. Lytle, supra, app. A at 288, 288-89. It should be noted, however, that much of organized labor, including the AFL-CIO and a number of the major international unions, had supported equal pay legislation since it was first proposed in 1945. See, e.g., 1945 Hearings on S. 1178, supra note 13, at 33-34, 180-82, 184-86; 1963 Hearings on H.R. 3861, supra note 13, at 108-20, 123-36, 178-81.
245. See supra note 236.
forces of supply and demand, which the employer must adopt if he is to remain competitive and in business. The reality of the labor market is quite different. In the first place, there is no single rate for each occupation or job. On the contrary, the entry-level wage rate for a single occupation in the same locality can vary by 200% to 300% or more.\footnote{46} Nor is there any consistency in how different employers rank the various occupations; some value technical skills over verbal skills, and others value verbal skills over technical skills.\footnote{47} In other words, the "market" provides a wide range of rates to choose from. As a result, it does not relieve the employer from having to make individualized pay decisions for his particular work force.

Second, most employers (at least those of any substantial size) do not use the market in establishing the rates for each of their jobs. Instead, they determine the relative ranking of each job based either on a job evaluation study, on collective bargaining, or on unilateral decisionmaking.\footnote{48} After this "internal" wage structure has been set, the employer will then refer to the "external" labor market for the purpose of fixing a floor for the internal wage structure (as in Corning Glass),\footnote{49} or for the purpose of fixing the wages for a number of entry-level positions;\footnote{50} but wages for all other jobs are determined by their relative position in the employer's internal wage structure. An employer may also compare the wages of certain "key" or "benchmark" jobs with the wages paid by other employers in the community for the same or similar jobs to assure the comparability or adequacy of his own wage structure.\footnote{51}

Once the internal ranking of an employer's jobs has been established, whether explicitly or implicitly, and whether through collective bargaining, job evaluation, or management decision, it is likely to remain fixed for a long period of years.\footnote{52} Thus, while

\begin{footnotes}
\footnote{47. NRC Report, supra note 57, at 70, 73; see also D. Treiman, supra note 11.}
\footnote{48. C. Lytle, supra note 244, at 10; N. Tolles & R. Raimon, supra note 209, at 247; Dunlop, supra note 246, at 13-16; Marshall & Paulin, supra note 60, at 205.}
\footnote{49. See supra note 203 (discussing Corning's use of male and female unskilled labor rates in establishing the rates for its evaluated jobs).}
\footnote{50. Marshall & Paulin, supra note 60, at 205.}
\footnote{52. See N. Tolles & R. Raimon, supra note 209, at 240-41; Dunlop, supra note 246, at 17-18.}
\end{footnotes}
wage rates may increase, the relative rankings of the jobs will remain the same, unless the employer conducts a complete new job evaluation study or engages in some major restructuring of his business. This means that an employer usually will not reduce the relative ranking of a specific job simply because there is a temporary surplus of qualified workers in the market. Of course, an employer, to avoid employee turnover, may occasionally have to increase the wage for a particular occupation when there is a shortage of workers, but that wage would be treated as an exception. The main point is that wage structures, once established, are surprisingly rigid.253

Finally, the employer, in determining the wage rates for each occupation, or in fixing a floor and a ceiling for the internal wage structure, will consider a number of factors other than the minimum rate that must be paid to attract or retain employees—what the economists call the "market clearing rate."254 Employers want to maintain the relative wage rankings established by their internal structure.255 They are thus bound in large part by tradition and custom, and will adhere as much as possible to the existing wage structure.256 Employers also typically share a portion of their profits with their employees, either out of some sense of social responsibility or to maintain a stable and productive work force.257 As a result, firms that can afford to pay more usually will, whereas other firms that are in economic distress or in a highly competitive market will generally pay less.258

In other words, it is not generally the external labor market that fixes wage rates for the male- and female-dominated jobs in a particular firm; it is the employer himself. If the employer's wage decisions treat male- and female-dominated jobs differently, the plaintiff who demonstrates this has made out a prima facie case of wage discrimination. It is therefore of fundamental importance in a wage discrimination case to focus on the employer's pay decisions, and not on some other aspect of the employment relationship. Proof of an employer's discriminatory hiring and assignment practices may be some evidence of the employer's tendency to undervalue the worth of women's work, and may help explain how a dual wage structure has been main-

253. Dunlop, supra note 246, at 13, 20; Hartmann, supra note 59, at 179.
254. U.S. COMM'N ON CIVIL RIGHTS, supra note 61, at 23, 25; M. WALLACE & C. FAY, supra note 251, at 25-44; Dunlop, supra note 246, at 9-23.
255. NRC REPORT, supra note 57, at 62.
256. Id. at 56; Marshall & Paulin, supra note 60, at 205.
257. Dunlop, supra note 246, at 19-20.
258. Id. at 19; N. TOLLES & R. RAIMON, supra note 209, at 300.
tained over a number of years. At the same time, it detracts attention from the basis of the Title VII charge, and leads many judges and commentators to suggest that the cure for wage discrimination is for women to take men's jobs.\textsuperscript{259} To the extent that women are in the least productive and least skilled jobs, it is of course true that the only way for them to effect any real change in their economic condition is to do just that. But to the extent that women are paid less for their work than they would

\textsuperscript{259} See American Nurses' Ass'n v. Illinois, 783 F.2d 716, 719 (7th Cir. 1986); U.S. COMM'N ON CIVIL RIGHTS, supra note 61, at 74; MINORITY REPORT OF THE WISCONSIN TASK FORCE ON COMPARABLE WORTH [hereinafter WISCONSIN TASK FORCE MINORITY REPORT] in WISCONSIN TASK FORCE REPORT, supra note 179, at 83, 96; Killingsworth, supra note 83, at 188; Statement of June O'Neill, supra note 85, at 114-15. A classic example of the view that job access is the only equal employment issue for women is the statement of President Reagan's nominee for general counsel of the EEOC, Jeffrey I. Zuckerman, that blacks and women could overcome discrimination by offering to work for lower wages than white males. See EEOC Aide Saw Lower Wages as Way to Beat Discrimination, Wash. Post, Mar. 5, 1986, at A20, col. 1.

The fallacy in the argument that greater job access is the single solution to sex-based wage disparities is its assumption that the only reason for the disparities—once adjustments are made for seniority, years of experience, breaks in service, etc.—is that women are employed in a larger number of less productive jobs. This assumption is refuted by the history of wage discrimination and by the fact that every study of pay disparities within a single firm or governmental unit has concluded that female-dominated jobs were paid less than male-dominated jobs of equal or lesser value. R. STEINBERG, L. HAIGNERE, C. POSSIN, C. CHERTOS & D. TREIMAN, THE NEW YORK STATE COMPARABLE WORTH STUDY EXECUTIVE SUMMARY 7-8 (Center for Women in Gov't, State Univ. of N.Y. at Albany, 1985) [hereinafter R. STEINBERG]; see COMPTROLLER GEN. OF THE U.S., supra note 5, at 36-39; D. TREIMAN, supra note 11, at 27-28; WISCONSIN TASK FORCE REPORT, supra note 179, at 5-9, 53. In other words, it is a combination of factors—unequal job access, the undervaluation of women's work, and the early socialization/family responsibilities that limit women's career choices—that results in women earning less than men.

Wage discrimination can be corrected only by increasing the wage rates for female-dominated jobs, not by moving women out of these jobs. This of course does not mean that job discrimination and wage discrimination are not integrally related. On the contrary, as women's job opportunities increase, they can demand higher wages for traditional female jobs. Moreover, as their wage rates increase, perceptions will change about the ability of women to handle increased responsibility. And as both the wages and job status of women improve, employers will be more receptive to child day care and parental leave practices. Finally, as women's jobs improve both in status and pay, more men will choose these jobs, which in turn will lead to greater occupational integration. This is important because while there has been a fairly significant movement of women into men's jobs as a result of Title VII of the Civil Rights Act, Blumrosen, Expanding the Concept of Affirmative Action to Address Contemporary Conditions, 13 N.Y.U. REV. L. & SOC. CHANGE 297, 298-300 (1984-1985); Jones, The Genesis and Present Status of Affirmative Action in Employment: Economic, Legal, and Political Realities, 70 IOWA L. REV. 901, 914-19 (1985), there has been almost no change in the female composition of women's jobs. So, for example, the percent female in the occupation of "secretaries, stenographers and typists" increased from 96.9\% in 1970 to 98.3\% in 1980; "information clerks," from 80.6\% in 1970 to 85.3\% in 1980; and "financial records processing occupations," from 80.2\% to 88.4\%. BUREAU OF THE CENSUS, U.S. DEPT OF COMMERCE, 1980 CENSUS OF POPULATION, DETAILED OCCUPATION OF THE EXPERIENCED CIVILIAN LABOR FORCE BY SEX FOR THE UNITED STATES AND REGIONS: 1980 AND 1970, at 10 (1984).
be paid if such work were performed primarily by men, the cure is to remove the sex bias from the wage rate. Thus, the main task of a plaintiff's attorney in a Title VII comparable worth case is to expose the employer's discriminatory pay decisions.

