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Comparable Worth: The Next Step toward Pay Equity under Title VII

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COMPARABLE WORTH: THE NEXT STEP TOWARD PAY EQUITY UNDER TITLE VII

INTRODUCTION

Twenty years ago, Congress took the first steps toward pay equity between the sexes by enacting the Equal Pay Act[1] and Title VII.[2] Simply requiring equal pay for equal work, as the Equal Pay Act provides, has not remedied past economic wage disparities. In fact, current United States Labor Department statistics reveal that women who held full-time jobs in 1983 received only about two-thirds as much as their male counterparts.[3] Judicial recognition of comparable worth claims is the next step toward pay equity under Title VII.

There is no controversy that a wage gap exists; there is controversy as to the reasons for its existence. Critics of comparable worth attribute the wage gap to a number of non-discriminatory factors including age, education and training, the type of work performed, job history, and absenteeism.[4] However, after taking these factors into consideration, there is still an unexplained differential between the wages paid to men and those paid to women. This differential results from society's historic devaluation of "women's work" and segregation of women into specific occupations.

Although women work in a greater variety of professional fields than in the past, women remain concentrated in predominantly female occupations. In 1982, 99% of all secretaries, 96% of all nurses, and 82% of all elementary school teachers were women.[5] In 1983, women accounted for 80% of all administrative support workers but only 8% of precision production, craft and repair workers; 70% of retail and personal sales workers but only 32% of managers, administrators, and executives.[6]

Advocates of comparable worth have called for judicial or legislative intervention to redress the pay inequity resulting from job segregation. The comparable worth doctrine requires equal pay for jobs that are equal or comparable in value to an employer. The focus is on a single employer and whether women, in predominantly female positions, are being paid the same wage rate as men, in predominantly male positions, when both types of jobs are of equal value to their employer.

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1. 29 U.S.C. § 206(d)(1) (1982). *See infra* notes 26-36 and accompanying text.
2. 42 U.S.C. § 2000e (1982). *See infra* notes 37-40 and accompanying text.
3. U.S. DEP'T OF LAB. BUREAU OF LAB. STATISTICS, WOMEN AT WORK: A CHARTBOOK 28-29 (April 1983) [hereinafter cited as WOMEN AT WORK].
4. *See generally* F. MORRIS, J. O'NEILL, J. CALHOON, J. SLOAN, S. MITCHELL, T. FAHNER, JUDICIAL WAGE DETERMINATION . . . A VOLATILE SPECTRE: PERSPECTIVES ON COMPARABLE WORTH (1984) (discussing legal, economic, labor, independent business, corporate, and state government perspectives on comparable worth).
5. WOMEN AT WORK, *supra* note 3, at 8-10.
6. U.S. DEP'T OF LAB., WOMEN'S BUREAU, FACTS ON WOMEN WORKERS (1984).

The comparable worth doctrine under Title VII mandates that sex, like race, color, religion, or national origin, cannot be used by employers as a factor to discriminate in setting wages for employees. Employers violate Title VII whenever they pay women lower wages than men because of sex. The issue of comparable worth is one of sex-based wage discrimination, a traditional Title VII claim.

I. HISTORICAL PERSPECTIVE

Comparable worth is not a new or untested idea. The issue first surfaced in the United States[7] during World War I as women began moving into jobs predominantly held by men.[8] The needs of war production created a drastic increase in the demand for workers both in the military and in industry. As a result, a National War Labor Board was created by executive order of the President for both World War I and World War II.[9] The First War Labor Board established governmental support for pay equity by issuing General Order 13, which prohibited the lowering of wages for women doing work equal to men within a single plant.[10] However, at the end of the war, most women left the workforce voluntarily, to assume the domestic role, or involuntarily, either to be displaced by returning veterans or laid off as war production slowed.[11]

In January 1942, the Board was reestablished by Executive Order 9017 as a wartime measure.[12] Although originally the War Labor Board established the policy of equal pay for equal, or substantially equal, work during World War II, the Board soon realized that sex-based disparities existed between men and women holding different jobs.[13] Consequently, the Second War Labor Board was used to ensure equal pay for

7. Comparable worth claims have been recognized in other countries. For example, Canada and Great Britain have moved beyond the equal pay for equal work standard. In order to combat sex-based wage discrimination, Great Britain prohibits pay disparity between men and women not only for equal work, but for work of equal value as well. Similarly, Canada prohibits pay disparity between men and women for work of equal value. Great Britain adopted its standard in 1970 and Canada adopted its standard in 1977. While the judiciary and the legislatures in the United States struggle with the merits of comparable worth claims, Great Britain and Canada have long since enforced the idea. *See generally* Note, *Beyond Equal Pay for Equal Work: Recent Developments in the United States, Great Britain, and Canada*, 7 B.C. INT'L & COMP. L. REV. 179 (1984) (discussion of the developments of comparable worth in the United States, Canada, and Great Britain).

8. A. COOK, COMPARABLE WORTH: THE PROBLEM AND STATES' APPROACHES TO WAGE EQUITY 1 (1983).

9. Bellace, *Comparable Worth: Proving Sex-Based Wage Discrimination*, 69 IOWA L. REV. 655, 658 (1984). The Boards were established at the request of unions and management in order to carry out the no strike/no lockout commitments and as a means of resolving conflicts that could not be settled through bargaining. *Id.* at 658. *See also* Williams & McDowell, *The Legal Framework*, in COMPARABLE WORTH: ISSUES AND ALTERNATIVES 195, 205 (R. Livernash ed. 1980).

10. A. COOK, *supra* note 8, at 1.

11. Bellace, *supra* note 9, at 659.

12. Newman & Vonhof, *"Separate But Equal"—Job Segregation and Pay Equity in the Wake of* Gunther, 1981 U. ILL. L. REV. 269, 269.

13. *Id.* at 270.

jobs of comparable value.[14] The Board authorized "adjustments which equalize[d] the wage or salary rates paid to females with the rates paid to males for comparable quality and quantity of work on the same or similar operation."[15] Trade unions supported the wage-setting principles of the National War Labor Board, not out of a commitment to pay equity, but because women and minorities had historically been a source of cheap labor, and the unions feared the hard-won gains of union men would be jeopardized.[16]

Several equal pay cases were brought before the War Board,[17] the most famous being *General Electric Co. and Westinghouse Electric Co.*[18] The union in that case argued that General Electric's job evaluation system was arbitrarily applied and resulted in women not receiving the same pay rate as men for work of comparable quality and quantity. In support of that position the union cited a 1937 job manual, which stated that "[f]or female operators, the value shall be two-thirds of the value for adult male workers."[19] The company argued that since there was no interchangeability of jobs, women did not perform work equal to men.[20] The union also protested Westinghouse Electric's dual job evaluation system where jobs were evaluated according to which sex performed them.[21]

In its decision the Board stated, first, that where women hold jobs which are also performed by men, women are to receive equal pay with men.[22] It claimed that indirect costs of employing women, such as higher rates of absenteeism and turnover, and lack of training in the industry, would not be recognized as justifications for reducing wage rates where no comparison of job content is made.[23] Second, with respect to adjustment of wage rates for women's jobs, wage differentiation was presumed to be correct for jobs performed historically by women.[24] However, this presumption could be overcome by affirmative evidence of unequal wage rates derived from a comparison of the content of jobs

14. Williams & McDowell, *supra* note 9, at 205.

15. Thomas, *Pay Equity and Comparable Worth*, 34 LAB. L.J. 4 (1983) (quoting General Order 16, adopted Nov. 24, 1942).

16. R. STEINBERG, WAGES AND HOURS: LABOR AND REFORM IN 20TH CENTURY AMERICA 116-17 (1982). *See also* A. COOK, *supra* note 8, at 1.

17. The War Board did not act as a judicial or administrative body and it did not implement legislative enactments. The Board had power to arbitrate and mediate disputes only. For a discussion on the power and composition of the War Board, see Williams & McDowell, *supra* note 9, at 206-07.

18. 28 WAR LAB. REP. 666 (1945). For a summary of the decision, see 17 L.R.R.M. (BNA) 1667 (1945).

19. 28 WAR LAB. REP. 666.

20. *Id.*

21. *Id.* "We line women's jobs up with other women's jobs. We line men's jobs up with men's jobs. We do not line women's jobs up against men's jobs." *Id.*

22. *Id.*

23. *Id. See also* General Motors Co., 16 L.R.R.M. (BNA) 1601 (1945) (wage differential of 21¢ per hour lowered to 6¢ per hour where the only decisional criterion could be the difference in job content).

24. 28 WAR LAB. REP. 666.

performed by men with the content of jobs performed by women.[25] The Board's decision clarified that the worth of a job must be based on the job's content and not on the sex of the person performing that job.

A. *The Equal Pay Act*

Despite the early success of the equal pay and comparable worth concepts during World War I and World War II, many years passed before the federal government formally accepted wage equity for women. In 1963, section 6 of the Fair Labor Standards Act[26] was amended to include one additional fair labor standard—equal pay for equal work regardless of sex.[27] Under this amended provision, now known as the Equal Pay Act, the plaintiff carries the burden of proof and must establish that the employer is paying workers of one sex more than workers of the opposite sex in a situation where both sexes are performing the same or similar work. The similarity of the work is established by demonstrating that the skill, effort, and responsibility of both jobs are equal and performed under similar working conditions.[28]

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25. *Id.* For a discussion of this case, see Bellace, *supra* note 9, at 660; M. GOLD, A DIALOGUE ON COMPARABLE WORTH 67 (1983); Newman & Vonhof, *supra* note 12, at 292-96.

26. 29 U.S.C. § 206(d)(1) (1982); *see also* U.S. CODE CONG. & AD. NEWS, 88th Cong., 1st Sess. 1963, 688-89. The Equal Pay Act provides in pertinent part:

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

For legislative history of the provision, see U.S. CODE CONG. & AD. NEWS, 88th Cong., 1st Sess. 687-92 (1963).

27. "Equal pay for equal work" was not the standard initially proposed by the Kennedy Administration in 1962. That proposal prohibited paying a lower wage to "any employee of the opposite sex for work of *comparable* character on a job the performance of which requires *comparable* skills." *Hearings on H.R. 8898 Before Selected Subcommittees.* Although support for the original language was strong among the Unions, arguments against the bill presented by business representatives prevailed. The language was changed to the equal work standard because it was constructed more narrowly. *See* H.R. 8898, 87th Cong., 1st Sess. (1963); H.R. 10226, 87th Cong., 2d Sess. (1963). *See also* Note, *supra* note 7, at 184.

