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REMEDIES FOR WAGE DISCRIMINATION

Ruth Gerber Blumrosen*

Eight years ago, issues of wage discrimination were only beginning to reach the lower courts. At that time, I suggested a theory of wage discrimination based on the premise that the same factors that produced a segregated job were likely to produce a discriminatorily depressed wage rate. I noted that there were practical problems of fashioning remedies for discriminatorily depressed wage rates, but suggested that they could be resolved as easily as the courts had remedied other forms of employment discrimination. In light of eight years of court decisions, extensive research studies, and a considerable amount of voluntary revision of wage structures, the importance of examining remedies problems comprehensively is now clear. Courts have shied away from any theory of wage discrimination, largely out of fear of becoming enmeshed in the "dismal science" of wage economics, which seems to have no bounds. They are supported in these concerns both by employers, who emphasize the difficulty of departing from the "market rate" in wage setting, and by some feminist supporters of one version of "comparable worth," which would turn the courts into a wage-setting bureaucracy. Faced with these risks, the courts, despite an arguably "green light" from the Supreme Court, have refused, in the main, to take wage discrimination seriously.


The thesis of this Article is that wage discrimination can be remedied by the federal courts through a process that is both practical and efficient. This can be done, without turning the federal courts into wage control agencies or bankrupting the nation's employers, by treating the problem of wage discrimination in precisely the same manner as other forms of discrimination are treated. Our experience with different types of wage discrimination now permits us to generalize about the types of remedies that are appropriate to correct those typical forms of wage discrimination that have now been fully identified. Part I describes the general pattern of proof of discrimination under Title VII of the Civil Rights Act of 1964 and applies that pattern to wage discrimination. It relates the practice of wage discrimination to the practice of job segregation, which is clearly illegal under Title VII. It notes that the question of the quantum of a plaintiff's injuries in a class action is normally reserved for the second stage of litigation and is not a part of a plaintiff's prima facie case. Some courts, however, when dealing with wage discrimination, have erroneously and unnecessarily insisted on making the quantum of injury a part of that prima facie case. This has been done, I believe, at least in part, because of a concern that the remedy stage of a wage discrimination case will be too complex and uncertain to be manageable. Therefore, the courts have avoided facing the issues by imposing proof requirements that preclude plaintiffs from reaching the remedy stage of the case.

Part II identifies three typical patterns of wage discrimination that have emerged from an analysis of studies and litigated cases during the past six years. It then describes practical remedies appropriate to each such pattern. The three stereotypical situations are: (1) where the employer has identified the differential that is based on race or sex; (2) where wages of significant numbers of minority or female employees are clustered below the wage of white male unskilled labor; and (3) where there is a violation of the Equal Pay Act as to some jobs and a resulting pattern of wage discrimination as to others. These three typical situations encompass most of the wage discrimination cases that are likely to arise under Title VII. Part III deals with the proof of discrimination in wage rates between men's and women's jobs, or between white male and minority jobs, by examination of the practices of a single employer. Part IV analyzes those legitimate factors that may cause pay differentials between individual.

workers, including the employer's need to be able to compete in a labor market where some skills may be in short supply. Part V demonstrates that these situations can be remedied by utilizing clear and easily applied principles that will be manageable by the courts and will not bankrupt employers. I estimate that most wage discrimination cases in these three typical situations can be remedied at a cost of one to four percent of the employer's payroll. This Part also suggests some remedial steps employers or unions may wish to take voluntarily, even though a court might not order such actions.

I. REMEDIES: GENERAL PRINCIPLES

Discrimination in compensation is proscribed by Title VII of the Civil Rights Act of 1964. Under ordinary Title VII standards, plaintiffs can prove discrimination either by demonstrating adverse impact or disparate treatment. Title VII covers all privileges of employment and addresses "opportunities" and "benefits" as well as jobs themselves. Proof that women or minorities were "steered" into segregated jobs at the low end of an employer's pay scale would meet either the disparate impact or disparate treatment standards, and would additionally show job segregation, which is independently proscribed by the statute. Thus, the concentration of women and minorities in low-paying jobs gives rise to either of two permissible inferences: (1) they were affirmatively directed to these low-paying jobs in the first instance, or (2) the decision as to what rates to pay these jobs was itself influenced by the sense that they were "worth less" because they were the jobs that women or minorities were expected to do. The low pay is thus a direct and foreseeable ad-

5. See infra note 154 and accompanying text.

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; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Civil Rights Act § 703(a), id. § 2000e-2(a).
verse effect of the job segregation. It is therefore within the clear, explicit prohibitory language of the statute.

Traditionally, society has paid those considered "inferior" less than those not so considered. This is the paradigm of discrimination. The most extreme example of this phenomenon is paying those considered inferior nothing! Both slavery and the unpaid work of women* are classic examples. In this way, society has used "market forces" to reinforce its sense of which groups in society were "inferior." It was precisely to eliminate all vestiges of such discrimination that Title VII was passed.

Under ordinary Title VII analysis, proof that the employer segregated women and minorities in low-paying positions would be sufficient to establish a prima facie case of discrimination and compel an employer to demonstrate that its organization of workers and its decisions as to pay rates were based on "business necessity" considerations, or at least "justified" on grounds that were "legitimate and nondiscriminatory."¹° The plaintiff

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9. In Anglo-American law, marriage imposed certain duties on a wife, including consortium (thus, a husband could not rape his wife), keeping house, providing meals, and caring for the children. These all were considered—and lawfully could be—unpaid. The husband owned or managed all the property. The wife's only "pay" was what her husband chose to give her. During marriage, a husband could not be forced to support his wife. If he, however, chose to give nothing, she could charge "necessaries" to him—if a merchant would extend her the credit. The merchant could then recover the price of the goods from the husband. This system, combined with prohibitions on divorce, was analogous to the laws forbidding manumission of aged or sick slaves. The object was not to pay for the work of slave or wife so much as to protect the public fisc. See, e.g., Greenspan v. Slate, 12 N.J. 426, 97 A.2d 390 (1953) (discussing English origins of law permitting suit against the husband for necessaries). Recent attempts to require that housework be treated as if it were paid—including attempts to grant social security credits for housewifery, to include the estimated value of women's work in GNP, and to include housewives in labor force statistics—have not been successful. Compare the movement toward equitable distribution on the dissolution of marriage.

10. Griggs v. Duke Power Co., 401 U.S. 424 (1971); see also Texas Dept' of Community Affairs v. Burdine, 450 U.S. 248 (1981); International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). In a series of cases starting with Griggs, the Supreme Court developed the "disparate impact" or adverse effect theory of discrimination, which redefined discrimination in terms of consequence rather than motive, effect rather than purpose. In Griggs, the Court ruled that if an employer cannot show that an employment practice that operates to exclude blacks is related to job performance, the practice is prohibited by Title VII. Dothard v. Rawlinson, 433 U.S. 321 (1977), made it clear that the Griggs analysis applied to sex in the same way it does to race. Although the employer may have defenses that are not applicable to race cases, that fact neither altered the nature of the prima facie case in Dothard nor relieved the employer from demonstrating business necessity.

No showing of discriminatory purpose is required under a disparate impact analysis. Such a showing is "critical," however, for the disparate treatment theory, though such motive can sometimes be inferred from differences in treatment. The same set of facts may give rise to both a disparate treatment and a disparate impact claim. See, e.g., Teamsters, 431 U.S. at 335 n.15. The order and nature of proof in disparate treatment
would then have the opportunity to demonstrate that these reasons were not "legitimate" or "real reasons," but were instead a pretext for discrimination.\textsuperscript{11} In any case involving race or national origin discrimination, the legal analysis of the Title VII action would be complete.\textsuperscript{12}

After determining employer liability, courts turn to questions of remedy. They consider back pay in a second-stage proceeding.\textsuperscript{13} "How much" is a question of remedy, not one of liability. If an employer has failed in its effort either to rebut the inference of discrimination or to justify the wage structure on grounds of business necessity, the plaintiff is entitled to prospective relief in the form of an injunction or some other appropriate order.\textsuperscript{14} At this point, the question of how much the sex or race discrimination has affected the pay for the jobs identified as women's or minorities' is relevant to construct an appropriate order to rectify a system found to disadvantage women and minorities and to assess damages. To the extent that precision in assessing damages is required, therefore, the precise amount the discrimination in the employer's wage-setting system has af-

\textsuperscript{11} \textit{McDonnell Douglas}, 411 U.S. at 804; \textit{see also Burdine}, 450 U.S. 248 (disparate treatment); \textit{Albemarle Paper Co. v. Moody}, 422 U.S. 405 (1975) (disparate impact).


\textsuperscript{14} \textit{Teamsters}, 431 U.S. at 361. The Court stated:

If an employer fails to rebut the inference that arises from the Government's prima facie case, a trial court may then conclude that a violation has occurred and determine the appropriate remedy. Without any further evidence from the Government [or private plaintiffs], a court's finding of a pattern or practice justifies an award of prospective relief. Such relief might take the form of an injunctive order against the continuation of the discriminatory practice . . . or any other order "necessary to ensure the full enjoyment of the rights" protected by Title VII.

\textit{Id.} (footnote omitted).
fected pay for women's and minorities' jobs would normally be a question of remedy. Moreover, courts have repeatedly stated that the precise extent of discrimination need not be established under Title VII when the effects on women and minorities are apparent. With respect to claims that wage discrimination was based on sex, however, many courts have assiduously required plaintiffs to prove, as part of the prima facie case, precisely "how much" sex discrimination affected the employer's wage rates. Requiring the quantum of damages to be proved as part of the liability determination places a much heavier burden on plaintiffs making wage discrimination claims based on sex than is appropriate in other kinds of Title VII cases. This burden has, in many instances, effectively cut off wage claims. Although such apparent hostility to sex-based wage claims may reflect lingering judicial sex bias, it is more likely that the real problems

15. Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364 (5th Cir. 1974); Rowe v. General Motors Corp., 457 F.2d 348 (5th Cir. 1972); United States v. Bethlehem Steel Corp., 446 F.2d 652 (2d Cir. 1971).


17. When Congress reviewed the administration of the sex provisions of Title VII during the process of adopting the Equal Employment Opportunity Act of 1972, 42 U.S.C. §§ 2000e to 2000e-17 (1982), the speeches and reports particularly noted and condemned the initial hostility and suspicion with which both the Equal Employment Opportunity Commission (EEOC) and the lower courts had greeted the sex provisions of Title VII. Both the Senate and House reports underscored the seriousness with which Congress viewed the continuation of wage and job discrimination against women. The Senate report said:

While some have looked at the entire issue of women's rights as a frivolous divertissement, this Committee believes that discrimination against women is no less serious than other prohibited forms of discrimination, and that it is to be accorded the same degree of concern given to any type of similarly unlawful conduct.

S. REP. NO. 415, 92d CONG., 1st Sess. 7 (1971), reprinted in SUBCOMM. ON LABOR OF THE SENATE COMMITTEE ON LABOR AND PUBLIC WELFARE, 92d CONG., 2nd Sess., LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972, at 410, 416 (Comm. Print 1972) [hereinafter EEO HISTORY]. The House report recognized that both the EEOC and the courts had progressively begun to create a body of law disapproving of sex discrimination in employment, but that "discrimination against women continues to be widespread, and is regarded by many as either morally or physiologically justifiable." H.R. REP. NO. 238, 92d CONG., 1st Sess. 5 (1971), reprinted in EEO HISTORY, supra, at 61, 65. The report particularly noted that "women's rights are not judicial divertissements. Discrimination against women is no less serious than other forms of prohibited employment practices and is to be accorded the same degree of social concern given to any type of unlawful discrimination." Id.; see also Wage Discrimination, supra note 1, at 486.

The Supreme Court has likewise rejected interpretations undercutting the reach of the sex provision. See, e.g., City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702 (1978) (citing Griggs, a race discrimination case, in finding sex discrimination in
troubling the courts are the absence of an acceptable and manageable remedy and the fear of becoming involved in a morass of economic theories about wage fixing. These fears are exaggerated and unrealistic. Although sex-based wage discrimination is a serious and complex problem, it is no more intractable than the equally complex problems of revising discriminatory recruiting systems, testing systems, or seniority systems. 18 The courts have learned to handle these matters so effectively that they have literally changed the entire complexion of the work force. 19


19. Blumrosen, The Law Transmission System and the Southern Jurisprudence of Employment Discrimination, 6 INDUS. REL. L.J. 313 (1984) [hereinafter Law Transmission System]. In 1980, 2,461,140 minority workers, or 22.6% of the 10,890,000 minority workers, were in higher paying and higher status jobs than would have been the case if the occupational distribution of minorities were the same as it was in 1965. These workers received nearly nine billion dollars more in wages than they would have had minority workers been distributed throughout the occupational categories in accordance with the pattern present in 1965. There has also been a substantial movement of women into formerly white male jobs. Of the 41,283,000 women in the work force in 1980, at least four million, or 10%, are in higher paying and higher status jobs than would be the case had the 1965 distribution of women workers remained in effect. These workers had a net increase of more than $21 billion over the income they would have received had that
One principle followed in Title VII cases is that once liability has been established, the defendant bears the risk of uncertainty as to the extent of liability.20 Uncertainty as to the amount of damages should not relieve wrongdoers of responsibility. Damages are assessed on the most reasonable basis available, and the wrongdoer should bear the risk of error arising from any uncertainty.21 The Fifth Circuit took this position, which is particularly relevant in an action seeking an increase in future wages, in connection with uncertain back pay claims:

The constant tendency of the court is to find some way in which damages can be awarded where a wrong has been done. Difficulty of ascertainment is no longer confused with right of recovery.

Of course, many equitable considerations will enter into any resolution of entitlement, but onerous and specula-

distribution remained. Id. at 330-40. This influx into traditionally white male jobs by both women and minorities is confirmed by H. HAMMERMAN, A DECADE OF NEW OPPORTUNITY (1984) (Potomac Institute Study) and U.S. COMM'N ON CIVIL RIGHTS, COMPARABLE WORTH: AN ANALYSIS AND RECOMMENDATIONS 14-15 (1985). Despite this substantial change, however, traditional women's and minorities' jobs continue to be occupied predominately by women and minorities. More than 99% of all secretaries and more than 95% of all registered nurses are women, and more than 80% of all elementary school teachers and librarians are women. Id. at 16 (citing the U.S. Statistical Abstract: 1984, table 696). Women and minorities also tend to predominate in the lowest paying food and laundry service, clerical, and health care occupations. Salaries for these have tended to remain in the same relatively low position in the pay hierarchy.

20. The law deals with uncertainty with two competing legal principles. One principle is that where damages are uncertain the court will not order recovery because there is not a sufficient basis to justify a recovery. This is generally the rule applied in contract cases. It is also at the heart of the argument of opponents to pay equity, which is that plaintiffs must establish, to a certainty, the extent to which discrimination has depressed their pay. The countervailing principle is that once liability has been established there should be a remedy. This is the principle most often followed in determining claims of a tortious nature as well as those of a federal right. See Bazemore v. Friday, 106 S. Ct. 3000, 3009 (1986) ("A plaintiff in a Title VII suit need not prove discrimination with scientific certainty; rather, his burden is to prove discrimination by a preponderance of the evidence.") (citing Burdine, 450 U.S. at 252). Bazemore held that the lower court erred in refusing to admit a multiple regression analysis that omitted variables thought to have an effect on salary level. Id. at 3007-11.


[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief. . . . [T]he [district] court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future. (quoting Bell v. Hood, 327 U.S. 678, 684 (1946), and Louisiana v. United States, 380 U.S. 145, 154 (1965)).
tive limitations should not be utilized as a bar to the restoration process. 22

Moreover, not all aspects of wage discrimination involve such uncertainties. When there is evidence—either direct or circumstantial—of "evil motive" discrimination against an individual woman, courts have been willing to find discrimination, to assess damages, and to issue orders to eliminate future discriminatory pay. 23 Difficulties arise when it is not an individual who is underpaid, but, instead, when a whole job classification is underpaid because of the sex or race of the traditional occupants of that classification. Large employers rarely bargain with individuals about what they will be paid. 24 The employer assigns a wage rate to a job classification. All who are assigned to the job category get the same pay. 25 Here, the few men in the female job and the few white men in a "black job" receive the same rate for the job. The discrimination is against the job classification: the pay


23. See, e.g., Fitzgerald v. Sirloin Stockade, Inc., 624 F.2d 945 (10th Cir. 1980) (pre-Gunther case holding that intentionally paying a woman disproportionately less than the man she succeeded was a violation of Title VII). In Fitzgerald, the plaintiff's predecessor continued to do part of his former work on a freelance basis, so the plaintiff's job did not meet the Equal Pay Act standard for equal work. Because the court held that this kind of intentional discrimination was not covered by the Equal Pay Act, it could be tried under Title VII. See also Statos v. Bowden, 728 F.2d 15 (1st Cir. 1984) (office manager and subordinate paid about half of what male department heads received; plaintiffs relied on informal and formal job evaluations, which the Board had refused to follow, and anecdotal evidence of other instances of sex discrimination); Carter v. Duncan-Huggins, Ltd., 727 F.2d 1225 (D.C. Cir. 1984) (female bookmobile driver paid less than male delivery truck driver; evidence of similarity of jobs, history that jobs were sex-segregated, and that even the highest pay level for bookmobile drivers was less than the pay for a truck driver, regardless of how much seniority she accumulated); Taylor v. Charley Bros. Co., 25 Fair Empl. Prac. Cas. (BNA) 602 (W.D. Pa. 1981) (sex-segregated warehouse jobs; history of only considering women job applicants for job in women's department; jobs of similar nature, though not "equal" under equal pay standard; employer had refused to evaluate the jobs).

