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WAGE DISCRIMINATION AND JOB SEGREGATION: THE SURVIVAL OF A THEORY

Ruth G. Blumrosen*

My earlier article in this journal, *Wage Discrimination, Job Segregation, and Title VII of the Civil Rights Act of 1964*, advanced the theory that the same discriminatory factors which lead to job segregation are also likely to be responsible for wage differentials between segregated jobs.¹ The discriminatorily depressed wage rate of the segregated job is therefore one of the "adverse effects" under *Griggs v. Duke Power Co.*² of job segregation. In order to establish a prima facie case of wage discrimination in a Title VII action, plaintiffs must show the fact of job segregation — that the jobs were identified as minority or female — and that the wages in the segregated jobs occupied the low end of the employer's wage scale.

In a subsequent issue of this journal, Messrs. Nelson, Opton, and Wilson challenged both the factual and legal premises of my thesis.³ In this article I address only the main points of their critique; the reader, however, should not assume that my silence indicates acquiescence on any point made by them.

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¹ Blumrosen, *Wage Discrimination, Job Segregation, and Title VII of the Civil Rights Act of 1964*, 12 U. MICH. J.L. REF. 397 (1979) [hereinafter cited as *Wage Discrimination*.].

² 401 U.S. 424 (1971). See generally A. SCHLEI & P. GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW* 1-25, 65-181 (1976); Blumrosen, *Strangers in Paradise: Griggs v. Duke Power Co. and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59, 66-71 (1972); *Int'l Bhd. of Teamsters v. U.S.*, 431 U.S. 324, 335 n.15 (1977). See also *Wage Discrimination*, *supra* note 1, at 290 n.222.

³ Nelson, Opton & Wilson, *Wage Discrimination and the "Comparable Worth" Theory in Perspective*, 13 U. MICH. J.L. REF. 233 (1980) [hereinafter referred to as *Nelson et al.* and cited as *Comparable Worth*].

I. POINTS OF REBUTTAL

A. *Congressional Intent and the "Plain Meaning" of the Title VII Language*

Nelson *et al.* argue that Congress did not intend to address wage discrimination resulting from job segregation.⁴ This argument simply disregards the language of Title VII. In their Introduction, the authors quote Section 703 (a)(1) of Title VII in criticizing the statutory basis of my theory. Nowhere, however, do they quote Section 703 (a)(2), which makes it unlawful for an employer:

[t]o limit, segregate, or classify his employees 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.⁵

The breadth of the statutory language makes clear that Congress intended to address *all* consequences of job segregation, including an effect which segregation might have on wages. My argument states that where job segregation is established, a discriminatorily depressed wage in the segregated job will generally constitute an "adverse effect" of segregation. Assuming the validity of the evidence in support of this proposition,⁶ then discriminatorily depressed wages seem clearly within the plain meaning of "adverse effect" under Section 703 (a)(2). Even a Title VII linguistic purist such as Justice Rehnquist would agree.⁷

B. *Precision in Measuring Discrimination*

Messrs. Nelson, Opton, and Wilson, after a thorough review of the economic, social, and legal materials, conclude that my theory is flawed essentially because the extent of wage discrimina-

⁴ *Comparable Worth*, *supra* note 3, at 265-67.

⁵ Civil Rights Act of 1964, Pub. L. No. 88-352, § 703(a)(2), 78 Stat. 253 (codified at 42 U.S.C. §2000(e)-2(a)(2) (1976)).

⁶ Nelson *et al.* never explicitly deny the validity of the evidence presented in *Wage Discrimination*, but point to *other* evidence to support their position. See *Comparable Worth*, *supra* note 3, at 260-63.