A good place to begin is to find out how women were paid when first employed. This means obtaining pay information as far back as possible.\textsuperscript{260} Specifically, when were women first employed? Were they employed in jobs that previously had been performed by men and, if so, what happened to the pay and relative ranking of those jobs once they became women's jobs? Were men and women ever employed in the same or similar work and, if so, were they paid the same or differently? How were the initial pay rates for women established? For example, is there any evidence that male workers demanded a lower wage for women?\textsuperscript{261} Or that the employer considered the lower unskilled community labor rate for women in establishing their pay rates? Or that the employer relied on the willingness of women to work for less than men?\textsuperscript{262} Or that the rates set for the women's jobs were below the lowest rate for any male job and/or below the rate for which men would have been willing to work?\textsuperscript{263}

The easiest type of case will be one where the employer used a job evaluation plan that established the equal or proportionate worth of the male and female jobs, as in \textit{Corning Glass}\textsuperscript{264} and \textit{Westinghouse},\textsuperscript{265} but then set a lower or disproportionately low rate for the female-dominated jobs, either because of the lower unskilled labor rate for women,\textsuperscript{266} or because of an unsubsti-


\textsuperscript{261} \textit{See}, e.g., \textit{Shultz v. Wheaton Glass Co.}, 421 F.2d 259, 262 (3d Cir.), \textit{cert. denied}, 398 U.S. 905 (1970); \textit{supra} note 244.

\textsuperscript{262} \textit{See}, e.g., \textit{Corning Glass}, 417 U.S. 188, where the employer used the lower unskilled female community wage rate in establishing a separate and lower floor for its wage structure for women's jobs. \textit{See also} \textit{JENCKES REPORT}, \textit{supra} note 14, at 34, where the Librarian of Congress referred to the willingness of women to perform the same work as men for substantially less pay.

\textsuperscript{263} \textit{See supra} note 203.

\textsuperscript{264} 417 U.S. 188.

\textsuperscript{265} 631 F.2d 1094.

\textsuperscript{266} \textit{See supra} note 203.
ated assumption that women would be more costly to employ.\textsuperscript{267} In other cases it may be possible to show that the men would not work for the rates paid to the women, or that the entry rates for the lowest skilled male and female jobs bore a direct relationship to the community unskilled labor rates for male and female workers.

Even where there is no information explaining the original basis of the employer's female wage structure, it is still important to establish the historic ranking, by wages, of the employer's jobs, the sex of those jobs and, if possible, a description of each job. This information can be used in several ways. First, it may reveal that, for at least some point in time, women were paid less than men for equal work—either because they were paid less than men when employed in the exact same job, or because the "female" job they performed was "equal"—as that term has since been defined by the courts\textsuperscript{268}—to a separate "male" job, but was paid less. Such data would constitute a prima facie showing that sex had been a factor in the establishment of the employer's wage rates. It could also reasonably be inferred that if the rates of "equal work" jobs were depressed because of sex, so were the rates of all other female-dominated jobs.

This search for equal work information can be very rewarding. If the pay rates for the equal work jobs were never equalized, there would be (1) a present violation of the Equal Pay Act, and (2) prima facie evidence that the wage rates for all female-dominated jobs are likewise depressed because of sex. And even if the pay rates for the equal work jobs have been raised to comply with state or federal law, or with the employer's own equal pay for equal work policy, the plaintiff may find that the rates for the other female-dominated jobs, which did not have any male counterpart jobs, were not similarly increased. This is particularly significant where the plaintiff has demonstrated that the employer had, either explicitly (through a job evaluation instrument) or implicitly (through consistent pay practices), ranked his female-dominated jobs in the order of their value to the employer. If the female-dominated jobs, which historically had been paid the same as or more than the female equal work jobs, are now paid less, the inference is that these jobs are still paid on the basis of a separate wage structure for women, and that if

\textsuperscript{267} See supra note 204.

\textsuperscript{268} The courts have held that the phrase "equal" work, as used in the Equal Pay Act, does not require that the jobs be identical, but only that they must be substantially equal. \textit{E.g.}, Shultz v. Wheaton Glass Co., 421 F.2d 259, 265 (3d Cir.), \textit{cert. denied}, 398 U.S. 905 (1970).
their rates were set without regard to sex, they would once again be paid the same as or more than the equal work jobs. In other words, if the rates for the equal work jobs were increased by ten percent to eliminate the sex bias, the rates for the other female jobs that the employer had previously rated as being of equal or greater value than the equal work jobs—as evidenced by the employer's own wage payments—should also have been raised by ten percent. Similarly, if the wage rates for the equal work jobs were only ten percent more than the wage rates for the less valued jobs, and the adjustment in the equal work jobs increased this differential to twenty percent, it is obvious that a substantial part of the new differential is due to the uncorrected sex bias of the employer's original wage structure, and not to the differences in job content.

This was in effect how the court approached the wage discrimination issue in Taylor v. Charley Brothers Co.269 In that case, most of the male jobs were paid one rate ($4.80 per hour), and all of the female jobs were paid another, lower rate ($3.10 per hour).270 Once the Title VII plaintiff had established that three of the female jobs had “equal work” counterparts among the male jobs, and that the wage rate for the three female jobs was $1.70 per hour less than the wage rate for the three male jobs, there was at least a presumptive showing that all of the other female jobs would likewise have been paid that much more if they too had been performed by men.271

Even if there is no direct evidence of sex bias in the establishment of the employer’s wage structure—i.e., no manuals or other instructions directing the reduction of wage rates for women workers, or the use of a lower base rate in setting the salaries for female-dominated jobs, or the payment of lower wages to women for equal work—the plaintiff in a Title VII case can use standard job evaluation techniques and regression analysis to expose the criteria that determine the pay rates for male-dominated and integrated jobs, and contrast these findings with the dollar values attached to the same criteria in establishing pay rates for the female-dominated jobs.272

270. Id. at 608.
271. Id. at 609-14. This presumption was overcome in part by a study prepared by a job evaluator hired by the employer just prior to trial. Thus, while some of the female jobs would have been paid $4.80 per hour but for sex, other lighter jobs would have been paid $4.32 per hour. Id. at 611-12.
272. This is a policy capturing method of evaluation. See supra text accompanying notes 190-92.
Critics of comparable worth argue that intentional discrimination cannot be established solely on the basis of such statistical data. But these "statistics" are different from those used in a discriminatory hire or promotion case (comparing applicant flow and hire data by sex). Even where there are substantial statistical disparities by sex or race between the number of applicants and the number of hires, it will still be necessary to establish through other proof that the women and/or minorities are equally qualified, or that the employer has expressed a bias toward women and/or minority employees. Similarly, statistical data that disclose substantial disparities between the earnings of male and female employees, even when adjusted for education and experience, does not conclusively establish sex-based wage discrimination, because there may be material differences in the skill and productivity levels of the male and female jobs.

The kinds of statistics contemplated here, however, are not used simply to demonstrate a wage disparity based on sex, but are designed instead to show the court how the employer's pay system rewards the various components of the male-dominated and integrated jobs, and to compare that with how the employer's pay system rewards those same components when performed as part of the female-dominated jobs. In other words, the purpose of the statistical showing, when used in conjunction with standard job evaluation techniques, is not to demonstrate the statistical probabilities of such a wage structure existing by chance, without regard to sex, but rather, through a form of reverse engineering, to expose the employer's current pay system and to demonstrate its disparate application to female-dominated jobs.