24. At best, when individual bargaining does occur, it occurs within limits defined by the pay assigned to the job. There may be, at most, some leeway so that an individual may be able to bargain for a higher classification or job title, thus receiving higher pay. This is more likely at professional or managerial levels. Lower level jobs, including almost all jobs traditionally considered to be women's or minorities' jobs, rarely have even this degree of flexibility of compensation. The employer usually has a vacancy in a job with a defined job description and defined pay. The applicant generally must take it or leave it.

25. The situation is, therefore, not covered by the Equal Pay Act, which reaches only those situations in which men and women are working on the same job but are being paid differently.
determinations are still governed by the sex or race of those with whom the job classification is associated. The underpayment is a direct result of the fact that the job classification is, for pay purposes, treated as if it were still segregated. Indeed, often the job rate was set at a time—not long ago—when the employer was deliberately segregating the job.26 The discrimination is systemic27 as well as systematic. Such cases are inherently class actions, and the remedy should realign the pay of the job classification. Everyone working in that classification has been harmed by decisions tainted by race or sex. The remedy should run to the classification in order to eliminate future underpayment of the job based on race or sex.

Discrimination against the job classification is not always easily recognized because it does not involve actions taken against discrete identifiable individuals. Recognition of this form of discrimination requires acceptance of the view that wages are set by large employers as part of a system of employee relations that may be impersonal and free of bias directed against individuals, yet may still discriminate. This view evolved under the interpretations of the 1964 Act and was explicitly approved in committee reports leading up to the 1972 Amendments to Title VII.28

26. See Bazemore v. Friday, 106 S. Ct. 3000, 3006 (1986) (concluding that salary disparities based on race created prior to the enactment of the Civil Rights Act and perpetuated into the post-Act period constitute a violation of Title VII). The Court stated:

A pattern or practice that would have constituted a violation of Title VII, but for the fact that the statute had not yet become effective, became a violation upon Title VII's effective date, and to the extent an employer continued to engage in that act or practice, he is liable under that statute.

Id.

27. For further discussion of how job classification, evaluation, and compensation systems are designed and operate, see infra text accompanying note 59. For the need to develop a "technical perception" of industrial relations systems, see infra note 28.

28. S. REP. No. 415, supra note 17, at 5, reprinted in EEO HISTORY, supra note 17, at 414; H.R. REP. No. 238, supra note 17, at 8-9, reprinted in EEO HISTORY, supra note 17, at 68-69. Both the House and Senate reports contained similar language to explain why the EEOC needed enforcement powers. The House report said:

During the preparation and presentation of Title VII of the Civil Rights Act of 1964, employment discrimination tended to be viewed as a series of isolated and distinguishable events, due, for the most part, to ill-will on the part of some identifiable individual or organization. . . . Employment discrimination, as we know today, is a far more complex and pervasive phenomenon. Experts familiar with the subject generally describe the problem in terms of "systems" and "effects" rather than simply intentional wrongs. The literature on the subject is replete with discussions of the mechanics of seniority and lines of progression, perpetuation of the present effects of earlier discriminatory practices through various institutional devices, and testing and validation requirements. The forms and incidents of discrimination which the Commission is required to treat are increasingly complex. Particularly to the
Thus, the key to wage discrimination against job classifications is that the jobs are segregated, and that the identity of the job as female or minority is preserved by the employer when classifying and grading jobs for pay purposes. The wrong done through segregation of jobs is not only denial of promotion opportunities; it is that each person in the job class is continually subjected to the discriminatorily depressed wage rate.

For many victims of discriminatory assignments, relief from wage discrimination will be the only effective remedy because of the legal or practical unavailability or inadequacy of the promotional remedy. There are at least four reasons why the opening of job opportunities and back pay are not adequate remedies, even where the segregation of the job classification resulted from discriminatory job assignments. First, such remedies depend on the opening of vacancies in higher paying jobs. These vacancies may not be available when needed and, in static or declining industries, may never become available. Second, the number of vacancies will rarely equal the number of claimants, for there are usually fewer places as one moves up the job pyramid. Third, the underlying interests and qualifications of the plaintiffs may have changed during the years of working in segregated jobs. Whatever might have been the case at the time of their initial assignment, the workers may no longer be interested, or perhaps qualified, for those jobs they might have held but for the discriminatory assignment. They have also probably missed out on training opportunities that would have been available had they not been discriminatorily assigned to the segregated job. Fourth, the Supreme Court decision in *International Brotherhood of Teamsters v. United States* sharply restricts the situations in which promotional opportunity remedies can be granted at all.

untrained observer, their discriminatory nature may not appear obvious at first glance. . . .

It is increasingly obvious that the entire area of employment discrimination is one whose resolution requires not only expert assistance, but also the technical perception that a problem exists in the first place, and that the system complained of is unlawful.

*Id.* at 8, reprinted in EEO History at 68 (footnote omitted).

29. *See Wage Discrimination, supra* note 1, at 491.

30. 431 U.S. 324 (1977) (holding that the § 703(h) seniority exception of Title VII, 42 U.S.C. § 2000e-2(h) (1982), protects seniority systems that are not designed or intended to discriminate). Prior to *Teamsters*, most courts of appeals had applied the effects test to seniority systems to hold that departmental seniority systems that locked women or minorities into historically segregated departments were illegal. The remedy allowed women and minorities to use plantwide seniority to claim promotional opportunities in previously all white or male departments. *Teamsters* thus cut off this movement of women and minorities into their "rightful places."
In addition to the direct victims of discriminatory assignment, there may be others who, in theory, might have gone into another occupation, but who in reality had little choice but to take an available job. Although the employer may claim that all jobs are open to everyone, at any particular time the employer may well be hiring women and minorities only into traditionally female or minority jobs. Applicants for these jobs rarely have much bargaining power because they are women and minorities in need of a job. When they accept a position for which the pay was set at a time when the job was segregated, or through methods that take into account the race or sex of those normally doing the job, they suffer the adverse effects of segregation just as surely as those the employer deliberately segregated into that job classification. For others who have invested time and money to become skilled in work highly valued by society, but nevertheless ill-paid, changing jobs is no answer. They do not want a man's job; they just want to be paid fairly for the work they do. The nature of an individual's job influences individual dignity and the status others are willing to accord it because

31. Opponents of pay equity who claim that the low pay for such women's jobs is due to the choices women made to enter those fields, rather than male fields, are simply ignoring the long history of pervasive discrimination and restrictions that have defined and confined women's roles to those expected or thought proper for women. See Wage Discrimination, supra note 1, at 402-08. This history has deeply affected the demand side of the labor market. It tends to shape the way men—it has usually been white men who make the hiring and pay decisions—think about jobs suitable for a woman. The same kind of history of discrimination influences perceptions about minorities. Such "supply siders" are simply playing "blame the victim," see E. BERNE, GAMES PEOPLE PLAY (1964). The Civil Rights Commission report, see supra note 19, is another recent example of this supply-side approach.

32. The harmful effect of occupational segregation on depressed pay was addressed by the Supreme Court in Mississippi University for Women v. Hogan, 458 U.S. 718 (1982). In Hogan, a male sought to gain admission to an all-female nursing school. Justice O'Connor, writing for the Court, cautioned against permitting gender-based classification based on stereotypical notions of the roles of men and women. She highlighted the history of women's exclusion from a wide spectrum of employment opportunities, ranging from admission to the legal profession to tending bar. She then noted that while denying entry to men may have helped maintain a female monopoly in nursing, it served to perpetuate the stereotypical view of nursing as women's work, which, far from serving to benefit women professionally, was thought to have depressed nurses' wages. Id. at 729 & n.15; see also Gerdom v. Continental Airlines, 692 F.2d 602 (9th Cir. 1982) (dismissing the employer's claim that because segregating stewardess jobs benefited women, weight restriction rules that applied only to that classification were not discriminatory), cert. dismissed, 460 U.S. 1074 (1983). Moreover, the contention that wages in many men's occupations are higher because of collective bargaining often is another example of "blaming the victim," see supra note 31. The implication is that if women wanted higher pay and better treatment, they should have organized. This contention ignores the fact that negotiating power in collective bargaining ultimately depends on the power to strike. It is thus ironic that teachers, nurses, and other health care workers—all in predominately female and minority occupations—were among the few workers that, almost
work defines one's role in society. The value of that role is related to the wages that work commands. Discrimination that circumscribes opportunity and defines the status of women and minorities through low pay for the work they do harms both dignitary and economic interests.33

II. THREE POSSIBLE REMEDIES FOR THREE DIFFERENT PATTERNS OF DISCRIMINATORY WAGE SETTING

Although understanding an employer's wage-setting system sufficiently to devise appropriate remedies may be difficult, it is unnecessary to wrestle with abstract macroeconomic labor market theories in the usual case. The search for a remedy should start in the employer's own wage-setting practices. The goal under Title VII is not to make all jobs pay "what they are worth"; it is to eliminate wage discrimination. Because the objective is to remedy discrimination, not necessarily to make the employer's system in general operate fairly, an appropriate remedy need only cure the practices that have been identified as factors depressing pay for women's or minorities' jobs. Thus, the proof of discrimination often points the way to the remedy.34

Hidden in the interstices of compensation systems, there may be many specific practices, mechanisms, and design features that either deliberately or opportunistically result in low wages for jobs held predominately by women and minorities.35 One approach to identifying and remedying the discriminatory practices would be to dissect the employer's wage-setting system to determine the precise ways in which the underpayment is accomplished. This process would subject employers to extensive discovery.36 Such discriminatory practices, however, leave fingerprints: distinctive patterns that can be more easily identified

35. See infra note 77 (discussing some of the discrete practices found in New Jersey that had resulted in underpayment for most women's and minorities' job classifications).
36. Cf. Cowan, Some Policy Bases of Products Liability, 17 STAN. L. REV. 1077 (1965). Professor Cowan suggests that one policy base underlying the move to strict product liability law is found in the desire of large producers to keep plaintiffs' experts out of their plants. This, he suggests, may make implied warranty or strict liability more in their overall interest than are actions based on negligence.
and remedied than if all the discrete decisions of which they are composed had to be examined. This approach has been taken by the Supreme Court in other Title VII cases. 37

Three patterns are now foreseeable consequences of discriminatory wage setting. These are: first, when the employer has established the extent of the injury; second, when women's and minorities' jobs are clustered below the entry-level pay for white unskilled labor; and third, when a violation of the Equal Pay Act has occurred. These three situations encompass most of the typical kinds of wage discrimination likely to be found in large employers. Each can be remedied within parameters derived from the employer's own wage-setting systems.

By concentrating on the end result of discriminatory employment practices, a remedy in wage discrimination cases that only addresses the harm done will simplify the task of a court and eliminate much of the fear of interfering unduly with management decisionmaking and of wage fixing in general. Such narrow remedies adhere to the general policy of judicial restraint followed in other kinds of discrimination cases. 38 The result of such judicial restraint may be to spur employers and unions to develop better systems that will both eliminate discrimination and achieve more equitable compensation. 39


[At the liability stage of a pattern-or-practice trial the focus often will not be on individual hiring decisions, but on a pattern of discriminatory decisionmaking. While a pattern might be demonstrated by examining the discrete decisions of which it is composed, the Government's suits have more commonly involved proof of the expected result of a regularly followed discriminatory policy. In such cases the employer's burden is to provide a nondiscriminatory explanation for the apparently discriminatory result.]

Id. at 360 n.46. Teamsters was an "intentional discrimination" case. The same analysis applies in "disparate impact" cases. See Griggs v. Duke Power Co., 401 U.S. 424 (1971). Where the components of a discriminatory practice include subjective judgments—a factor common in wage discrimination cases—an issue arises as to whether these judgments are properly subject to the disparate impact principle. Compare Atonio v. Wards Cove Packing Co., 810 F.2d 1477 (9th Cir. 1987) (en banc) (holding that disparate impact analysis may be applied to subjective employment practices) with Pouncy v. Prudential Ins. Co., 668 F.2d 795, 801 (5th Cir. 1982) (holding that the disparate impact analysis does not apply to evaluations of employees based on subjective criteria). See Blumrosen, The Legacy of Griggs: Social Progress and Subjective Judgments, CHI.-KENT L. REV. (forthcoming).

38. See, e.g., United States v. Bethlehem Steel Corp., 446 F.2d 652 (2d Cir. 1971) (requiring that blacks be allowed to use plantwide seniority in competing with whites, but leaving the seniority rights of whites vis-à-vis each other on a departmental basis).

39. In cases such as Bethlehem Steel, judges narrowly defined their remedial power. They gave "black only" remedies that resulted in dual-seniority systems, which created considerable tensions. Although such remedies tended to put the injured black workers in their "rightful place," they wreaked havoc in the rest of the system. These "black
In developing remedies in a new area, one source of practical instruction is to examine what is done by employers and unions in developing good industrial relations practices. The experiences in Minnesota and New Jersey illustrate the first two most common situations a court might need to remedy. These states are fairly typical of most large employers, both public and private, in the way they determine what they will pay their employees. Like most large employers, they use job evaluation systems to rank jobs and to group jobs requiring similar degrees of particular qualities together into pay grades. These job evaluation systems constitute the employer's "value system." The employer, in adopting a job evaluation system, indicates precisely for what it is paying. Moreover, in these states, as for most large employers, the distribution of men and women, and of whites and minorities through the occupational levels of the work force tend to be similar; and similar jobs tend to be ranked and paid in similar patterns. The proof of discrimination in the two states, however, is different. Most large employers will be like one or the other.

only remedies are credited for spurring the steel industry employers and the United Steelworkers to develop a system that would correct their discriminatory seniority systems in a way they could live with. The result was the steel industry consent decree (later copied for the aluminum industry), which revamped the industry's seniority system for all covered workers throughout the industry. It altered the departmental seniority system and gave decisive weight to plant seniority for blacks and whites alike. It also opened training opportunities to both white and black workers that would otherwise not have existed for anyone. See United Steelworkers v. Weber, 443 U.S. 193 (1979) (upholding the legality of a race- and sex-specific skilled training program, designed to improve opportunities for women and minorities, which was also open to whites). An account of the effect of narrow court remedies in spurring "voluntary action" in the steel industry is discussed in Law Transmission System, supra note 19, which draws heavily on two papers delivered at the Rutgers University Equal Employment Opportunity Symposium, November 28-29, 1975: B. Fischer, Evaluating the Steel Industry Consent Decree, and G. Moore, Steel Industry Consent Decrees—A Model for the Future? The Moore paper was revised and published as Moore, Steel Industry Consent Decrees—A Model for the Future?, 3 EMPLOYEE REL. L.J. 214 (1977).

40. New Jersey may be atypical only because the state civil service personnel have been more aware than most employers of possible discriminatory pitfalls and had eliminated, before a commission study, many of the more obvious kinds of discrimination from their pay practices. NEW JERSEY COMM'N ON SEX DISCRIMINATION IN THE STATUTES, AN ANALYSIS OF WAGE DISCRIMINATION IN NEW JERSEY STATE SERVICE (1983) [hereinafter N.J. ANALYSIS].
A. When the Employer Has Established the Extent of the Injury

The manifestation of discrimination identified in Minnesota is easier to understand and to cure than that in New Jersey. It is also probably more typical of large employers who have job evaluation and compensation systems than is the New Jersey system. Minnesota—like many other states and private employers—employed a formal job evaluation system, but there was little relationship, for women’s jobs, between the formal job evaluation system and the compensation schedule. Women’s jobs consistently were paid less than men’s jobs with the same number of job evaluation points. The state employer had thus put its own value on positions covered by the classification/compensation system but had not applied the system in the same way to men’s and women’s jobs. The facts are thus similar to those presented to the United States Supreme Court in County of Washington v. Gunther. In Gunther, women jail matrons claimed their pay was depressed because of sex discrimination. They contended that the county had evaluated their jobs, that the county determined they should be paid ninety-five percent as much as the male correctional officers, that after a community wage survey, however, it paid them only about seventy percent as much, and that the failure of the county to pay the full evaluated worth of their jobs was attributable to intentional sex discrimination. The Supreme Court denied that “the pay structure of virtually every employer and the entire economy” would be “subject to scrutiny by the federal courts” if it recognized this as discrimination and approved this kind of proof because, as the Court said, the “respondents’ suit does not require a court to make its own subjective assessment of the value of the male and

41. Many employers rate jobs according to their job evaluation system, but then do not pay accordingly. This was the problem in Minnesota, but not in New Jersey. In New Jersey, the evaluated points determined the pay grade, but the pay patterns were the same as in states where there was a discrepancy between evaluated points and pay. Id. at 4-6.


43. Id. at 13.

44. 452 U.S. 161 (1981). The Court held that a Title VII claim of wage discrimination based on sex will lie even though men’s and women’s jobs are too dissimilar to meet the “equal work” standard of the Equal Pay Act. This case opened the door for Title VII claims of wage discrimination, but also left many questions about the nature and order of the proof and the allocation of the burdens of proof appropriate for wage discrimination claims based on sex.
female guard jobs, or to attempt by statistical technique or other method to quantify the effect of sex discrimination on the wage rates.\textsuperscript{446}

Thus, when an employer like Minnesota has evaluated jobs, then pays men "the full evaluated worth of their jobs" but pays women or minorities less than the full evaluation of theirs, at least when the different treatment can be attributed to sex discrimination,\textsuperscript{46} courts following the approach of the Supreme

\textsuperscript{45} Id. at 180-81 (1981) (citation and footnote omitted).

\textsuperscript{46} One major question not addressed by Gunther goes directly to the definition of "sex discrimination." It is unclear whether there must be proof of intentional discrimination (disparate treatment) or whether a case of disparate impact may also be used to prove sex-based wage discrimination. In Gunther, the plaintiffs only claimed intentional sex discrimination, and most commentators and courts that have addressed the question agree that intentional discrimination can be challenged in a Title VII suit although there is some disagreement on what kinds of proof are appropriate. Cf. American Nurses' Ass'n v. Illinois, 783 F.2d 716 (7th Cir. 1986); Connecticut State Employees Ass'n v. Connecticut, 31 Fair Empl. Prac. Cas. (BNA) 191 (D. Conn. 1983); EEOC v. Hay Assoc's., 545 F. Supp. 1064 (E.D. Pa. 1982). For a discussion of possible prima facie cases, see Wage Discrimination Revisited, supra note 10, at 120-21, 124-28.