⁷ See *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977).

tion in any given setting cannot be measured with precision. They do not deny that wage discrimination may exist to a significant degree; they argue, rather, that it cannot be measured precisely because no abstract yardstick is available to compare the "worth" of one job with the "worth" of another. That being the case, they argue, it is improper to infer that there is *any* wage discrimination arising out of the fact that jobs reserved for minorities or women are paid less than jobs reserved for whites or males.⁸

But these arguments attack a strawperson. My theory does not depend on an abstract yardstick for measuring the relative worth of jobs. In fact my theory is based on the opposite proposition: that relative wage rates are the result of conventions and traditions which *cannot* be derived in any scientific way. Nelson *et al.*'s lack-of-an-objective-yardstick criticism stems from their insistence on labeling my theory of wage discrimination "comparable worth." There are those who propound theories of equal pay for work of comparable value, calling for wage rate determinations based on the intrinsic value of the work performed rather than the prevailing discriminatory wages paid in the labor market. These theorists propose that job evaluation methodology be used to measure the relative "intrinsic" values of work performed, substituting the plaintiff's (or the government's) yardstick for the one chosen by the employer.⁹ Nelson *et al.*'s claims that a prohibition on wage discrimination would lead to government wage fixing and the death of collective bargaining is based on opposition to these "comparable worth" theories — not opposition to my theory. Their objections have little relevance to a theory of wage discrimination such as mine, which

⁸ *Comparable Worth*, *supra* note 3, at 238-40. At bottom, their argument that the evidence is not sufficiently creditable simply restates arguments that were anticipated and answered in my article. See *Wage Discrimination*, *supra* note 1, at 465-74.

⁹ See, e.g., U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, HEARINGS BEFORE THE UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION ON JOB SEGREGATION AND WAGE DISCRIMINATION 836-39 (1980) (testimony of Hilda Curran) [hereinafter cited as EEOC HEARINGS]. See also EEOC notice which postponed the above hearing from February to April, 1980. The notice specifically divorced questions of wage discrimination in segregated jobs from the theory of comparable worth, i.e., "that the government should adopt or administer an abstract standard to determine job worth." 45 Fed. Reg. 11659 (1980). As EEOC Chairwoman Eleanor Holmes Norton stated,

Even the language of comparable worth misapprehends and miscommunicates the issue, as one which simply seek [sic] to close the wage gap by revaluing mainly men [sic] and women's jobs in the workplace. We believe these Hearings can help to better educate the public concerning the more limited goal of eliminating discrimination from wage setting that circumscribes the Commission's purposes.

EEOC HEARINGS, *supra*, at 6.

does not rely on an objective wage "yardstick" at any point. My theory begins with the "objective" fact of job segregation.

Messrs. Nelson, Opton, and Wilson essentially argue that the central proposition of my thesis — that the same denigrating perceptions which lead initially to job segregation generally influence the pay rate of those jobs — is inexact, and therefore cannot be the basis of an inference of discrimination.¹⁰ This argument has been repeatedly rejected by the courts in discrimination cases. The United States Supreme Court has stated that precision in the evidence used is not required to establish discrimination, only that it be sufficiently strong to support an inference which the employer must address.¹¹ Even in cases based on a disparate treatment theory, in which proof of motive, not merely adverse effect, is essential to the plaintiff's prima facie case, the Court has held that plaintiff need not point to specific employment practices nor establish the amount of damages in order to make a prima facie case.¹²

C. *The Distinction Between Establishing Liability and Shaping a Remedy*

The argument by Nelson *et al.* that the plaintiffs must prove the exact extent of wage discrimination also ignores the difference between establishing liability and shaping a remedy under Title VII. "How much" is a question of remedy, not one of liability.¹³ Courts have repeatedly stated that the precise extent of discrimination need not be established under Title VII when the effects on minorities and women are apparent.¹⁴

Problems with Nelson *et al.*'s approach persist, however, when the discussion focuses on remedy alone. The central difference

¹⁰ *Comparable Worth*, *supra* note 3, at 244-63.

¹¹ *New York City Transit Authority v. Beazer*, 440 U.S. 568 (1979).

¹² *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977). Nelson *et al.* tend to use the words "discriminate" or "segregate" as if the statutory language required a showing of animus or evil motive. However, all members of the U.S. Supreme Court agree that motive is not required by 703(a)(2). *Nashville Gas v. Satty*, 434 U.S. 136 (1977). It is important when weighing Nelson *et al.*'s arguments to remember that "Congress directed the thrust of the Act to the consequences of employment practices." *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (emphasis added).

¹³ See *Wage Discrimination*, *supra* note 1, at 468, 490; *Int'l Bhd. of Teamsters v. U.S.*, 431 U.S. 324 (1977); *Johnson v. Goodyear Tire & Rubber Co.*, 491 F.2d 1364 (5th Cir. 1974).