28. The EEOC regulations define equal skill, effort, and responsibility as follows:

> "Skill" involves such factors as experience, training, education, and ability and must be measured in terms of the performance requirements of the job. If two jobs require essentially the same skill, both the jobs would be equal under the Act even if the employee in one of the jobs is not required to exercise that skill as frequently or during as much of the work period as the other. An employee's possession of a skill not needed in the job cannot make two employees' jobs unequal.
>
> "Effort" relates to the physical or mental exertion needed for the performance of the job. Differences only in the kind of effort required will not justify wage differentials. Although there are circumstances in which a differential may be based on the fact that one employee has to perform lifting functions and others do not, serious questions of good faith arise if the men on a job receive the differential regardless of their actual lifting activities.
>
> "Responsibility" relates to the degree of accountability required in the performance of the job, with emphasis on the importance of the job obligation. Examples of differences in responsibility that may justify pay differentials include the following: one employee of a group serves as relief supervisor whenever the

If the plaintiff establishes a prima facie case under the Equal Pay Act, the burden shifts to the employer to justify wage differentials under one of four affirmative defenses. These defenses include payment made pursuant to a seniority system, a merit system, a system measuring quality or quantity of production, or where the wage differential is based on "any factor other than sex."[29] The first three defenses are very specific; it is the fourth defense, the catch-all defense, which has created confusion. Although questions remain as to what constitutes a "factor other than sex," the Supreme Court has at least determined that market justifications, such as supply and demand, do not fall within it.

The only case under the Equal Pay Act to reach the Supreme Court, *Corning Glass Works v. Brennan*,[30] is most noted for its rejection of the defense that market conditions are a factor other than sex. In *Corning Glass*, male quality control inspectors on the night shift were paid more than female quality control inspectors on the day shift, even though both groups performed identical tasks.[31] Company officials claimed the pay differential was intended to compensate for night work and was, therefore, a factor other than sex. However, before this time, there was no difference in pay between day and night shifts at Corning Glass Works. This was the first time a plant-wide shift differential had been established.[32] The Court held that non-discriminatory shift differentials could exist, but that in this instance, Corning Glass had failed to prove that the higher rate paid to night workers was intended solely as compensation for night work rather than as additional payment based on sex.[33] The Court found that the employer paid the higher wages as an encouragement for men to perform work they perceived as women's work, and therefore, demeaning.[34] The Court refused to accept market justifications for differing the base pay rates between men and women

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supervisor is absent and during these periods the relief supervisor is in training for a supervisory position; one of several sales clerks is designated as responsible for determining whether to accept payment by personal check. Some types of additional responsibility are not sufficiently important to justify higher pay; for example, turning off lights at the end of the day would not be enough.

See 29 C.F.R. § 800.122-.129 (1984). See also COMMERCE CLEARING HOUSE, HARASSMENT AND COMPENSATIONS—TODAYS SEX DISCRIMINATION ISSUES 12-13 (1981). "Working conditions" are explained in COMMERCE CLEARING HOUSE, *supra* at 13, as follows:

> According to the United States Supreme Court, industrial relations' definition of "working conditions" at the time the Act was under consideration encompassed two subfactors: surroundings and hazards. "Surroundings" refers to the elements, such as toxic chemicals or fumes, that are regularly encountered by the worker and takes into account the intensity and frequency of such encounters. "Hazards" includes the physical hazards regularly encountered, their frequency, and the severity of injury they can cause. Time of day is not a factor included within the term "working conditions."

29. 29 U.S.C. § 206(d)(iv).

30. 417 U.S. 188 (1974).

31. *Id.* Originally, New York and Pennsylvania had laws prohibiting women from working at night. The inspection work was performed during the day until automatic production equipment made it possible to also do the work at night. Male inspectors were subsequently hired to perform the evening inspections. *Id.* at 191.

32. *Id.* at 192.

33. *Id.* at 204.

34. *Id.* at 191-92 n.3.

for identical jobs.[35] Thus, the Supreme Court rejected market conditions as a factor other than sex where equal work is performed.[36]

B. *Title VII*

Title VII of the Civil Rights Act of 1964[37] forbids discrimination in all aspects of employment on the basis of race, color, religion, sex, or national origin.[38] It is far broader and more comprehensive than the Equal Pay Act, which applies only to wages and wage differentials be-

35. *Id.* at 205. "The differential arose simply because men would not work at the low rates paid women inspectors, and it reflected a job market in which Corning could pay women less than men for the same work. That the company took advantage of such a situation may be understandable as a matter of economics, but its differential nevertheless became illegal. . . ." *Id.*

36. Other courts have continued to reject the marketplace defense. *See, e.g.*, Brennan v. Victoria Bank & Trust Co., 493 F.2d 896 (5th Cir. 1974); Hodgson v. Brookhaven Gen. Hosp., 436 F.2d 719 (5th Cir. 1970); Shulte v. Wilson Indus., Inc., 547 F. Supp. 324 (S.D. Tex. 1982). For a discussion of these cases, see Pauley, *The Exception Swallows the Rule: Market Conditions as a "Factor Other Then Sex" in Title VII Disparate Impact Litigation*, 86 W. VA. L. REV. 165, 170-72 (1983).

37. Title VII provides:

> It shall be unlawful employment 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 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.

42 U.S.C. § 2000e-2(a).

38. Originally, Title VII was intended to eliminate employment discrimination among blacks and ethnic minorities. The original bill prohibited discrimination based on race, creed, or color. During a discussion regarding the inclusion of the word "age" in Title VII, Rep. Ryan of New York stated: "We have failed repeatedly to face the crucial issue, and that is whether or not it is time for us to declare as a matter of national policy that there shall be no discrimination on the basis of race, creed, or color." 110 CONG. REC. 2603 (1964).

Rep. Howard Smith of Virginia offered the Amendment including "sex" on February 8, 1964. 110 CONG. REC. 2577 (1964). Smith, in support of the amendment, read a letter from a constituent who was concerned about the "imbalance" of men to women as recorded by the 1960 census. The letter stated, "[J]ust why the Creator would set up such an imbalance of spinsters, shutting off their [sic] 'right' of every female to have a husband of her own is, of course, known only to nature." *Id.* Smith agreed with the injustice and read the letter "just to illustrate that women have some real grievances and some real rights to protect." *Id.*

Some critics claim the word "sex" was inserted hastily by Smith in an effort to prevent the passage of Title VII. *See* Miller, *Sex Discrimination and Title VII of the Civil Rights Act of 1964*, 51 MINN. L. REV. 877, 880-82 (1967). This claim is supported by legislative history, in particular, remarks made by Rep. Green during House debates. In addressing the House, Rep. Green stated: "[The amendment] will clutter up the bill and it may—very well—be used to help destroy this section of the bill by some of the people who today support it." 110 CONG. REC. 2581 (1964).

Ultimately, a comparison of the black employed women's and the white employed women's remedies for wage discrimination was the source of most of the discussion. The fact that black women would have a cause of action for discrimination in employment based on race but white women would have no such redress for employment discrimination caused concern. Clearly, it was the argument that white women would be at the "bottom of the barrel," below black women in particular, with respect to equal employment rights that persuaded the House to include "sex" in Title VII. *See* 110 CONG. REC. 2579, 2583 (1964).

tween men and women. In order to achieve equal employment opportunities, Title VII proscribes overt discriminatory practices as well as facially neutral practices that are discriminatory in effect.[39] Title VII followed so closely on the heels of the Equal Pay Act that concern about conformity between the two laws, and about preserving the efficacy of the Equal Pay Act, led to the Senate's introduction of an amendment to the bill.[40]

C. *The Bennett Amendment*

The purpose of the Bennett Amendment was to resolve the anticipated conflict between Title VII and the Equal Pay Act.[41] The Amendment became a contested issue that sharply divided the lower courts in their resolution of sex-based wage discrimination claims.

The text of the Bennett Amendment provides:

> It shall not be an unlawful practice under this title for any employer to differentiate upon the basis of sex in determining the amount of wages or compensation paid or to be paid to employees of such employer if such differentiation is *authorized* by the (Equal Pay Act).[42]

The meaning of the word "authorized" created the controversy in the lower courts. One theory interpreted the phrase "authorized by the (Equal Pay Act)" as incorporating only the four defenses of the Equal Pay Act into Title VII,[43] while the other theory incorporated the four defenses and, in addition, restricted Title VII's coverage to the equal pay for equal work standard.[44]

The controversy over the Bennett Amendment was resolved by the Supreme Court in *County of Washington v. Gunther*.[45] *Gunther* held that the Bennett Amendment did not limit Title VII's protections against sex-based wage discrimination to claims of equal pay for equal work as prescribed by the Equal Pay Act.[46] In reaching this decision, the Court re-

39. Griggs v. Duke Power Co., 401 U.S. 424, 430-31 (1971). "The Act proscribes not only overt discrimination but also practices fair in form, but discriminatory in operation." *Id.* at 431.

40. The House approved the incorporation of the word "sex" and sent the bill to the full Senate for consideration. It was at this level that concern for the conformity of the Equal Pay Act and Title VII grew. Senator Bennett proposed an amendment in response to this concern. 110 CONG. REC. 13647 (1964).

41. "The purpose of [this] amendment is to provide that in the event of conflicts, the provisions of the Equal Pay Act shall not be nullified." *Id.* For a discussion of the limited legislative history of the Bennett Amendment, see Newman & Vonhof, *supra* note 12, at 277-79.

42. 42 U.S.C. § 2000(e)-2(h) (emphasis added).

43. *See, e.g.*, International Union of Elec. Workers v. Westinghouse Elec. Corp., 631 F.2d 1094, 1099-1107 (3d Cir. 1980), *cert. denied*, 452 U.S. 967 (1981).

44. *See, e.g.*, Lemons v. City and Cty. of Denver, 620 F.2d 228 (10th Cir.), *cert. denied*, 449 U.S. 888 (1980).

45. 452 U.S. 161 (1981) (female prison guards paid less than male prison guards for substantially equal work could raise claims under Title VII). For a discussion of the facts, procedural history, and Supreme Court decision in *Gunther*, see Newman & Vonhof, *supra* note 12, at 274-77.

46. 452 U.S. at 181.

lied on the language of the amendment itself and upon its recognition that the denial of Title VII protection is appropriate only to the extent that the Equal Pay Act has "authorized" pay differentials. By determining that the word "authorized" normally denotes an affirmative enabling action, the Court was able to focus upon the wage practices that were affirmatively authorized by the Equal Pay Act.[47] Thus, the Court held that only the four defenses of the Equal Pay Act "authorized" pay differentials unprotected by Title VII, while the rest of Title VII remained intact.[48]

Although the *Gunther* Court did not discuss the issue of comparable worth,[49] it left open the possibility that Title VII protection is available in comparable worth claims. Claims under the Equal Pay Act must be based on pay differentials between men and women for the same job.[50] Comparable worth is properly focused upon the disparity in the earnings gap which is left unprotected by the Equal Pay Act.[51]

II. PROVING THE WAGE GAP

The existence of a wage gap is not in dispute. The statistics illustrate that women earn, on the average, approximately 60% of what men earn.[52] What is in dispute is the cause of the wage gap. In theory, the argument against comparable worth seems plausible; the wage gap is attributed to factors other than sex-based discrimination. However, data regarding the existence and cause of the wage gap is available to counter the critics.