While plaintiffs in Title VII cases have used regression analyses to establish intentional disparate treatment, they typically have had their expert witnesses select the factors or variables against which to measure value—what has been referred to earlier as an a priori approach to job evaluation. What is being suggested here is that the expert instead use the regression techniques to determine what the factors and weights are that are

273. The Supreme Court rejected just this argument in Bazemore v. Friday, 106 S. Ct. 3000 (1986), where it said that "[a] plaintiff in a Title VII suit need not prove discrimination with scientific certainty" and that "a regression analysis" may "in a given case" be sufficient to carry the plaintiffs' ultimate burden. Id. at 3009.

274. See supra text accompanying note 190. This was the approach used in the State of Washington study, N. Willis & Assocs., STATE OF WASHINGTON COMPARABLE WORTH STUDY (1974), see COMPTROLLER GEN. OF THE U.S., supra note 5, at 36-37, which was then unsuccessfully relied upon by the plaintiffs in AFSCME v. Washington, 770 F.2d 1401 (9th Cir. 1985).
used by the employer in establishing wage rates for the male-dominated and integrated jobs—i.e., a policy capturing approach. 276 Although it is true that the results under these two approaches may not be too different, the use of a policy capturing model relieves the court of having to decide, on the basis of conflicting expert testimony, which factors would be most appropriate for determining the value of work. This is so because the policy capturing approach exposes for the court those factors that the employer believes are most appropriate. While the defendant’s experts may challenge the reliability and accuracy of the plaintiff’s policy capturing model, disputes over methodology are disputes that the courts have had to resolve in a variety of technical areas. 276 Moreover, the purpose of the testimony is to expose the employer’s value system 277—i.e., reverse engineering—and not to persuade the court to adopt the expert’s value system—i.e., what the opponents of comparable worth refer to as social engineering. 278

There have been a number of Title VII cases in which the plaintiff did not attempt to establish sex bias throughout the employer’s wage structure, but instead based the claim of wage discrimination on a comparison of selected female-dominated jobs with the job content of higher paid male-dominated jobs. 279 The court in such a case is asked to find, on the basis of the testimony of the employees or, in some cases, of a job evaluation expert, that the male and female jobs are “equal in value” and that the employer’s payment of a lower wage rate to the female jobs is based on sex.

Although a court has occasionally found such evidence sufficient for a prima facie case, 280 most courts will not infer discrimination from such limited information, unless the jobs are very

275. See supra text accompanying notes 190-92; see also Comptroller Gen. of the U.S., supra note 5, at 34-36.


277. As Ms. Hartmann noted in her discussion of the 1981 National Research Council study on comparable worth, while “‘worth’ is ultimately a matter of values, . . . once criteria of worth are agreed to [by the employer], the establishment of job-worth hierarchies is amenable to technical solutions.” Hartmann, supra note 59, at 176.

278. Statement of Jeremy Rabkin, supra note 78, at 118.


much alike. There are at least two reasons why a court would be unwilling to base a finding of discrimination on job evaluation evidence alone. First, the fact that two jobs are of equal value does not by itself establish that the employer would have paid the two jobs the same if they had both been male, because wages can be based on factors other than job content and human capital characteristics, including custom, unionization, or simply the randomness of the employer's wage structure. Second, the fact that a job evaluation expert would rate the two jobs as being equal in value does not mean that the employer would have. 281

Accordingly, it will usually be necessary, where there is no direct evidence of bias, to develop a regression analysis of the employer's entire wage structure. The development and presentation of such evidence is undeniably costly. On the other hand, it can be assumed that if the plaintiff does not make this kind of showing, the employer will use selected job evaluation data to rebut the plaintiff's case, assuming that the plaintiff's more limited showing was sufficient to survive a motion to dismiss. At this point the plaintiff will be required to do a complete analysis if she hopes to carry her burden of persuasion. In other words, it is doubtful that this cost can be avoided—whether incurred during the plaintiff's prima facie case or, subsequently, in rebuttal. 282

Finally, because of the claim that wage inequities are due to institutional discrimination and not to any employer discrimination, the plaintiff will want to offer all the evidence possible of

281. These concerns were expressed in Spaulding, 740 F.2d at 700, where the plaintiffs based their wage discrimination claim on a comparison of wages paid to the nursing school faculty (almost all female) with wages paid in two other departments (almost all male). The court noted first that the plaintiffs' "evidence of comparable work, although not necessarily irrelevant in proving discrimination . . ., will not alone be sufficient to establish a prima facie case." Id. (quoting Gunther v. County of Washington, 623 F.2d 1303, 1321 (9th Cir. 1979), aff'd, 452 U.S. 161 (1981)). It also complained that the plaintiffs had "never compared female nursing wages to wages of female faculty in other departments" and that "[w]ithout such a comparison, we have no meaningful way of determining just how much of the proposed wage differential was due to sex and how much due to [academic] discipline." Id. at 704 (emphasis in original). The evidence offered by the plaintiffs in Spaulding is thus very different from the evidentiary showing suggested here, which would include an examination or description of the job content of all—or a sample of all—of the employer's jobs (male-dominated, integrated, and female-dominated), a multiple regression analysis to determine the factors and factor weights that are used by the employer in establishing the wages of the male-dominated and integrated jobs, and a comparison of the application of these same values to the employer's female-dominated jobs.

282. See supra text accompanying note 165.
specific discriminatory pay decisions.\textsuperscript{283} I have already mentioned information about the original structuring of the employer's pay scale. The plaintiff may also be able to obtain information about how wage rates for newly created jobs are established. It is highly likely that the employer will have based these wage rates on internal equity considerations,\textsuperscript{284} with the caveat that if the job is female-dominated, the wage rate will have been based on comparability with the other female-dominated jobs, and that if the job is male-dominated, the wage rate will have been based on comparability with the other male-dominated jobs.

Another instance of this kind of behavior can be found where the employer conducts market surveys for a select number of jobs, called "benchmark" jobs. An example of this was brought out in \textit{AFSCME v. Washington},\textsuperscript{285} where the State testified that it surveys three percent of its jobs every year prior to making any salary recommendations to the legislature. The salary recommendations for the nonsurveyed jobs are tied to the recommendations for the surveyed jobs through a process of indexing, under which the nonsurveyed jobs are all grouped with one of the benchmark jobs. This indexing was designed to maintain the internal wage structure, which means that sex as well as job content determines how the jobs are indexed. For example, the po-

\textsuperscript{283} This task will probably be easiest in a case where the employer does very little hiring from the external labor market (except at entry levels), trains and promotes its employees from within, and has a large number of jobs that have no counterpart in other work places. In such a case the wage decisions are more clearly those of the employer and not of the external labor market. Employers who would appear to meet this description include telephone and communications companies, public employers, electronics firms, insurance and banking companies, and the aerospace industry.

\textsuperscript{284} A plaintiff in a Title VII case may want to use the testimony of a labor economist to explain the importance of the internal labor market, its relationship to the external labor market, and the types of pay decisions that employers can be expected to make in view of the internal labor market. Such testimony was used by the plaintiffs in \textit{AFSCME v. Washington}, 770 F.2d 1401 (9th Cir. 1985).

The importance of the internal labor market, which determines the relative ranking of an employer's jobs, has been recognized by Congress in the Davis-Bacon Act of 1931, 40 U.S.C. §§ 276a to 276a-5 (1982). This Act, among other things, requires government construction contractors to pay at least the wage rates determined by the United States Secretary of Labor to be "prevailing" for each class of laborer and mechanic employed on similar types of construction projects in the locality. \textit{Id.} § 276a. The Department of Labor has promulgated regulations that require contractors who use classes of laborers or mechanics that are not included in the prevailing wage determination to pay wage rates that conform to the specified rates. If the union or employees disagree with the wage rates established by the contractor, the Department of Labor will conduct a conformance hearing at which it will decide the appropriateness of the contractor's suggested wage rates. \textit{See 29 C.F.R. § 5.5(a)(1)(ii)(A)-(C) (1986).}

\textsuperscript{285} 578 F. Supp. 846 (W.D. Wash. 1983), rev'd, 770 F.2d 1401 (9th Cir. 1985).
sitions of campus police assistant and fish warden, which are female jobs, are indexed to the clerical job rather than to the security guard position; the job of game warden, however, which is a male job, is indexed to the security guard position, although the game warden, like the fish warden, is not authorized to carry a weapon. Similarly, the female jobs of drug room clerk, stock clerk, and store clerk are indexed to the clerical position rather than to the male position of warehouse worker.\footnote{Petition of Appellee Class for Rehearing and Suggestion for Rehearing En Banc at 4 n.4, \textit{AFSCME}.}

Of course, in all of these examples, it is likely that the employer will contend that the salaries were set to reflect the external market rates, and were not explicitly designed to undervalue women's work. It is this point that is addressed next.