¹⁴ *Johnson v. Goodyear Tire & Rubber Co.*, 491 F.2d 1364 (5th Cir. 1974) (difficulty of ascertainment is no longer confused with right of recovery); *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). See also *Wage Discrimination*, *supra* note 1, at 490, 495.

between my approach and theirs is that I believe Congress intended to provide a full panoply of remedies for discrimination stemming from job segregation; Nelson *et al.* would have Congress withhold one class of remedies — those affecting wage-setting. Messrs. Nelson, Opton, and Wilson insist that while Congress did intend to interfere with the operation of the law of supply and demand in terms of recruiting, selection, hiring, assigning, promoting, and fringe benefits, Congress did not intend to interfere with respect to wage-setting. Affecting wage-setting, however, is no more and no less an interference with market forces than regulating recruitment, selection, or other employment practices. Remedies designed to affect wage-setting are simply another way of reaching the objective Congress specified. To exclude only the wage setting process from judicial action is indeed to set up a strange dichotomy.

D. Sufficiency of the Evidence to Justify an Inference of Discrimination

Messrs. Nelson, Opton, and Wilson argue that there is insufficient evidence to warrant an inference of discrimination from the fact of law paid segregated jobs. My critics, however, *assume* such discrimination throughout their article. In their argument that depressed wages due to segregation will be cured by eliminating segregation,¹⁵ Nelson *et al.* clearly recognize the existence of wage discrimination. Throughout their article, the authors implicitly acknowledge the substantial presence of residual discrimination in the wage-setting process.¹⁶

Similarly, courts often underscore the existence of wage discrimination while denying relief in the particular case. In *Christensen v. Iowa*¹⁷ and *Lemons v. City and County of Denver*,¹⁸ for example, both courts rejected comparable worth-style theories, but did so not because they believed discrimination did not exist, but because they thought there was *too much* discrimination. Both courts recognized the persistent and pervasive nature of discrimination against women manifested in the market rate for women's jobs, but did not believe that Congress had intended to "abrogate the laws of supply and demand."¹⁹ By

¹⁵ *Comparable Worth*, *supra* note 3, at 297-98.

¹⁶ *See, e.g., Comparable Worth*, *supra* note 3, at 238-39, 264-65.

¹⁷ 563 F.2d 353 (8th Cir. 1977).

¹⁸ 620 F.2d 228 (10th Cir. 1980).

¹⁹ *Christensen v. Iowa*, 563 F.2d 353, 356 (8th Cir. 1977).

pointing to the widespread effects of granting relief, the *Christensen* and *Lemons* courts — as well as Messrs. Nelson, Opton, and Wilson — implicitly acknowledge the pervasiveness of the discrimination.

*E. “Irrebuttable Presumption” or Merely Shifting
the Burden of Proof?*

Nelson *et al.* argue that my thesis creates an irrebuttable presumption of discrimination. This analysis, however, confuses two meanings of the word “irrebuttable.” The presumption of wage discrimination may not be rebuttable because the presumed fact exists as a matter of fact. The presumption in such a case is “irrebuttable” because there has been discrimination in the wage-setting process. The presumption, however, is not irrebuttable in the legal sense. It is fully possible under my theory for an employer to show that sex or race were not factors in the employment decisions leading to the pay schedules.²⁰ Moreover, the employer does not have to “prove a negative” in order to rebut the presumption, as Nelson *et al.* claim. The burden on the employer is a positive one: to show that legitimate, race-neutral and sex-neutral factors account for the wage differential. Indeed, Congress in the Equal Pay Act, and therefore by the Bennett Amendment in Title VII, has laid precisely that burden on employers.²¹

²⁰ *Wage Discrimination*, *supra* note 1, at 488. See also *Furnco Constr. Corp. v. Waters*, 438 U.S. 567 (1978).

²¹ See *Corning Glass Works v. Brennan*, 417 U.S. 188 (1974). Senator McNamara, Chairman of the Committee which reported the Equal Pay Act, stated,

There is no question that under the Fair Labor Standards Act the Secretary must show that an employer has violated the act, and the same will hold true for the enforcement of the new equal pay provision The employer's defense, if it is based on an employer's plan (referring to job evaluations) must be a bona fide one; and the burden of demonstrating the legitimacy of that defense will rest upon the employer.