Not all of the wage gap may be attributed to wage discrimination; some non-discriminatory factors contribute to wage disparity between men and women. Non-discriminatory factors include, among others, age, education, job training, job history and seniority, type of work performed, risks involved, wage conditions, and absenteeism. Taking these factors into consideration, available data still leave a large portion of the

47. *Id.* at 169.

48. *Id.* at 168-69. "We therefore conclude that only differentials attributable to the four affirmative defenses of the Equal Pay Act are authorized by that Act within the meaning of . . . Title VII." *Id.* at 171.

49. The Court cautioned that it was not deciding "the precise contours of lawsuits challenging sex discrimination in compensation under Title VII" and that because the comparable worth issue was not raised under the facts of the case it was not required to "make its own subjective assessment of the value of the male and female guard jobs. . . ." *Id.* at 181.

50. *See supra* notes 26-36 and accompanying text.

51. See Newman & Vonhof, *supra* note 12, at 300, where the authors comment that the Equal Pay Act may have exacerbated occupational segregation by encouraging employers to segregate women so as to keep their wages down and be able to avoid equal pay claims. "If an employer wants to keep labor costs low, therefore, it can do so with less fear of detection by isolating a group of workers, assigning them to different jobs, and devaluing their wages, than it can by paying them lower wages for equal work." *Id.*

52. The earnings differential has fluctuated over the past thirty years. In 1956, fully employed women's earnings were 63% of men's earnings. Fourteen years later, in 1970, they had decreased to 59% of men's earnings. U.S. DEP'T OF LAB., TIME OF CHANGE: 1983 HANDBOOK ON WOMEN WORKERS 4. [hereinafter cited as TIME FOR CHANGE].

gap unexplained.[53]

In a study commissioned by the Equal Employment Opportunity Commission, the National Academy of Sciences (NAS) was asked to determine if wage differentials, for work of comparable value, vary as to the sex of the worker.[54] The study summarized the findings from several other studies and examines two explanations for the wage gap: 1) characteristics of workers; 2) characteristics of jobs.[55]

The first explanation, characteristics of workers, considers the differences that affect the productivity, education and training, work experience, continuity of work history, and health.[56] The NAS determined that the empirical data consistently found a substantial part of the wage gap could not be explained by non-discriminatory factors measuring productivity differences.[57] The committee concluded that such results created a presumption of additional factors, including discrimination, affecting pay disparity between men and women.[58]

The second explanation scrutinized by the committee concluded that the pay disparity between men and women resulted from the characteristics of the jobs they hold.[59] Included within these characteristics are prestige of job, authority exercised, and percent female.[60] Citing a 1974 study, the Committee stated "[n]ot only do women do different work than [sic] men, but also the work women do is paid less, and the more an occupation is dominated by women the less it pays."[61] The Committee concluded that the sex composition of jobs, independent of the personal or job characteristics, strongly influences the earnings of a worker within an occupation.[62]

Finding that only a small part of pay disparity may be attributed to the differences in education, experience, commitment or other personal characteristics of employees,[63] and that the level of job segregation by sex may be, in part, a result of discriminatory practices, the committee

53. *Id.* at 87.

54. *See* WOMEN, WORK, AND WAGES: EQUAL PAY FOR JOBS OF EQUAL VALUE 61 (D. Trieman & H. Hartman, eds. 1981) [hereinafter cited as WOMEN, WORK, AND WAGES] (The study addressed discrimination within the single firm and not a systematic solution to unintentional discrimination. The study focused on the inequalities between men and women rather than between whites and non-whites because the pay disparity is greater between the sexes. Moreover, the pay disparity between men and women has increased while the pay disparity between whites and non-whites has decreased over the years.).

55. *Id.* at 16-17.

56. *Id.* at 18.

57. *Id.* at 17-24.

58. *Id.* at 24. The Committee did, however, recognize that the studies surveyed may have contained flaws, and consequently, stated that they were to be suggestive of the finding rather than definitive. *Id.*

59. *Id.*

60. *Id.* at 31.

61. *Id.* at 28 (citing Sommers, *Occupational Rankings for Men and Women By Earnings*, 97 MONTHLY LAB. REV. 34-51 (Aug. 1974)).

62. WOMEN, WORK, AND WAGES, *supra* note 54, at 30-31.

63. "The findings from studies attempting to explain the differences in earnings between men and women on the basis of such factors usually account for less than a quarter and never more than half of the observed earnings differences." *Id.* at 42.

concluded that substantial discrimination in pay exists.[64] The Committee suggested that job evaluation plans be used to identify and eliminate discriminatory effects of pay disparity among jobs within a firm.[65]

Other data concerning the wage gap are available in the findings of the Panel Study of Income Dynamics conducted by the University of Michigan's Institute for Social Research (1978).[66] Five thousand households were the subjects of the study which focused specifically upon persons in the workforce who were between the ages of 18 and 34. The panel analyzed the impact of formal education, labor force attachment, work history, and years of training in the current job on four groups: white men, white women, black men, and black women. These four groups included married and unmarried men, married women, and unmarried women who were heads of households.

The findings revealed several important facts. First, formal education had little impact on wages for white women, moderate impact for black women, and substantial impact for black men.[67] The study indicated that only 2% of the wage gap between white men and white women could be attributed to the difference in education. The factor of education explained 11% of the gap between white men and black women and 39% of the gap between white men and black men.[68] The fact still remains that fulltime working women earn substantially less than similarly employed men with equivalent educations.[69]

The attachment of an employee to the workforce has been cited by critics of comparable worth as one of the major factors causing the wage gap.[70] Tested factors of labor force attachment are: absenteeism as a result of one's own illness or the illness of another; self-imposed restrictions on hours of work a day and on location of work; and plans to quit.[71] Although women have a lower attachment to the workforce than men, this difference accounts for very little, if any, of the earnings gap.[72] Even though the level of labor force attachment may fluctuate between women, the pay remains substantially the same.[73] Consequently, wo-

64. *Id.* at 91. "[I]t is . . . true in many instances that jobs held mainly by women and minorities pay less at least in part *because* they are held mainly by women and minorities." *Id.* at 93 (emphasis in the original).

65. Although the Committee admitted that job evaluation plans contain built-in biases, it still encouraged their use as the only acceptable method of achieving pay equity. *Id.* at 95-96. *See also infra* notes 98-100 and accompanying text.

66. UNIVERSITY OF MICHIGAN INSTITUTE FOR SOCIAL RESEARCH, PANEL STUDY OF INCOME DYNAMICS, FIVE THOUSAND FAMILIES: PATTERNS OF ECONOMIC PROGRESS (1978), *reviewed by* TIME FOR CHANGE, *supra* note 52, at 88-90.

67. *Id.* at 88.

68. *Id.*

69. *Id.* at 98. In 1981, over half the women with a college degree had incomes slightly higher than the median for men completing the eighth grade. *Id.*

70. *See, e.g.*, M. GOLD, *supra* note 25, at 3-19.

71. *Time for Change, supra* note 52, at 88.

72. Labor force attachment explains only 2% of the differences between white men and white women and negatively influences the difference between white men and black women, and white men and black men. *Id.* at 88.

73. *Id.*

men with a high labor force attachment earn about as much as women with lower attachment levels.

The panel found the single factor with the largest impact on the wage gap was work history. Work history, along with the closely related factor of years of training on the current job, accounted for 38% of the wage gap for white women, 22% for black women, and 18% for black men.[74] Two elements in the work history category explained the largest part of the gap: length of employment with the present employer and years of training completed at the present job.[75]

In theory, much of the wage gap may be explained by the fact that women have less continuous employment than men. Women lose seniority and acquisition of important skills by interrupting their work. However, the study concluded that in reality, staying out of the work force has little significant or direct impact on women's wages.[76] In fact, white women with frequent work interruptions (two or more) earned practically the same hourly wage as those women with similar work experience and fewer interruptions in employment.[77]

Both the NAS study and the Michigan study enumerate several neutral factors, such as age, education, training, job tenure, seniority, and amount and location of work done, that affect the wage gap. Relevant data acknowledge that a higher percentage of women work in part-time jobs,[78] a lower percentage of women are union members, and that men's work weeks are usually longer.[79] Even so, taking all these factors into consideration, there is still an unexplained proportion of the wage gap between men and women.[80] The United States Labor Department concluded that "[t]his unexplained difference can be attributed to sex discrimination."[81] The NAS acknowledged the argument that the high

74. *Id.*

75. *Id.* at 90. On-the-job training explained 10% of the wage gap between white women and white men, and 15% for black men and white men. Years of continuous employment explained 12% of the gap for white women and 9% for black women. This is due to the fact that, in general, black women have more continuous employment than white women. *Id.*

76. *Id.*

77. *Id.*

78. Although it is true that women in the work force are more likely to work part-time than men, it is important to note that there is no overall pay disparity with respect to part-time work between men and women. Most men who work part-time are either between the ages of 16 and 19 years old or over 55 years old. Whereas a large number of women employed part-time are between the ages of 25 and 54. Labor statistics published by the United States Department of Labor in 1982 indicated that women who work part-time have achieved pay equity with men working part-time; both groups receiving about the minimum wage. The difference in median hourly wages between full-time working men and part-time working men was large—$6.25 and $3.20 respectively. Women's wages, on the other hand, showed very little difference between full-time and part-time median wages—$3.98 and $3.21 respectively. Unlike men, women receive approximately the minimum wage for the work they perform, regardless of whether it is full-time or part-time. TIME FOR CHANGE, *supra* note 52, at 92-93 (citing U.S. DEP'T OF LAB., BUREAU OF LAB. STATISTICS, EMPLOYMENT EARNINGS (March 1982)).

79. TIME FOR CHANGE, *supra* note 52, at 88.

80. *Id. See also* Pauley, *supra* note 36, at 167 (Neutral factors reduce the wage gap but there is still a 34% unexplained differential between men and women in the work force).

81. TIME FOR CHANGE, *supra* note 52, at 87.

concentration of women in lower-paying jobs often results, in part, because women choose these jobs for a variety of reasons usually related to family obligations.[82] However, the NAS concluded that the high concentration of women in lower-paying jobs also results from "the exclusionary practices of employers and from the systematic underpayment of jobs held mainly by women."[83]

The findings of the NAS and the United States Labor Department not only support the actual existence of the wage gap but also bolster the conclusion that sex-based discrimination is one of the primary causes of the wage gap.