Some commentators point to the emphasis in Gunther on the necessity for "the broad approach" to the definition of equal employment opportunity "essential to overcoming and undoing the effect of discrimination," Gunther, 452 U.S. at 178, for sex-based wage discrimination claims as for other claims of discrimination to argue that proof of discrimination should be treated in the same way for all groups, and that claims may be founded either on intentional discrimination (disparate treatment) or on the adverse effects of facially neutral practices (disparate impact). See, e.g., Wage Discrimination Revisited, supra note 10, at 118-20; Comment, Sex-Based Wage Discrimination Under the Title VII Disparate Impact Doctrine, 34 STAN. L. REV. 1083 (1982). Section 703(a)(1) of Title VII, 42 U.S.C. § 2000e-2(a)(1) (1982), is usually considered the source of the disparate treatment theory requiring a showing of discriminatory intent, although some courts have also held that a disparate impact theory will lie in a § 703(a)(1) claim of discrimination "with respect to . . . compensation," id. See Wambheim v. J.C. Penney Co., 705 F.2d 1492 (9th Cir. 1983) (employer's head-of-household rule), cert. denied, 467 U.S. 1255 (1984); Bonilla v. Oakland Scavenger Co., 697 F.2d 1297 (9th Cir. 1982) (finding that preferences in wages, hours, and assignments to members of founding families have an adverse impact on blacks and Hispanics), cert. denied, 467 U.S. 1251 (1984); Kouba v. Allstate Ins. Co., 691 F.2d 873 (9th Cir. 1982) (examining a compensation scheme that used prior salary as a factor in determining commission sales agents' minimum monthly salary). On the other hand, the Third Circuit found that Westinghouse had violated § 703(a)(2) of Title VII, 42 U.S.C. § 2000e-2(a)(2) (1982), by segregating and then intentionally classifying women's jobs to deny women employment opportunity—i.e., better pay. International Union of Elec., Radio & Mach. Workers v. Westinghouse Elec. Corp., 631 F.2d 1094 (3d Cir. 1980), cert. denied, 452 U.S. 967 (1981). See Wage Discrimination, supra note 1, for a discussion of why wage discrimination is a foreseeable consequence of segregation and thus violates both provisions of § 703. Cases in which courts have allowed statistical evidence of the failure of employers to follow their own job evaluations as probative evidence of wage discrimination include Wilkins v. University of Houston, 654 F.2d 388 (5th Cir. 1981) (where 18 of 21 persons paid less than the minimum pay established for their jobs under a pay structure based on a job evaluation were women), vacated, 459 U.S. 809 (1982); and Heagney v. University of Washington, 642 F.2d 1157 (9th Cir. 1981) (holding that it was reversible error to exclude evidence of job evaluation results that the University followed in its compensation to males but not fe-
Court can order the compensation for the women's and minorities' jobs raised so that all jobs evaluated the same will be paid the same.47

Other commentators have read Gunther as restricting wage discrimination in segregated jobs to instances where intent is shown. See, e.g., Cox, Equal Work, Comparable Worth and Disparate Treatment: An Argument for Narrowly Construing County of Washington v. Gunther, 22 Duq. L. Rev. 65 (1983). This is the view the U.S. Civil Rights Commission favors. See U.S. Comm'n on Civil Rights, supra note 19, at 57, 71 (finding no. 14).

While no courts have allowed a claim based solely on a comparison of jobs too dissimilar to meet the Equal Pay Act standard for equal work, some have indicated that such a claim might lie. E.g., Hay Assocs., 545 F. Supp. at 1064 (holding that comparable worth claims, defined as equal salary for work that differs in content but is equally valuable to the work performed by men in another job, are cognizable under Title VII). Several courts have indicated that though such comparisons alone would not state a cause of action under Title VII, they might be relevant evidence of intentional discrimination. See, e.g., Power v. Barry County, Mich., 539 F. Supp. 721 (W.D. Mich. 1982); Gerlack v. Michigan Bell Tel. Co., 501 F. Supp. 1300 (E.D. Mich. 1980). One court has suggested that a showing of comparable worth might be required to raise an inference of discrimination. Briggs v. City of Madison, 536 F. Supp. 435 (W.D. Wis. 1982); see also Plemer v. Parsons-Gilbane, 713 F.2d 1127 (5th Cir. 1983) (holding that only a disparate treatment claim is a cognizable Title VII wage claim, but that statistical evidence is relevant on the question of pretext); Taylor v. Charley Bros. Co., 25 Fair Empl. Frac. Cas. (BNA) 602 (W.D. Pa. 1981) (concluding that plaintiffs' job evaluation expert's testimony on similarity of jobs and disproportionate wage differential is probative evidence of discrimination and that the employer's refusal to conduct a job evaluation is evidence of intent); cf. American Nurses' Ass'n v. Illinois, 606 F. Supp. 1313 (N.D. Ill. 1985) (granting motion to dismiss for failure to show cause of action and holding that the State's failure to pay according to the results of a state-funded job evaluation was not actionable), rev'd on other grounds, 783 F.2d 716 (7th Cir. 1986).

47. Some recent decisions have not followed the Supreme Court's example and have not found violations even when an employer pays women less than its own evaluation of the worth of their jobs. The Seventh and Ninth Circuits have distinguished Gunther despite similarity of factual claims. American Nurses' Ass'n v. Illinois, 783 F.2d 716 (7th Cir. 1986); AFSCME v. Washington, 770 F.2d 1401 (9th Cir. 1985); Spaulding v. University of Wash., 740 F.2d 686 (9th Cir.), cert. denied, 469 U.S. 1036 (1984). In AFSCME, the State of Washington, in 1974, had done the first "comparable worth study." N. Willis & Assocs., State of Washington Comparable Worth Study (1974) [hereinafter Washington Study]. The study showed women's positions were paid, on average, 20% less than the evaluated value. Despite a state surplus, the study was not implemented before litigation was initiated. The district court found intentional discrimination, inter alia, because the State had not taken steps to remedy the underpayment, and also found that the compensation practice of paying the market price had an illegal disparate impact on women. The court of appeals reversed on both grounds, relying on Spaulding. In Spaulding, the court had held that although the University practice of setting pay for faculty departments based on the market price for practitioners of the discipline had a disparate impact on the school of nursing, it was not the kind of employment practice contemplated by Griggs. The court said that employers are "takers" of the market price, not decisionmakers about pay. To reach this decision, the court distinguished salary determinations from fringe benefit determinations, which both the Supreme Court and the Ninth Circuit had held violated the Title VII prohibition against discrimination in compensation, Arizona Governing Comm'n v. Norris, 463 U.S. 1073 (1983); City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702 (1978); Wambheim v. J.C. Penney Co., 705 F.2d 1492 (9th Cir. 1983), cert. denied, 467 U.S. 1255 (1984); Bonilla v. Oakland Scavenger Co., 697 F.2d 1297 (9th Cir. 1982), cert. denied, 467 U.S. 1251 (1984). Spauld-
The Minnesota Task Force on Pay Equity attributed much of the discrepancy between points and pay to reliance on prevailing wage rates that overrode the evaluations. The Task Force identified this practice, which resulted in underpaying women's jobs, as discriminatory. The Minnesota legislature agreed. One remedy for this form of wage discrimination is to raise the women's salaries so that all jobs evaluated alike are paid alike. Such a

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ing relied in part for its conclusion that Griggs was inapplicable to wage discrimination claims on Pouncy v. Prudential Insurance Co., 668 F.2d 795 (5th Cir. 1982), see Spaulding, 740 F.2d at 707. The Ninth Circuit, en banc, rejected the reasoning in Pouncy in Atonio v. Wards Cove Packing Co., 810 F.2d 1477 (9th Cir. 1987), which held that a variety of employment practices that included the subjective judgments of the employer were subject to the disparate impact concept of discrimination. This is crucial in wage discrimination cases because the process of wage setting as practiced in American industry involves, at bottom, a range of subjective judgments concerning the valuation of the job. See Wage Discrimination, supra note 1. Although American Nurses' Association found that the "principal practice ... instanced as intentional sex discrimination [in the complaint]—the employer's failure to implement comparable worth—is lawful," 783 F.2d at 727, the court held that where allegations can be read into the complaint that an employer intentionally depressed wages or classified employees by sex, the complaint should not be dismissed. The court's position that "proof of this causality is essential and is not to be inferred merely from the results of a comparable worth study and from the refusal of the employer to implement the study's recommendations," id. at 730, seems to suggest that evidence of failure to follow a job evaluation would not constitute evidence of an intent to discriminate, nor even of the employer's assessment of the value of male and female jobs. Cf. Gunther, 452 U.S. at 180-81; see also supra text accompanying note 45.


49. Acting as an employer, the legislature ordered the State's pay system to be revamped to ensure that jobs would be valued and paid according to the same criteria, i.e., skill, effort, responsibility, and working conditions. State Employees Pay Equity Act, ch. 634, § 3, 1982 Minn. Laws 1559, 1559 (codified at MINN. STAT. ANN. § 43A.02(14a) (West Supp. 1987)). The internal valuation was to be given priority over market rates in case of a conflict. Comparable worth would be a bargaining issue for personnel engaged in collective bargaining, and the legislature committed itself to provide money as a "set aside" in addition to regular salary increases with a goal of pay equity within five years. Now in its fifth year, the system has been so satisfactory that in 1984 the Minnesota legislature required all political subdivisions to review their pay practices and to correct any inequities. Local Government Pay Equity Act, ch. 651, 1984 Minn. Laws 1896 (codified as amended at MINN. STAT. ANN. §§ 471.991-.999 (West Supp. 1987)). See generally MINNESOTA REPORT, supra note 42; Rothchild, Pay Equity—The Minnesota Experience, 20 U. MICH. J.L. REF. 209 (1986).

50. The Federal Government's General Schedule is an example of a compensation plan in which the evaluation of a job classification determines the pay grade for that classification, i.e., thus determining where the job fits into the salary structure. In the federal classified system, there are now 18 classified grades, 5 U.S.C. § 5332 (1982 & Supp. III 1985), and five political ones. Some blue collar jobs are not included in the general schedule. These are paid the local prevailing wage rate, which has generally meant the union wage rate. New Jersey likewise determines pay range strictly by job evaluation score. See generally DEP'T OF PERSONNEL, STATE OF NEW JERSEY COMPENSATION SCHEDULES (1986) [hereinafter N.J. COMPENSATION SCHEDULES]. In these systems, at least in theory, there is a consistent relationship between job evaluations and pay range.
remedy would be appropriate for a court to order. The employer has already determined what the jobs are "worth." The extent to which sex discrimination depressed the pay for women's jobs has thus already been defined by the employer. The extent of damages is not speculative, and a court can order future payment of the "proper" wages, pursuant to the employer's own evaluation.

It is appropriate to raise the women's wages, not to lower the men's. The employer has determined the "proper" wage for that score by what it pays the male jobs. Even if this is perceived as favoring men, rather than discriminating against women or minorities, the result is that the jobs associated with women or minorities are being treated less favorably than the male jobs. The remedy is to eliminate the less favorable treatment. Thus, future pay should be at the male rate. This is consonant with the remedy mandated in the Equal Pay Act and may be required under Title VII by the Bennett Amendment. At least two courts have

51. The Equal Pay Act states: "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).

In Corning Glass Works v. Brennan, 417 U.S. 188 (1974), the Court explained:
The purpose of this proviso was to ensure that to remedy violations of the Act, "[t]he lower wage rate must be increased to the level of the higher." . . . Comments of individual legislators are all consistent with this view. Representative Dwyer remarked, for example, "The objective of equal pay legislation . . . is not to drag down men workers to the wage levels of women, but to raise women to the levels enjoyed by men in cases where discrimination is still practiced." Representative Griffin also thought it clear that "[t]he only way a violation could be remedied under the bill . . . is for the lower wages to be raised to the higher." Id. at 207 (quoting H.R. REP. No. 309, 88th Cong., 1st Sess. 3 (1963); 109 CONG. REC. 2714 (1963); Hearings on Equal Pay Act Before the Special Subcomm. on Labor of the House Comm. on Education and Labor, 88th Cong., 1st Sess. 65 (1963)) (alterations in original).

The Bennett Amendment states:
It shall not be an unlawful employment practice under this title 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 employer if such differentiation is authorized by the provisions of [the Equal Pay Act].

42 U.S.C. § 2000e-2(h) (1982). The Bennett Amendment became the last sentence in the exception section of Title VII, § 703(h), id. Opponents of pay equity had argued that the Bennett Amendment required that Title VII claims of wage discrimination based on sex be restricted to those that could also be brought under the Equal Pay Act, and thus that claims not arising from equal work were prohibited. This line of argument met with considerable success in the lower courts. See Wage Discrimination, supra note 1, at 469 n.257 (discussing cases that accepted this argument). In Gunther, however, the Supreme Court put this line of reasoning to rest, holding that only the four affirmative defenses of the Equal Pay Act were "authorized" and thus incorporated into Title VII. The Court also noted that the Bennett Amendment was "designed to resolve any potential conflicts between Title VII and the Equal Pay Act." 452 U.S. at 170. The argument would be that the Equal Pay Act specifically forbids lowering pay in order to equalize wage rates while Title VII is silent; therefore, allowing lowering of wages as a remedy under Title VII
held that the requirement that the Equal Pay Act and Title VII be read in pari materia means that the principle of the Equal Pay proviso prohibits lowering compensation where a violation of Title VII has been found. 52 More recently, when the New Jersey legislature mandated that wage discrimination in state service be eliminated, lowering wages was specifically prohibited. 53 Thus, when the employer has established the extent of the injury, the remedy is to link compensation levels to the employer's own estimate of job evaluation levels—to raise the pay of the underpaid classifications so that the same number of evaluation points results in the same amount of pay.

Minnesota, for political reasons, took a somewhat different tack to resolve the same problem—that women's job classes were consistently paid less than the men's jobs evaluated the same. Most of the job classes in Minnesota state service are included in one of the sixteen bargaining units that negotiate wages. 54 This, in part, explained why job classes evaluated the same were paid differently. 55 It did not explain the consistent pattern of lower pay for women's jobs than for men's, "even when the two jobs are at the same point level." 56

would be in conflict with the intention of Congress expressed in the Equal Pay Act, which the Bennett Amendment was designed to prevent.


55. The Minnesota Task Force on Pay Equity found that not only were women's jobs not paid the same as similarly rated men's jobs, but, at any point on the job evaluation scale, not all men's jobs were paid the same. MINNESOTA REPORT, supra note 42. The Task Force attributed some of the justifiable differences to collective bargaining and recruitment problems. Id. at 13. For instance, General Repair Worker (m), rated at 134 Hay job evaluation points, is paid a maximum monthly salary of $1564. This is not only higher than any of the 10 largest female job classes; it is also more than a male job rated 154. Similarly, a male job at 238 points was paid about $100 less a month than another male job rated 206. Id. at 20 (app. I). Despite such differences, the Task Force found that "[f]or the system as a whole, there is a positive correlation between evaluation points and pay—that is, jobs with higher point values generally receive higher pay than jobs with lower point values." Id. at 11.

56. Id. at 11. Of the 10 largest male and female jobs in 1981, no female job paid as well as any male job. The 10 female jobs ranged from Clerk Typist 1, rated at 100 points, with a top monthly salary of $1039, to Licensed Practical Nurse 2, rated 183, paid $1382. The male jobs ranged from General Repair Worker, rated 134, paid $1564, to Engineer Principal, rated 479, paid $2923. More pertinently, the Correctional Counselor 2 male job, rated 188—only 5 Hay points more than the nurse—got $1656, over $250 more per month. Id. at 20 (app. I). For matched pairs: at 117 points the male job's pay was $1382, the female, $1115; at 129, male $1506, female $1202; at 173, male $1693, female $1343; at 199, male $1834, female $1373. Id. Note that not only are the women paid lower, but the pay spread is tighter. Although there is more than $200 difference between the male jobs
Minnesota had, in fact, a dual wage system. The dual nature of the compensation scheme became visually apparent when analyzed using schematic scattergrams and a simple statistical technique that estimates the line of best fit between wages and point scores. This visually defines a pay line for the male and female jobs. The Minnesota Task Force analyzed the compensation schedule in this way, graphically demonstrating that there were, in fact, separate pay lines for male- and female-dominated jobs.

The remedy for discrimination analyzed in this way is to eliminate the dual wage structure. The female line would be raised.

57. Because the Minnesota legislature required payment of "prevailing wages," see supra note 48, and this had been interpreted to require prevailing wage rates to override job evaluations, a dual wage system could have been anticipated. It is, in fact, a well-known phenomenon among compensation specialists. One job evaluation consultant emphasizes to clients that there is a good deal of dispersion in wage rates in the market: that there is a market rate for female-dominated jobs and a second market rate for male-dominated jobs. OREGON TASK FORCE ON STATE COMPENSATION AND CLASSIFICATION EQUITY, FINAL REPORT AND RECOMMENDATIONS TO THE SIXTY THIRD LEGISLATIVE ASSEMBLY 30 (1985) [hereinafter OREGON REPORT]. Thus, the foreseeable consequence of a policy of paying prevailing wages for sex- or race-segregated jobs is an adverse effect on women and minorities, precisely the kind of employment practice explicitly prohibited by the clear language of Civil Rights Act § 703(a)(2), 42 U.S.C. § 2000e-2(a)(2) (1982). It should therefore be considered violative of Title VII, unless the employer can show that the higher wages for the male jobs were necessary because of skill shortages, or, alternatively, the employer utilizes the prevailing male rates as the measure of value for all jobs evaluated alike.