109 CONG. REC. 9219-20 (1963) (remarks of Sen. McNamara). See also *Gunther v. Co. of Washington*, 623 F.2d 1303 (9th Cir. 1980), where the Ninth Circuit said one of the significant functions of the Bennett Amendment was to clarify the burden of proof to make clear that the allocation of affirmative defenses to the employer would continue into Title VII. A cautionary note: the language of the Ninth Circuit is unclear. There are two possible interpretations of the court's understanding of the Bennett Amendment. (1) The Bennett Amendment operates only when plaintiff claims an Equal Pay-type claim under Title VII. Then, the Bennett Amendment would allow the employer to raise EPA defenses even though the claim had been brought under Title VII. Unless an Equal Pay case were argued, however, the Bennett Amendment would simply not apply. (2) The Bennett Amendment operates to allow employers to raise EPA defenses against all wage and compensation claims brought under Title VII, even ones that could not have been

What my theory does is not to establish an ironclad presumption, but merely to shift the burden of proof. As Nelson *et al.* admit, *some* portion of the low wages associated with jobs identified as minority-work or women's-work is probably due to discriminatory wage setting, though some portion may also be due to other discriminatory employment practices such as hiring, assignment, lack of mobility, etc. Therefore, where an employer still maintains low paid, segregated jobs or segregated pay classifications, it is appropriate that the employer — who best knows which practices resulted in low pay for these groups — explain or justify them.²² If an unexplained differential that cannot be explained by factors other than race, sex, or national origin then persists, it is appropriate that certain risks be born by the employer: *i.e.*, the risk of imprecise injury measurement, and the risk that some injuries are 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.²³

Such changes may well include not only modification of the wage-setting process, but redesign of jobs previously assigned to women or minorities. To eliminate job segregation requires funnelling men and whites into previously segregated jobs as much as opening white male jobs to women and minorities. As discussed in my earlier article, the litmus test for the end of discrimination in segregated jobs is when the jobs can attract and retain white men in sufficient numbers to overcome the former stigma and identification.

F. *Economic and Social Costs in Implementing the Blumrosen Theory*

Finally, Messrs. Nelson, Opton and Wilson raise the specter of total disruption of the industrial relations system should my

entertained under EPA. The Supreme Court in *Manhart* indicated that in its opinion the latter is the correct interpretation. See *Los Angeles Department of Water & Power v. Manhart*, 435 U.S. 702, 712 n.23 (1978), where the Court said, "We need not decide whether retirement benefits or contributions to benefit plans are 'wages' under the Act, because the Bennett Amendment extends the Act's four exceptions to all forms of 'compensation' covered by Title VII." If the Bennett Amendment is construed to extend the affirmative defenses to all compensation claims based on sex — even those not cognizable under the EPA — the clarification of the burden of proof which the Ninth Circuit found 'significant' is more needed than if it applies only to equal pay cases in Title VII.

²² See *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 359-60 (1977).

²³ *Wage Discrimination*, *supra* note 1, at 495.

theory prevail. This disregards both the good sense of the federal district courts and the adaptability of the American industrial relations system. If the law requires reexamination of wage systems which evolved under conditions of discrimination, industry will react without falling into chaos, as it has in reexamining hiring and promotion criteria. I agree that the task of the judges in the first few cases in shaping remedies will be difficult, but they competently faced that task before, during the early development of Title VII law. If industry does not like the approach which the courts evolve, they can substitute their own. Difficulties in shaping a remedy are simply not grounds for denying relief under Title VII.

II. NEW DEVELOPMENTS: WAGE DISCRIMINATION BEYOND THE SCOPE OF THE EQUAL PAY ACT

A. Court Decisions

In the year since *Wage Discrimination* appeared, courts and administrative agencies have begun to develop and apply principles of discrimination law to the wage-setting process. The Supreme Court has agreed to review the decision in *Gunther v. County of Washington*²⁴ which raises sharply and clearly the question of whether the Bennett Amendment precludes consideration of sex-based wage discrimination claims under Title VII which are not cognizable under the Equal Pay Act.²⁵ The issue should be resolved this year. Moreover, in the interim since pub-

²⁴ 623 F.2d 1303 (9th Cir. 1980), *cert. granted*, 49 U.S.L.W. 3322 (Nov. 3, 1980).