4. \textit{The market made me do it}— The basic argument against comparable worth is that it interferes with the operation of the market, and that by forcing employers to pay more than the "market" wage, it will (1) leave the employer without any mechanism for determining pay rates, and (2) force the employer into a competitive disadvantage.

The first contention has already been dealt with in the preceding section. As noted there, most employers do not use the market to fix the pay rates for each occupation in their work force; rather, these rates are determined by the employers' own implicit or explicit job rankings. This is not to say that the market is irrelevant. Employers generally refer to the external labor market in establishing the top and bottom of their wage structures, taking into account their position in the market, and the importance they attach to employee stability and work quality. Nor is there anything in Title VII that prohibits an employer from using the market to determine the relative ranking of a male-dominated job versus other male-dominated jobs, or the relative ranking of a female-dominated job versus other female-dominated jobs.\footnote{Typically, of course, employers do not rank all similar occupations the same, because the value of specific job characteristics will vary from employer to employer.} The only restriction is that the employer cannot use the market's lower prevailing wage rate for women as a justification for paying female-dominated jobs less than they would be paid if they were male-dominated or integrated jobs.

This restriction on the use of the female labor market does not require that every employer institute a formal job evaluation system. No one suggests that the employer's pay decisions must be made with the precision of the theorems of Euclid. It is
enough if the wage rates for female-dominated jobs appear consistent with the value judgments implicit in the employer's wage structure for male-dominated and integrated jobs. Only when this is not the case will there generally be any employees willing to undergo the expense of litigation, or will there be evidence that is sufficiently compelling to make out a prima facie case of discrimination.

The market defense is not a new argument that employers have adopted in response to comparable worth claims. The same argument was initially made in the Equal Pay Act cases, although employers are now almost unanimous in their verbal support for the Act. The motivation and legal justification for the market argument were the same then as they are now—that it was possible to fill the jobs at less than the rates being paid to male workers. Thus, employers who after the Equal Pay Act wanted to continue to take advantage of the lower costs for female labor and, at the same time, avoid unequal wage payments to men and women employed in the same work, devised three solutions.

The first was to terminate or transfer the male employees in the equal work job, so that the job was then performed only by women, and to continue the preexisting lower rate for women workers. The second was to open up the female job to men, and the male job to women, and pay them the preexisting rates for those jobs; under this approach, the two equal work jobs were paid differently, but, or so the argument went, not because of sex, because women were paid the male rate when employed in the old male job, and men were paid the female rate when employed in the old female job. A variation on this approach was to give smaller than average wage increases to the now-integrated old male job, so that the differential between the two jobs would diminish over time. A third method, used by employers who did not maintain a fixed wage structure, was simply to pay what the employees demanded, assuming that the employees' demands fell within some acceptable or predetermined range.

288. See Wisconsin Ass'n of Mfrs. & Commerce, Special Report on Comparable Worth #1, at 1 (Jan. 11, 1985); cf. Wisconsin Task Force Minority Report, supra note 259, at 95 (urging vigorous enforcement of the Equal Pay Act as an alternative to comparable worth); Williams, supra note 56, at 161.

289. See Hodgson v. Miller Brewing Co., 457 F.2d 221, 223 (7th Cir. 1972).


291. Corning Glass, 417 U.S. at 208 n.29.

Alternatively, these employers might base wage rates on a percent increase over the employees' prior wage rates.293

While the employment effects of these three practices were different—with the first two removing most men from the equal work jobs (either directly or indirectly through the market mechanism because very few men would continue to work at female wage rates), and the third retaining both men and women in the equal work jobs but paying them disparate wages because the wage demands of applicants and employees would typically reflect the market's dual wage structure for male and female employees—the effects on the employer's wage bill, and on the women's paychecks, were the same; that is, there was no significant increase in wage rates due to the Equal Pay Act.

The courts rejected all three of these approaches on the ground that the purpose of the Equal Pay Act was not simply to eliminate the inequality in wage payments, which could be accomplished by reducing the wages of the men, but to raise the earnings of women workers to where they would have been but for sex, and to thereby increase the economic well-being of women workers.294 Admittedly, the courts' rejection of a practice that transferred men out of the equal work jobs, or paid them the old female rate, was facilitated by explicit language in the Equal Pay Act prohibiting the reduction of any male wages.295 The courts' decisions, however, placed equal emphasis on the Act's purpose to remedy the effects of prior wage discrimination by directing an increase in the wage rates of women.296 The courts also rejected the argument that basing pay on an employee's or applicant's wage demand was a factor other than sex.297 As Justice Marshall wrote in *Corning Glass Works v. Brennan*,298 the wage differentials between men and women inspectors "reflected a job market in which [the employer] could pay women less than men. . . . That the [employer] took advantage of such a situation may be understandable as a matter of economics, but its differential nevertheless became illegal once

293. See *Kouba v. Allstate Ins. Co.*, 691 F.2d 873, 874-75 (9th Cir. 1982) (a Title VII equal work case).


295. Section 3 of the Equal Pay Act included the following proviso: "Provided, that an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee." 29 U.S.C. § 206(d)(1) (1982).


Congress enacted into law the principle of equal pay for equal work. 299

The Supreme Court has thus explicitly rejected the employer's reliance on the market and the market's lower prevailing wage rate for women employees as justifications for paying women less than men for jobs that are equal. Moreover, the employer representative who testified before the United States Commission on Civil Rights conceded the correctness of this ruling with respect to Equal Pay Act cases. 300 The question remains then as to why the market should be a defense to pay differentials existing between male- and female-dominated jobs of equal value, but not for pay differentials existing between men and women employed in the same job.

One possible answer is the one already addressed—namely, that in equal work cases the rates for women workers can be determined by reference to the rates for men workers, but in a comparable worth case, where there is no male rate for the female-dominated job, there is no "market" wage, untainted by sex, that the employer can use to establish a proper wage rate. But there frequently is no "market" rate for a particular job, as for example when an employer creates jobs that are unique to the employer's business. The employer simply fixes the rate for these new jobs on the basis of their relative value to other jobs in the workplace. 301 The same can be done with respect to female-dominated jobs. This was graphically illustrated in the Corning Glass and Westinghouse cases, where the employers had ranked a number of female jobs as being equal in value to a number of male jobs, but had then paid the female jobs less—in Corning Glass, because of the lower prevailing market rate for women workers, and in Westinghouse, because of an unsubstantiated assumption that women were less productive workers than men. 302

Another possible answer is that in an equal work case the only reason for the wage differential between the men and women workers, assuming that their human capital characteristics are the same, is the willingness of women to work for less than men—i.e., the existence of a dual wage structure based on sex. But when the jobs of the men and the women are different, even though of equal value, there may be other explanations for the

299. Id. at 205.
300. See Williams, supra note 56, at 155 & n.65.
301. See supra text accompanying notes 248-53.
302. See supra text accompanying notes 203-04.
difference in pay other than sex or any differences in human capital characteristics or in job content. One such explanation would be where there was a shortage of skilled workers able to do the male-dominated job. Another would be a particular bargaining history under which the incumbents of the male-dominated job had been able to obtain a favorable wage status in relation to other male-dominated jobs, which could not be explained by any difference in job content or by any labor shortage.

Admittedly, the principle of nondiscrimination does not render such wage differentials illegal. Men in other male-dominated jobs are likewise paid less than these particular male employees. But the fact that there may be factors other than sex that account for part of the wage differential between a particular male-dominated job and female-dominated job of comparable value does not automatically immunize that differential from attack under Title VII of the Civil Rights Act. It simply requires plaintiffs to distinguish between those wage differentials that are based on the difference in the prevailing market rates for men and women workers—the sex-based market factor that the Supreme Court condemned in Corning Glass—and those wage differentials that are based on true labor shortages and factors other than sex.