58. MINNESOTA REPORT, supra note 42, at 12. A simple linear regression is the main statistical tool currently used to identify inequities and to describe current pay practices. The "line of best fit," "line of central tendency," or "trend line" estimates the central tendency that underlies the data and is considered the best predictor of wages for any given point score. To illustrate the results graphically, each male and female job is plotted on a chart called a scattergram, according to pay on the vertical axis and evaluation points on the horizontal. The "trend line" is determined and drawn. The existence of not a single line, but of two lines—one organizing the male jobs, the other the female—became clear for the Minnesota data. See id. at 13. A similar situation was uncovered in Oregon, see OREGON REPORT, supra note 57, sec. IV. For example:
to merge into the male line. Both male and female jobs would then be scattered around the single line. Minnesota thus decided that pay equity did not require all jobs to be paid according to a single formula according to points. Defining the problem and the remedy by focusing on the pay trend line allows greater flexibility for the play of such factors as collective bargaining, recruitment problems, or other legitimate reasons for pay discrepancy. The test of whether discrimination has been eliminated is that there no longer is a pattern of consistently lower pay for female jobs. The first remedy discussed, holding the employer to its own evaluation by requiring jobs evaluated alike to be paid alike, will probably be simpler to determine and administer and so may be more desirable for a court. Merging divergent pay lines into a single pay system, however, might be preferable to employers and unions, and would be an appropriate remedy for a court to approve if the parties suggest it.

B. When There Is a Pattern of Women's and Minorities' Jobs Clustered Below the Pay Level for White Unskilled Labor

A second pattern of wage discrimination occurs when the employer has not explicitly established the extent of the injury, but when there is a pattern of women's and minorities' jobs clustered below the pay of entry-level, unskilled white manual labor. In this case, wage discrimination analysis—which indicates that when there is a pattern of segregated female and minority jobs paid less than white male jobs, particularly when most of the segregated jobs are at the low end of the employer's wage schedule, there is reason to infer discriminatory wage practices—is a powerful instrument both for identifying discrimination and determining the remedy. It provides a starting place for the formulation of a remedy rooted in the employer's existing wage structure. The recent study in New Jersey provides a good example of this approach.59

59. See generally N.J. ANALYSIS, supra note 40. The report provided the documentation for a bill requiring the adoption of a comparable worth standard of assessing state jobs, elimination of wage discrimination, and achievement of equitable pay patterns within five years. The legislature accepted the report and the bill became law, following a gubernatorial conditional veto and some negotiated changes. The Governor's Task Force on Equitable Compensation established by the Act is mandated to consider the Commission's analysis and report on its work. Act approved Oct. 17, 1984, ch. 166, 1984 N.J. Sess. Law Serv. 148 (West) (No. 6).
1. The remedy— The starting point for forging remedies in this kind of case is the wage rate that the employer pays for certain other jobs. These are jobs that are not segregated or are occupied by white males. The logical first step is to raise the pay of the women’s and minorities’ jobs to the rate of the lowest paid unskilled entry job held predominately by white males. Because it is the pay grade or range that is realigned, individuals would remain in the same relative positions within the pay range. That is, if a typist had reached step 5 of the pay range when her classification was slotted at pay grade 04, she would remain at step 5 when the pay grade is raised to pay grade 06.

The second phase is to realign all jobs related to those entry-level positions so that the relative relationships between jobs established by the employer are maintained, unless there has been proof that these internal relationships are themselves products of discrimination. For jobs that require previous training and that are not related to any of the unskilled entry-level positions, the entry level for broadly defined skill levels such as technical (to include skilled crafts and paraprofessionals) and professional/managerial might be a preferred measure for female/minority jobs in those general categories.

2. Putting women’s and minorities’ jobs into their rightful place— The second phase of the remedy is designed to put all undervalued female or minority jobs into their rightful place in the employer’s wage structure. It is appropriate because it relies on judgments already made by the employer about the relative

60. Segregated jobs are generally defined as those that are 70% or more male or female, or that are disproportionately minority. See Wage Discrimination, supra note 1, at 460-61. Minnesota defines male jobs as jobs that are more than 80% male, MINN. STAT. ANN. § 43A.02(27a) (West Supp. 1987), in order to account for the greater number of men in state employment and in the labor force generally. MINNESOTA REPORT, supra note 42, at 9. “Balanced,” “integrated,” or “not segregated” job classes would be all others. In Oregon, for example, 69% of the state work force were in male-dominated classes, 9% in female-dominated, and 22% in mixed classes. OREGON REPORT, supra note 57, at 8. No single statistic necessarily identifies the conditions under which prior female or minority job segregation should no longer give rise to an inference of wage discrimination. The test should be whether sufficient numbers of the majority have taken previously segregated jobs so that the jobs have lost their identity as female or minority so the inference of discrimination is no longer justified. Wage Discrimination, supra note 1, at 460. Although studies indicate a direct correlation between the percent female and lower pay, see, e.g., COMMITTEE ON OCCUPATIONAL CLASSIFICATION AND ANALYSIS, NATIONAL RESEARCH COUNCIL, WOMEN, WORK, AND WAGES 28 (1981) [hereinafter NRC REPORT]; Buckley, Pay Differences Between Men and Women in the Same Job, MONTHLY LAB. REV., Nov. 1971, at 36, for the purpose of identifying the lowest pay not tainted by discrimination, either an integrated job or a predominately white male job is a satisfactory standard. Hereinafter, for convenience, both shall be referred to as white male jobs unless further differentiation is needed.
value of those jobs. Typically, the segregated jobs will have a wage structure of their own, distinguishable from that of predominantly white male jobs, but the relationship within that structure may be nondiscriminatory. In developing their wage structures, large employers, both in the public and private sectors, typically utilize classification and grading to group jobs and to relate jobs to each other. Jobs are usually ranked in relation to other positions to reflect the employer's perception of differences in job level and sense of fairness. Because employees tend to judge the fairness of their pay by its relation to pay in other jobs rather than by its absolute dollar value, they also expect pay to reflect perceived differences in job levels. Management thus has interests independent of any legal requirement in encouraging a sense of fairness in compensation to promote a feeling of employee satisfaction.\(^61\) This is encouraged by relating jobs vertically, by classification or grouping of families with common elements.\(^62\) For example, a family, or group of related clerical jobs, forms a career ladder, with spaces between jobs representing differences in job level. Pay and status rise as one goes up the promotion ladder. Jobs may also be related horizontally. One reason for relating jobs horizontally is the desire to group dissimilar jobs into relatively few pay grades. Employers' interests in promoting employee satisfaction is served, and a feeling

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61. J. Hicks, The Theory of Wages 317 (2d ed. 1963). Professor Hicks states:

'The labour market is—by nature, and quite independently of Trade Union organisation—a very special kind of a market, a market which is likely to develop "social" as well as purely economic aspects. . . For the purely economic correspondence between the wage paid to a particular worker and his value to the employer is not a sufficient condition of efficiency; it is also necessary that there should not be strong feelings of injustice about the relative treatment of different employees (since these would diminish the efficiency of the team) . . .

[W]age rates are more uniform, both between workers, and over time, than they would be if the labour market worked like a commodity market.


62. Jobs with similar duties and knowledge base, but which require different levels of knowledge or which have different responsibilities, are grouped into "job families," also called "series" or "lines of progression." For example, mechanic jobs make up one series, while clerical jobs form another. Jobs in a family or a series are ranked in relation to other positions in the series to meet a "felt fairness" test. For example, distinguishing between job levels, even in highly "objective, scientific" evaluation systems, is done primarily intuitively, relying on the ability to perceive differences. Job evaluation systems generally incorporate a scale based on empirical studies that have quantified the amount of difference necessary to detect a difference in levels between similar jobs. The more nearly alike the work of two jobs, the greater is the likelihood that employees in one of the jobs will measure the fairness of their pay by comparison with the other.
of fairness is encouraged, by rationalizing the compensation system—particularly by equalizing pay for jobs requiring similar knowledge and responsibility, but dissimilar duties and tasks. 63

Jobs are also almost inevitably related through the operation of the kinds of job evaluation systems used by most large employers. Although it is theoretically possible to factor, evaluate, and rank every job, this is rarely done. Rather, a full scale inquiry is made for only a relatively few “benchmark” or “key” jobs, and the other jobs are ranked in relation to the benchmark. 64 The benchmark jobs form a structure, and the other jobs are evaluated and slotted into that structure. Pay for other jobs is derived by keying or indexing related jobs to the benchmark job. Thus, in general, rankings and positions vis-à-vis benchmark jobs can be understood to be the employer’s estimate of the relationship to one another that the jobs should occupy.

Problems arise, however, when the benchmark or key jobs are not representative of all job families. 65 This is one way in which dissimilar jobs can be grouped together for a more invidious purpose, such as to obviate unwanted comparisons. 66 Because many

63. Unions, too, have such an interest and often press for such implementation of “equal pay,” even when resisting management proposals for formal job evaluation. The prime function of job evaluation is comparing dissimilar jobs so that jobs that have different content but that are similar with respect to skill, effort, responsibility, and working conditions can be slotted into the same pay grade. Paying like wage rates for jobs of the same grade is what is traditionally meant by equal pay for equal work. See Wage Discrimination, supra note 1, at 428-45 (extensively discussing job evaluation systems). This differs substantially from the legal definition of equal work under the Equal Pay Act, 29 U.S.C. § 206(d)(1) (1982) (defining “equal work” to require jobs that are similar, including similar job content, or jobs that “look alike,” Angelo v. Bacharach Instrument Co., 555 F.2d 1164, 1171-73 (3d Cir. 1977)).

64. Jobs are generally grouped by classification and job family with “benchmark” or “key” jobs representing each grouping. The benchmark jobs are usually selected by the evaluation committee on the basis of agreement among committee members as to ranking and point worth. Benchmark or key jobs must be susceptible of exact and well-understood definitions, and agreement on the existing rate for the job. See Wage Discrimination, supra note 1, at 433, 434 n.143; see also id. at 439-40 (discussing ways a benchmark system can discriminate).

65. The same effect can be achieved by constructing job families of dissimilar jobs that share, as the common element, the race or sex of the usual occupants.

66. Fairness tends to be in the eye of the beholder. Not only are employees more likely to compare their jobs with others that are similar in nature and that are done nearby, but, until recently, dichotomies based on traditional separation of the sexes (and races) were taken for granted, and employees tended to compare their jobs with those done by others of the same sex or race, rather than comparing across sex or race lines. See Newman, The Policy Issues: Presentation III, 1 SIGNS: J. WOMEN IN CULTURE & Soc. 265, 271 (1976). Newman notes that when the International Union of Electric Workers negotiated pay equity increases for undervalued women’s jobs, it was other women who complained about the change. They had been accustomed to the female wage structure and thought those relationships fair; they did not even consider comparing their jobs or
occupational categories are sex- or race-identified and segregated, avoiding direct comparison of relative job worth across occupational categories has been relatively easy. Some of the mechanisms for accomplishing this have included using separate evaluation plans, using different factors, weighting factors differently, or having multiple wage schedules in which jobs are internally related only to key jobs that can be said to fall within the same labor market. Thus, nurses, dieticians, and librarians may be on one schedule, trade and maintenance workers on another, and managers on a third. The “key” job or “benchmark” job system that pegs the evaluation of the key job to the market rate for that job is probably the most common method used. Any his-

pay with the male jobs, so they had not been disturbed about the real undervaluation of some of the female jobs. Id. at 269-71.

67. Except for broad categories such as manager, which require applicants who share a “common body of knowledge,” the “labor markets” recognized in such job evaluation plans rarely refer to a pool of people with similar training or skills from which employers usually recruit, although that is what the term is generally thought to mean. Rather, they tend to include a varied collection of different occupations and skills that are similar primarily in who does the work. Dunlop suggests that in large enterprises job competition is still limited for practical purposes to a certain range of occupations “within production and maintenance, technical and professional, clerical and top management categories” which are “practically isolated from each other.” Dunlop, supra note 61, at 10, reprinted in Daily Lab. Rep. (BNA) at D-1 (citing J. CAIRNES, SOME LEADING PRINCIPLES OF POLITICAL ECONOMY, NEWLY EXPOUNDED 72 (1874) on noncompeting groups); see also Bergmann, The Effect on White Incomes of Discrimination in Employment, 79 J. Pol. Econ. 294 (1971) (Professor Bergmann is the leading exponent of the “crowding theory,” applying the theory of noncompeting groups to modern sex and race segregation.); Wage Discrimination, supra note 1, at 451-54. The usual evaluation plan based on labor markets, however, is restricted even more drastically than those Dunlop recognizes. For instance, female technical and professional, and possibly clerical, will be considered one labor market; male technical and professional another. See supra note 57. If the rates for these job groupings define labor markets for purposes of developing evaluation plans, the circle is complete. The approach taken by the Supreme Court in City of Los Angeles Department of Water & Power v. Manhart, 435 U.S. 702 (1978) (reviewing city’s pension plan scheme that required women employees to make higher mandatory contributions than men), should be followed in determining whether such plans are legitimate under either Title VII or the Equal Pay Act.

Manhart, a Title VII case involving different men’s and women’s jobs, thus, arguably, would not have been covered by the Equal Pay Act. The city, however, relied on the fourth affirmative defense of the Act to claim that rates based on actuarial tables were legal because they were a “factor other than sex.” Id. at 706-07. The Court held that rates based on actuarial tables were not factors other than sex, because “one cannot ‘say that an actuarial distinction based entirely on sex is “based on any other factor other than sex.” Sex is exactly what it is based on.’” Id. at 712-13 (quoting the appellate court’s decision, Manhart v. City of Los Angeles Dep’t of Water & Power, 553 F.2d 581, 588 (1976)) (footnote omitted). The question “How can a factor that is based on sex be a factor other than sex?” should also be asked about labor market demarcations based on sex, and the answer should be the same.
historical or community bias is thus imported into the wage structure.\textsuperscript{68}

It is particularly likely that female and minority jobs will be keyed to a relatively few samples of dissimilar female and minority jobs. Thus, not only will the ranking for "head nurse," a managerial position, probably be keyed to "registered nurse" instead of to other (male) managerial positions, but functionally unrelated female jobs may also be keyed to the same female benchmark. For example, librarian and dietician may be indexed or keyed to "nurse," or all three to "secretary."\textsuperscript{69} If a women's job is keyed to other women's jobs, any undervaluation of the key job will be transmitted to all jobs keyed to it. The consequence is a dual wage structure, such as was found in Minnesota.\textsuperscript{70}

Even where the segregated jobs have their own wage structure, however, that structure often reflects the employer's nondiscriminatory sense of how the jobs within that structure should be related to each other. Within a given group, for example, the relationships between jobs are typically established as a function of a certain number of points. Within this point system, the women's and minorities' jobs group may have been slotted lower on the pay scale than the white men's jobs group, but with similar point spread between each of the women's and minorities' jobs as between the male jobs. Once the nondiscriminatory entry-level rate has been established, rates for the higher rated women's jobs may be calculated by reference to the point spread between each of the women's jobs.

To remedy underpayment, the presumptively nondiscriminatory structure established by the employer for the women's or minorities' jobs remains intact. It is simply realigned with the male wage structure, which was also set by the employer. Thus, by first raising the entry-level pay for unskilled female and minority jobs to the same grade as the lowest paid entry-level unskilled white male job, then realigning all jobs related to those entry-level positions to maintain the relative relationships set by the employer, the basic nondiscriminatory business judgments made by the employer are preserved. The employer's own value system has determined the extent of the undervaluation. The

\textsuperscript{68} See generally Wage Discrimination, supra note 1.


