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## SOME JURISPRUDENTIAL PERSPECTIVES ON EMPLOYMENT SEX DISCRIMINATION LAW AND COMPARABLE WORTH

*Mark Seidenfeld\**

### INTRODUCTION

Literature on comparable worth abounds but, by and large, it views the subject from a narrow perspective.<sup>1</sup> It asks whether employers treat jobs predominately held by women — “female jobs” — differently from “male jobs.”<sup>2</sup> It takes as given traditional models of equality, which derive

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1. *E.g.*, H. AARON & C. LOUGY, *THE COMPARABLE WORTH CONTROVERSY* (1986); M. GOLD, *A DIALOGUE ON COMPARABLE WORTH* (1983); E. PAUL, *EQUITY AND GENDER: THE COMPARABLE WORTH DEBATE* (1989); Dowd, *The Metamorphosis of Comparable Worth*, 20 *SUFFOLK U.L. REV.* 833 (1986); Gertner, *Thoughts on Comparable Worth Litigation and Organizational Strategies*, 20 *U. MICH. J.L. REF.* 163 (1986); Nelson, Opton & Wilson, *Wage Discrimination and the “Comparable Worth” Theory in Perspective*, 13 *U. MICH. J.L. REF.* 233 (1980); Comment, *Pay Equity or Pay Up: The Inevitable Evolution of Comparable Worth Into Employer Liability Under Title VII*, 21 *LOY. L.A.L. REV.* 305 (1987). *See generally* Weiler, *The Wages of Sex: The Uses and Limits of Comparable Worth*, 99 *HARV. L. REV.* 1728 (1986).

2. *See* Treiman, Hartmann & Roos, *Assessing Pay Discrimination Using National Data*, in *COMPARABLE WORTH AND WAGE DISCRIMINATION: TECHNICAL POSSIBILITIES AND POLITICAL REALITIES* 137 (H. Remick ed. 1984) [hereinafter *TECHNICAL POSSIBILITIES*]; *see, e.g.*, Clauss, *Comparable Worth — The Theory, Its Legal Foundation, and the*

from the similarity of all human beings, and posits that likes be treated alike.<sup>3</sup>

That the commentary focuses on the issue as one of equality and different treatment is not surprising. Congress debated comparable worth when it passed the Equal Pay Act of 1963,<sup>4</sup> and litigants premised initial comparable worth type claims on Title VII of the Civil Rights Act of 1964.<sup>5</sup> Thus the debate on comparable worth has been colored by the notions of what constitutes sexual equality and discrimination under these existing employment sex discrimination statutes.

This article contends that framing the debate in terms of these traditional understandings of sexual equality biases its outcome against comparable worth. It proposes that Congress premised the Equal Pay Act on a theory of equality that accepts differential treatment of men and women and requires merely that employers apply the workplace's independently accepted norm that equal work deserves equal pay. It also asserts that Congress adopted Title VII primarily to address race discrimination. Therefore, Title VII doctrine reflects the prevailing attitude that race should be irrelevant to the workings of the labor market.<sup>6</sup> Since Title VII

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*Feasibility of Implementation*, 20 U. MICH. J.L. REF. 7, 23-24 (1986); Grune, *Pay Equity Is a Necessary Remedy for Wage Discrimination*, in *COMPARABLE WORTH: ISSUE FOR THE 80's* 165 (U.S. Comm'n on Civil Rights 1984) [hereinafter *ISSUE FOR THE 80's*]; Livernash, *An Overview*, in *COMPARABLE WORTH: ISSUES AND ALTERNATIVES* 1, 3 (E. Livernash 2d ed. 1984) [hereinafter *ISSUES AND ALTERNATIVES*]. Livernash's portrayal of the "fundamental issue . . . [as] simple," betrays the narrowness of this focus.