The importance of distinguishing between wage differentials based on differences in the prevailing wage rates for men and women, which differences simply reflect the market’s dual wage structure based on sex, and wage differentials based on a shortage of labor is well illustrated by Christensen v. Iowa. In that case, which was decided before the Supreme Court’s decision in Gunther, the employer had instituted a formal job evaluation system that determined the relative value of each job classification. Pay, however, was determined by community wage surveys, so that the pay rates for the female-dominated jobs, which were all in the clerical department, were significantly less than the pay rates for equally valued male-dominated jobs, which were all in the plant department. In 1974, the employer adopted a new system under which all jobs with the same point total were to be placed in the same labor grade. Each labor grade was divided into sixteen pay steps that reflected a range of about forty percent from the minimum to the maximum pay in a

303. See supra text accompanying notes 65-68, 246-58.
304. 563 F.2d 353 (8th Cir. 1977).
labor grade. Under the terms of the plan, new employees were to begin at step one and subsequent step increases were to be awarded on the basis of seniority. In fact, however, a majority of the employees in the male-dominated jobs were started at steps much higher than were their counterparts in the female-dominated jobs.

Although the employer argued that the reason for the difference in wage treatment was that there was a shortage of labor for the male-dominated jobs, the record established that there was a surplus of experienced labor in the community for the male-dominated job classifications. The real reason for the employer’s having to place employees in the male-dominated jobs at a higher step than equally rated employees in the female-dominated jobs was that the men would not work at the new salary scale, which was based in part on the prevailing wage rates for women. In other words, the male-dominated jobs went unfilled, not because there was a shortage of available male labor, but because men were unwilling to work for wages below those prevailing for men in the community.

The employer in Christensen had thus adopted a variation of the employer’s Equal Pay Act responses similar to the one used in the Corning Glass case. The employer established an “equal” wage for the comparably valued male and female jobs, which was more than it had previously paid to the women, but less than it had previously paid to the men, and, rather than transferring the men as in Miller Brewing Co. or “red circling” them as in Corning Glass, attempted to justify their continuing higher wage rate on the ground that men would not work for less, and that the male-dominated jobs would go unfulfilled unless the court authorized the higher rate.

The court’s error was not in authorizing the higher rate, but in failing to see that the employer had not in fact eliminated the sex-based differential between the equally valued male- and female-dominated jobs when in practice it continued to pay the prevailing “male” wage to the male-dominated jobs, while paying a wage less than the prevailing “male” wage to the female-dominated jobs. To eliminate the disparate treatment, the employer had to raise the wages of the female-dominated jobs to

306. Christensen, 563 F.2d at 354-55.
308. Id. at 18-22.
310. Hodgson v. Miller Brewing Co., 457 F.2d 221, 223 (7th Cir. 1972).
311. 417 U.S. at 208 n.29.
the equivalent male standard. As in *Corning Glass*, if the employer can use the "market" to justify continuing a differential between equally valued male- and female-dominated jobs—where the "market" refers not to any shortage of labor, but simply to the difference in the prevailing wage rates for male- and female-dominated jobs—the intent of Congress to eliminate wage disparities based on sex would be defeated. This is so because the "market," if defined as it was in *Christensen*, would always justify a higher rate for the male-dominated jobs.312

A more rational approach, which would also be consistent with a policy of nondiscrimination, would be to restrict the definition of "market" to wage differentials resulting from true shortages of labor and differences in bargaining history or employer and/or community wage practices that are completely divorced from sex. The use of a policy capturing approach, which exposes the employer's current pay practices with respect to its male employees, permits just such distinctions. It does not mandate a fixed rate for each job of equal value—where the employer has not voluntarily adopted such a system—but instead permits the employer to continue to pay different rates for equally valued male-dominated jobs and for equally valued female-dominated jobs so long as the differences in rates are not based on sex, but on some factor other than sex.

### III. THE OBJECTIVES FOR COMPARABLE WORTH

While I am satisfied that Title VII's prohibition against sex-based wage discrimination would, if properly interpreted, comfortably accommodate a "comparable worth" suit, comparable worth legislation is probably inevitable—in part because of the politics involved, and in part because the lower courts have been so reluctant to use Title VII to remedy pervasive wage discrimination. Indeed, the legislative process has already begun. It is therefore useful to consider what form such legislation should

312. The War Labor Board rejected a similar "market" argument in its intraplant inequality cases. For example, when the defense was raised in the *General Electric Co.* case, the Board dismissed it, stating:

We have previously indicated that the claim of community and industry practice cannot be advanced as a sound reason for doing nothing to correct an injustice which patently exists. Moreover, these companies, as the whole or dominant employer in the community in many instances, may have themselves initiated or supported the practice.

take. What are the clear objectives for such legislation? What issues will have to be addressed, either in the enabling legislation, or in its subsequent administration and enforcement? And how can such legislation be best administered?

Obviously, the overriding objective of any comparable worth legislation is the elimination of wage disparities based on race, color, sex, religion, or national origin. But if this were the sole objective, new legislation would hardly be necessary because that objective is already met by Title VII, at least since Gunther. Other goals, therefore, could include the following: (1) creating a presumption of violation, rebuttable by the employer, where there are wage disparities based on sex, race, color, religion, or national origin that, when equitable job evaluation techniques are used, cannot be explained by the differences in job content; (2) defining and limiting the factors that an employer might raise as a defense, and specifically eliminating the "market defense" to the extent that it is based on lower prevailing wage rates for any racial or sexual group; (3) prohibiting the reduction of wage rates for any employee as a means of eliminating illegal wage differentials; (4) prohibiting the use of any pay practice unrelated to job content or to individual job performance or seniority, such as the use of prior salary or head-of-household status, that would result in disproportionately lower wage rates for any racial or sexual group; (5) directing a government agency to develop equitable job evaluation techniques that could be used by courts or by employers in monitoring their own pay practices; and (6) requiring government contractors to monitor regularly their pay practices, identify any wage disparities based on sex, race, and other impermissible factors, and submit a plan to the government contracting agency or to the Office of Federal Contract Compliance and Procurement for the immediate elimination of these disparities.

All of these objectives—with the possible exception of (5) and (6)—are consistent with a notion of civil liberty that would
restrict government intervention to the prohibition of wage discrimination; they closely parallel several provisions of the Equal Pay Act, and in my view are fully consistent with Title VII and are added only to simplify litigation and to resolve the market defense and reduction of rates issues by legislation. Although it is true that in 1963 Congress refused to extend the "equal pay" requirement to "work of comparable character," on the ground that Congress did not want the government to tell private businesses how to value jobs and how much to pay,\(^{316}\) it is now clear that job evaluation techniques are reliable, and can be used to capture the employer's own implicit value system, without imposing on employers the government's view as to what factors should be considered and how much monetary weight each factor should be given.\(^{317}\)

In addition to these objectives, many legislators at the federal and state levels would add two others, applicable only to the public sector: (7) the mandatory use of job evaluation in establishing pay rates for jobs, and (8) the payment of the same wage rate for all jobs of equal or comparable worth. Both of these objectives constitute a much more significant intrusion into the pay practices of an employer, and would certainly be bitterly opposed if any effort were made to extend such requirements to the private sector. But several of the recent legislative enactments or proposals (applicable only to state or federal employees) have contained one or both of these requirements.\(^{318}\) There can hardly be any objection on interventionist grounds, because


\(^{316}\) During the 1963 debates, Congressman Goodell explained this rejection of the "work of comparable character" language as follows:

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. . . .

. . . [W]e 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.


\(^{317}\) See supra text accompanying notes 190-92.

the legislature is the paymaster for the executive branch, and in that role has always determined the types of pay practices that the executive branch must follow. Indeed, these principles, or some version of them, have been part of the federal civil service law for over 100 years. The more relevant questions concern the extent to which either of these requirements should be extended to other subdivisions of the state, or to the private sector, and whether they are necessary to full eradication of sex-based wage disparities.