\textsuperscript{70} See supra text accompanying notes 48-58.
employer thus has "quantif[ied] the effect of sex discrimination on the wage rates." 71

3. The New Jersey study—Initially, the New Jersey Commission on Sex Discrimination in the Statutes 72 approached the problem of identifying whether there was discrimination by attempting to compare predominately women's jobs with predominately men's jobs. Relatively few classifications were more than seventy percent female, and the job-for-job comparison was not helpful. The approach was then changed from a "comparable worth" analysis to simply a search for wage discrimination following the theory developed in Wage Discrimination, Job Segregation, and Title VII of the Civil Rights Act of 1964. 73 Examination of the employment data for both women and minorities indicated that minorities—both men and women—had begun to move into some of the positions once occupied solely by white women. Moreover, although there had been some movement of women and minorities into formerly white male bastions, most women and minorities continued to work in stereotypical "women's" and "minorities' " jobs, in relatively few state governmental departments. They were clustered in only a few positions, but those positions were almost entirely female or minority or both. 74 Moreover, women and minorities earned less than

72. In February 1982, the New Jersey State Division on Women of the Department of Community Affairs created a Task Force on Employment, which formed the Subcommittee on Comparable Worth Legislation. The Commission on Sex Discrimination in the Statutes, a bipartisan commission created by law in 1978 and a Task Force participant, performed the study and reported its conclusions in N.J. Analysis, supra note 40. (At the request of the Commission, I assisted in the preparation of the analysis and report.) The legislature accepted the report and, with some modifications requested by the Governor, passed the bill, which referred to the report in adopting a policy that state compensation should reflect the job, not the sex of the people doing the job. It established a Task Force on Equitable Compensation authorized to eliminate wage discrimination and achieve equitable compensation in five years. The work of the Task Force will be done in phases over about eighteen months. The first recommendations issued at six months recommended that the pay for the lowest tier jobs be raised. See Act approved Jan. 8, 1986, ch. 402, 1985 N.J. Sess. Law Serv. 177 (West) (No. 11) (committee statement) (appropriating funds to implement this recommendation); see also infra text accompanying note 100 (discussing the second alternative remedy).
73. Wage Discrimination, supra note 1.
74. In New Jersey, some positions in new technologies tend to be integrated, and some of the positions are beginning to lose their previously sex-segregated character. The Commission found, however, that some positions that had traditionally been predominately white female were being "integrated" only in the sense that minority men and women were now included. Thus, in some of those positions, the percentage of females had declined to about 68%, but the combination of women and minorities totaled over 89%. The Commission determined that the same kind of attitudes identified and downgraded positions associated with either race or sex. See generally N.J. Analysis, supra note 40, at 12.
white men. 75 Indeed, not only were they clustered in few jobs, but those jobs occupied the bottom of the pay scale. 76

As the Commission looked at the work force demographics—particularly at what level women and minorities were working, at what level white men started, and at the qualifications and pay for entry-level jobs—and compared a sample of jobs at various skill and supervisory levels that had similar experience and educational requirements, it became obvious that old patterns persisted. There remained clearly defined women's jobs, minorities' jobs, a few integrated jobs, and finally, white men's jobs. The expected pay patterns likewise persisted. After investigation, the Commission concluded that "discriminatory job patterns perpetuate traditional negative attitudes toward minorities and women and are translated into depressed wages paid to those jobs. This constitutes a wage discrimination which must be ended." 77 While recognizing that access for women and minorities to nontraditional jobs is essential and that affirmative action to end sex-segregated jobs is a necessity, the Commission reported that opening access would not be sufficient: "Even if

75. Id. at 14.
76. Id. at 16-18.
77. Id. at ii (Summary of Findings and Recommendations). The report also identified at least 15 specific practices that led to lower pay for women's and minorities' jobs. Some of the problems identified in New Jersey are the same as those identified in other states. See, e.g., OREGON REPORT, supra note 57, at 7. The New Jersey findings are discussed in Wage Discrimination Revisited, supra note 10, at 130. One of the major problems identified inheres in the job evaluation system chosen. For all practical purposes, the evaluation system used in New Jersey provides no guidelines for distinguishing between relatively unskilled jobs up through the first line supervisory level. Too many skill levels are included, and specification of factors is too vague to inform evaluators how to rate these jobs. Thus, judgments as to these lowest level jobs are almost purely subjective, allowing stereotyped notions free play. This problem is exacerbated by position descriptions for women's jobs that are written in broad, overly vague language, while men's descriptions are clearer, more forceful, more likely to use the language of the evaluation system, and therefore make the men's jobs seem more demanding when, in reality, approximately the same level of skills is required. Some classifications are so broad they contain jobs requiring different levels of skill and responsibility; these are usually women's and minorities' jobs that are often evaluated at the level of the lower skills, while the few broad male classes are often evaluated and paid at the level of the highest skill. Moreover, women's classes are more likely to be large, with many occupants. Men's classes tend to be small. This translates into an inability to distinguish and compensate for differences in women's and minorities' jobs to the same extent that male jobs are distinguished and compensated. Furthermore, it is less costly—and therefore more likely—to give a small number of people raises than it is to raise the pay for job classes with several thousand workers. One fairly simple step some employers can take to integrate their pay systems is to divide some of the overly broad clerical jobs to better distinguish skills and levels, and then slot those requiring higher level skills throughout more of the pay scale. This alone, in some establishments, would break up the pattern of women's jobs being clustered at the bottom of the pay scale. Several other structural problems with the system also tend to downgrade women's jobs, including those at the managerial and professional levels.
more female or minority workers move into occupations previously dominated by males, if white men are not also attracted to traditional women's [and minorities'] jobs, the undervalued traditionally female [and minority] jobs will still be undervalued and still be segregated." The Commission recommended that

the State should strive to create a logical "unisex" pay structure, that is, a rate which within existing social patterns and wage rates attracts both men and women to a job. Only in this way will jobs become desegregated. This is also the best test of whether the pay structure is non-discriminatory.79

a. Developing a unisex wage based on the employer's own standards—Development of a unisex wage is within the capacity of courts and employers. Again, the New Jersey experience is instructive. First, New Jersey, like most other large employers, had already adopted a job evaluation system. That means that the employer had adopted and implemented a value system that determined pay for the State's employees. New Jersey had decided that the criteria of job worth for pay purposes would be "know-how," "problem solving," and "accountability." Second, the State had decided what experience and education a particular job requires. The requirements described in a position (job) description indicate what the position requires at entry level. The New Jersey evaluation system, like most systems, measures

78. N.J. ANALYSIS, supra note 40, at 3.
79. Id.
80. Id. at 5. In 1968, New Jersey adopted—and continues to use—the Hay Guidechart system of job evaluation. Id. New Jersey, however, had decided to use only three factors, though many employers who use the Hay system also add a fourth factor, "working conditions," when evaluating both white and blue collar jobs. Both "know-how" and "problem solving" are measures of skills, experience, and education. Know-how measures how much of these factors are required to do a job, while problem solving measures what percentage of the available know-how is generally used in doing this job. Thus, education and skill levels are crucial elements in computing the relative value of jobs to the employer.

Inclusion of "working conditions" tends to downgrade office work as opposed to most male blue collar jobs. Critics, therefore, generally claim that the usual way of using "working conditions" is discriminatory to women. It was probably for this reason that New Jersey eliminated this factor. The Hay system, like most others using "working conditions," awards no points to typical office work because the office is defined as the standard of good working conditions. The claim of discrimination is not only that most women work in offices, but that the evaluation systems, in defining unpleasant working conditions that deserve additional pay points, have rated office work incorrectly and have not credited many aspects that make office work hazardous to a worker's health. See generally J. STELLMAN & M. HENIFIN, OFFICE WORK CAN BE DANGEROUS TO YOUR HEALTH (1983).
only the job to be performed as described in the job description. It does not measure the skills or other qualifications individual occupants of the position may possess.\textsuperscript{81} The Commission decided that an employer should be held to the standards it says it uses when evaluating women's or minorities' job classifications. It found that New Jersey had not used its standards in the same way for jobs held predominately by women and minorities as for white men's jobs.\textsuperscript{82}

\textit{b. Pay patterns in New Jersey—} The pay patterns in New Jersey are much like those of other large employers. Women's and minorities' positions are clustered at the bottom of the pay schedule, between pay ranges 03 and 07.\textsuperscript{83} Most white male unskilled entry-level jobs start at pay range 09.\textsuperscript{84}

\textit{i. Women and minorities are clustered at the bottom of the pay scale—} Over 6000 women—about ten percent of the state employees—are in the ranges at the bottom of the State's pay scale.\textsuperscript{85} These ranges include not only entry-level positions for traditional women's and minorities' work, but also several advanced levels of clerical positions.\textsuperscript{86} The lowest paid white male unskilled common laboring job with more than fifteen occu-

\begin{itemize}
\item \textsuperscript{81} See generally N.J. ANALYSIS, supra note 40.
\item \textsuperscript{82} Id. at 7-11, 16-24.
\item \textsuperscript{83} Id. at 16. The New Jersey compensation plan is divided into 45 pay ranges, each with eight steps. A formula translated individual job ratings into evaluation and pay ranges. Although technically the compensation schedule begins with pay ranges 01, there are few occupied jobs below pay range 03. The lowest position with more than 15 employees is at pay range 03. Id.
\item The following comparison of the pay and evaluation points for New Jersey state positions is complicated by the fact that New Jersey is unique among the states in maintaining dual workweeks. Office workers (predominately female) generally work 35 hours per week and are paid at one range below their evaluated range. Id. at 5 n.1. Blue collar workers (predominately male, but including many female and minority jobs in institutions) generally work a 40-hour week and are paid one range above their actual evaluated range. Id. The step up or down is justified in order to accommodate two work weeks in one pay schedule. Id. In the following discussion, I have adjusted the figures for time worked, so data on jobs and pay are comparable. Although this system results in many women earning less per week than men in lower rated jobs, there was no evidence that the system was intended to harm women. Moreover, the Commission decided that in the trade-off between more pay and longer hours versus less pay and shorter hours, it is unclear where the advantage lies, and recommended that it be left to the collective bargaining process. Id. On the other hand, if it were proven that the 40-hour week was a pretense to enable higher pay for those jobs, such a system would be discriminatory. For example, if the 40-hour week included paid lunch time, and lunch time was not included in the 35-hour week, both should receive paid lunch time to remedy the discrimination in compensation.
\item \textsuperscript{84} Id. at 18.
\item \textsuperscript{85} Id. at 16.
\item \textsuperscript{86} Id.
\end{itemize}
pants—the position of “helper”—is paid at grade 06,\textsuperscript{87} even though it requires no higher level of education, skill, or effort than the largest female/minority unskilled labor job, “building maintenance worker,” which is paid at range 04.\textsuperscript{88} The Commission realized that only the minority laboring positions were rated less than the clerical jobs. All white male laboring jobs, which require no more education or experience than those minority jobs, are paid higher rates than even advanced women’s jobs. There is thus a consistent pattern of female and minority jobs clustered well below white male jobs requiring no more “know-how,” “problem solving,” or “accountability.” Moreover, the proportion of white men increases dramatically in the better paid levels of the series.\textsuperscript{89}

Range 07 is the largest of the first ten pay ranges. It is overwhelmingly female and minority. There are 4815 employees in range 07: 3072 women (64\%) and 1743 men (36\%). Fewer than 800 of these employees are white men. Most of these white men, approximately 625 of them, work in four job titles that are predominately female or minority. Only one range 07 job is even two-thirds white male.\textsuperscript{90} In range 08 there is one predominately (77\%) white male job, and the position description states that it is an “entry level position and therefore no formal education or experience is required.”\textsuperscript{91}

\textsuperscript{87.} Id.

\textsuperscript{88.} Id. This entry-level building maintenance worker classification is 83.6\% female or minority. One of the reasons the first approach tried by the Commission—comparing only jobs 70\% or more male and female—gave few indications of discriminatory patterns is that this job, which is close to 67\% female, was not included as female. Nor did that approach take account of the fact that this laboring job is definitely minority. It is evaluated slightly lower than the lowest clerical job, which is predominately female. But because it is a 40-hour/week job while the clerical jobs are 35, they are paid the same. Therefore, the pay schedule looked more integrated than when the minority status of this position was taken into account.

\textsuperscript{89.} The next level, senior building maintenance worker (pay range 07), is 30\% white male. Id. at 17. In the supervisory level position “foreman building maintenance,” 70\% of the workers are men, id., although almost 70\% of those supervised are female. This is a fairly common pattern: going up the job ladder, as the pay increases, the number and proportion of white males in female or minority areas also increases. This is particularly marked at the supervisory and managerial levels. Other well-documented examples are that elementary and high school teachers tend to be women (although the number of men increases at the high school level), while most principals tend to be men; librarians in small libraries and at the lower levels of large ones tend to be women, while top librarian jobs are usually held by men; and predominately female work forces in many highly feminized industries such as insurance, banking, and the garment industry are often bossed by men. \textit{See Wage Discrimination, supra} note 1, at 406 n.30.

\textsuperscript{90.} N.J. \textit{Analysis, supra} note 40, at 17. This is the Department of Transportation position “maintenance worker,” which is approximately two-thirds white male. The rest are minority males.

\textsuperscript{91.} Id.
ii. Where most white men start—It is not until pay range 09 that there are a significant number of titles in which white men predominate. In fact, although there are far more women than men paid in this range—most in senior level clerical positions that require independent judgment, organizational skills, and “considerable knowledge of department laws, regulations, policies and procedures”—there are more men’s jobs in this range than women’s. Of twenty-six positions surveyed, thirteen are more than 70% male, while only nine positions are female dominated. The majority of these white male positions require neither experience nor prior training. Those few that call for prior entry qualifications require only six months of common laboring experience, and no additional education. Of the thirteen different job titles, about half are remarkably similar in tasks performed and abilities required. They all involve basic unskilled entry-level janitorial work. Moreover, the Commission noted that some male entry-level positions (at range 07) were evidently being used only for temporary training, while the level 09 position seemed to be the “real” job. The entry-level title requires no education or experience; the next higher level merely requires six months of common labor experience. The Commission suspected that white men were either rapidly promoted into the higher level job or were more likely to be hired directly onto that level than minority men. Unlike most lines of progression, which are pyramidal, there are relatively few workers in the positions in the lower range 07 position. Most workers occupy range 09. Moreover, there is a higher number and proportion of white men at the higher level.

Thus, New Jersey, like most large employers, has several entry-level jobs—such as common laborer—that do not require any previous education, skill, or training and that call for minimal discretion. The employer has committed itself to pay all jobs according to the quantum and level of these criteria the job

92. Id. at 18 (quoting position description). This is also the lowest pay range in which there are any integrated jobs with more than 15 employees. See supra note 83.
93. Id.
94. Id.
95. Id. at 19. The Commission recommended that the State Civil Service Commission (CSC) investigate whether or not the practices of hiring at a higher level or of rapid promotion operate in a discriminatory manner. Note also that the CSC had recently reevaluated two corrections officer positions. Finding them similar, the CSC merged the lower position with the higher, so that all corrections officers are now paid the same. Based on this action by the CSC, the Commission suggested that for these jobs also it might be appropriate to merge the lower, more heavily minority job with the next higher level title. Id. The resulting job title would retain the lower entry requirements, but would be paid at the higher rate. Id.
requires. Therefore, according to the employer's own system and commitment, all these unskilled entry-level positions should occupy the same pay range.

c. Realignment when there are several different white unskilled entry pay levels—The remaining question, then, is which is the most appropriate entry-level pay grade when there are several white male unskilled entry-level jobs at different pay levels. Optimally, the parties might negotiate a beginning wage for all unskilled entry-level jobs. Either the court or the parties could reasonably choose from at least three possible solutions:

i. Alternative 1: The lowest white male job—Under this alternative, both the white male and the female/minority wage structures remain intact except that the entry-level women's and minorities' jobs are shifted up to the pay grade now occupied by the lowest white male job.

In New Jersey, this would mean that the lowest entry-level pay would be in range 06. The building maintenance, food service, and laundry workers—who are primarily women or minorities, and are usually both—and the entry-level clericals—predominantly women and including many minorities—would rise from pay level 04 to pay level 06. Other jobs related to these entry-level positions would likewise be adjusted to maintain the previous relationships within the job families or job ladders. In this example, "senior clerks" paid at range 07—three ranges higher than the beginning entry-level clerical jobs—would remain three ranges higher and be paid at range 09. The "principal clerk" and the "head clerk" positions would be raised to pay ranges 14 and 16, respectively. This would put the principal clerk within one evaluation range of other (male) supervisory positions that also require two years' experience and involve similar duties.

Although this proposal might not satisfy all advocates of pay reform, it is a defensible solution based on the standards and relationships determined by the employer. It is thus a minimal remedy, which occasions relatively slight interference with managerial decisionmaking, while, nevertheless, providing a remedy for the worst of the pay discrimination. The very minimal nature of such an order might spur employers and unions to

96. This position, which involves actually performing the tasks as well as supervising, and which requires two years of experience, is now paid at range 12.
97. This position requires three years of experience—one as supervisor—and is now paid at range 14.
98. N.J. ANALYSIS, supra note 40, at 21-22.
99. Like the "black only" remedies in the steel industry, see supra note 39.
go further in revising the pay system. They might, for instance, voluntarily undertake a reevaluation and revision of job descriptions and of the classification, evaluation, or compensation systems. This might be a real possibility if the court order created tensions between women and minorities who receive pay raises, and men who do not. The men may press for such revisions to correct possible perceived inequities in their jobs or pay.

ii. Alternative 2: The highest white male unskilled laboring jobs—Because the employer has adopted standards for evaluating jobs and has indicated that the several white male entry-level positions require similar qualifications and have similar tasks, but pays them differently, it might be politic to choose the highest of the white male laboring jobs without prior qualifications as the beginning rate. Thus, all job classes below would be merged into this highest unskilled laboring pay grade. In the New Jersey example, for instance, all the bottom jobs, including any white male jobs paid at a lower grade, would move up to range 09. Again, obviously, if women’s or minorities’ jobs require higher qualifications but are paid less than the new entry level, appropriate proportionate adjustments should be made: the other jobs related to those entry jobs should also be adjusted to maintain the employer’s female or minority wage structure. This is a remedy a court would be less likely to choose than might the parties through negotiation or collective bargaining. It is similar to the first step proposed by Senator Lipman of New Jersey, opposing the initial step recommended by the Governor’s Task Force on Equitable Compensation.100

Senator Lipman recommended that all bottom jobs be raised to the poverty level, which in New Jersey is approximately $12,500 for a family of four. This would put the starting salary for New Jersey jobs at the equivalent of the present 08 pay level. Senator Lipman’s proposal was grounded in the proposition that no one in New Jersey state service should be paid less than poverty level for working. Other employers might well believe that better employee morale and productivity might result from raising pay not only for the low-paying women’s and minorities’ jobs, but also for the lowest paid men’s jobs, particularly if publicity or union bargaining pressure has highlighted that some men’s jobs are paid less than others with no more requirements. Senator Lipman’s first phase proposal, however, stopped short of putting all women’s and minorities’ jobs into their rightful

100. See Alternative 3, the Task Force proposal, infra.
place in the wage hierarchy. She did not adjust the rates for those higher level jobs that had been paid less than the new proposed bottom rate. Under her proposal, those jobs would thus receive only the same pay as jobs with few requirements. In addition, her proposal did not increase the rates of jobs that already had starting salaries above the “poverty level.” As a result, the rates for those jobs would no longer have reflected the differences in skill levels that the employer had previously recognized. These jobs would continue to be underpaid not only as compared to male-dominated jobs, but now also as compared to lower women’s and minorities’ jobs. These steps are necessary to avoid a wage compression that would almost ensure employee dissatisfaction, and to maintain the supposedly nondiscriminatory relationships set by the employer.

iii. Alternative 3: The Task Force proposal— The recommendation of the Governor’s Task Force on Equitable Compensation, as a first step, also took the approach of raising the pay of women’s and minorities’ jobs clustered at the bottom of the pay schedule. The Task Force chose a different formula, however. It recommended that all positions paid below pay range 06 be raised to 06. Positions slotted into pay ranges 06 to 08 would receive a five percent or one pay range raise so that all jobs previously rated 06 would be paid at 07, and so on. This, the Task Force said, would provide pay raises for about eighty percent of the women and minorities working for the State. While this proposal, as far as it goes, resembles the first alternative, it has a major flaw. It maintains the old relationships between women’s/minorities’ jobs and the men’s jobs. Because the evaluation of the job, the attendant status, and pay are relative, maintaining the old relationships simply continues the prior discrimination at a higher level.