III. PROVING A TITLE VII WAGE DISCRIMINATION CLAIM

The Supreme Court's decision in *Gunther* affirmatively settled the issue of whether Title VII applies to wage discrimination claims when male and female jobs are dissimilar, but left unanswered how such claims were to be proved.[84] In order to promote Title VII's broad prohibition of discriminatory employment practices,[85] the standard Title VII burdens and modes of proof should apply in the wage discrimination context as well.[86]

There are two theories available to a plaintiff to prove a Title VII case, disparate treatment and disparate impact.[87] A disparate treatment case involves a situation where an employer treats an individual protected by Title VII differently simply because of the person's minority status, religion, or sex. A treatment case, unlike an impact case, necessitates proving the employer's intent to discriminate. Such intent, however, can be inferred from circumstantial evidence.[88] Once a plaintiff has introduced evidence from which it appears more likely than not that the defendant had an intent to discriminate, a prima facie treatment case is established.[89] An employer will be liable unless it can "articulate" reasons which justify disparate treatment.[90] If an employer does articulate legitimate, nondiscriminatory reasons for disparate treatment, the employee can then show that these reasons were merely a pretext to

82. WOMEN, WORK, AND WAGES, *supra* note 54, at 53-54.

83. *Id.* at 65.

84. The *Gunther* Court declined to determine what may constitute a prima facie case or to lay down standards for litigation of the case on remand. On remand, the case settled prior to trial for a $3,250 payment to four former jail matrons and $26,000 in attorney's fees. *See* 954 GOV'T EMPL. REL. REP. (BNA) 33 (March 15, 1982).

85. As Congress itself has indicated, a "broad approach" to the definition of equal employment opportunity is essential to overcoming and undoing the effect of discrimination. S. REP. No. 867, 88th Cong., 2d Sess. 12 (1964).

86. *Cf.* Note, *Sex-Based Wage Discrimination Under Title VII Disparate Impact Doctrine*, 34 STAN. L. REV. 1083 (1982) (disparate impact analysis should not be used in comparable worth claims).

87. International Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).

88. *Id.* A pattern of treatment supports an inference of intentional discrimination such as substantial disparaties in the rates of hire of minority as compared with nonminority groups. United States v. Hazlewood School Dist., 433 U.S. 299 (1977).

89. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

90. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981); McDonnell Douglas Corp., 411 U.S. at 802.

hide bias.[91]

In a disparate impact case, the plaintiff must show that some facially neutral employment practice has a substantially disproportionate impact upon a group protected by Title VII.[92] Under this theory, "practice, procedures, or tests neutral in terms of intent, cannot be maintained if they operate to 'freeze' the status quo of prior discriminatory employment practices."[93] Examples of such outwardly neutral employment practices include height and weight requirements,[94] or certain types of employment tests adversely affecting the job opportunities of those of certain ethnic or cultural backgrounds.[95] Once a plaintiff has shown the existence and impact of such a practice, the employer will be held liable unless the practice can be justified by "business necessity."[96]

A. *Disparate Treatment Wage Discrimination Claims*

The majority of wage discrimination cases decided to date have proceeded under a Title VII disparate treatment theory. In these cases, the degree of similarity between men's and women's jobs is not considered relevant; what is relevant is the fact that an employer intentionally set women's wages lower than men's wages for jobs which are of equal value to the employer. The courts have held that discriminatory intent, in the wage discrimination setting, can be inferred from proof of sex-based deviation from job evaluation studies and other traditional means of proving Title VII discrimination.[97]

1. Job evaluation studies as proof of disparate treatment

Job evaluation studies have been utilized in the employment setting to compare, rank, and set wages for jobs, from as early as the 1940's by the War Labor Board and consistently by courts and employers through implementation of the Equal Pay Act.[98] In a study of job evaluation sys-

91. McDonnell Douglas Corp., 411 U.S. at 804.

92. This theory was first articulated by Chief Justice Burger in *Griggs*, 401 U.S. at 431.

93. *Id.* at 430.

94. *See* Dothard v. Rawlinson, 433 U.S. 321 (1977) (height and weight requirements for prison guard positions disproportionately excluded 50% of the women from consideration for employment, compared to 1% of the male population).

95. *Griggs*, 401 U.S. 424 (effect of non-job related testing and educational requirements was to deny employment opportunities to otherwise qualified blacks who, throughout their lives, had been the victims of discriminatory educational systems).

96. *Id.* at 431.

97. Testimony by Winn Newman and Christine Owens before the United States Commission on Civil Rights Consultation on Comparable Worth Panel on Legislative Perspective and Precedents, (June 6-7, 1984) [hereinafter cited as Testimony by Newman and Owens]. Newman and Owens contended that a showing of sex discrimination in the administration of various aspects of the employment relationship, such as discriminatory job assignments and classifications, is evidence of sex-based wage discrimination. They also supported the use of statistical evidence by itself or in conjunction with other types of evidence to prove sex-based wage discrimination.

98. Under the Equal Pay Act, jobs are evaluated to determine if they are "substantially similar" based on factors of skill, effort, responsibility, and similar working conditions. *See* 29 U.S.C. § 206(d)(1).

The Supreme Court noted the importance of job evaluations in employment discrimination suits in *Corning Glass*, emphasizing that Congress' intent was "to incorporate into

tems in the United States, the EEOC found four major types: 1) a ranking system; 2) a classification system; 3) a factor comparison system; and 4) a point method approach.[99] Although there are several types of job evaluation systems, almost all show a similar methodology: the first step involves a careful description of each job within the unit being evaluated (the entire firm, a particular plant, or a division within the plant); the second step evaluates each job with respect to its "worth" to the organization, and ranks all the jobs accordingly; the third step uses the results of the job evaluation in the setting of wage or salary rates.[100]

Job evaluation results are useful, competent, and relevant evidence in employment discrimination cases.[101] Sex-based deviation from job evaluation studies in the establishment of wage rates is especially probative of intentional discrimination. *Gunther*,[102] the only Supreme Court decision which has mentioned the comparable worth theory, made it clear that proof of intentional discrimination in violation of Title VII could be inferred from an employer's deviation from job evaluation results.[103] The case involved a dispute regarding a county's evaluation of the worth of the jobs of female matrons and male guards at the county jail. The county determined that female matrons should be paid 95% of what male guards earned. Notwithstanding that determination, the females were compensated only at 70% of the male wage. The males, on the other hand, were paid the full evaluated worth of their jobs.[104] The Court recognized that a claim of discriminatory undercompensation under Title VII could be proved by the failure of the county to pay the female matrons their full evaluated wage rate.[105]

The Third Circuit in *International Union of Electrical Workers v. Westinghouse Electric Corp.*,[106] has held that sex-based wage differentials would violate Title VII where the employer deviated from job evaluation results along pronounced sex-based lines for jobs involving comparable, rather than equal, work. Wage rates for jobs filled predominantly by females were set lower than jobs filled predominantly by males despite the fact that the jobs had been rated equally with respect to the knowledge and training required, and the specific demands and responsibilities of the job.[107] The court held that Westinghouse could not create

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[the Equal Pay Act] the well-defined and well-accepted principles of job evaluation so as to ensure that wage differentials based upon bona fide job evaluation plans would be outside the purview of the Act." 417 U.S. at 201.

99. *See* NAT'L ACAD. OF SCI., JOB EVALUATION: AN ANALYTICAL REVIEW, INTERIM REPORT TO THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, 39-48 (June 1979).

100. *Id. See also* A. COOK, *supra* note 8, at 13-14; D. THOMPSEN, *Principles for Design and Audit of Job Evaluation Plans* in MANUAL ON PAY EQUITY 109 (J. Grune ed. 1980).

101. *Cf.* Bellace, *supra* note 9, at 671-79 (a difficulty with litigating comparable worth cases is judicial unfamiliarity with job evaluation and wage setting).

102. 452 U.S. 161. *See also supra* notes 45-49 and accompanying text.

103. 452 U.S. at 181.

104. *Id.* at 180-81.

105. *Id.* at 181.

106. 631 F.2d 1094 (3d Cir. 1980), *cert. denied*, 452 U.S. 967 (1981).

107. *Id.* at 1097. The particular wage structure challenged embodied a deliberately discriminatory policy of an earlier plan which maintained sex-segregated wage scales. *Id.*

job classifications whereby wages were paid to one group solely because of considerations of religion, race, national origin or sex.[108]

Two other cases demonstrate the propriety of using job evaluation results as a test for comparing dissimilar jobs and setting wages. In *Briggs v. City of Madison*,[109] the court set forth a prima facie case of Title VII wage discrimination which comprised, inter alia, a job evaluation study. The Court held that a plaintiff must show (1) she is a member of a protected class, (2) occupying a sex-segregated job classification, (3) that is paid less than, (4) a sex-segregated job classification occupied by men, and (5) that the two job classifications at issue are so similar in their requirements of skill, effort, and responsibility and in their working conditions that it can reasonably be inferred that they are of comparable value to an employer.[110] And, in *Connecticut Employees Association v. Connecticut*,[111] the court held that the state intentionally discriminates against female employees in violation of Title VII when it pays female employees at lower rates of compensation for work the state has determined to be of comparable or equal value to the work performed by men.

The cases which have found job evaluations to be useful in wage discrimination cases demonstrate that job evaluation studies have been and can continue to be manageable in the courts. Furthermore, when the employer has deviated from its own self-evaluation, the evidence of intentional discrimination in setting wages is particularly compelling. If the premise of these cases is that an employer is liable because it conducted job evaluations that compared job worth and found wage disparities based on sex, the question arises whether an employer can avoid liability by simply not conducting any evaluations.[112] Such a practice would run counter to Title VII's broad remedial purposes and should be curbed. Commentators have raised two proposals which would encourage judicial use of job evaluation studies to ascertain Title VII violations in the absence of an employer conducted study.[113]

First, a standard methodology for conducting job evaluations should be established so that courts could take judicial notice of the pro-

108. *Id.* The court stated the issue in the case was "whether Congress intended to permit Westinghouse to willfully discriminate against women in a way in which it could not discriminate against blacks or whites, Jews or Gentiles, Protestants or Catholics, Italians or Irish, or any other group protected by [Title VII]." *Id.*

109. 536 F. Supp. 435 (1982).

110. *Id.* at 455. Although the plaintiffs, public health nurses, all of whom were women, proved a prima facie case of discriminatory undercompensation in comparison to male sanitarian workers, the court found that the defendants rebutted such proof and the plaintiffs failed to prove pretext.

111. 31 Fair Empl. Prac. Cas. (BNA) 191 (D.C. Conn. 1983).