IV. The Implementation of Comparable Worth

Two major issues have been raised by the case law and legal and economic commentary concerning the implementation of comparable worth. First, what is the appropriate remedy for sex-based wage discrimination affecting dissimilar jobs? This in turn has raised a number of subsidiary questions: How are nondiscriminatory wage rates determined? Can large numbers of wage rates be determined without direct reference to the market? Can the wage rates for the male-dominated jobs be reduced, and the monies used to increase the wage rates for the female-dominated jobs? The second major issue is whether comparable worth can be implemented without imposing unacceptably high costs in terms of worker displacement, reduced earnings for blue collar families, employer/union autonomy, and economic efficiency.

A. How To Remedy Sex-Based Wage Discrimination

Wage discrimination, as was discussed in Part I of this Article, is a structural problem. In other words, if the employer has used different criteria in establishing the wage rates for male- and female-dominated jobs, that disparate treatment will, presumptively at least, have affected all female-dominated jobs and not just some of them. As a result, any remedy will likewise have to be a structural one. Of course, if the alleged discrimination is based on a claim that the employer is paying lower wages for female-dominated jobs that are equal or similar in job content to a higher paid male-dominated job—as, for example, in Laffey v. Northwest Airlines and Briggs v. City of Madison—or that

319. D. Treiman, supra note 11, at 1, 17.
have been rated as equal by the employer's own job evaluation plan, as in International Union of Electrical, Radio & Machine Workers v. Westinghouse Electric Corp.,\textsuperscript{322} the remedy would simply be to raise the wages of the female-dominated job to the appropriate male-dominated job counterpart.\textsuperscript{323} But if the alleged discrimination is based on the use of different criteria in establishing the wage rates for male- and female-dominated jobs, the remedy should properly include all female-dominated jobs in the unit of analysis.

In those cases in which the employer pays the same wage rate to all male-dominated and integrated jobs at the same point value, the remedy is an easy one: raise the rates of the female-dominated jobs to the rates of the correspondingly valued male-dominated jobs. More typically, however, the employer will not pay the same wage rate to all male-dominated and/or integrated jobs at the same point value. The reason is that job rates are often determined by factors other than job content and human capital, the most common being the scarcity or surplus of particular job skills, differences in respective union strengths, historic bargaining positions, and custom. These same factors will also have influenced the wage rates for the female-dominated jobs at the same point value.\textsuperscript{324} But because sex is an additional factor, the rates of the female-dominated jobs will almost always be below the rates of the correspondingly valued male-dominated and integrated jobs.

In determining an appropriate remedy for such cases, it is helpful to examine a number of possibilities: (1) raise the rates of the female-dominated jobs to the rate of the lowest paid male-dominated or integrated job; (2) raise the rates of the female-dominated jobs to the rate of the highest paid male-dominated or integrated job; (3) raise the rates of the female-dominated jobs to the average or mean rate of the male-dominated and integrated jobs; or (4) raise the rate of each female-dominated job by a fixed percentage, equal to the percent differential between the average rate of the female-dominated jobs and the average rate of the male-dominated and integrated jobs.

The first approach assumes that the sex bias in the employer's wage structure affects each of the female-dominated jobs differently. Thus, if some of the female-dominated jobs are paid at or

\textsuperscript{321} 536 F. Supp. 435 (W.D. Wis. 1982).
\textsuperscript{322} 631 F.2d 1094 (3d Cir. 1980), cert. denied, 452 U.S. 967 (1981).
\textsuperscript{323} See supra text accompanying notes 152-58.
\textsuperscript{324} See supra text accompanying note 201.
near the rate of the lowest paid male-dominated or integrated job, those female-dominated jobs are assumed to be unaffected by any sex bias. This assumption is wholly inconsistent with what we know about the origins of the dual wage structure and its effect on all female-dominated jobs.\textsuperscript{325} Moreover, this first approach would eliminate those wage disparities among the female-dominated jobs that are based on factors other than job content. It would mandate that all female-dominated jobs at the same point value be paid the same, even though the wage disparities that had previously existed among these jobs could not have been based on sex, or on any other illicit factor. Such an approach would thus constitute disparate treatment based on sex, because these other factors would continue to influence the wage rates of the male-dominated and integrated jobs, but not the wage rates of the female-dominated jobs.

Finally, it is difficult to see how this first approach would eliminate the sex bias. The purpose of the remedy is to implement the wage rates that would have been paid to the female-dominated jobs had they been male-dominated. It would seem highly unlikely that all of these jobs, had they been male, would have been paid no more than the rate paid to the lowest paid male-dominated or integrated job. Some jobs would presumably have been paid less; some the same; and others more. If an employer were to adopt this first approach, and, after implementation, draw a salary line for the female-dominated jobs and another salary line for the male-dominated and integrated jobs, the line for the female-dominated jobs would still be substantially below the line for the male-dominated and integrated jobs.

The second approach would have many of the same defects as the first, except that now the employer would be overcompensating for any sex bias. In other words, it would assume that any differential between the rates of the female-dominated jobs and the highest paid male-dominated or integrated job was due to sex, and not to the presence or absence of those factors, unrelated to job content, that have influenced the wage rates of the male-dominated and integrated jobs, and have resulted in disparities in the wage rates for these jobs. Moreover, if one were again to draw two salary lines, one for the male-dominated and integrated jobs, and one for the female-dominated jobs, there would still be a large disparity, only this time the disparity would be in favor of the female-dominated jobs—thus setting up the employer for a reverse discrimination claim.

\textsuperscript{325} See \textit{supra} text accompanying notes 107-23.
The third approach is far superior to the first two. By using an average rate, it more clearly attempts to isolate the sex taint from any of the other factors resulting in varying wage rates for the male-dominated and integrated jobs at the same point value. But this approach, like the other two, would still eliminate any wage differentials between the female-dominated jobs. As a result, a number of the female-dominated jobs would be placed in a better position than they would have been in if they were male-dominated, where the absence of specific factors (e.g., union representation, skill shortages, or custom) would result in that job being paid less than other jobs at the same point value. And, of course, a number of the female-dominated jobs would be placed in a less favorable position than they would have been in if they were male-dominated, where the presence of these same factors would have resulted in their being paid more than other jobs at the same point value.

The fourth approach, which would increase the rate for each female-dominated job by the amount of the percent or dollar difference between the two salary lines, is the one most clearly designed to remedy sex discrimination. This approach eliminates only the sex bias and nothing else; it leaves in place the existing wage differentials between equally rated female-dominated jobs (which differences are due to factors other than sex) and simply superimposes the pay structure for the male-dominated and integrated jobs. There will thus be female-dominated jobs above the line, just as there are male-dominated and integrated jobs above the line; and there will be female-dominated jobs below the line, just as there are male-dominated and integrated jobs below the line. But although the rates for these equally valued jobs remain varied, there are no longer two distinct salary lines based on sex. This approach is similar to the one used under the Equal Pay Act in those cases where the employer has a random rate structure, under which employees who perform equal work are all paid differently, although the female employees are generally paid significantly less than the male employees. In such a case, the employees would be divided into separate groups based on their experience, seniority, and quantity or quality of production, and the average wage would be determined for the male and female employees within each group. The difference between the male and female average would then be added to the wage rate of each female within that particular group, thereby eliminating the sex taint from each of their wage rates.326

326. See supra text accompanying notes 128-31.
B. The Cost of Implementing Comparable Worth

An increasing number of commentators argue that comparable worth is too costly to be implemented and that any benefits that it would obtain for women workers are more than outweighed by the “extraordinary and unwarranted costs” that would result from comparable worth’s “massive intervention in the market economy,” including the loss of employer/union autonomy, economic efficiency, and jobs. This assessment of the unwarranted costs of comparable worth is based on three precepts, all of which I believe to be flawed: (1) the courts, even with modern job evaluation and regression techniques, will be unable to determine with sufficient accuracy the extent to which an employer’s wage structure is biased by sex; (2) the relative benefits to the economic status of women will be minimal; and (3) the disemployment effects of comparable worth will be disproportionately borne by the economically disadvantaged, and will result in the loss of family income for blue collar workers.