²⁵ In *Gunther*, jail matrons sued the County of Washington on two counts. They claimed that their work was equal to that of the male jail guards, so that paying them less was a violation of EPA; but that even if their work was not "equal," they were paid less than could be accounted for by the work differential, and that part of the difference was due to sex discrimination. The district court found that the jobs were not equal and dismissed the complaint, citing the Bennett Amendment. The Ninth Circuit reversed, holding that a plaintiff is not precluded from establishing sex-based wage discrimination under some other theory compatible with Title VII. *Gunther*, 623 F.2d at 1317. Rehearing was then requested on the grounds that the Bennett Amendment argument had not been clearly argued and considered. The court, in an exhaustive opinion, denied rehearing, carefully restricting its holding solely to the Bennett Amendment issue. The opinion stressed that the record was unclear as to what alternative claims plaintiffs might present to establish a Title VII claim. However, in dicta, the court did indicate that although comparisons of jobs might be relevant to "some other Title VII theory," the theory of comparable worth alone was not sufficient so the plaintiff "could not establish a Title VII prima facie case based solely on a comparison of the work she performed," unless the work met EPA standards of equality.

lication of *Wage Discrimination*, four Courts of Appeal have held that the Bennett Amendment does not preclude consideration of wage discrimination claims which are beyond the EPA.²⁶ These courts have maintained that the Bennett Amendment merely incorporates the four exceptions of the EPA into Title VII as affirmative defenses.

²⁶ See *Gunther v. County of Washington*, 623 F.2d 1303 (9th Cir. 1980), *cert. granted*, 49 U.S.L.W. 3322 (Nov. 3, 1980); *IUE v. Westinghouse*, [1980] LAB. REL. REP. (BNA) (23 Fair Empl. Prac. Cas.) 588 (3d Cir. 1980); *EEOC v. Aetna Insurance Co.*, 616 F.2d 719 (4th Cir. 1980); *Fitzgerald v. Sirloin Stockade, Inc.*, 624 F.2d 945 (10th Cir. 1980).

Despite these courts' agreement with my position, Nelson *et al.* argue that my argument to this effect is "unpersuasive." *Comparable Worth*, *supra* note 3, at 271. Their position, and that taken by several courts, can be responded to in several ways. First, in *Orr v. Frank R. MacNeill & Son, Inc.*, 511 F.2d 166 (5th Cir.), *cert. denied*, 423 U.S. 865 (1975) — a case usually cited for the proposition that the Bennett Amendment requires plaintiffs to make an Equal Pay case to prevail under Title VII — the plaintiff never proved the intentional discrimination she had alleged. Secondly, it has generally been overlooked that both *Orr* and a similarly cited case, *Ammons v. Zia*, 448 F.2d 117 (10th Cir. 1971), were both Equal Pay Act cases. They were brought for pre-1972 wages, by employees "exempt" under FLSA and therefore also not covered by EPA, at that time. It has now been all but forgotten but whether such employees were also excluded from Title VII coverage had been the major early battle over the Bennett Amendment. It was to establish broader coverage under Title VII that the original EEOC general counsel letter of 1966 was drafted, 129 C.F.R. 1604.7 (1965). Contrary to Nelson *et al.*'s assertion that the EEOC intended to restrict Title VII substantively, coverage was the problem the EEOC was addressing. After publication of the letter, the Bennett Amendment was understood not to restrict coverage so that persons like *Orr* and *Ammons*, not eligible under Equal Pay Act, could, and did, bring Equal Pay-type actions under Title VII. It is in this context that the restrictive language of those cases should be understood. Senator Bennett tried a year later to explain that coverage restriction was the intended objective of his amendment. See 111 CONG. REC. 13359 (1965). Nelson *et al.* quote Bennett's conclusion that "discrimination . . . does not violate Title VII unless it also violates the Equal Pay Act," *Comparable Worth*, *supra* note 3, at 272, but does not mention that this statement referred only to the coverage controversy and to the four exceptions. Ironically, had Senator Bennett's explanation been accepted, the Bennett Amendment would today be a dead letter, since in 1972 Congress extended coverage of the Equal Pay Act to "exempt" employees.