112. Some commentators state that "an increasing number of attorneys are advising employer-clients, with some good reason, not to study their compensation systems at all or to do so in utmost secrecy." Siniscalco & Remmers, *Comparable Worth in the Aftermath of* AFSCME v. State of Wash., 10-1 EMPLOYEE REL. L.J 6, 22 (1984).

113. *See Failure to Adopt Comparable Worth Pay Plan After State Was on Notice of Discrimination*, 115 LAB. REL. REP. ANALYSIS 1, 4 (January 2, 1984).

cess;[114] courts would be less reluctant to adopt a comparable worth policy based on sophisticated well-tested job evaluation studies.[115] Although the research and methodology for a bias-free job evaluation system are in the infant stage,[116] a common methodology can be developed from synthesizing a number of existing or proposed methodologies. Job evaluations have been used by practically every large employer to evaluate the worth or grade level of job classifications.[117] Some eighty-five state and local governments either have studied or have actually implemented pay equity.[118] The federal government requires a uniform classification system for all government employees.[119] Comparable worth legislation has been proposed in Congress which encourages the development and use of equitable job evaluation techniques.[120] These efforts to provide workable, independent, bias-free job

114. *Id.* at 4 (citing United Steelworkers of Amer. v. Weber, 443 U.S. 193, 198-99 n.1 (1979) ("Judicial findings of exclusion from crafts on racial grounds are so numerous as to make such exclusion a proper subject for judicial notice.")).

115. It is recognized that courts are reluctant to assume the task of evaluating jobs and setting wage rates. *See* Plemer v. Parsons-Gilbane, 713 F.2d 1127 (5th Cir. 1983) (court refused to make an "essentially subjective" assessment of the value of the differing duties of males and females in comparable jobs); *Lemons*, 620 F.2d at 229 ("[T]his would be a whole new world for the courts, and until some better signal from Congress is received we cannot venture into it."); Power v. Barry Cty., 539 F. Supp. 721, 726 (W.D. Mich. 1982) ("This court cannot, and will not, evaluate different jobs and determine their worth to an employer or to society and then, on that basis alone, determine whether Title VII or the Equal Pay Act as been violated.").

116. *See* Valez & Buitenbeck, *Comparable Worth and the Union's Duty of Fair Representation*, 10-1 EMPLOYEE REL. L.J. 31, 32-35 (1984).

117. Winn Newman, *Statement to the Equal Pay Joint Committee of Iowa* 6 (Nov. 17, 1982). *See also* T. PATTERSON, JOB EVALUATION xi (1972) ("Almost two thirds of the adult population in the United States are pay graded by job evaluation schemes.").

118. To date, twenty states have adopted legislation defining pay equity in terms of "comparable worth" or "equal value." Sixteen states apply comparable worth legislation to all employees and four states apply it only to state employees.

The states with comparable worth legislation for all employees are: Alaska, Arkansas, Georgia, Idaho, Kentucky, Maine, Maryland, Massachusetts, Nebraska, North Dakota, Oklahoma, Oregon, South Dakota, Tennessee, and West Virginia. *See* ALA. STAT. § 18-80.220 (1981); ARK. STAT. ANN. § 81-624 (1976); GA. CODE §§ 34-5-1, 34-2-3 (1981); IDAHO CODE § 44.1702 (1977); KY. REV. STAT. § 337.423 (1979); ME. REV. STAT. ANN. tit. 28, § 628 (1964); MD. ANN. CODE art. 100, § 55A (1979); MASS. ANN. LAWS ch. 149, § 105A (Michie/Law. Coop. 1976 & Supp. 1984); NEB. REV. STAT. § 48-1219 (1978); N.D. CENT. CODE §§ 34-06.1-01, 34-06.1-03 (1980); OKLA. STAT. ANN. tit. 40, § 198.1 (West. Supp. 1983-84); OR. REV. STAT. § 652.220 (1983) (all employees), § 240.190 (1983) (state employees); S.D. CODIFIED LAWS ANN. § 60-12-15 (1978); TENN. CODE ANN. § 50-2-202 (1983); W. VA. CODE § 21-513-3 (1981). Four states, California, Minnesota, Montana, and Washington, have comparable worth legislation for state employees only. *See* CAL. GOV. CODE § 19827.2 (West Supp. 1984); MONT. CODE ANN. §§ 2-18-208, -209, 39-3-104 (1983); WASH. REV. CODE §§ 41.06.150, 41.06.155 (Supp. 1984-85). For discussion of the status of comparable worth in eight states, see A. COOK, *supra* note 8, at 32-66.

119. *See* Siniscalco & Remmers, *Nonjudicial Developments in Comparable Worth*, 10-2 EMPLOYEE REL. L.J. 222, 235 (1984) (citing *Beyond Equal Pay for Equal Work*, BUS. WK., July 18, 1983, at 169).

> Such studies of public employees have found a consistent wage disparity between predominantly male and predominantly female jobs ranging from fifteen to thirty-five percent. Studies in Connecticut, Washington, and Wisconsin prove a twenty percent wage disparity based upon sex segregation in jobs requiring equivalent skill, effort, and responsibility.

120. *See* S.1900, 98th Cong., 1st Sess. (1983). Senator Alan Cranston introduced the Pay Equity Act of 1983 which would "require the executive branch to enforce applicable

evaluation studies should be beneficial to the courts. Judicial notice of a national standard for job evaluation studies would allow courts to infer wage discrimination from an employer's situation with respect to an objective standard.[121]

A second proposal for judicial action when an employer decides not to voluntarily conduct a job evaluation study urges that the courts treat the employer's failure to conduct such a study as an indication of the employer's belief that such a study would reveal that wage discrimination does in fact exist.[122] The courts could infer discriminatory intent from the employer's failure to conduct a study and prima facie liability under Title VII could be established.[123] Employers would therefore be liable in two ways: first, if the result of a voluntarily conducted study showed women were underpaid; and second, if the employer refused to carry out such a study.[124] Once a prima facie case of underpayment is shown, an employer could avoid liability only by conducting a study which shows that wages are properly adjusted for certain job classifications.[125]

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equal employment opportunity laws and directives so as to promote pay equity and eliminate wage-setting practices which discriminate on the basis of sex, race, or ethnicity and result in discriminatory wage differentials." A provision of the Act discusses job evaluation studies as follows:

> Sec. 2(a) The Congress finds that—
>
> (8) objective job evaluation techniques now exist which are utilized by many public and private employers to determine the comparative value of different jobs through a system which numerically rates the basic features and requirements of a particular job, and additional efforts should be made to develop, improve, and implement these techniques so as to help eliminate discriminatory wage-setting practices and wage differentials.

129 CONG. REC. S13,095-101 (daily ed. September 28, 1983). See also H.R. 5092, 98th Cong., 2d Sess. (1984), introduced by Rep. Mary Rose Oaker, which was designed to effectuate pay equity for employees in the private and public sector alike. 130 CONG. REC. H1426-27 (daily ed. March 8, 1984).

121. Testimony by Newman and Owens, *supra* note 97, at 23-24, explained how courts could use job evaluation results in proving wage discrimination:

> Analytically, the role of job evaluations in proving wage discrimination claims is similar to the role of seniority or employee selection devices in other Title VII contexts. All three form an objective backdrop against which employment related decisions may be assessed to determine whether prohibited discrimination has occurred. By way of example: if more senior blacks are routinely passed over for advancement, while less senior whites obtain promotions, courts infer race discrimination because on the basis of objective criterion, i.e., seniority, blacks are treated less favorably than whites. Similarly, if blacks who satisfy certain employee selection criteria are denied employment opportunities while whites do not satisfy those criteria (or do not fare as well on them) obtain those opportunities, courts again infer discrimination. By the same token, where on the basis of an objective job measure—i.e., skill, effort and responsibility—women's jobs which are consistently rated equal to or higher than those of men nonetheless carry a lower pay rate, it is reasonable to infer wage discrimination thereby shifting to the employer the burden of justifying that differential.

122. *See* LAB. REL. REP., *supra* note 113, at 4.

123. *Id. See, e.g.*, Taylor v. Charley Bros. Co., 25 Fair Empl. Prac. Cas. (BNA) 602 (1981) (intent to discriminate inferred from failure to evaluate value of jobs).

124. LAB. REL. REP., *supra* note 113, at 4.

125. *Id.*

B. *Traditional Means of Proving Title VII Wage Discrimination Claims*

Aside from the theory that job evaluation studies can provide powerful evidence of wage discrimination, traditional means of proving discrimination are equally effective in proving sex-based wage discrimination. A showing of discriminatory job assignments, classifications or other practices in the administration of an employment relationship provides circumstantial evidence of an intent to discriminate.[126] For example, in *Taylor v. Charley Brothers Co.*,[127] the court inferred the existence of the employer's discriminatory intent in setting women's wage rates lower than men's, from proof that the employer maintained a pattern and practice of classifying jobs by sex, hired and assigned jobs in a segregated fashion, deprived women of full-time wages and seniority rights by employing them on a "part-time" or "temporary basis," and failed to undertake a job evaluation study for determining values of jobs. The fact that the employer also did not pay men and women equal pay for equal work was an additional demonstration of discriminatory intent.[128]

Similarly, in *Fanegan-Grimms v. Library Association of Portland*,[129] a prima facie case of disparate treatment in setting compensation was proved by evidence of sex-based job segregation where female bookmobile drivers were historically paid less than male delivery truck drivers. Although the jobs were similar, a female bookmobile driver demonstrated that even if she were "to achieve the highest pay scale in her classification, she would still receive less pay than delivery truck drivers, no matter how many years of seniority she achieved."[130]

Discriminatory intent, resulting in Title VII violations, has also been inferred from the extremely low number of women who held management positions in a corporation;[131] from initial assignment discrimination and thereafter discrimination in promotions, transfers, and pay;[132] and from maintaining sex-based classifications resulting in lower wages for women.[133]

Finally, statistical evidence of a pattern of treatment in an employment relationship should lead toward an inference of sex-based wage discrimination.[134] In *AFSCME v. State of Washington*,[135] the district court

126. *See* Testimony by Newman and Owens, *supra* note 97, at 1ba.

127. 25 Fair Empl. Prac. Cas. (BNA) 602 (1981).

128. *See* Testimony by Newman and Owens, *supra* note 97, at 17 n.22, "Evidence of Equal Pay violations is extremely compelling evidence of wage discrimination in other women's jobs. . . . [I]f an employer pays women less than men when they are performing precisely the same job, then surely he will pay women less, because of their sex when jobs differ."

129. 560 F. Supp. 486 (D. Or. 1983).

130. *Id.* at 494.

131. *See* Fitzgerald v. Sirloin Stockade, Inc., 624 F.2d 945 (10th Cir. 1980).