This Article has already dealt with the first premise, and has, I believe, established the ability of the legal process to expose disparate treatment based on sex. Moreover, because the typical remedy for comparable worth violations will be a structural wage adjustment affecting all female-dominated jobs, the court or legislature need not displace employer/union judgments concerning the relative ranking of female-dominated jobs vis-à-vis other female-dominated jobs, or the relative ranking of male-dominated and integrated jobs vis-à-vis other male-dominated and integrated jobs, thereby preserving not only employer autonomy but also any wage distinctions between equally valued jobs that reflect differences in their market rates (or some other factor unrelated to job content or to the individual worker’s human capital characteristics) where those differences are not just the result of sex.

Second, while it is certainly true that the correction of discriminatory wage practices will impose additional costs on employers (unlike nondiscriminatory hiring and promotion practices), it is far from clear that the resulting disemployment

effects will be as substantial as the critics of comparable worth have projected, or that the effects will fall disproportionately on women, and/or the disadvantaged.\textsuperscript{328} Some of the increase in wages should be offset by productivity improvements resulting from reduced turnover, lower training costs, etc. Employers might also secure cost reductions in other areas such as health care and workers compensation by implementing, for example, cost-control procedures and early return to work programs. While these costs are not related to comparable worth, they are mentioned to illustrate that job reduction is not the only possible response to increased costs.

Moreover, even if the unrelated cost reductions were to affect employment in other sectors of the economy (e.g., a loss of jobs in the health care industry), a broad redistribution of the costs of comparable worth—through price increases, cost savings, increased productivity, and reduced profits\textsuperscript{329}—would also spread its effects. In addition, most of the disemployment projections assume instant compliance with comparable worth, which, however desirable, will not occur.\textsuperscript{330} Even employers who initiate voluntary corrective action will typically phase in the wage adjustments over a period of years, as was done for public employees in San Jose, Washington, Minnesota, and Wisconsin.\textsuperscript{331}

Significantly, the studies of those systems that have implemented comparable worth do not support the thesis that an increase in the relative wage rates of female-dominated jobs will have substantial disemployment effects. Thus, a 1985 study of Australia's experience following the implementation of comparable worth by the federal and state wage tribunals in the period from 1972 to 1975\textsuperscript{332} found that the actual wages of women


\textsuperscript{329}. See B. BERGMANN, supra note 10, at 173-98.

\textsuperscript{330}. Id.

\textsuperscript{331}. A. COOK, supra note 58, at 140-41, 226; WISCONSIN TASK FORCE REPORT, supra note 179, at 69. Many equal pay settlements, even after the expiration of the Equal Pay Act's statutory grace periods, provided for the gradual equalization of wage rates. For example, in 1977 the Chicago office real estate firms negotiated a collective bargaining agreement with the Service Employees International Union under which the substantial wage differential between male and female maintenance employees was eliminated over a three-year period. Most female employees, particularly if the relationship with their employer is a good one, will consider an immediate, and voluntary phase-in of comparable worth more desirable than having to obtain the same relief, albeit with back pay, only after extended and expensive litigation.

\textsuperscript{332}. Gregory, supra note 328, at S294, S298-99, S300, S304, S306.
workers (and not just their award rates) increased thirty percent more than the actual wages of men workers, and that women workers are now paid substantially more than their market rate.\textsuperscript{333} At the same time, the study reveals that women, during this period, increased their share of the labor market. The study concludes that comparable worth can be implemented without any serious relative employment effects for women, "at least over a period of a decade or so."\textsuperscript{334}

A recent study of the economic effects of the implementation of comparable worth by the city of San Jose, California, found similar results. In San Jose, where the comparable worth adjustments were made in five stages from July 1981 to July 1984, the wages in the jobs that received comparable worth adjustments increased by 73.9% over a six-year period, whereas the wages in all other jobs increased by only 50.4%\textsuperscript{335}. The study also established that the relative wage increments for the female-dominated jobs were the result of the comparable worth adjustments and not of any general increase in the wages for these occupations.\textsuperscript{338} Despite the increased costs resulting from the implementation of comparable worth, employment in the comparable worth jobs increased more than twice as fast as employment in the other city jobs.\textsuperscript{337} Of course, as the authors of both the Australian and San Jose studies note, it is possible that employment would have increased even more significantly if comparable worth had not been implemented.\textsuperscript{338} But these studies should at least cause us to question some of the projected disemployment effects of comparable worth.

Moreover, even if there is some disemployment effect, the question still is whether that effect is warranted or unwarranted by the benefits of comparable worth. In this connection, there is considerable disagreement as to just how much the full implementation of comparable worth will cost.\textsuperscript{339} But even if comparable worth were to reduce the total gap between men's and

\textsuperscript{333}. \textit{Id.} at S294, S299-300, S304.

\textsuperscript{334}. \textit{Id.} at S306. Gregory's earlier studies had reported similar findings. \textit{See}, \textit{e.g.}, Gregory & Duncan, \textit{supra} note 205, at 404; Gregory & Ho, \textit{Equal Pay and Comparable Worth: What Can the U.S. Learn from the Australian Experience?} (unpublished draft, 1984). Gregory and Ho also reported that the United Kingdom, in implementing its various equal pay policies, which were broader than the Equal Pay Act, also experienced a large increase in women's wages with little relative employment loss.

\textsuperscript{335}. S. Kahn, \textit{supra} note 328, at 8-9.

\textsuperscript{336}. \textit{Id.} at 9-10.

\textsuperscript{337}. \textit{Id.} at 10-11.

\textsuperscript{338}. \textit{Id.} at 11-12; Gregory, \textit{supra} note 328, at S306 n.16.

\textsuperscript{339}. \textit{Cf.} B. BERGMANN, \textit{supra} note 10, at 194; G. JOHNSON & G. SOLON, \textit{supra} note 86, at 15; Weiler, \textit{supra} note 68, at 1803.
women's earnings by only a few percentage points, because of the higher concentration of women in the more marginal firms and industries, and because of differences in women's human capital, it is undisputed that in every study of a public sector pay system, all of which made adjustments for differences in job content and human capital, the sex-based wage differential has averaged somewhere between ten and twenty percent.\textsuperscript{340} It is also estimated that this sex taint would be even greater in the private sector. Moreover, in at least the Wisconsin study, the largest percent disparities occur in the lower salary ranges.\textsuperscript{341} Thus, although the more skilled female-dominated jobs may receive larger pay increments in terms of dollar amounts, the comparable worth adjustments for the lower skilled jobs—because they involve a larger percent increase—will have a more significant impact on the economic condition of women in the lower salary levels.

It is difficult to believe that these women would not be substantially better off after the implementation of comparable worth. As one economist noted, if the unemployment rate for women were to increase by ten percent, raising their average length of unemployment from 11.5 weeks to 12.5 weeks, their yearly wage loss would be only two percent, and less if they were eligible for unemployment insurance—which is the loss that must be balanced against a ten to twenty percent wage increase.\textsuperscript{342} This assumes, of course, as the Australian and San Jose studies have already demonstrated, that the number of female-dominated jobs will not be disproportionately affected by the implementation of comparable worth.

Nor does the documentation support the suggestion that minority and/or blue collar families will bear a disproportionate share of the cost of implementing comparable worth.\textsuperscript{343} The assumption seems to be that if the average employer's male-dominated and integrated jobs were grouped by job point value, using

\textsuperscript{340} Comptroller Gen. of the U.S., supra note 5, at 36-39; R. Steinberg, supra note 259, at 7-8; D. Treiman, supra note 11, at 27-28; Wisconsin Task Force Report, supra note 179, at 5-9, 53.

\textsuperscript{341} Department of Employment Relations, State of Wisconsin, Report to the Joint Committee on Employment Relations on a Proposal for Correcting Pay Inequities, attachment 1 (Dec. 4, 1986); see also Wisconsin Task Force Report, supra note 179, at 57-58.

\textsuperscript{342} B. Bergmann, supra note 10, at 191.