3. See, e.g., Westen, *The Empty Idea Of Equality*, 95 HARV. L. REV. 537, 539-40 (1982).

4. See 108 CONG. REC. 14,767-71 (1962).

5. Title VII cases alleging pay discrimination based on a comparison of men's and women's jobs, and preceding the academic debate on comparable worth, include: *County of Wash. v. Gunther*, 452 U.S. 161 (1981) (comparing guards in female prison to those in male prison); *Lemons v. City of Denver*, 620 F.2d 228 (10th Cir.) (comparing nurses to nonnursing city employees), *cert. denied*, 449 U.S. 888 (1980); *Christensen v. State of Iowa*, 563 F.2d 353 (8th Cir. 1977) (comparing clerical employees of state university to university physical plant workers). Almost immediately after the Court ruled in *Gunther* that Title VII proscribed sex-based wage discrimination even where such suits did not involve equal work claims, proponents of comparable worth published a guide to framing pay equity suits in terms of Title VII doctrine. See Newman & Vonhof, *"Separate But Equal" — Job Segregation and Pay Equity in the Wake of Gunther*, 1981 U. ILL. L. REV. 269, 285-91 (1981).

6. Race and sex discrimination have much in common due to white males' historic subjugation of blacks and women. See Hacker, *Women as a Minority Group*, 30 SOC. FORCES 60 (1951), reprinted in, *MASCULINE/FEMININE, READINGS IN SEXUAL MYTHOLOGY AND THE LIBERATION OF WOMEN* 130-48 (B. Roszak & T. Roszak eds. 1969) [hereinafter *MASCULINE/FEMININE*]. For the purposes of this article, however, there is an important distinction: in the labor market, "society continue[s] to value sex roles, but not race roles." Kay, *Models of Equality*, 1985 U. ILL. L. REV. 39, 45-46 n.43 (1985)

prohibits race and sex discrimination in almost identical terms, this doctrine recognizes a formal equivalence of men and women just as it treats blacks as indistinguishable from whites.<sup>7</sup> Most significantly, neither the Equal Pay Act nor Title VII mean to alter the fundamental character of the workplace to address the historical exclusion of traditionally female values.<sup>8</sup>

This article sees the debate on comparable worth as part of a broader question about the appropriate meaning of sexual equality underlying employment sex discrimination law. Discussion of this question generally has not been explicit. The more usual analysis of employment sex discrimination law takes place within a framework that does not question the underlying preferences reflected in the market. But, throughout the history of the women's movement in the United States, and especially in the last decade, feminists have argued that a theory of sexual equality will have to take into account the differences between men and women as groups.<sup>9</sup> Applied to the labor market, a model of "equality of difference" recognizes the existence of sex roles in society — that male and female workers tend to have different preferences and make different choices. Because men have historically dominated the labor market, it overwhelmingly reflects values consistent with male roles and rewards "masculine" choices while ignoring "feminine" concerns and penalizing choices consistent with female roles. To the extent, however, that society considers many

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(conclusion based on a study of reverse discrimination cases). See also Wasserstrom, *Racism, Sexism, and Preferential Treatment: An Approach to the Topics*, 24 UCLA L. REV. 581, 605 (1977). For further discussion, see *infra* notes 130-146 and accompanying text.

7. See *infra* note 130 and accompanying text.

8. See *infra* notes 85-92, 107-29 and accompanying text.

9. As early as 1853, Antoinette Brown Blackwell argued that if women were to avoid being regarded as "inferior versions of men, [they must] admit the irreducible difference of sex" rather than strive for formal egalitarianism. *The 1984 James McCormick Mitchell Lecture: Feminist Discourse, Moral Values, and the Law — A Conversation* 34 BUFFALO L. REV. 11, 65 [hereinafter *A Conversation*] (comments of Professor Ellen C. DuBois). Recent feminist writings in sociology, philosophy, psychology and law emphasize the need for society to recognize, and equally value, women's views. See, e.g., C. GILLIGAN, *IN A DIFFERENT VOICE* (1982) (reinterpreting psychological gender differences as not indicating developmental inferiority of women); E. WOLGAST, *EQUALITY AND THE RIGHTS OF WOMEN* (1980) (arguing that "equality" should take into account the biological and social differences between men and women); Rossi, *Sex Equality: The Beginning of Ideology*, in *MASCULINE/FEMININE*, *supra* note 6, at 173 (proposing a sociological "hybrid" model of equality that envisions a society whose values reflect male and female input); Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373, 1382 (1986) (viewing social and legal institutions as a means for male domination over women and arguing that "a commitment to equality requires that we undertake to investigate the genderization of the world").

traditionally female values not only legitimate but salutary,<sup>10</sup> prices set by the market should incorporate them and, ideally, a theory of labor market discrimination should rectify their exclusion. Therefore, to assess comparable worth, it is necessary first to understand the influences of theories of sexual equality underlying existing employment discrimination law, and second, to extend the analytic panorama beyond that outlined by these traditional theories' assumption that the marketplace validly reflects the tastes and preferences of society.