101. Senator Lipman’s proposal deliberately dealt only with raising salaries to poverty level, because she anticipated that a revised job evaluation system would later do equity. Conversation with Senator Lipman (Dec. 1985); see infra note 104.

102. This was the pay for the lowest male job and to this point resembles Alternative 1.

103. See Alternative 1, supra.

104. Neither the Task Force nor Senator Lipman’s recommendations reached all the jobs related to entry-level jobs that they proposed to raise. The reason for this was that they interpreted their mandate both as eliminating discrimination and affirmatively changing or improving the evaluation system. To this end they have hired a consultant who is to assist them in evaluating the system and in recommending changes. All members of the Task Force expect the consultant to recommend new evaluations for many of the women’s and minorities’ jobs. It is expected that some positions may be raised more by a new evaluation system than by simply realigning all jobs according to the adjusted beginning rate for all entry-level jobs. Conversations with Barbara Fields, Executive Di-
4. **Applying the remedy when the employer has not evaluated jobs**— In New Jersey and wherever the employer has adopted a value system by which to rate jobs, but has then deviated from its professed standards by paying segregated jobs less than white male jobs with no higher qualifications, it is reasonable to hold the employer to its own standards in fashioning a remedy. Thus, ratings are adjusted so that all entry-level jobs with no fewer requirements than the lowest paid white male job are paid what that job is paid. This approach to determining a remedy is also applicable when the employer has not formally adopted such a value system. Because at the time of their hiring all entry-level employees possess similar kinds and amounts of skill, with any necessary learning to be acquired on the job, there is a presumption that when factors of sex or race are disregarded the employer values one employee about as much as another. The pay for the unskilled, white male jobs is presumably either the lowest pay that an employer would pay white men, or the lowest wage for which white men would work. Women and minorities should not be paid less because of their sex or race. Therefore, their wages should be equalized to the white men's entry-level pay even though the jobs have a different content.\(^{105}\)

5. **Clerical starting salaries should be aligned with other unskilled work**— The statement that all entry-level employees possess similar quantities and qualities of skill, with any learning to be acquired on the job, is generally true for blue collar work but not for clerical work. The majority of female-dominated jobs require some type of "learned" ability prior to hiring, such as typing or clerical skills. Clerical jobs also assume a higher degree of schooling than most common labor jobs.\(^{106}\) It is fair to assume,
therefore, that work requiring higher levels of skill and training would be paid at least as much as the least demanding job in the business.

Some proponents of pay equity might argue that the higher requirements of clerical work mandate even better pay than for unskilled male laboring jobs. Many employers agree, and accordingly pay beginning clericals more than some laboring jobs. Note, however, that those laboring jobs are usually performed by minorities. On the other hand, one of the difficulties in devising a remedy for pay discrimination is comparing jobs across content lines. This problem is particularly acute when comparing clerical jobs and blue collar jobs. Yet each tends to have its own wage structure, and within the clerical job family some jobs are recognized as less skilled than others. These are generally the basic entry-level clerical jobs; these should be analogized to the least skilled entry-level blue collar jobs for purposes of estimating the extent of underpayment due to sex discrimination. Because each segment of the salary scale has a bottom—the starting pay for the lowest ranked job in that line—aligning the bottom for each segment recognizes the employer’s business judgment in deciding at what competitive level its pay schedule should be, while simultaneously wringing out of the salary scale the considerations of sex or race that have depressed the pay for female and minority jobs.

Thus, the employer’s starting rate for white male common labor becomes the starting place for the rest of the employer’s wages. By then adjusting the related jobs to maintain the employer-determined internal relationships among positions, a non-discriminatory pay realignment can be ordered based on the employer’s own wage structure. A court ordering such a remedy, therefore, does not substitute its own subjective judgment for the employer’s as to the general relative value of jobs. The remedy is firmly rooted in the employer’s own value judgments and practices.

This standard is less firm than when the employer has explicitly established the effect of sex or race discrimination on the pay rates. Experience, however, indicates that the realignment that occurs will probably put most of the women’s and minorities’ jobs in the same pay bracket as functionally similar posi-

107. See supra note 88. In New Jersey, the entry clerical job is actually evaluated higher, but is paid the same as the minority maintenance job because of the dual (35/40 hour) work week/dual salary structure described supra note 83.
tions, or close to it.\textsuperscript{108} To the extent that there may be some uncertainty in exactly how much women's and minorities' jobs have been depressed, this uncertainty can be shared between the parties. Thus, it should not be necessary to determine exactly where particular jobs should be slotted. The approximation suggested here meets the requirements of the remedial principle most often invoked by uncertainty in Title VII cases.\textsuperscript{109} That is, once liability has been established there should be a remedy. Damages should be assessed on the most reasonable basis available, but uncertainty as to the amount of damages should not relieve the wrongdoer of responsibility. The primary risk of error arising from uncertainty should rest on the wrongdoer.

The countervailing principle is that unless a plaintiff can establish the amount of damages with sufficient certainty, the court will not entertain the cause of action because there is an insufficient basis to justify a recovery. This is the principle generally applied to claims of breach of contract,\textsuperscript{110} not to claims arising in tort for injury to dignitary or economic interests, nor to claims of a federal right arising under a broad remedial statute. Some opponents of pay equity go even further, arguing that still higher standards of certainty be required of plaintiffs in wage discrimination suits.\textsuperscript{111} Such standards would require plaintiffs to demonstrate the effect of sex discrimination on the pay rate beyond a reasonable doubt before the cause of action would be recognized.\textsuperscript{112} All such attempts to narrow the statute

\footnotesize{\textsuperscript{108} See supra text preceding note 100.}
\footnotesize{\textsuperscript{109} See supra text accompanying note 22 (discussing principles to be applied in developing remedies).}
\footnotesize{\textsuperscript{110} Hadley v. Baxendale, 156 Eng. Rep. 145 (1854); Restatement of Contracts § 330 (1928).}
\footnotesize{\textsuperscript{111} E.g., U.S. Comm'n on Civil Rights, supra note 19, at 13-22.}
\footnotesize{\textsuperscript{112} Beyond a reasonable doubt is, of course, the standard for determining guilt in a criminal case. It has no relevance to wage discrimination claims under either Title VII or the Equal Pay Act. This argument is merely another attempt to require the courts to treat antidiscrimination legislation like criminal statutes. Courts have unanimously refused to do so. See, e.g., Jackson v. Concord Co., 54 N.J. 113, 123 n.4, 253 A.2d 793, 798 n.4 (1969) ("[O]ur statute is basically remedial and not penal in nature . . . .").}

Federally, since the landmark case of Griggs v. Duke Power Co., 401 U.S. 424 (1971), the Supreme Court has continued to reaffirm that Title VII is to be broadly construed to effectuate the strong congressional purpose to eradicate discrimination "in whatever form," Franks v. Bowman Transp. Co., 424 U.S. 747, 763 (1976); Albemarle Paper Co. v. Moody, 422 U.S. 405, 421 (1975) (noting that the central statutory purposes of Title VII are "eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination") (footnote omitted); see also Hishon v. King & Spalding, 467 U.S. 69 (1984); City of Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702 (1978); Nashville Gas Co. v. Satty, 434 U.S. 136 (1977); Dothard v. Rawlinson, 433 U.S. 321 (1977) (broadly construing Title VII in sex discrimination cases). In \textit{Manhart}, the Court stated: "Myths and purely habitual assumptions about a
have now been put to rest by the Supreme Court decision in *Bazemore v. Friday.*\(^{113}\) In *Bazemore,* the Court held that “[a] plaintiff in a Title VII suit need not prove discrimination with scientific certainty; rather, his or her burden is to prove discrimination by a preponderance of the evidence.”\(^{114}\)

In wage discrimination cases, as in other Title VII cases, lack of precision in the evidence should not affect the prima facie case. The Supreme Court has stated that precision in the evidence used is not required to establish discrimination. The evidence need only be sufficiently strong to support an inference that the employer must address.\(^{116}\) Almost everyone concedes that *some* portion of the low wages associated with jobs identified as women's or minorities' work is probably due to discriminatory wage setting—though some portion may also be due to other discriminatory practices such as hiring, assignment, socialization of women affecting their choices, or lack of mobility.\(^{116}\) The question is how much the employer should be asked to remedy. Therefore, when an employer maintains basically segregated, low-paid jobs or job classifications, it is appropriate that the employer—who best knows which practices resulted in low pay for these groups—explain or justify them. If a differential that cannot be explained on grounds other than race, sex, or national origin persists, it is appropriate that certain risks be borne primarily by the employer. These include the risk that injury

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114. *Id.* at 3009 (citing Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252 (1981)).

\[T\]his is not to suggest that there is no sex discrimination in the setting of wages or that no part of the wage gap can be attributed to discrimination. Since the wage gap is not *entirely* due to discrimination, however, it is wrong to try to eradicate that gap in the name of antidiscrimination. *Id.* at 70 (emphasis added). The Civil Rights Commission then proceeds to define "discrimination" very narrowly, excluding all but intentional discrimination and severely restricting the kinds of evidence it would find probative. *Id.* at 70-71; *see also* Blumrosen, *Wage Discrimination and Job Segregation: The Survival of a Theory,* 14 U. Mich. J.L. Ref. 1, 5-6 (1980).
will be measured imprecisely and the risk that some injuries may be attributable to discriminatory employment practices other than wage discrimination. The employer not only created the wage-setting system, but is in a better position to obtain key information and to make needed changes.\textsuperscript{117}

On the other hand, plaintiffs cannot expect the kind of remedy that would have been possible had they quantified their precise damages. The risk of uncertainty is thus shared in the proposed wage discrimination remedy. Neither side can expect exactitude. Plaintiffs may not get all they think they are entitled to, but cannot prove; employers will not go scot-free because the plaintiffs cannot prove to a certainty the extent of damages as part of the prima facie case. The proposed remedy strikes a reasonable balance. It goes far towards putting female and minority jobs into their rightful place on the pay scale, and it closes the wage gap between jobs identified with women and minorities and other jobs in the employer. It avoids entangling the courts in either the morass of job evaluation or economic theory in general.

Furthermore, several other considerations support this approach. First, it is well within the parameters of judicial discretion in formulating damage remedies under Title VII. Second, the sting of the wage increase is reduced to the extent it is not retroactive.\textsuperscript{118} Third, as suggested above, the employer and the union, if there is one, may take additional steps in the future to deal with the need to adjust pay rates. Such changes may well include not only modifications to the wage-setting system, but redesign of jobs previously assigned primarily to women and minorities. As the New Jersey Commission recognized, the elimination of job segregation requires funneling white men into previously segregated jobs as much as opening white male jobs to women and minorities.\textsuperscript{119} The litmus test for the end of wage discrimination is when formerly segregated jobs can attract and retain white men in numbers sufficient enough to overcome the former identification and stigma.


\textsuperscript{118} See infra text accompanying note 179.

\textsuperscript{119} N.J. Analysis, supra note 40, at 3.
C. When One Job Is Shown To Be Undervalued in Violation of the Equal Pay Act

In the third situation, when plaintiffs have proven a violation of the Equal Pay Act, remedying the identified violation is not the end, but only the beginning of a Title VII remedy for all jobs related to the one proven underpaid.\footnote{120} By proving the Equal Pay Act violation, the plaintiffs have established how much of the pay differential for that particular job is due to sex discrimination. The remedy mandated by the Equal Pay Act is to raise the pay of the "equal" job to match the pay for the comparable male job.\footnote{121} All female employees whose pay rates were keyed or otherwise related to the rate found to be in violation of the Equal Pay Act now have a Title VII claim that their wages should be raised as well. An employer's discrimination against women in one job is evidence that it discriminated in the others. The principles that were discussed in the preceding section should apply here as well.\footnote{122} If any job is proved undervalued, then it is not enough simply to reclassify it. The evidence of that job's rightful place in the overall scheme also suggests that all other positions related to it have also been undervalued, according to the employer's own value system. The employer thus has "quantified the effect of sex discrimination on the wage rates."\footnote{123} This should be the measure of damages and thus the remedy.

Thus, plaintiffs would argue that the employer has established a relationship between the wages paid to various female jobs. This relationship should be maintained when the Equal Pay Act violation is corrected. This is accomplished by raising the wages of all women in related jobs by an amount measured by the extent to which the "equal" job was underpaid. For example, New Jersey's position descriptions for "truck driver" (male, paid at range 10) and "bus driver" (female, paid at range 08) looked remarkably similar. In fact, the New Jersey Commission reported:

[T]he position description for truck driver in the Department of Human Services requires that the "truck driver"
be able to get a bus driver's license, presumably because he might need it. In other words, sometimes a truck driver is a bus driver. But when he is, he is paid a truck driver's pay.\textsuperscript{124}

Not only should the bus driver's pay be raised to that of the truck driver's, but any other women's jobs related to the bus driver job should likewise rise two pay grades.

The truck driver example illustrates another problem area of pay alignment: formulating a remedy when several different men's jobs are all paid at the same rate, and a female job is proven "equal" to one of these. That is, the position description for "truck driver" describes not merely a single set of tasks and duties, but a group of various jobs to any one of which an applicant may be assigned. Once assigned to a particular position, a driver would only do limited kinds of driving. The Commission noted, for instance, that there seemed to be more differences among some of the various kinds of trucking described in the truck driver description "than there is between 'truck driver' and 'bus driver,' but all the truck drivers are paid the same."\textsuperscript{125}

It is not uncommon for employers to group jobs with some generally similar requirements, but with different tasks and duties, under one title or job description.\textsuperscript{126} Such groupings facilitate recruiting based on general skills, and are useful for pay purposes because they enable the payment of all at the rate of one of the included jobs.\textsuperscript{127} In fact, one way an employer can voluntarily mitigate the effect of segregated jobs is to classify several jobs, including some segregated female and some male or integrated jobs, under one non-sex-identified title. Evaluation and pay comparisons with community wage rates, for example, would then be performed on a generalized functional basis, choosing either integrated or male jobs for the comparison.

Assume, for example, a workplace where men doing several different jobs are all paid at the same rate, regardless of whether their jobs are subsumed under one title or have different titles, while women, also doing various jobs similar to the men's, are paid different rates. Pay for the women's jobs reflects differences

\textsuperscript{124} N.J. \textit{Analysis}, \textit{supra} note 40, at 24.
\textsuperscript{125} \textit{Id.} (emphasis added).
\textsuperscript{126} Many clerical positions are also, in reality, collections of different jobs, depending on the agency, division, or department in which a person works.
\textsuperscript{127} The New Jersey Commission noted the phenomenon of paying some jobs the rate for their highest skills, N.J. \textit{Analysis}, \textit{supra} note 40, at 24, implying others, particularly clerical jobs, may be paid at the rate of some of their lesser skills, \textit{id.} at 9.
in skill level between the women's jobs, but all are paid less than the male jobs' rate. Such a fact pattern might be sufficient to establish discrimination, particularly if the women's work were sufficiently like the men's and the differential between the male and female pay was large.\textsuperscript{128}

If one of the women's jobs is proven the equal of one of the men's jobs under the standards of the Equal Pay Act, the rate for that job should be raised to that of the male jobs.\textsuperscript{129} Formulating a remedy for the other female jobs keyed to the job that was proven to be the male job's equal becomes more complicated when there exists the kind of dual wage structure hypothesized here. Because the employer makes pay distinctions between the women's jobs according to perceived skill differentials, but all male jobs are paid at the same rate regardless of skill differentials, the remedial issue is which employer structure to follow. It is clear that one of the female jobs should have been paid the male rate. The remaining question is whether the relative employer differentials should be maintained, if the women prevail in their argument that proof of the Equal Pay Act violation also measures how much their pay was depressed. Such a remedy would order the "equal" job rate raised to that of the male rate. Other related female jobs would be paid either more or less than the male jobs, depending on their employer-determined relationship to the "equal" job. An alternative remedy would be to change the female wage structure to match the male wage structure. In this case, all the female jobs related to the one proven

\textsuperscript{128} See, e.g., Taylor v. Charley Bros. Co., 25 Fair Empl. Prac. Cas. (BNA) 602 (W.D. Pa. 1981). In Taylor, the employer operated a supermarket distribution center, which had two warehouses. Men in one warehouse used forklifts to select, move, and pack large items; women in the other warehouse also selected, moved, and packed, but handled smaller items, without mechanical aids. All men received one rate, and all women received a different, lower one. The plaintiff's job evaluation experts testified that job content difference did not warrant the male pay differential. The court held that the employer's refusal, when asked, to do an evaluation of the jobs, in connection with the facts indicated above and anecdotal evidence of other discrimination on the basis of sex, proved sex-based wage discrimination under Title VII.