132. *See* Carpenter v. Stephen F. Justin State Univ., 706 F.2d 608 (5th Cir. 1983), *reh'g denied*, 712 F.2d 1416 (5th Cir. 1983). *Contra* Brooks v. Ashtabula Cty. Welfare Dept., 717 F.2d 263 (6th Cir. 1983); Cox v. American Cast Iron Pipe Co., 585 F. Supp. 1143 (N.D. Ala. 1984).

133. *See* Gerlach v. Michigan Bell Tel. Co., 501 F. Supp. 1300 (E.D. Mich. 1980).

134. *See* Testimony by Newman and Owens, *supra* note 97, at 10. Statistics are particu-

found that the state had intentionally engaged in "institutional" and systematic discrimination in pay against state employees working in predominantly or traditionally female jobs.[136] The expert evidence introduced by the plaintiffs showed a statistically significant inverse correlation between sex and salary.[137] When jobs were controlled for skill, effort, responsibility, and working conditions, so that only jobs of substantially equal value were compared, the monthly salary of the classification decreased by $4.51 for every one percent increase in the female population of the classification.[138] A one hundred percent female job was paid, on average, $5,400 a year less than a one hundred percent male job of equivalent value.[139] Since the probability of such a relationship occurring by chance is less than one in ten thousand, the court attributed the difference in pay to discrimination.[140]

The plaintiffs in *AFSCME* bolstered these showings with additional discriminatory evidence based on occupational segregation and classification of employees,[141] Equal Pay Act violations,[142] wage disparities in jobs requiring comparable skill levels,[143] sex-based deviations from job evaluation measures in setting wage rates,[144] and admissions by state officials of discriminatory practices.[145]

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larly significant under the Title VII principles set forth by the Supreme Court in *Teamsters*: "Statistics showing racial . . . imbalance are probative . . . because such imbalance is often a telltale sign of purposeful discrimination, absent explanation, it is ordinarily to be expected that nondiscriminatory . . . practices will in time result in more or less representative . . . evidence of long-lasting and gross disparity between them may be significant. . . . In many cases the only available avenue of proof is the use of racial statistics to uncover clandestine and covert discrimination." 431 U.S. at 339-40 n.20.

135. 578 F. Supp. 846 (W.D. Wash. 1983), *appeal docketed*, No. 84-3569 (9th Cir.).

136. 598 F. Supp. at 864.

137. *Id.* at 863.

138. Brief for Plaintiff of Proposed Findings of Fact and Law at 30, AFSCME v. State of Wash., 578 F. Supp. 846 (W.D. Wash. 1983).

139. Brief, *supra* note 138, at 30.

140. *Id.* at 33.

141. The state placed classified advertisements in "male only" and "female only" columns in the newspapers. Classification specifications indicated a preference for male or female employees. 578 F. Supp. at 862-63.

142. Predominantly male jobs were consistently paid more than predominantly female jobs requiring similar duties, i.e., barber and beautician, institution counselor and classification counselor, and duplication service supervisor and data processing supervisor. Brief, *supra* note 138, at 12.

143. Regardless of entry-level requirements for jobs, male jobs at all levels paid more than female jobs with the same requirements. Male entry-level jobs were paid 16% more than female entry-level jobs requiring no high school education, 22% more for high school graduates, 19% more for one year of college, and 13% more for two years of business college. Brief, *supra* note 138, at 31.

144. A series of job evaluation studies updated yearly reflected an increasing across-the-board disparity (20%-32%) between predominantly male and predominantly female jobs which required an equivalent composite of skill, effort, responsibility, and working conditions. No action was taken to correct the situation and only on the eve of trial did the state pass legislation calling for a 10-year phase-in to correct its discriminatory wage situation. 578 F. Supp. at 862-63.

145. Successive state governors, personnel boards, and the Governor's Affirmative Action Committee admitted that job evaluation studies showed discrimination in compensation. *Id.* at 860-62.

B. *Disparate Impact Wage Discrimination Claims*

A second means of proving a sex-based wage discrimination claim is through application of the traditional Title VII disparate impact doctrine. Although some comparable worth advocates discourage the use of the disparate impact principle for comparable worth litigation,[146] foresaking this judicial vehicle would work the demise of the comparable worth doctrine.

One of the problems perceived with implementing a disparate impact theory for Title VII wage discrimination claims is that this theory of discrimination focuses on the effect of, and not motivation for, an employer's policy.[147] The reasons why an employer has pursued a given policy are irrelevant; use of the challenged practice is unlawful unless its continued use is necessary to the employer's legitimate interest and no less discriminatory alternatives would meet the employer's needs.[148] A literal interpretation of the Equal Pay Act's fourth affirmative defense, incorporated into Title VII by the Bennett Amendment,[149] departs from this approach. If an employer's practice of setting women's wages lower than men's is based on any "factor other than sex," the practice withstands an Equal Pay Act or Title VII challenge. It has been argued that this literal interpretation provides an absolute defense to claims of sex-based wage discrimination under a disparate impact approach.[150]

Notwithstanding this argument, claims of comparable worth should be brought under the disparate impact theory[151] because the majority of female workers suffering from covert wage discrimination are unable to

146. *See* Note, *supra* note 86, at 1101 ("Although comparable worth impact claims advance the Title VII policies which the judicially created disparate impact doctrine serves, they intrude further into employer prerogative and labor-management relations than Congress intended."); Gould, *The Supreme Court's Labor and Employment Docket in the 1980 Term: Justice Brennan's Term*, 53 U. Colo. L. Rev. 1, 66 (1981) (*Gunther* conclusively denies a wage-impact claim under either Title VII or the Equal Pay Act); *cf.* Blumrosen, *Wage Discrimination, Job Segregation, and Title VII of the Civil Rights Act of 1964*, 12 U. MICH. J.L. REF. 397, 428-57 (1979) (proof of sex-based job segregation establishes a prima facie Title VII claim); Comment, *Equal Pay for Comparable Work*, 15 HARV. C.R.-C.L. L. REV. 475 (1980) (proof of unequal average salaries of male and female workers establishes a disparate impact claim).

147. Bellace, *supra* note 9, at 686.

148. *See supra* notes 92-96 and accompanying text.

149. 29 U.S.C. § 206(d)(1). *See supra* notes 41-48 and accompanying text.

150. *See* Gould, *supra* note 70, at 63-74.

151. The following are proposed as the essential elements to a prima facie case of comparable worth using the disparate impact approach:

(i) the plaintiff represents workers in a job category which is predominantly female;

(ii) the employer also employs workers in a job category which is not dominated by female workers and which requires

(a) comparable work or

(b) substantially similar minimum qualifications of applicants for employment; and

(iii) workers of plaintiff's job category receive less pay pursuant to the employer's pay scale.

See Johnson, *The Prima Facie Case of Comparable Worth*, 11 OHIO N.U.L. REV. 37, 52 (1984). *See also* Bellace, *supra* note 9, at 687 (suggesting a modified disparate impact litigation model which would require the plaintiff to prove that an evaluation or wage-setting process, which is sex neutral on its face, operates to depress the wage rate for women's jobs).

prove their claims under the disparate treatment theory.[152] Outlawing only those wages factors openly labeled "sex-based" would allow employers to segregate jobs by sex and discriminatorily assign values to those held by women, taking precautions only to avoid explicit use of sex in assigning those values. Moreover, employers could use market conditions to establish wages. This practice would fall short of meaningful intent, but would perpetuate the devaluation of female jobs in the market which results, to some extent, from past discrimination.[153] To effectuate the remedial scheme of Title VII, no showing of intentional discrimination should be necessary for women to challenge a purportedly neutral practice which discriminatorily determines their wages.

The use of market conditions to set wages is an example of a purportedly "neutral" policy which could be challenged under a Title VII disparate impact claim.[154] It is argued, however, that Title VII's remedial purpose is not so broad as to make a present employer liable for employment practices of others or for existing market conditions.[155] For example, in *Christensen v. Iowa*,[156] the Eighth Circuit stated it did not interpret "Title VII as requiring an employer to ignore the market in setting wage rates for genuinely different work classifications."[157] A disparate impact claim was rejected and the employer was allowed to maintain a practice of paying clerical workers, who were exclusively female, less than the amount it paid physical plant workers, who were predominantly male. The jobs were of equal value to that employer, but did not command an equal price in the labor market.[158]

In *Lemons v. City and County of Denver*,[159] several city-employed nurses sued in a class action to require the city to pay them the same as other employees with jobs of comparable value. The city had set its pay scale according to the market wages of nurses in the community.[160] The nurses argued that their depressed wages were a product of past attitudes and practices; historically nurses were underpaid because their work was undervalued and because they were almost exclusively women.[161] A market-based pay scale for nurses would perpetuate these imbalances. Although the gross disparity between wages of nurses and wages of employees in different jobs of comparable worth evidenced a

152. *See* Pauley, *supra* note 36, at 176. Only if the definition of "intent" were given a more expansive construction to include those acts that are prompted by subconscious beliefs regarding the value of women's work, could a disparate treatment theory embrace such covert discrimination. *Id.*

153. *See infra* notes 179-85 and accompanying text.

154. *See, e.g.*, AFSCME v. State of Wash., 578 F. Supp. 846 (W.D. Wash. 1983).

155. *See* Briggs v. City of Madison, 536 F. Supp. 435, 445 (W.D. Wis. 1982).

156. 563 F.2d 353 (8th Cir. 1977).

157. *Id.* at 356.

158. The plaintiffs argued that reliance upon prevailing wage rates in determining pay scales served to carry over the effects of long-standing discriminatory practices in the local job market, which channeled women workers into a small number of jobs, resulted in an over-supply of workers and depressed wages in those jobs. *Id.* at 355-56.

159. 620 F.2d 228 (10th Cir.), *cert. denied*, 449 U.S. 888 (1980).

160. *Id.* at 229.

161. *Id.*

disparate impact which affected women, the Tenth Circuit summarily disposed of the claim.[162]

A similar approach to a wage discrimination claim under a disparate impact doctrine was recently rejected by the Ninth Circuit in *Spaulding v. University of Washington*.[163] The court first rejected the predominantly female nursing faculty's claim of discriminatory underpayment under the Equal Pay Act and under a Title VII disparate treatment claim. Refusing to infer intent "merely from the existence of wage differences between jobs that are only similar,"[164] the court also rejected a "comparability plus" test which would determine whether discriminatory animus existed.[165]

In addition to rejecting the disparate treatment claim, the court denied the nursing faculty's disparate impact claim. The plaintiffs showed a wage disparity between comparable jobs and showed that the disparate impact on women was caused by the university's facially neutral policy or practice of setting wages according to market rates. The court stated that the disparate impact model was not available to establish a wide-ranging claim of wage disparity between only comparable jobs.[166] Finding that an employer's reliance on competitive market prices to set wages does not qualify as a facially neutral policy or practice, the court noted that employers "deal with the market as a given, and do not meaningfully have a 'policy' about it in the relevant Title VII sense."[167]

The rationale employed by the courts which have accepted a market defense and which have rejected a disparate impact theory of liability for Title VII wage discrimination claims exemplifies the attitude which the disparate impact doctrine seeks to remedy.[168] The social purposes furthered by the disparate impact doctrine should be recognized by the courts in wage discrimination cases.