This article analyzes employment sex discrimination law from that broader perspective. It begins by outlining three models of sexual equality. It proceeds to show how existing discrimination law — the Equal Pay Act and Title VII — reflect the two traditional models. It then introduces the theory of comparable worth and provides some background on that theory. It describes various means by which the theory might be implemented and reviews the reasons for the wage gap between men and women, which provided the most direct impetus for the recent push for comparable worth. Finally, it demonstrates that comparable worth implements the third model of equality intended to change the social values in the prevailing society to reflect "female" tastes and preferences and argues that this is the precise reason comparable worth might succeed in generating gender equality in the workplace while existing anti-discrimination law has failed.

## I. THEORIES OF EQUALITY

While debate about discrimination has generated a myriad of models defining sexual equality, for purposes of discussing employment anti-discrimination laws, these models can be grouped into three classes: conservative, liberal and feminist.<sup>11</sup> The conservative model emphasizes innate distinctions between males and females and posits that existing sociological differences between men and women result naturally from these innate distinctions. The liberal model rejects the significance of biological distinctions between males and females and demands that

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10. While the labor market may not reward the bearing and raising of children, society obviously values those functions, at least as long as preservation of the human species remains one of its important goals.

11. The designation of these models as conservative, liberal, and feminist provides a simplified description of the political philosophies underlying each model. These labels are not meant to suggest that all conservatives will agree with the conservative model, all liberals with the liberal model, and all feminists with the feminist model. Nor are they meant to suggest that there is a bright line between these various political ideologies. For the purposes of this article, however, it is not necessary to describe either the diverse conceptions of justice held by individuals *within* each of these political denominations, or the points at which these ideologies overlap.

institutions defining relations of authority and power — legal, economic and public-social frameworks — ultimately be gender blind. The feminist model recognizes that biological distinctions between males and females historically have led to sociological differences between men and women, but does not accept that these distinctions manifest any “natural” sociological order. Rather, society has a choice about how to account for these innate distinctions, and equality requires restructuring society to reflect the concerns of both men and women in a nonhierarchical manner.

#### A. *The Conservative Model Of Sexual Equality*

The conservative model of equality posits that males and females innately differ and therefore should not be treated identically.<sup>12</sup> Rather, equality is achieved by assigning each to his or her own natural sex-appropriate domain and allowing each group to structure its respective domain. This will result in structures consistent with the innate nature of the group's members. The conservative idea of equality requires only the application of gender appropriate norms to each separate sphere, adopting an ideal of “separate but equal.”

This model views the separation of home and market responsibilities, and the assignment of the former to women and the latter to men, as a natural consequence of distinctions it sees between males and females.<sup>13</sup> The home is a private sphere that operates according to principles of love and devotion. Primary home responsibilities include creating a supportive atmosphere, which allows the wage-earning spouse to be more productive, and bearing and nurturing children to carry on socially productive activity in the future.<sup>14</sup> The market, unlike the home, is driven by calculation and

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12. Philosophers from the time of ancient Greece to the modern era have espoused the view that women's rationality and psychology differ from men's in a manner that justifies the different treatment society accords them. See 1 ARISTOTLE, *POLITICS* ch. 12, 13 (Jowett transl. 1943); J. ROUSSEAU, *EMILE, OR EDUCATION* 322-26 (Foxley transl. 1914); A. Schopenhauer, *On Women*, in *ESSAYS OF ARTHUR SCHOPENHAUER* 435 (Saunders transl. 1892); Freud, *Femininity*, *NEW INTRODUCTORY LECTURES ON PSYCHOANALYSIS* 184 (Sprott transl. 1933). More recent advocates of this position include: G. GILDER, *WEALTH AND POVERTY* 69, 136-37 (1981); G. GILDER, *MEN AND MARRIAGE* 144 (1986); S. GOLDBERG, *THE INEVITABILITY OF PATRIARCHY* 139-46 (1973); P. SCHLAFLY, *THE POWER OF THE POSITIVE WOMAN* 11 (1977).