\textsuperscript{129} This was the proof in Thompson v. Sawyer, 678 F.2d 257 (D.C. Cir. 1982). In Thompson, male bindery workers were all paid at the same "craft rate." For each male job there was a matching woman's job that was supposedly an assisting role. The women's jobs were paid at various rates. Evidence indicated, however, that despite their "helper-type" titles, the women actually did work similar to much that the men did, although only one female job was held to meet the "equal" standard of the Equal Pay Act. The court awarded approximately $30 million to the women in that job. Because the case had been framed as one of equal pay, and no one raised the next question raised here—whether proof of the Equal Pay Act violation also established a violation of Title VII—the court did not reach that question. Obviously, it also did not reach the question of how to formulate a Title VII remedy for the related female jobs.
"equal" would be paid the same (male) rate. This remedy would carry out the employer decision that all (male) jobs should be paid the same, despite differences in required skills.

Maintaining the female differentials seems a reasonable compromise position only if the "equal" female job is at the top of the women's pay structure. If it is not, then some women will be paid more than any of the men. Whether the male rate reflected the employer's judgment that the single male rate was the most any of those men's jobs should be paid, or whether the rate was bargained for in order to raise the lower valued craft jobs at the expense of the higher, the concept of a uniform rate probably should also be applied to all related women's jobs, once an Equal Pay Act violation in one job has been established.

D. When Proof of Discriminatory Wage Structures Is Statistical

Among the methods of proving that sex discrimination infected an employer's wage structure that plaintiffs are now considering is a highly complicated form of statistical proof similar to that used in Vuyanich v. Republic National Bank. Some state employers are also developing and implementing advanced statistical methods to revise their pay policies. It is more likely that such studies will be undertaken on a voluntary basis by employers and unions than that courts will require such studies. For example, both New York and Wisconsin are utilizing a "policy capturing" approach in revising their pay systems. In Wis-

130. 505 F. Supp. 224 (N.D. Tex. 1980), vacated, 723 F.2d 1195 (5th Cir. 1984); see also NRC REPORT, supra note 60 (setting out the methodology suggested by the National Academy of Sciences).

131. Steinberg, Identifying Wage Discrimination and Implementing Pay Equity Adjustments, in 1 U.S. COMM’N ON CIVIL RIGHTS, COMPAREABLE WORTH: ISSUE FOR THE 80’S 99, 110 (1984); see CENTER FOR WOMEN IN GOV’T, THE NEW YORK STATE PAY EQUITY STUDY (State Univ. of N.Y. at Albany 1986) [hereinafter NEW YORK STUDY] (describing New York's approach); Clauss, Comparable Worth—The Theory, Its Legal Foundation, and the Feasibility of Implementation, 20 U. MICH. J.L. REF. 7, 49-54 (1986) (describing Wisconsin’s approach). The methodology used by the Center for Women in Government study for New York State combined, first, psychometric techniques of questionnaire construction, resulting in a structured questionnaire querying about characteristics of over 3500 state jobs; second, sociometric techniques of sample selection in order to establish statistically the relationship between wages paid for jobs in the state employment system and the content of those jobs; and third, econometric techniques of data analysis to assess potential costs and to make recommendations for phasing-in pay equity adjustments. Steinberg, supra, at 110-11. The second step results in the development of a compensation model adjusted statistically to remove the impact of "femaleness" and "minorityness." The model then can be applied to each female- and minority-dominated
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The methodology has enabled the Wisconsin Task Force to ascertain what job characteristics the state is really paying for in male-dominated jobs. This information is then used to determine what female jobs should be paid. Despite the sophisticated methods utilized, the final results in both states and in Oregon—where the Task Force started from scratch to develop a new classification system, a new evaluation system, and recommendations for an equitable compensation system—have been similar to the results obtained with methods proposed in this Article. In all cases, the bulk of the jobs remedied are the clerical, health care, food, and service jobs occupied by women and minorities. Most of these were clustered below white male unskilled entry levels or were related to jobs that were. I believe the three methods of proof relating to remedy described in the sections above will cover most of the cases and will, when applied, result in a wage structure that reflects the employer’s judgment, modified to wring out discrimination.

III. When Internal Relationships Are Themselves Discriminatory

The discussion above assumes that the pay relationships established by the employer among the women’s and minorities’ jobs are themselves fair—that they resemble the relationships among male jobs, and that internally both wage structures reflect the employer’s nondiscriminatory judgment of what is fair. These internal relationships, however, may themselves some-

job title to obtain a predicted nondiscriminatory wage rate. Id. This, Dr. Steinberg claims, is “information analogous to the point comparisons [made by] other comparable worth studies,” without making comparisons between specific male- and female-dominated jobs. Id. An estimated 77,000 women and minorities employed by New York State are paid less than white males with jobs of comparable value to the State. New York Study, supra. The State will spend $74.1 million over two years to implement the recommendations of the two studies. National Comm. on Pay Equity, Pay Equity News Notes 1 (Apr. 1986). (A second study was done by Arthur Young on the State’s job classification and compensation system, see id.) Provisions requiring these studies were included in the 1982-1985 labor agreement with the Civil Service Employees Association, Local 1000, AFSCME, which also negotiated $64 million for implementation in their 1985-1986 contracts. Id.


133. See generally Oregon Report, supra note 57.

134. In Oregon, the Task Force recommended that 72% of the wage increases go to women in entry-level, support, and paraprofessional jobs. See Oregon Report, supra note 57, sec. V.
times be discriminatory. The following examples both illustrate the problem and suggest the remedy.

A. Different Patterns for Relating Male Supervisory Jobs to Those Supervised

In constructing job ladders, particularly when the employer has adopted a value system that places a premium on learned skills, discretion, and managerial know-how, supervisors of positions requiring more entry-level skills should be evaluated at a higher level than supervisors of the lesser skilled. Male job series, including those composed of higher ranking professional positions, seem to follow this standard operating procedure. In New Jersey, for example, the evaluation rating and pay range for the job title “supervisory accountant” reflect not only managerial functions but also the fact that the people supervised are likewise professional.135 This, however, is not the case for many supervisory positions of predominately female jobs in New Jersey136 and elsewhere.137 A common pattern, in both public and private employment, is to pay supervisors and managers of traditionally female-intensive areas less than other department managers, despite the functional similarity of their work, qualifications, and job requirements. Lower pay for such jobs is particularly likely at the lower supervisory levels, where the supervisors are also women. For example, even though clerical supervisors are required to have more experience in order to supervise properly the more complex work of their subordinates, in New Jersey they are paid less than blue collar low and middle level supervisors, who according to state requirements supervise less skilled work and need less experience.138 As noted above,139 realignment from the bottom level up may alleviate much of this problem where the female/minority wage structure is internally fair.

135. N.J. ANALYSIS, supra note 40, at 21.
136. Id.
137. See, e.g., Stathos v. Bowden, 728 F.2d 15 (1st Cir. 1984).
139. See supra text accompanying notes 60-71 & 96-98.
B. Internal Relationships Differ from Those in the White Male Wage Structure

Internal relationships are, however, not always fair. There is evidence of instances in which the women's/minorities' wage structure is not only slotted further down the pay scale than the male wage structure, but the internal relationships are distorted and different than the structure for the male job group. This can occur in several ways.

1. Minority or female career ladders are shorter— The career ladder for traditional female and minority jobs may be truncated, so that promotion avenues are cut off, while on-the-job training opportunities are provided for male jobs, thereby extending their career ladders. For instance, many "women's areas" traditionally have male top managers whose jobs typically are included in a different managerial series, not keyed to the female series. Jobs are often disassociated from former promotion ladders when a formerly white male job is "turned" or feminized. Examples from banking and insurance are typical. Before World War II, bank tellers were white men; the job had high prestige and was the entry-level job leading to bank officer. Since that time, banks have begun to hire women and minorities as tellers. In turn, pay has not kept pace with other predominately male jobs, and the promotion ladder has been cut off as managers and future bank officers are more likely to be hired from recent MBA or college graduates. Similarly, in the insurance industry, the position of "financial officer," formerly a male job of considerable responsibility in signing off on loans, has become a women's job. In the process, it has been relegated to the lower portion of the firm's organization chart and to a narrowed range of salary levels.

140. See supra note 89; see also Wage Discrimination, supra note 1, at 405-08; R. Shaeffer & E. Lynton, Corporate Experiences in Improving Women's Job Opportunities 9-10 (1979) (a Conference Board Report); Malkiel & Malkiel, Male-Female Pay Differentials in Professional Employment, 63 Am. Econ. Rev. 693 (1973) (economic study of male/female differentials in professional employment).

141. See generally Wage Discrimination, supra note 1. The "turning" of banking jobs is also noted in Work in America 61 (1973) (report of a special task force to the Secretary of Health, Education, and Welfare). The insurance industry example is from
2. **The top of the women's line is compressed or the male line is stretched**— The top of the women's line may be compressed more severely than male lines, or the male lines may be stretched out resulting in underpayment of the higher women's jobs. The point spreads for women's and men's or for minority and white jobs may not be the same, or they may not be the same throughout the wage hierarchy.

This may occur if a men's job and a women's job, though different, are considered roughly equivalent by the employer. The principle that equal work be graded and paid equally would require that the two jobs be treated the same. To avoid this result, the employer may compress the top of female and minority pay lines by allotting fewer points between jobs than elsewhere in the pay structure. For example, a male line, such as building maintenance, and a women's line, such as housekeeper, may merge at the managerial level. Experience in either line qualifies an applicant for the entry-level managerial position that supervises both lines. The employer, therefore, considers the experience, skills, and responsibility gained in each line to be roughly equivalent. The top of the women's job line, however, is at a lower pay grade than the top of the predominately male line. That is, the top position in the housekeeper line of progression may be at pay range 18, whereas the top job in the male building maintenance line is at pay range 20. The entry-level managerial position where the lines merge is at pay range 21. The top of the women's line is underpaid, relative to the next male or integrated job. Two kinds of discrimination flow from this: not only are the women in that top position and all other jobs keyed to it underpaid, but they are less likely to get any available promotions because their job title is slotted into a lower grade than the equivalent male title. The latter effect is likely because there are fewer pay levels from the top of the male line to the managerial job than from the female line. Generally, the greater the pay jump between two adjacent jobs in a series, the more difficult it is to be promoted. Although not a universal practice, it is common to consider prior salary when assessing qualifications for promotion.  

J. LYLE & J. Ross, WOMEN IN INDUSTRY 8 (1973). See also CENTER FOR WOMEN IN Gov't, REPORT ON CAREER LADDERS IN NEW YORK STATE SERVICE (State Univ. of N.Y. at Albany 1980); EEOC Hearings on Job Segregation and Wage Discrimination 643-51 (Center for Women in Gov't, State Univ. of N.Y. at Albany 1980) (testimony of Nancy Perlman, Executive Director, Center for Women in Gov't).

142. See Wage Discrimination, supra note 1, at 429. Although the federal classification system is predicated on the proposition that jobs should be paid according to the
managers in such lines tends to be men, and men have a greater opportunity for higher pay than women.\textsuperscript{143}

The following illustration of how stretching and shortening can skew male or female/minority lines is typical of many wage systems. Although New Jersey evaluates a day care technician and an assistant storekeeper at the same level, range 12,\textsuperscript{144} their respective supervisors are rated quite differently. The day care technician reports to a "head day care center technician" (female) who is only at one range higher (range 13) than she is, or to a "day care supervisor" (female) at range 16, whereas the assistant storekeeper reports to a storekeeper II (male), range 16, or a storekeeper I (male), range 19. The day care supervisor, at three pay levels lower than the storekeeper I, requires three years of experience and college credit, whereas the storekeeper requires four years of experience, but no formal education.\textsuperscript{145} Applying the New Jersey evaluation criteria, or the principle of even pay steps, would require the two supervisors to be paid approximately the same salary, yet the women's line is far more compressed than the men's. The remedy would be to apply the same standard to both male and female, and minority and white pay lines. Obviously, in devising such remedies, care should also be taken to include revisions for all related jobs so that the pay line is not squeezed from either the top or the bottom.

Although examples of internally discriminatory wage structures are not rare, a court should probably assume that internal relationships are "fair," leaving to the plaintiff the task of demonstrating that they are not.

\textsuperscript{143} The example of the housekeeper and maintenance lines was drawn from data on those jobs in New Jersey from the time when New Jersey maintained sex-segregated jobs. The two separate lines were merged into the present building maintenance series.\textsuperscript{See supra note 88-89.}

\textsuperscript{144} N.J. ANALYSIS, supra note 40, at 22. The day care technician (female) is responsible for the physical, mental, and emotional well-being of assigned mentally retarded children and adults. The assistant storekeeper (male) is responsible for unloading and unpacking shipments, and maintaining stock in proper condition.

\textsuperscript{145} Id.
IV. RECOGNIZING LEGITIMATE FACTORS THAT CAUSE PAY DIFFERENTIALS BETWEEN INDIVIDUAL WORKERS

The objective of a remedy, under any form of proof, is not to equalize the wages of all workers. There are valid reasons for wage differentials that the law does not challenge. In fact, both Title VII and the Equal Pay Act recognize the role of seniority, merit, productivity, and exceptional service as defenses to pay differentials. Any theory of remedy must recognize, and perhaps emphasize, the legitimacy of these distinctions. But these are all distinctions related to performance in the work place and can be reviewed and evaluated.

There are also times when recruiting difficulties and market conditions should be recognized as justifications for pay differentials. New Jersey, for example, recognizes both seniority and market supply factors. Market factors, however, do not seem to have the same effect on employer pay decisions for women's as for men's jobs. Generally, all employees start at the first step of the assigned pay range. Pay increases with increased seniority in automatic increments as workers proceed up the employment ladder. When recruiting is difficult, however, the State can recognize an exception to its policy of not using market rates to determine pay for specific positions, only to determine the general level of compensation schedules. An "authorized hiring rate" can also be requested. This usually allows agency personnel to recruit at the second or third step of the pay range for specific jobs requiring skills in short supply.

The New Jersey Commission, however, warned that the authorized hiring rate authority, supposedly necessitated by market forces, was not used in the same way for female jobs as for male jobs. Almost all positions with authorized hiring rates are predominately white male. Although there was a two-step increase authorized for clerk-stenographer and clerk-transcriber, for example, other female jobs in short supply were not so


147. See N.J. Analysis, supra note 40, at 27.

148. Several years ago, for example, engineers were scarce and their starting salaries in the private sector were considerably higher than the State of New Jersey was offering. A higher rate, still about $2000 below the average offers, was authorized. At the same time, similar adjustments were made in the salary structure of related upper level engineering positions. Department of Civil Serv., Civil Serv. Comm'n, State of N.J., 74th Annual Report 7 (1980-1981); see N.J. Analysis, supra note 40, at 27.

Even at the time when most public and private hospitals were extensively hiring nurses from the temporary registers at much higher wages than stated rates, no authorized hiring rate had been requested for nurses, nor for word processors who are now typically offered premium pay. The Commission suggested that use of these special rates be monitored to ensure they are not requested or authorized in a discriminatory fashion and that they are discontinued when no longer needed.

Because the market rate for women's and minorities' jobs is likely to incorporate discriminatory wage-setting practices of all the employers who make up that market, employers should not be able simply to rely on "the market" to justify their pay practices. If, however, it is considered desirable to allow a limited market defense, the employer should have the burden of establishing that there is a labor shortage that adversely affects recruiting, that attempts at recruiting at the scheduled rates failed, and that the skills in short supply are needed. Such exceptions should periodically be reviewed and should cease when no longer needed. Pay decisions that continue the historical conspiracy of employers to keep women's wages low by reliance on each other's actions in the "market place" should not be allowed. The remedies proposed can take into account the employer's need to remain competitive. These remedies leave com-

150. Id. at 27.


152. For arguments that the market rate incorporates discrimination and that the policy of the Equal Pay Act prohibiting paying a woman less than that for which a man would work because she is willing to do so should be considered incorporated into Title VII, see Wage Discrimination, supra note 1, at 488.

153. The use of market rate information to regulate wages, even by employers who compete in other respects, has been noted by, inter alia, J. ROBINSON, THE Economics of Imperfect Competition 218 (2d ed. 1969); E.H. Phelps Brown, The Inequality of Pay (1977). The fact that employers can and do act in their common interest without open collusion has been recognized, inter alia, by the doctrine of "conscious parallelism" under the Sherman Antitrust Act, 15 U.S.C. §§ 1-7 (1982). Moreover, within an industry, employers often overtly—and probably legally—discuss and agree on what level of wages to pay for specific jobs: multi-employer, industrywide, and pattern bargaining are common wage-setting practices, as are formal and informal meetings among personnel managers such as the monthly meetings of hospital personnel administrators in which agreement is reached on how much nurses and other health care workers will be offered and paid. Conversations with New Jersey and New York hospital administrators (1985); see also National Comm. on Pay Equity, The Cost of Pay Equity in Public and Private Employment 74 (1984) (noting that how consistent some of this meeting and talking about wages is with free market competition and antitrust laws is a worry for at least one manager interviewed).
petitive market decisions to the employer or to collective bargaining. An employer's classification, evaluation, or compensation systems would be subject to scrutiny, and remedy, only when they have adversely affected the compensation for jobs identified with women and minorities.

V. REMEDIES AND COSTS

The foregoing analysis demonstrates that most, if not all, of the proof problems relating to wage discrimination are subject to resolution through careful and practical analysis of the type with which courts and lawyers are familiar. Even if the foregoing analysis is accepted, employers have developed another argument that, if accepted, might overwhelm the practical considerations discussed above. This is the argument with respect to the costs of remedying wage discrimination.