\textsuperscript{343} Rabkin, supra note 67, at 192, 194. For a contrary view concerning the importance of comparable worth to minority households, see Equitable Pay Practices Act Hearing, supra note 77, at 5-7 (statement of Eileen Stein, Chairman, National Comm. on Pay Equity), and Scales-Trent, supra note 57.
a policy capturing method, and a salary line drawn, the blue collar jobs would tend to be above the line and therefore have the wage rates that would be most at risk if comparable worth were implemented. Of course, wage rates above the salary line are at risk only if the employer freezes (i.e., red circles) or reduces those wage rates to pay for the costs of comparable worth. It is my view that any such action would be illegal under Title VII.\textsuperscript{344} But even apart from this argument, the Wisconsin study does not confirm that it is the blue collar jobs that are the highest paid. On the contrary, in Wisconsin, the blue collar jobs are often among the lowest paid. For example, the power plant supervisor, a job that was valued at 953 points, is paid less than the public defender investigator 3 and purchasing agent 2, jobs that were also valued at 953 points, and a plasterer is paid less than a real estate manager 1, although both jobs are rated the same.\textsuperscript{345}

The Wisconsin study also identifies a number of male-dominated and integrated jobs that are so substantially above or below the salary line that they should be examined to determine whether their wage rates are based on some other recognized factor, or are the result of the employer having failed to adjust

\textsuperscript{344} Although Title VII has no explicit language prohibiting an employer from reducing its wage rates in order to achieve compliance with the Act's nondiscrimination provisions, unlike the Equal Pay Act, see supra note 295, it does prohibit disparate treatment. An employer who adopts new criteria for establishing wage rates that are less generous than those that were previously used in establishing the wage rates for non-female-dominated jobs, when threatened with a lawsuit, is no different than an employer who simply refuses to extend the same treatment to female-dominated jobs. Courts should not allow employers to escape their obligation to extend the same benefits to female-dominated jobs as to male-dominated jobs by withdrawing those benefits that they had previously provided only to the male-dominated and integrated jobs. Any such response would violate the principal purpose of Title VII's prohibition against wage discrimination—to require that female and minority jobs be paid what they would have been had they been male and white jobs.

This kind of employer response would also create other problems. First, it would result in the difficulties experienced in Christensen v. Iowa, 563 F.2d 353 (8th Cir. 1977), where the employer could not maintain the new reduced wage rates for the male-dominated jobs. See supra notes 304-12. Second, it would place the full cost of Title VII compliance on the shoulders of employees in the male-dominated and integrated jobs, whereas an increase in the wage rates for the female-dominated jobs only would spread the cost of compliance more evenly to include consumers and business owners. Third, it seems deliberately designed to promote employee divisiveness, particularly against those in the female-dominated jobs. Finally, any such response misconceives the nature of the two salary lines. There is no basis for assuming that jobs above the male salary line are overpaid, or that jobs below the line are underpaid. The salary line is only a line of best fit, which, by definition, will have salaries above and below it. See Gray & Scott, A "Statistical" Remedy for Statistically Identified Discrimination, 66 Academe 174, 178 (1980).

\textsuperscript{345} Department of Employment Relations, supra note 341, attachment 4; Wisconsin Task Force Report, supra note 179, at 117.
the wage rates following some change in the content of the job, or reflect some other error. As a result of this process, the State has increased the salaries for a number of blue collar jobs, including cook 1, cook 2, fire control dispatcher, recreation assistant, and utility plant operator. Most of the jobs that were above the line were professional or supervisory in nature, including an administrative officer, civil engineer, electrical engineer, and radiation consultant. There were only a few jobs above the line that might be classified as either blue collar or craft jobs—typographer, printing technician, and superintendent of buildings and grounds. 346

Finally, the Australian and San Jose studies seem to refute the argument made by the critics of comparable worth that its implementation would discourage women from seeking male-dominated jobs. 347 So, for example, in San Jose, during the period when the wage rates for female-dominated jobs were rising relatively faster than the wage rates for male-dominated jobs, the number of women in male-dominated jobs increased by eighty-six percent. 348 Interestingly, men did not increase their representation in the female-dominated jobs, despite the improvement in wage rates. 349 This would suggest, as the authors of the Australian and San Jose studies conclude, that employers will generally select applicants of the sex identified with a particular job, except where this bias has been overcome by the kind of affirmative action program in effect in San Jose for women in traditional male jobs. 350

CONCLUSION

The primary purpose of this Article has been to demonstrate that comparable worth, defined as a wage discrimination claim

346. WISCONSIN TASK FORCE REPORT, supra note 179, at 117.
349. Id. at 15-19.
350. Id.; see also Gregory, supra note 328, at 306. Even if the proportion of men in female-dominated jobs did not increase over the short term, I am still convinced that any long-term integration of the occupations is dependent upon improving the status and wage rates of the female-dominated jobs. All the San Jose study shows is that, if the goal is to integrate the female-dominated jobs, it is not enough to raise the wage rates for these jobs; it will also be necessary to overcome the strong tradition that favors the employment of women in these positions. This tradition can perhaps only be overcome by the adoption of self-conscious hiring policies that are designed to overcome the effects of traditional hiring practices.
based on the employer's implicit or explicit use of different criteria in establishing the wage rates for male- and female-dominated jobs, requires no new legal theory or justification but is simply an application of the disparate treatment model of discrimination. The Article therefore proposes a very traditional approach to comparable worth cases, in which the plaintiff (1) establishes, wherever possible, the employer's historic basis for compensating female employees; (2) uncovers any specific indicators of an early dual wage structure, including equal pay violations before or after 1963, and/or disparities in the rates for unskilled male- and female-dominated jobs, that reflect the disparity prevailing in the community for unskilled female and male labor; and (3) demonstrates, through job evaluation and statistical regression techniques, that the employer uses different criteria (either explicitly or implicitly) in establishing the wage rates for male- and female-dominated jobs. The Article also discusses the critical difference between a market rate defense based on true labor shortages, or differences in the bargaining strengths and objectives of different unions, which, in the author's view, would be legal, and a market rate defense based on the lower prevailing wage structure for female labor, which, under any reasonable application of Corning Glass Works v. Brennan, should be illegal.

The Article then reviews the content and objectives of recently proposed and/or enacted comparable worth legislation, and examines critically what the objectives of such legislation should be. The Article notes that the comparable worth laws enacted by the states for application in the public sector do not define discrimination, nor establish any procedures for determining discrimination, but are rather the legislative enactment of pay systems for the civil service—similar to a private employer's adoption of a pay plan for its employees. For this reason, such laws contain provisions that would be inappropriate in legislation regulating conduct in the private sector. Therefore, the critical question is what kind of legislation would be appropriate for the private sector. First, it is my view that any new legislation should be limited to those objectives that are firmly rooted in a policy of nondiscrimination (except possibly in the area of government contracting), and not in any broader policy of social justice. Second, the most important objective of such legislation, other than the elimination of discrimination, should be to reduce the complexity of wage discrimination litigation,

thereby minimizing both the time and cost of such litigation, and, of equal importance, making enforcement and voluntary compliance realistic expectations.

Finally, the Article has attempted to refute the currently popular view that comparable worth, even were it to remedy some sex-based wage discrimination, cannot survive a cost-benefit analysis. In making this argument, the critics have, I believe, both overstated the costs of comparable worth and understated its benefits. Its benefits cannot be measured solely in terms of how much of the wage gap will be eliminated by its implementation, or in terms of what it will accomplish for women employed in marginal jobs. The importance of comparable worth is threefold: it can eliminate the continuing persistence of a dual wage structure based on sex; it will significantly increase the wages of women employed in the primary labor sector; and, most importantly, the improved economic stature of women's work can have a significant impact on how women are perceived in the workplace, and on what potential employers will infer about their abilities.

Comparable worth is not a flawed policy because it will not substantially affect the economic condition of women employed in the textile and clothing industries, any more than Title VII is a flawed policy because, despite the dramatic benefits it obtained for qualified minorities, it did not improve the economic condition of disadvantaged minorities who had few, if any, marketable job skills. No one law or policy can ever cure the effects of two centuries of racism and sexism. The importance of establishing the principle of comparable worth, like the importance of having achieved the enactment of Title VII, and its implementation, can never be measured simply in terms of numbers. Law is an educator, and the most important effect of establishing that existing practices are discriminatory and unjust is in how it affects future behavior and social morality.

352. See supra note 252. In particular, see Jones, supra note 259.
353. Others do not share this view concerning the importance of Title VII. See, e.g., T. Sowell, Civil Rights: Rhetoric or Reality? 133-34 (1984).