First, disparate impact checks covert intentional discrimination.[169] Once the Equal Pay Act came into effect, it was evident that overt, sex-based wage discrimination would subside. As one commentator stated, "[b]ut whether such practices would be eradicated or merely driven un-

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162. *Id.*

163. 740 F.2d 686 (9th Cir.), *cert. denied*, 105 S. Ct. 511 (1984).

164. *Id.* at 700.

165. *Id.* The "comparability plus" test required only some degree of job comparability plus some combination of factors including direct and circumstantial evidence of discriminatory conduct and pay disparities. The nursing faculty argued that it would be a sliding scale where the "plus" factors vary in inverse proportion to the degree of comparability shown.

166. *Id.* at 706.

167. *Id.* at 708. Although the majority disposes of a disparate impact claim, Judge Schroeder, in a concurring opinion, points out that the nursing faculty never attempted to show that any of the facially neutral practices of which it complained had a disparate impact on women. She criticizes the majority's analysis as "confusingly mesh[ing] adverse impact with varying concepts of comparable worth." Thus, she asserts, it is not possible for the majority "to render any definitive ruling on the validity of comparable worth." *Id.* at 710.

168. *See generally* Lerner, *Employment Discrimination: Adverse Impact, Validity and Equality*, 1979 SUP. CT. REV. 17 (discussing *Griggs* and *Dothard*).

169. *See* Note, *supra* note 86, at 1089.

derground is another question."[170] Using disparate impact doctrine as a means to eliminate covert discrimination is especially important in the setting of wages because, as the Supreme Court has noted, "more often than not people do not act in a totally arbitrary manner, without any underlying reasons, especially in a business setting."[171]

Second, the disparate impact doctrine alleviates present harm caused by historical discrimination which cannot be traced to a single purposeful discriminatory act.[172] Traditionally, society has undervalued women's work; the present wage situation aggravates the already disadvantaged social position of women.[173] To correct present pay disparities which reflect past discrimination, the impact doctrine would allow a plaintiff to demonstrate that she represents workers in a sex-segregated job who receive lower wages than workers performing work which is comparable,[174] without having to establish the original "blameworthy" act.[175]

Finally, recognizing a disparate impact claim for sex-based wage discrimination cases will prevent future remote discrimination.[176] This rationale has been discussed primarily in the context of remedying the effects of past race discrimination. Specifically, it is recognized that the injury inflicted by historical discrimination "can place its victims at a disadvantage in a variety of future endeavors, and discrimination can also perpetuate itself by altering the social environment to harm new generations of victims."[177] Bold enforcement of Title VII will reduce the gap in job prestige for women and will reduce future prejudice.[178]

In order to implement the social policies furthered by the disparate impact doctrine, the market defense used in Title VII wage discrimination claims should be rejected. The use of market conditions to establish wages is not an inherently bad practice, but it must be prohibited

170. Bellace, *supra* note 9, at 688.

171. Furnco Constr. Co. v. Waters, 438 U.S. 567, 577 (1978).

172. *Griggs*, 401 U.S. at 430 (citing inferior education in segregated schools as one reason why blacks were less likely to pass the employer's tests).

173. *See* Perry, *The Disproportionate Impact Theory of Racial Discrimination*, 125 U. PA. L. REV. 540, 558 n.99 (1977). See also M. Griffiths, *Can We Still Afford Occupational Segregation? Some Remarks* in WOMEN AND THE WORKPLACE 7-14 (M. Blaxall, B. Reagan eds. 1976) for a discussion of the argument which men have used to claim the best jobs and the most pay: men are breadwinners and women are wives or widows; men provide necessary incomes for their families, but women do not; women and families are supported by men, not women. The author points out that the supposition is not true, women work because of economic need, just as men do. Two-thirds of all women workers are either single, divorced, widowed, or separated, or have husbands who earn less than $7,000 per year. *Id.* at 7-9.

174. *See supra* note 151.

175. *See* Note, *supra* note 86, at 1090.

176. Brest, *supra* note 173, at 43.

177. Brest, *The Supreme Court 1975 Term—Forward: In Defense of the Antidiscriminative Principle*, 90 HARV. L. REV. 1, 31 (1976); *see also* Quarles v. Philip Morris, Inc., 279 F. Supp. 505 (D.C. Va. 1968) (differences in compensation which result from earlier hiring discrimination against a protected group for protected jobs are prohibited by Title VII).

178. *See generally* J. Bernard, *The Historical Roots of Occupational Segregation* in WOMEN AND THE WORKPLACE (M. Blaxall, B. Reagan eds. 1976) 87, 93 (suggestions for occupational nonsegregation and a sex-fair distribution of work).

when market conditions do not reflect the true value of the job.[179] Title VII does not require employees to ignore the interaction of supply and demand, it simply prohibits the use of the market as justification for perpetuating sex-based wage discrimination. For example, Title VII and public policy prohibit employers from using the high unemployment rate of blacks to justify paying black workers less than white workers.[180] The oversupply of black workers is no defense to discrimination. Consequently, employers must also be prohibited from using the same market argument to exploit women workers.[181] The argument that fails in race discrimination cases cannot succeed in sex discrimination cases.

Setting wage rates as a result of market conditions, in effect, means that each employer will pay only what other employers are willing to pay.[182] When the market rate reflects discriminatory factors, then the market defense will only perpetuate discrimination by transferring it from one employer to another.[183] Market wages should not be the only standard used to judge the relative worth of jobs.[184] In order to end wage discrimination, be it sex or race, policy intervention is necessary to alter the market outcome.[185]

An employer's reliance on the market rate to determine wage rates for women workers was rejected as a defense to Equal Pay Act violations by the Supreme Court over a decade ago.[186] In *Corning Glass*, the Supreme Court explicitly established that the market is not a factor other than sex. Courts have continued to find that the market is not a defense to sex-based wage discrimination under the Equal Pay Act.[187] Because the Equal Pay Act's affirmative defenses are incorporated into Title VII, *Corning Glass* and the case law addressing the market defense should have equal vitality in Title VII litigation. There is no legal justification for denying the market defense in Equal Pay Act cases while accepting it in Title VII cases.

Although pre-*Gunther* cases accepted market conditions as a factor

179. Pauley, *supra* note 36, at 186.

180. Testimony by Newman and Owens, *supra* note 97, at 36.

181. *Id.*

182. *Statements on Pay Equity Before the Joint Econ. Comm.*, 98th Cong. 2d Sess. (1984) (statement by Brian Turner, Nat'l Comm. on Pay Equity at G-7 [hereinafter cited as *Statements on Pay Equity*].

183. *Id. See also* WOMEN, WORK, AND WAGES, *supra* note 54, at 60 ("By use of the 'going wage' as a standard to set pay rates the wages of a (non-discriminating) firm will be biased by the discrimination of other firms in the market.").

184. WOMEN, WORK, AND WAGES, *supra* note 54, at 65.

185. *Id.*

186. *Corning Glass*, 417 U.S. 188. *See also supra* notes 30-36 and accompanying text.

187. See Laffey v. Northwest Airlines, 567 F.2d 429 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978), where the Court of Appeals stated: "This evidence leads convincingly to the conclusion that the contrast in pay is a consequence of the historical willingness of women to accept inferior financial awards for equivalent work—precisely the outmoded practice which the Equal Pay Act sought to eradicate." *See also* Hodgson v. Brookhaven Gen. Hosp., 436 F.2d 719, 726 (5th Cir. 1970) ("Clearly the fact that the employer's bargaining power is greater with respect to women than with respect to men is not the kind of factor . . . Congress had in mind.").

other than sex in Title VII disparate impact cases,[188] recent cases have rejected it.[189] In *Norris v. Arizona Governing Committee*,[190] the Ninth Circuit rejected sex-segregated actuarial tables in deferred compensation plans and ordered the state to pay female retirees benefits equal to those paid to similarly situated male retirees. The state argued that such plans reflect limits in the marketplace and constituted a restriction not of the state's making.[191] The court, in rejecting this argument, stated: "Title VII has never been construed to allow an employer to maintain a discriminatory practice merely because it reflects the marketplace. . . ."[192]

The Supreme Court affirmed the Ninth Circuit decision[193] holding that it would be inconsistent with Title VII to find that an employer, who adopts a discriminatory fringe benefit plan, can avoid liability on the ground that all plans in the open market are discriminatory. The Court stated that an employer who confronts such a situation must either supply the fringe benefit himself, free from market discrimination, or not provide it at all.[194]

In cases other than where the market is used as a defense, purportedly "neutral" employer policies affecting wages have been successfully challenged under a Title VII disparate impact theory. In a race-based wage discrimination claim, a disparate impact theory was used to challenge an employer's classification and pay scheme. Black employees in *Kirby v. Colony Furniture Co.*,[195] claimed that an employer's use of a "leadman" classification resulted in wage discrimination against them since leadmen were predominantly white. Approximately 60% of the higher paid leadmen positions were held by white employees; the work force from which they were chosen was 80% black. Recognizing that the additional duties required of leadmen were insignificant,[196] the plaintiffs argued that the employer classified the leadman position as a management position to enable the employer to pay white employees more than black employees for comparable work. The Eighth Circuit Court of Appeals recognized that the challenge to the classification scheme stated a cause of action for wage discrimination under the disparate impact theory.

Similarly, the disparate impact analysis has been used to challenge purportedly "neutral" employment policies causing sex-based wage dis-

188. *See* Lemons v. City and Cty. of Denver, 620 F.2d 228 (10th Cir. 1980); Christensen v. Iowa, 563 F.2d 353 (8th Cir. 1977).

189. *Contra* Briggs v. City of Madison, 536 F. Supp. 435 (W.D. Wis. 1982).

190. 671 F.2d 330 (9th Cir. 1982).

191. *Id.* at 335.

192. *Id.*

193. 463 U.S. 1073 (1983). The Court affirmed the judgment of the Court of Appeals with regard to the violation of Title VII, but reversed, in part, the holding applying retroactive relief.

194. *Id.* at 1083.

195. 613 F.2d 696 (8th Cir. 1980).