One district court, in *Gerlach v. Michigan Bell Telephone Co.*, [1980] LAB. REL. REP. (BNA) (24 Fair Empl. Prac. Cas.) 69 (Sept. 15) has concluded that the Bennett Amendment restricts Title VII to intentional wage discrimination claims. The Court's analysis, however, hinged on the fact that the first sentence of Section 703(h) has been interpreted to require intentional discrimination. From this Judge Boyle concluded that the limitation of intentional discrimination applied to *all* of 703(h). This is simply wrong. The Court overlooks the second sentence of Section 703(h), the Tower Amendment, which is the source of the *Griggs* principle that employment tests must be job-related. Thus, the Tower Amendment — which requires tests to be job related — and the Bennett Amendment — which brings over the EPA defenses allowing job-related evaluation systems based on factors other than sex — are clearly analogous. Both were intended to recognize and protect legitimate employer interests in the use of tests, job evaluation systems and other recognized "wage conditions" which were not based on race or sex. Both were intended to do so by requiring the employer to show job relatedness. Bennett's Amendment should therefore be interpreted in the same way as Tower's — not limited by the first sentence of 703(h).

The Courts have also begun to come to grips with the question of how wage discrimination may be established once the threshold Bennett Amendment issue is put to rest. These decisions have held that:

(1) Perpetuation of deliberate wage discrimination based on sex is present discrimination;²⁷

(2) A disproportionately large salary differential not accounted for by differences in work done by a man and a woman is permissible evidence of intentional sex discrimination;²⁸

(3) Proof of wage differentials between different jobs based on plaintiff's job evaluation, without more, will not establish a prima facie case of wage discrimination under Title VII;²⁹ and

²⁷ In *IUE v. Westinghouse*, [1980] LAB. REL. REP. (BNA) (23 Fair Empl. Prac. Cas.) 588 (3d Cir. 1980), plaintiffs alleged that Westinghouse had in 1939 adopted a policy overtly paying women's jobs less than men's jobs with the same job score. The union furthermore alleged that despite changes over the intervening years, the jobs were still predominantly male or female, and that current pay scales could be traced directly to that overt discrimination.

²⁸ See *Gunther v. County of Washington*, 623 F.2d 1303 (9th Cir. 1980); *Fitzgerald v. Sirloin Stockade, Inc.*, 624 F.2d 945 (10th Cir. 1980). In *Sirloin Stockade* the lower court had found, as part of a general pattern of sex discrimination, that although plaintiff had performed a substantial part of the duties of advertising manager, she had not been given a salary that reflected her responsibilities.

²⁹ Cf. *Lemons v. City and County of Denver*, 620 F.2d 228 (10th Cir. 1980). *Lemons*, however, presents a slightly complex situation. In *Lemons*, the Tenth Circuit summed up the case as "based on the proposition that nurses are underpaid in City positions, and in the community, in comparison with other and different jobs which they assert are of equal worth to the employer." *Lemons*, 620 F.2d at 220. Having so characterized the claim, the court then analogized *Lemons* to *Christensen v. State of Iowa*, 563 F.2d 353 (8th Cir. 1977) saying that the disparity shown by such comparisons "was not sought to be adjusted by the Civil Rights Act," evidently because, quoting *Christensen*, "We do not interpret Title VII as requiring an employer to ignore the market in setting wage rates for genuinely different work classifications." The Court in *Lemons* then relied, without further analysis, on *Ammons v. Zia Co.*, 448 F.2d 117 (10th Cir. 1971) for the proposition that "the Bennett Amendment is generally considered to have the equal pay/equal work concept apply to Title VII in the same way it applies to the Equal Pay Act Moreover, to establish a case under Title VII, one must prove a differential in pay based on sex for performing equal work."

Despite this seemingly definitive language, the Tenth Circuit probably does not really mean what it says in *Lemons*. Less than a month before the decision, the Tenth Circuit decided another case, *Fitzgerald v. Sirloin Stockade, Inc.*, 624 F.2d 945 (10th Cir. 1980), in which the court allowed a cause of action of discrimination in compensation based on sex under Title VII, saying:

The purpose of the Bennett Amendment, is to bring Title VII into accord with the Equal Pay Act. Thus the exceptions provided in the Equal Pay Act, such as pay differentials due to a seniority or merit system, or other valid factors not based on sex, are also exceptions under Title VII.