13. See S. GOLDBERG, *supra* note 12, at 104. The conservative model is succinctly summarized in several works critical of the model. See Jaggar, *Political Philosophies of Women's Liberation*, in *FEMINISM & PHILOSOPHY* 5, 6 (M. Vetterling-Braggin, F. Elliston & T. English eds. 1977); Rossi, *supra* note 9, at 5-6 (description of “pluralistic model”); D. KIRP, M. YUDOF & M. FRANKS, *GENDER JUSTICE* 53-55 (1986).

14. See D. KIRP, M. YUDOF & M. FRANKS, *supra* note 13, at 17-19; Berger, *Family, Bureaucracy, and the “Special Child,”* 40 *PUB. INT.* 96, 105-106 (1975).

competition. The free market capitalist system depends on competition to ensure efficient production and distribution of goods.<sup>15</sup> And, considering markets in a more dynamic sense, competition also encourages innovation and increased productivity via an economic "Darwinism" in which the most fit producers survive and others fall by the wayside. The free market system, which conservatives see as the ideal, dictates that participants be analytic rather than emotional, and aggressive rather than sensitive.<sup>16</sup>

The relegation of women to the home sphere and men to the market sphere does not manifest any inequality under the conservative model. The biological functions of child bearing and breast feeding predispose females to the care of home responsibilities. Data purporting to show that women are more emotionally sensitive, caring and nurturing provide further evidence that women's assumption of this role is natural.<sup>17</sup> Similarly men's aggressiveness and greater analytic skills, also purportedly demonstrated by psychological studies,<sup>18</sup> predispose men to occupy the market sphere. As stated by one proponent of the conservative view: "The male ethos . . . is absolutely necessary to the working world. It has made American business productive and efficient, and the requirements of the workplace simply demand such 'masculine' behavior from employees."<sup>19</sup>

From the conservative perspective, sex-segregation of jobs and the home orientation of women reflect the natural "voluntary" choice of the individual members of society given the distinctions between men and women. These phenomena do not indicate problems that justify government intervention into the individual choices underlying the structure of either the home or market arenas.<sup>20</sup>

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15. See D. KEEZER, MAKING CAPITALISM WORK 288 (1950); A. DAHLBERG, JOBS, MACHINES AND CAPITALISM 61 (1932); M. FRIEDMAN, CAPITALISM AND FREEDOM 133 (1962) (business has no social responsibility other than to compete in order to maximize profits).

16. For a comprehensive comparison of the family and the market, see Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983). At various points in her article Olsen depicts the traditional view that the market and family are based on conflicting ethics. *Id.* at 1499-500, 1500-22. She also demonstrates that such a view is, at best, overly simplistic. *Id.* at 1522-24.

17. See Mischel, *Sex Typing and Socialization* in 2 CARMICHAEL'S MANUAL OF CHILD PSYCHOLOGY 3, 6 (P. Mussen 3d ed. 1970) (reporting "greater dependency, social passivity and conformity in females than in males"); see also L. TIGER & R. FOX, THE IMPERIAL ANIMAL 102-04 (1971) (comparing the biological and evolutionary characteristics of male primates and humans in their socio-political relationships).

18. Mischel, *supra* note 17, at 4-5 (aggressiveness); E. MACCOBY & C. JACKLIN, THE PSYCHOLOGY OF SEX DIFFERENCES 274 (1974) (analytic skills); F. WESLEY & C. WESLEY, SEX ROLE PSYCHOLOGY 94 (1977) (analytic skills).

19. Flick, *The New Feminism and the World of Work*, 71 PUB. INT. 34, 44 (1981).

20. Brigitte Berger, a conservative sociologist, considers government intervention

## B. *The Liberal Model Of Sexual Equality*

### 1. The Liberal Critique of the Conservative Model

The liberal model critiques the conservative model on three grounds. First, it rejects the model's empirical basis that there are material innate distinctions between males and females.<sup>21</sup> Outside of the clear physiological distinctions between male and female roles in reproduction and physical strength, data do not show statistically significant sex differences for most traits.<sup>22</sup> Even for those psychological traits where studies have shown statistically significant differences, such as aggression and spatial ability, the degree of difference between male and female populations is small compared to the individual differences within each population.<sup>23</sup> If these distributions were mirrored in the labor force, jobs would be almost completely integrated and the workplace would not exhibit the pervasive sex segregation that presently exists. Thus, liberals reject the conservative naturalist position that biology dictates the division between home and market spheres.