A. Costs of Remedies

One of the bugaboos employers use to scare both courts and the public away from tackling the issues of wage discrimination is that the cost will be exorbitant. This simply is not true. Employers, including such large employers as the State of Minnesota, that have undertaken revisions to achieve pay equity have consistently estimated the cost at between one percent and four percent of their payroll.154 In Minnesota, for example, the legislature ordered that pay equity be achieved within five years.155 The plan adopted by Minnesota required a report and appropriation for this purpose every two years.156 Within four years, Minnesota brought the wages for all female-dominated job titles to the average pay line of male-dominated job titles. The State began implementation with pay equity adjustment appropriations of $21.8 million, adding roughly seven million dollars annu-

154. See, e.g., MINNESOTA REPORT, supra note 42, at 1-5 (estimated cost of pay equity in the U.S.); id. at 15 (Minnesota state costs); id. at 18 (Minnesota local governments' cost estimates); OREGON REPORT, supra note 57, at 43 (estimating Oregon cost at 1.1% of state payroll); National Comm. on Pay Equity: State Update (Apr. 1986) (reporting that 46 states have taken some action, and 12 states, Connecticut, Idaho, Iowa, Michigan, Minnesota, New Jersey, New Mexico, New York, Oklahoma, South Dakota, Washington, and Wisconsin, are providing pay equity salary increases to their employees).


156. MINN. STAT. ANN. § 43A.05(5)-(6) (West Supp. 1987).
ally to the wage bill. Although a fair pay system was originally estimated to cost Minnesota four percent of payroll, the total cost of eliminating the wage gap was only 3.7%. Individual pay equity increases averaged about $2200 annually, without reductions or freezes in salaries for male-dominated jobs. In New Jersey, the Task Force on Equitable Compensation estimated that its initial proposal would cost about seven million dollars and would affect almost 80% of the women and minorities in state employ. New Jersey employs over 65,000 people, and about half are women or minorities.

Opponents' propaganda, on the other hand, puts the bill for fair pay at as much as 20% or more of the gross national product. Such figures are patent distortions. First, economic and sociological studies attribute from 20% to 50% of the wage differential between men and women to factors that cannot be justified on grounds unrelated to discrimination. Even using these figures, however, does not mean that the cost of eliminating the wage gap would add 20% to 50% more to the national payroll. If 20% of the gap is attributable to discrimination, the cost to remedy that gap would be only 8% more than the current national wage bill. Even this estimate is high because it assumes that all the differential is due to underpayment for women's jobs. In reality, much of it is due to the fact that more men are in higher level jobs. This may reflect discrimination in hiring, assignment, and promotion—problems separate from wage discrimination. These forms of discrimination should not be confused; nor is one a substitute for the other. Long after an employer announces that access to all jobs is open to everyone,

157. Rothchild, supra note 49, at 211.
158. Id. at 210.
159. See Act approved Jan. 8, 1986, ch. 402, 1985 N.J. Sess. Law Serv. 177 (West) (No. 11) (appropriating that amount for pay equity implementation); see supra text accompanying note 102.
160. Preface to N.J. ANALYSIS, supra note 40, at i.
161. Cf. U.S. COMM'N ON CIVIL RIGHTS, supra note 19, at 38. This study cites Dr. Glasner of Hay Associates as estimating that to rectify 80% of the pay gap, when the pay gap is based on a 60% ratio, see infra note 164, would result in a $320 billion increase in higher wages and benefits for women. The study also cites Professor Schwab as calculating that the annual cost in wages would be about $413 billion. Id.
162. The Civil Rights Commission does note that these estimated costs are "undoubtedly too high" because the pay gap is not due entirely to discrimination. Id. at 38 n.114.
163. See Wage Discrimination, supra note 1, at 454-57.
164. The male/female wage gap is approximately 40%—that is, women earn about 60% of men's earnings. Twenty percent of 40%, or 8%, is thus the unexplained differential.
165. See supra note 162.
so long as formerly segregated jobs retain their identity as female or minority and their relative place on the wage scale remains unchanged, the employer's pay structure perpetuates the effects of the prior segregation. This is a wage discrimination that still must be remedied. However, because women's and minorities' jobs are not scattered through the pay schedule, but rather tend to be clustered at the low end of the spectrum, pay raises bringing these jobs into their rightful place in the compensation schedule will cost less than the doomsayers predict.

Interestingly, opponents of pay equity tend to be of two minds about these socioeconomic statistical studies. When the issue is the existence of wage discrimination, they deride significance of the studies as a method of identifying that there is a problem of discrimination in pay. They claim that because some studies explain more of the gap than others, the existence of any unexplained differential is due to researchers ignoring some legitimate explanatory factors rather than to discrimination. When pointing with horror to the potential cost of remedying pay discrimination, however, the same opponents who denied the existence of discrimination derive their cost estimates from the studies that indicate the largest amount of unexplained differential.

The remedies proposed here to cure pay inequities are not based on abstract macroeconomic arguments about closing the "wage gap" between men and women. These remedies are based on the employer's own assessment of the relative values of various job categories, not on some abstract notions of human capital or on regression analyses that take account of mythical variables that "might have" affected wage rates in an "ideal" labor market.166 The focus here is much simpler—it is rooted in both the legal system and in industrial relations practice. The focus is on what the employer has done and on what the employer claims it is doing. These have always been the source of discrimination determinations. Nor is the aim necessarily to make a significant dent in the overall relative earnings of men and women. The purpose of the remedy is to eliminate the effects of race and sex discrimination on particular wage rates. These are the rates that employers have set through a system "within which relative wage rates are also determined among job classifications, not by

166. For discussion of some of the realities not encompassed by recent labor economic writing, see Dunlop, supra note 61, at 10, 12, reprinted in Daily Lab. Rep. (BNA) at D-1, D-2 ("[S]pecial and peculiar features are at work, that do not permit the unrestrained application of competitive theory, as applied to other markets. . . . [W]ages are not simply determined by supply and demand.")) (citing J. Hicks, supra note 61, at 319).
individuals, with the aid of job evaluation or incentive systems or by decisions exercised by management or through collective bargaining.”  

B. How to Remedy a 20% Underpayment for 2% of the Payroll

Another source of a 20% cost estimate are the studies that have been conducted in the various states. Beginning with the State of Washington Comparable Worth Study in 1974, these studies have demonstrated a pervasive 20% difference between the evaluated scores for predominately women's jobs and the market rates for comparable jobs. The extent of this difference is a measure of the extent to which the market rate discounts the value of women's jobs. This does not mean, however, that the remedy will cost 20% of the nation's wage bill. Only about 2% of an employer's payroll may be needed to remedy a 20% underpayment because women and minorities work in low-paid jobs. If 80% of the women and minorities annually earn less than the poverty level—now about $12,000 in New Jersey—and if, moreover, many of these workers are paid less than $8000, then even a 20% raise may not cost much. Furthermore, a 20% estimate may itself be too high in many instances. The remedy outlined above—aligning all unskilled entry-level jobs with the first major white male unskilled job, while maintaining the internal wage relationships between the female and minority jobs—would mean women's and minorities' jobs would rise two pay grades in the New Jersey system. This would require only a 10% raise—or $1000—for each affected title. This may not seem like much, but for someone earning $8000 a year, an additional $1000 represents a great deal.

170. *See supra* text accompanying notes 59-63.
171. In the New Jersey system, there is a $500 difference between pay ranges at the first step of the pay ranges. *See generally N.J. Compensation Schedules,* supra note 50.
172. The very people who simultaneously say that (a) the amount of wage discrimination is unknowable, and (b) that it would cost so much to remedy that it would disrupt the entire economy, also conclude that so small a part of the wage gap is due to discrimi-
C. Other Impacts of Remediying Wage Discrimination Assessed

The impact of pay equity increases on the national economy will be even less drastic because many low-paid workers must now supplement their incomes with food stamps and other public aid. These costs to the government will be eliminated. Federal and state revenues will increase, as low-paid workers move into higher tax brackets. Moreover, there are reasons to believe that productivity will rise and absenteeism will fall.173

Perhaps one of the most important reasons for remedying underpaid women's and minorities' work is the ongoing shift in the postindustrial economy from smokestack industries to high technology and service industries. This has meant the flight of much traditional white male blue collar work overseas.174 The areas of expanding employment opportunity are in the service and clerical areas, which traditionally have tended to comprise female and minority jobs. Furthermore, it is precisely those areas—including health care, personal services, and food services—that are among the fastest growing and are the least likely to be exportable. It also is becoming apparent that developing high technology is likely to generate far more low level jobs of the kind usually occupied by women and minorities than high level managerial jobs.175 Therefore, a reappraisal of undervalued women's and minorities' jobs now is likely to benefit not only women and minorities, but also the white males who increasingly may find that they will have to work in such areas.

A recurring argument against every piece of remedial legislation in the last sixty years has been that it will cost too much and that the very people to be helped will suffer because raising wages will increase unemployment, affecting first the marginal

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173. See Wage Discrimination, supra note 1, at 421. Low-paying dead-end jobs in which the workers have little feeling of dignity or reward have high rates of turnover, absenteeism, and tardiness, no matter who occupies the job. See generally R. Tsuchi­gane & N. Dodge, Economic Discrimination Against Women in the United States (1974); Women's Bureau, U.S. Dept of Labor, Facts About Women's Absenteeism and Labor Turnover 6 (1969).

174. See generally Mitchell, The Changing American Workplace, 1 Lab. Law. 301 (1985). There has also, of course, been a significant loss of certain traditional women's work, such as that of unskilled and semiskilled operative jobs in the garment and electronics industries.

175. See id. at 308.
workers who are most likely to be women and minorities. It is not clear that remedying wage discrimination as suggested here will have such an effect, because not only are these jobs largely in expanding areas, but the rest of the century will see an increasing scarcity of labor. Any possible replacement of workers in labor-intensive industries by capital investment should not result in additional total unemployment.

D. Cost Is Not a Title VII Defense

The high cost of remedy has never been a defense under Title VII, nor is it a reason to refuse to recognize and remedy wage discrimination based on sex. In one sense, from the point of view of the cost to the society, there is no additional cost to remediying wage discrimination. The remedy simply shifts the cost from women and minorities, who have been subsidizing the production of the goods or services, to another group. This other group could be shareholders, taxpayers, or consumers, depending on other managerial decisions and the ability of companies to raise product prices.

On the other hand, pay hikes do raise labor costs for particular employers. In this way, pay equity does carry a cost that remedies for other forms of discrimination rarely do. To the extent that the employer must now pay more for the same services, it is unlike ordering an employer to hire or promote A instead of B. Except for back pay awards, no cost attaches to an employer who must remedy exclusionary practices. The same amount of pay is simply allocated to different people than would have held those jobs had the discriminatory practices continued. The cost involved in raising the pay of discriminatorily depressed jobs, therefore, is analogous to awards of back (or front) pay under Title VII in terms of real cost. But employers do not have the same incentive to take remedial action.

The sting of the pay raises is, however, mitigated to the extent that there is no back pay. The Supreme Court has recognized

176. See, e.g., U.S. COMM'N ON CIVIL RIGHTS, supra note 19, at 38-40.
that back pay is inappropriate when the law has been unclear, or if the refusal to award back pay does not undermine the purposes of Title VII to eradicate all forms of discrimination and to make whole victims of discrimination.

Back pay awards should be the norm in wage cases only when there is proof of intentional discrimination or gross delay in voluntarily taking remedial steps after the employer knows its system adversely affects segregated jobs. Under this approach, the costs of the court-ordered remedy would be lessened, and the incentives for employers and unions to self-evaluate and revise their systems would be improved. This approach, then, not only cuts costs, but is consonant with the national policy of encouraging voluntary action to remedy discrimination. The Court has ruled that back pay is necessary in discrimination cases because the threat of back pay acts as a "spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices.""

Employers should be encouraged to revise their own pay systems. They should be penalized only when they know the pay for segregated jobs is depressed and fail to do anything about it. Some have argued that employers should be encouraged to

179. Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) (majority and concurring opinions recognize, and seem to approve, lower courts' refusal to award back pay when it was not clear whether state protective laws were preempted by Title VII); see also Arizona Governing Comm. v. Norris, 463 U.S. 1073 (1983) (per curiam) (denying retroactive monetary relief because a conflict between the Wage and Hour Administrator's interpretation of Equal Pay Act pension contribution and benefit requirements and that of the EEOC under Title VII had left the law unclear); Manhart, 435 U.S. 702 (A conflict between agency interpretations had left the law unclear.). The Norris Court extended the period of no back pay because the law still was not clear and a contrary ruling would have jeopardized the pension fund. 463 U.S. at 1106-07.

180. According to the Supreme Court, back pay serves two purposes of Title VII: (1) "to make persons whole for injuries suffered on account of unlawful employment discrimination," Albemarle, 422 U.S. at 418, and (2) to "provide the spur or catalyst which causes employers and unions to self-examine and to self-evaluate their employment practices and to endeavor to eliminate, so far as possible, the last vestiges of an unfortunate and ignominious page in this country's history." Id. at 417-18 (quoting United States v. N.L. Indus., 479 F.2d 354, 379 (8th Cir. 1973)).

181. Id. at 417-18.

182. See EEOC v. Inland Marine Indus., 729 F.2d 1229 (9th Cir.), cert. denied, 469 U.S. 855 (1984) (finding race discrimination because the employer had been notified that the black worker was paid less than white workers); cf. AFSCME v. Washington, 578 F. Supp. 846 (W.D. Wash. 1984), rev'd, 770 F.2d 1401 (9th Cir. 1985). The district court in AFSCME found deliberate intentional discrimination because the State of Washington did a comparable worth study, recognized that women's positions were undervalued and underpaid because of discrimination, but did not take steps to remedy the underpayments for 10 years, despite a surplus in the state treasury during part of that time. The Ninth Circuit reversed on the grounds that the State could rely on the market rate in setting wages. The court of appeals seemed to regard the use of job evaluation as only
undertake job evaluation studies and to change their pay practices and that, to accomplish that end, the results of job evaluations should not be used as evidence of discrimination, lest employers decline to undertake them. The argument is simply wrong. It turns *Albemarle* on its head. *Albemarle* noted that Title VII was a catalyst to cause employers to reevaluate their employment practices so as to eliminate those that were discriminatory. An employer who reevaluates but takes no action on the basis of the evaluation should not be considered as having met the obligation that *Albemarle* implied.

Employers should be able to undertake remedial actions alone or through the collective bargaining process. They should be allowed time to make adjustments, and when they do so, those efforts should not be used against them as proof of discrimination. Moreover, employers should be encouraged to adopt measures to develop more equitable compensation systems without having to admit that their systems have ever been discriminatory. One protection for employers and unions who want to undertake such remedial efforts can be found in the Equal Employment Opportunity Commission affirmative action guidelines, which permit affirmative action without confessions of discrimination. As an exercise of discretion, courts should also be able to refuse back pay when employers have in good faith audited and reevaluated their compensation practices. Such refusals would be consonant with the spirit of the *Albemarle* decision and with the purposes of antidiscrimination law. But employers who audit, know some women’s and minorities’ jobs are underpaid, and do nothing should not be protected. That is the real lesson of *Albemarle*. It is as relevant to wage discrimination as to any other violation of Title VII.

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proof of the comparable worth of the men’s and women’s jobs, but rejected the comparable worth theory. The opinion does not deal with the claim that the employer, itself, recognized and labeled underpayment as a product of discrimination and then refused to remedy it. Washington has since appropriated money to remedy the underpayments. See also American Nurses’ Ass’n v. Illinois, 783 F.2d 716 (7th Cir. 1986) (rejecting the claim that a job evaluation study that indicates women’s jobs are paid less than their evaluated worth, while men’s are paid their evaluated worth, indicates discrimination).


E. Advice for Employer’s Counsel

Most large employers have used job evaluation systems that have left them vulnerable to charges of wage discrimination. Now—when the law is still in a state of flux—is the time for these employers to review and revise their pay practices. Any possible back pay liability can be avoided if an employer remedies putative discriminatory practices and no suit is brought within 180 days, or within 300 days if there is an accredited state or local agency. It is not necessary for an employer to get involved with studies such as those undertaken by states like Washington and Illinois. Many employers resist such studies, fearing that the results may be held against them—either as evidence of the amount sex discrimination has affected pay or, if there is no attempted remedy, as evidence of intentional discrimination. It is possible, however, to make the kinds of revisions suggested here without such a study. Following the analysis suggested above, it is likely that when the evaluation/compensation system is examined, at least one of the three patterns described will be found. Remedy can be achieved for each relatively quickly and without undue expense. The analysis developed in this paper also can be used to test the validity of the design or implementation of any new job evaluation or compensation systems that employers may consider.

CONCLUSION

The resistance of the courts to wage discrimination claims is based, at least in part, on concerns that the issue will prove intractable. These concerns have been emphasized by employer counsel hoping to keep the court out of the field of wage discrimination. But they have also been given substance by some “comparable worth” advocates who have no difficulty with the idea of courts supervising employer wage practices. The remedies for wage discrimination described in this Article should lay to rest the concerns of judges and encourage the courts to meet

186. Civil Rights Act § 706(e), 42 U.S.C. § 2000e-5(e) (1982). Section 706(e) provides that a charge of an unlawful employment practice must be filed within 180 days of the alleged practice. Cf. United Airlines v. Evans, 431 U.S. 553 (1977) (refusing to accept plaintiff’s argument that her claim was not barred because the employer’s seniority system gave “present effect” to a previous unlawful practice). Where a state or local agency exists, the charge must be made within 300 days of the challenged practice. Cf. Mohasco Corp. v. Silver, 447 U.S. 807 (1980) (construing the 300-day limitation narrowly).
the substantive issues of wage discrimination head-on. The remedies suggested here are practical. They do not require esoteric studies or macroeconomic analyses. They will not revise the employers' wage practices *de novo*. They are premised on the acceptance of the relative value of jobs set by the employer. But they will enable the courts to frame a practical remedy that will eliminate the most blatant forms of sex- and race-based wage discrimination. Because the remedies are practical and easily administered, the principles suggested can also be used by employers wishing to avoid Title VII litigation in the first instance. Such employers can take affirmative action to "defuse" wage discrimination claims and to reduce the likelihood that any claims that are pursued will be successful. Thus, these remedies fit within the broad objectives of Title VII—to reform discriminatory industrial relations systems through voluntary action with a minimum of litigation.