On the employer argument that Title VII claims of sex-based discrimination were controlled by the standards of the EPA, the Court stated: "Here a finding of discrimination under Title VII does not conflict with the provisions of the Equal Pay Act. It was found that the plaintiff was discriminated against solely because of her sex in a manner which is not within the scope of the Equal Pay Act. This finding does not offend the Bennett

(4) Proof of segregated jobs and deliberate wage classifications which resulted in low pay will show illegal discrimination.³⁰

In determining what theories might be within the parameters of Title VII, the courts so far have had no occasion to go beyond determining whether Title VII reaches at least some forms of intentional discrimination. Besides two "comparable worth cases" claiming discrimination in compensation under Section 703(a)(1),³¹ plaintiffs have for the most part so far only claimed intentional discrimination. However, the Third Circuit has also suggested that Title VII has as broad a coverage on sex discrimination as it does in any other case: that is, other than the four exceptions of the EPA, "there is no dilution of sex discrimination coverage in Title VII cases."³² This seems consonant with the Supreme Court position on the order and nature of proof of Title VII claims.³³

This set of decisions properly leaves the district courts free to evaluate various forms of proof against the mandate of the statute. A definitive judicial assessment of the proof process in wage discrimination cases must await the course of litigation. This is as it should be. My theory of wage discrimination resulting from job segregation, as well as other theories will, after *Gunther*, be tested in the crucible of concrete litigation.

B. Administrative Developments: EEOC Hearings on Wage Discrimination

Administrative agencies have been moving ahead vigorously in the wage discrimination area. In April, 1980, the EEOC held a three day public hearing in Washington, D.C., on Job Segrega-

Amendment and Equal Pay Act standards should not be controlling." *Sirloin Stockade*, 624 F.2d at 953 n.2 (emphasis added).

³⁰ See *IUE v. Westinghouse*, [1980] LAB. REL. REP. (BNA) (23 Fair Empl. Prac. Cas.) 588, 590 (3d Cir. 1980) ("Westinghouse allegedly used a system which set the wage rates lower for any classification if the group covered within that category was predominately female We hold that this alleged intentional discrimination in formulating classifications of jobs violates Title VII. . . ."); *Gerlach v. Michigan Bell Telephone Co.*, [1980] LAB. REL. REP. (BNA) (24 Fair Empl. Prac. Cas.) 69 (Sept. 15) (Company allegedly classified new job as clerical resulting in sex-segregated job and low pay).

³¹ *Lemons v. City and County of Denver*, 620 F.2d 228 (10th Cir. 1980); *Gerlach v. Michigan Bell Telephone Co.*, [1980] LAB. REL. REP. (BNA) (24 Fair Empl. Prac. Cas.) 69 (Sept. 15).

³² *IUE v. Westinghouse*, [1980] LAB. REL. REP. (BNA) (23 Fair Empl. Prac. Cas.) 588, 593 (3d Cir. 1980).

³³ See *Los Angeles Water Board v. Manhart*, 435 U.S. 702 (1978); *Dothard v. Rawlinson*, 433 U.S. 321 (1977). See also *Wage Discrimination*, *supra* note 1, at 459.

tion and Wage Discrimination.³⁴ The purpose of the hearing was to gather the facts necessary to identify the extent of depressed wages in jobs held by minorities and women and to determine if these depressed wages were, in fact, the result of forces which include discrimination.³⁵ These were the first hearings ever conducted by a government agency on the links between occupational segregation and wage discrimination. According to EEOC Chairwoman Norton, "these are the most important Hearings this Commission has had in a decade."³⁶

In the hearing, fifty-six witnesses from the private sector, interest groups, academicians, compensation specialists, and individual citizens presented almost a thousand pages of oral testimony. An overwhelming proportion of the testimony supported the central factual assertion of my theory — that wage depression generally accompanies job segregation.³⁷ Even if the Commission does no more than it has already done in publishing the record, the compilation of so much material focused on wage discrimination will be a useful source for judges and scholars alike.