Second, the liberal view dismisses the conservatives' blind faith in market mechanisms that leads to the belief that existing sex-roles reflect

into family matters "a social catastrophe." Berger, *supra* note 14, at 106. *See also* Olsen, *supra* note 16, at 1501-06 (summarizing the traditional arguments against state intervention into the family and the market as government neutrality).

21. *See, e.g.*, D. KIRP, M. YUDOF & M. FRANKS, *supra* note 13, at 53-54, 63; Jaggard, *supra* note 13, at 7; Wasserstrom, *supra* note 6, at 609-14.

22. *See* E. MACCOBY & C. JACKLIN, *supra* note 18, at 349-55. Maccoby and Jacklin conducted what is still the most comprehensive analysis of studies of sex differences and concluded that the only well established innate differences are:

1. That girls have greater verbal ability than boys;
2. That boys excel in visual spatial ability;
3. That boys excel in mathematical ability;
4. That males are more aggressive.

*Id.* at 351-52. More recent analysis using more quantitative analytic techniques (meta-analyses) suggest that even some of these well established differences may be suspect. *See, e.g.*, Hyde & Linn, *Gender Differences in Verbal Ability: A Meta-Analysis*, 104 PSYCH. BULL. 53, 62 (1988) (concluding that there is no statistically significant difference in the verbal abilities of boys and girls); *cf.* Hare-Mustin & Marecek, *The Meaning of Difference: Gender Theory, Postmodernism and Psychology*, 43 AM. PSYCH. 455, 457-58 (1988) (arguing that whether studies show sex differences often depends on whether the theoretical framework underlying the studies bias them to exaggerate or minimize the significance of gender differences).

23. "Gender differences appear to account for no more than 1% - 5% of the population variance." Hyde, *How Large Are Cognitive Gender Differences?: A Meta-Analysis Using  $w^2$  and  $d$* , 36 AM. PSYCH. 892, 894 (1981). Interestingly, Plato had foreseen and used this overlap of male and female abilities to justify sex neutral roles even though he accepted natural differences between the sexes. *See THE REPUBLIC OF PLATO: TRANSLATED WITH NOTES AND AN INTERPRETIVE ESSAY BY ALLAN BLOOM* 133-34 (1968).



the volitional choices of all members of society. Liberals believe instead that market structures can limit women's opportunities for self development.<sup>24</sup> A history in which women were considered second class citizens, unable to vote and restricted from pursuing many occupations, supports this liberal critique.<sup>25</sup> It is supported as well by the consistent evidence of discrimination against women throughout history.<sup>26</sup> Even today there are employers who explicitly channel women into a limited class of jobs without concern for whether individual women can perform the jobs they are restricted from holding.<sup>27</sup>

Finally, liberals criticize the conservative model because it dictates proper sex roles in the good society, rather than ensuring the fairness of the process which defines those roles.<sup>28</sup> Even if one concedes that women and men innately differ in ways that at one time justified present sex roles, the conservative position locks in those roles. It fails to allow for changes in technology and social values that might require alteration or elimination of traditional sex roles. It thereby forces its outcome on society rather than reflecting a choice made by the individuals within society.

Thus, for liberals, the conservative premise that only individuals of like nature need be treated alike falters because it allows unbridled leeway to characterize classes of individuals as dissimilar. The conservative model does not rigorously relate its naturalist and market-operation foundations to its gender-linked division of home and market. Coupled with the

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24. "[L]iberals now expect the state itself to mitigate the worst effects of a market economy." A. JAGGAR, *FEMINIST POLITICS AND HUMAN NATURE* 34 (1983).

25. See Wildman, *The Legitimation of Sex Discrimination: A Critical Response to Supreme Court Jurisprudence*, 63 OR. L. REV. 265, 273 (1984) (describing pre-1970 sex discrimination).

26. For a brief description of history and cultural explanation of male domination over and discrimination against women in the United States, see J. POLE, *THE PURSUIT OF EQUALITY IN AMERICAN HISTORY* 293-324 (1978). See also D. KIRP, M. YUDOF & M. FRANKS, *supra* note 13, at 29-45.