196. As the evidence in the record about the supervisory nature of the leadman position was highly contradictory, the Eighth Circuit remanded the case to the district court to determine the extent of the leadman's responsibilities. *Id.* at 701.

crimination. In *Kouba v. Allstate Insurance Co.*,[197] a Title VII equal pay case, it was argued that a company's method of computing wages constituted unlawful sex discrimination where a minimum salary guaranteed to starting employees was based, in part, on the employee's prior salary. A result of the practice was that, on the average, the female employees made less than their male counterparts. The court expressed concern that using a factor such as prior salary to set wages could easily be manipulated by employers to capitalize on the unfairly low salaries historically paid to women.[198] It held that "an employer thus cannot use a factor which causes a wage differential between male and female employees absent an acceptable business reason."[199]

In *Wambheim v. J.C. Penney Co.*,[200] the Court held that the disparate impact analysis was appropriate in an action alleging that an employer's medical insurance policy discriminated against women with respect to compensation. The court found that the employer's "head-of-household" rule allowing dependent coverage for a spouse only if the employee earned more than half of the couple's combined income, had a disparate impact on women, most of whom were in low-paying positions.

Finally, in *AFSCME*, a disparate impact claim was allowed to challenge the state's policy of paying female job classifications twenty percent less than employees in predominantly male job classifications that required an equivalent or lesser composite of skill, effort, responsibility, and working conditions.[201]

Allowing the Title VII disparate impact doctrine in wage discrimination cases does not call for a novel approach to Title VII. Rather, employers merely are held liable for acts of overt and covert discrimination. The eradication of sex-based wage discrimination should involve application of traditional Title VII burdens, standards, and means of proof which have successfully gained a foothold in the elimination of discrimination in other contexts.

IV. ARGUMENTS AGAINST COMPARABLE WORTH

Comparable worth has received considerable attention lately from Congress, state legislatures, and labor unions.[202] Advocates rest wo-

197. 691 F.2d 873 (9th Cir. 1982).

198. *Id.* at 876. *See also* Neely v. MARTA, 641 F.2d 877 (5th Cir. 1981) (disparate impact analysis applied to company rule requiring prior management approval for starting salaries of employees that exceeded their prior salary by 10%); Futran v. RING Radio Co., 501 F. Supp. 734 (N.D. Ga. 1980) (expressing concern that the use of prior salary would perpetuate the traditionally lower salaries paid to women).

199. 691 F.2d at 876.

200. 705 F.2d 1492 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 3544 (1984).

201. 578 F. Supp. 846 (W.D. Wash. 1983). *See also supra* notes 135-45 and accompanying text.

202. Comparable worth has received very little attention from the EEOC under the Reagan Administration. This marks a drastic change from action by the EEOC under the Carter Administration which filed an amicus curiae brief in *Gunther*, brought many lawsuits, and commissioned the NAS study on comparable worth. The Reagan Administration has

men's economic survival on the adoption of a comparable worth scheme. Opponents charge that nationwide adoption of comparable worth will be costly and disruptive to the free market system.

A. *Market Justifications*

Comparable worth opponents argue that the free market system will be disrupted if a comparable worth system is established because wages are determined by the interaction of neutral forces of the supply of workers and the demand for their skills.[203] However, it has been argued that the factors of supply and demand have little, if any, impact on predominantly female occupations.[204] Cited as support for this proposition is the long-term nurse shortage where salaries did not rise to match the unmet demand for nurses. Rather than pay American nurses a fair wage, hospitals resorted to recruiting nurses from the Philippines who would gladly accept depressed wages.[205]

The claim that new social reforms will destroy the American free market system has been espoused at various times throughout the history of labor legislation. For example, in the 1880's Massachusetts employers testified that a new piece of legislation would destroy the employer-employee relationship, cause chaos in production, force employees to relocate their businesses in areas where the legislation was more favorable, and lead to the spread of socialism.[206] This portentous legislation was the Child Labor Law, which prohibited children from working more than eight hours a day.

Interference in the free market system to achieve important social goals has been a common congressional practice. This is illustrated by legislative efforts to protect laborers in a variety of ways through child labor laws, health laws, minimum wage laws, and equal pay laws. Similarly, unions attempt to circumvent the free market system to achieve their goals. By engaging in collective bargaining, these organizations directly influence the wages paid to their members rather than relying solely on the neutral forces of supply and demand.

The United States does not have an unfettered market system. The fact that comparable worth opponents cling to market conditions as justification for denying comparable worth claims merely camouflages sex-based wage discrimination.

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recently taken a strong stand to defeat comparable worth. *See* Siniscalco & Remmers, *supra* note 119, at 223. Recently, the EEOC has been the object of a frontal attack by Congress for its inaction in sex-based wage discrimination claims other than straight Equal Pay Act cases. *See* HOUSE COMM. ON GOV'T OPERATIONS, *Pay Equity: EEOC's Handling of Sex-Based Wage Discrimination Complaints*, 98th Cong., 2d Sess. (1984).

203. *See, e.g.*, J. O'NEILL, *An Economic Perspective: An Argument Against Comparable Worth*, *supra* note 4, at 27; *Comparable Worth—Part 1: A Theory With No Facts*, BACKGROUNDER, March 2, 1984.

204. *Statements on Pay Equity*, *supra* note 186 (citing E. BRANDERS, 4 HISTORY OF LABOR LEGISLATION IN U.S. *Labor Legislation* (J. Commons, ed.).

205. *Id.*

206. *Id.*

B. *Cost Justifications*

The cost of correcting sex-based wage discrimination cited by employers[207] does not justify the cost of discrimination to the individual and society.[208] So great are the disparities between men's and women's current wage rates, that employers are concerned that the establishment of equity will be too burdensome for the economy to bear.[209]

Congress has never placed a price tag on the cost of correcting discrimination in employment.[210] In enacting the Pregnancy Discrimination Act of 1978 under Title VII,[211] Congress acknowledged that requiring employers to cover pregnancy on the same terms as other disabilities would raise their total costs by approximately $200 million, but discussed this factor and determined that the Act was necessary "to clarify [the] original intent" of Title VII.[212]

Similarly, in *Los Angeles Department of Water & Power v. Manhart*,[213] the Supreme Court stated that the cost of correcting discrimination is no justification for violating title VII.[214] The Court rejected the city's argument that the costs of equal treatment in employee retirement plans would be too great and found that the city was not justified in charging women more than men for pension premiums. In *Newport News Shipbuilding & Dry Dock Co. v. EEOC*,[215] the Supreme Court stated that although the cost of providing complete health insurance coverage for the dependents of male employees, including pregnant wives, might ex-

207. *See, e.g., AFSCME*, 578 F. Supp. at 867. The state argued that the tremendous costs involved, lack of revenue in a depressed economy, and prior state revenue commitments were reasons why injunctive relief to correct wage discrimination should be denied.

208. *See generally* Sawhill, *Discrimination and Poverty Among Women Who Head Families* in WOMEN AND THE WORKPLACE 201 (M. Blaxall, B. Reagan eds. 1976) (labor market discrimination and occupational segregation are factors which contribute to the poverty level of families headed by women; the elimination of sex discrimination alone would improve their economic status and there would be far less poverty and welfare dependency among these families).

209. *See* S. MITCHELL, *Comparable Worth: Unchartered & Treacherous Waters*, *supra* note 4, at 51-57. The commentator states:

> . . . [C]omparable worth is unnecessary, ill-conceived, premature, vague and unintelligible, and it will impose an enormous burden on employers, taxpayers and unions with currently productive collective bargaining relationships. One indication of the cost is the federal court judgment [*AFSCME*] handed down in December, 1983 against the State of Washington on an intentional sex-discrimination theory. Commentators have estimated that back pay in that case could amount to $500 million, while estimates for pay adjustments necessary to comply with the judge's notion of comparable worth may amount to another $5 million. In Illinois, a similar judgment would require a 1% increase in the individual State income tax, or $300.00 more on taxes for a family with an income of $30,000.00. Applied to private employers, no reliable estimates of costs exist, but they would be considerably larger.

Id. at 57.

210. Pauley, *supra* note 36, at 186.

211. 42 U.S.C. § 2000e(k).

212. H.R. REP. No. 948, 95th Cong., 2d Sess. 4, 9 (1978), *reprinted in* U.S. CODE CONG. & AD. NEWS 4749 (1978).

213. 435 U.S. 702, 716-17 (1978).

214. *Id.* "That argument might prevail if Title VII contained a cost-justification defense comparable to the affirmative defense in a price discrimination suit. But neither Congress nor the courts have recognized such a defense under Title VII." *Id.*

215. 462 U.S. 669 (1983).

ceed the cost of preventing such coverage for the dependents of female employees, no such cost justification is recognized under Title VII once discrimination has been shown.[216] And, in *Liberles v. County of Cook*,[217] the Seventh Circuit stated: "The desire, however laudable, of county and state employers to save money does not bear a manifest relationship to the . . . compensation of predominantly female job classifications."

The argument that remedying disparate treatment and impact would impose heavy costs on institutions and individuals was also rejected in the race discrimination context with respect to suspension of voting tests, invalidating employment tests, and massive busing remedies for school segregation.[218] Similarly, the prohibitive costs of eliminating sex-based wage discrimination should not be used to justify denying female employees their full Title VII rights.

V. CONCLUSION

The time has come to recognize the comparable worth theory as an appropriate vehicle for proving sex-based wage discrimination under Title VII. Comparable worth claims are entitled to the same remedies as any other Title VII claim and should be analyzed under both disparate treatment and disparate impact.

The time has come to acknowledge that the wage gap does exist and results, in part, from the historical devaluation and segregation of women's work. Although non-discriminatory factors affect the wage gap, there still remains a significant portion of the gap that cannot be attributed to any factor. Logic demands the acknowledgment that this unexplained differential results from sex-based discrimination. In order to eradicate sex-based discrimination, job evaluation studies must be used to determine the size of the unexplained differential within each individual organization.

The time has come to move forward toward equality for women. No longer can we continue to have a national policy forbidding employment discrimination while at the same time protecting employers in their efforts to pay women unequal wages for work of comparable or equal value. Women are calling for a uniform policy—one that prohibits sex-based discrimination in the same breadth as race-based discrimination and makes no remedial distinctions. We have the tool—Title VII expressly prohibits employment discrimination based on race and sex classifications. All that is needed is the courage to take the next step toward pay equity for all working women.

Diana Fields
Kathryn Morrison

216. *See also* 29 C.F.R. § 1604.9(e) (1982) ("It shall not be a defense under Title VII to a charge of sex discrimination in benefits that the cost of such benefits is greater with respect to one sex than the other.").

217. 709 F.2d 1122 (7th Cir. 1983).

218. See Brest, *supra* note 173, at 36-43, for a discussion of the benefits and costs of eliminating racially disproportionate impact.