The hearing, moreover, was only part of the EEOC's three-pronged approach to the issue of wage discrimination in segregated jobs. The EEOC in July, 1979, became responsible for enforcement of the Equal Pay Act, pursuant to President Carter's first Reorganization Plan, and became the lead agency charged with the development of a "uniform and harmonious body of law concerning employment discrimination."³⁸ In exercise of this responsibility, the EEOC has, in addition to the hearings, commissioned a study of job evaluation from the prestigious National Academy of Sciences,³⁹ and intervened into recent court cases to obtain legal clarification on jurisdictional and other primary issues.

Other agencies have gotten involved, as well. The Department of Labor, which enforces the Executive Branch program prohibiting employment discrimination by government contractors, also is focusing on wage discrimination. The Department is in the process of toughening its enforcement efforts, according to Assistant Secretary of Labor Donald Elisburg, modifying the

³⁴ EEOC HEARINGS, *supra* note 9.

³⁵ 44 Fed. Reg. 63485 (1979) (first notice of EEOC job segregation hearings). *See also* EEOC HEARINGS, *supra* note 9, at 4.

³⁶ EEOC HEARINGS, *supra* note 9, at 4.

³⁷ *See generally* EEOC HEARINGS, *supra* note 9, at 10-668.

³⁸ *See* 1978 CONG. Q. ALMANAC 802.

³⁹ EEOC HEARINGS, *supra* note 9, at 3.

OFCCP regulations, and encouraging routine investigations for wage discrimination based on job segregation by sex. As secretary Elisburg has testified:

Executive Order 11246 was amended in 1968 to extend its coverage to sex discrimination. It is clear to those of us who have dealt with the issue of sex-based wage discrimination and job segregation by sex, that the two matters are inextricably interwoven. Women are not only deprived of initial hiring opportunities and meaningful transfer and promotional opportunities, but are also paid lower wages on the jobs they are assigned precisely because those jobs are "women's" jobs.⁴⁰

CONCLUSION

In conclusion, I am gratified that Messrs. Nelson, Opton and Wilson undertook such a rigorous evaluation of my thesis. The wage discrimination issue, however, is more than a conflict over the legal theories of Title VII. As Owen C. Johnson remarked to personnel professionals at the October, 1980, meeting of the American Compensation Association:

Wage discrimination is more than a legal theory. Societal pressure makes this an issue that you must deal with just as you deal with compression as an issue, inflation or changing employee values. As a compensation professional, you will determine or help determine how work or values on this issue will or will not lead to societal change. The questions that you ask regarding sex segregated job categories, your company's philosophy on compensation and equity, your job evaluation thinking, all of these things will impact on how we shape our profession in the 1980's. So don't sit back and expect judicial decisions to determine how you perform your job. I am not interested in a future where federal judges determine how my company will compensate our staff or how I'm compensated. Proactive action is required of the compensation community.⁴¹

⁴⁰ *Id.* at 354.

⁴¹ Remarks of Owen C. Johnson, American Compensation Association Annual Meeting, Chicago (October 2, 1980). Owen C. Johnson is Personnel Director of the Continental Grain Bank, Chicago, and Vice-Chairman of the Equal Employment Advisory

Mr. Johnson's statement suggests that employers recognize the problem of wage discrimination, and implies that some employers have already begun to take corrective action.⁴² In the political arena as well the nation is reaching a common understanding of the need. Two planks of the 1980 Republican Platform, for example, speak directly to this issue. The party position on wage discrimination in segregated jobs calls for "total integration of the work force (*not* separate but equal) to bring women equality in pay," and states that "women's worth in the society and in the jobs they hold, at home or in the workplace, must be reevaluated to improve the conditions of women workers concentrated in low-status, low-paying jobs."⁴³ The Courts of Appeal have been resolving the Bennett Amendment problem; the Supreme Court will finish the clearing this year. The problem of wage discrimination needs to be faced squarely and objectively, for as EEOC Chair Eleanor Holmes Norton has noted, the question has captured the public imagination and is "likely to be one of the central legal and industrial relations issues of the 1980's."⁴⁴

Council.

⁴² See also EEOC HEARINGS, *supra* note 9, at 53 (Testimony of David Thomsen and Bertram Gottlieb); *Id.* at 752 (Testimony of compensation and evaluation consultants); *Id.* at 679 (Testimony of Richard Henderson).

⁴³ 1980 Republican Platform, reprinted in 38 CONG. Q. 2033 (1980).

⁴⁴ EEOC HEARINGS, *supra* note 9, at 4.