27. Roos & Reskin, *Institutional Factors Contributing to Sex Segregation in the Workplace*, in *SEX SEGREGATION IN THE WORKPLACE: TRENDS, EXPLANATIONS, REMEDIES* 235, 243-44 (B. Reskin ed., 1984) [hereinafter *SEX SEGREGATION*]. See, e.g., *Pitre v. Western Elec. Co., Inc.*, 843 F.2d 1262, 1270 (10th Cir. 1988) (men were assigned to certain technical jobs management believed women could not handle); *Van v. Plant & Field Serv. Corp.*, 672 F. Supp. 1306, 1311 (C.D. Cal. 1987) (employer refused to hire women for "dirty" or "dangerous" jobs).

28. Liberal theory instead demands:

[P]olitical decisions must be, so far as is possible, independent of any particular conception of the good life, or of what gives value to life. Since the citizens of a society differ in their conceptions, the government does not treat them as equals if it prefers one conception to another. . . .

Dworkin, *Liberalism*, in *PUBLIC AND PRIVATE MORALITY* 113, 127 (S. Hampshire ed. 1978).

empirical weaknesses of those foundations, liberals find little reason to believe that splitting society into distinct women's and men's spheres is either preordained or a reflection of the personal values of the members of our society.

## 2. The Liberal Model Defined

The liberal model of sexual equality mandates that any difference in the treatment of individuals be justified by the distinctions between them. The liberal concept of equality de-emphasizes differences between men and women, viewing any differences as immaterial to the choices made within the public domain of society.<sup>29</sup> It advocates formal gender-neutral decisionmaking and resulting equality of opportunity in the labor market as its ultimate principles. It envisions a society in which women have been fully assimilated into the public spheres of society on the same basis as men now participate.<sup>30</sup>

The liberal model builds upon individual autonomy as its basis for defining equality.<sup>31</sup> The model refers to autonomy as capacity of a person to decide what she values — to choose personal goals. In most cases, no one else is better able to decide what is in the individual's best interests, for she most profoundly experiences the effects of her decisions. For this reason society should allow people the maximum liberty to fulfill the ends they deem important.

The liberal's respect for autonomy is not necessarily absolute. The ability to decide meaningfully what is in one's self interest requires both the capacity to relate one's conduct to its future effect on one's life and the experience to comprehend what that the future effect might feel like. For this reason we restrict the rights of children or the mentally incompetent to make decisions in long term pursuit of their life goals. But, by all indications women and men are equally able "to enjoy and suffer, to reason,

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29. D. KIRP, M. YUDOF & M. FRANKS, *supra* note 13, at 20. See also Jaggar, *On Sexual Equality*, 84 ETHICS 275, 276 (1974) (describing the traditional (*i.e.*, liberal) feminist notion of sexually egalitarian society).

30. "Under the assimilationist definition of equality the distinction between men and women are de-emphasized in favor of the likeness of the sexes. The formerly disadvantaged or excluded group participates on terms identical to those offered the included group. . . ." Note, *Sexual Equality Under The Pregnancy Discrimination Act*, 83 COL. L. REV. 690, 704 (1983).

31. See D. KIRP, M. YUDOF & M. FRANKS, *supra* note 13, at 13-14; A. JAGGAR, *supra* note 24, at 33; Richards, *The Individual, the Family, and the Constitution: A Jurisprudential Perspective*, 55 N.Y.U. L. REV. 1, 9 (1980). This reliance on autonomy connects the liberal model to liberal philosophy. Cf. I. KANT, FOUNDATIONS OF THE METAPHYSICS OF MORALS 58 (Beck transl. 1959).

to engage in moral deliberation," in short to gauge what is in their own interests.<sup>32</sup> Thus, women are entitled to the same respect for their autonomous choices as men.

This notion of liberty goes a long way towards delineating the set of valid decisions under the liberal model. Decisions motivated simply by a desire to restrict the liberty of women, even if the decision-maker believes he is acting in their best interests, violate the principle of autonomy. Similarly this principle requires, at a minimum, that decisions restricting personal choices be justified as a means of protecting other legitimate societal interests.

The liberal respect for autonomy and its concomitant right of liberty, however, do not completely define the bounds of legitimate personal activity. One person's pursuit of his personal values will often interfere with another's pursuit of her life plan. For example, a man looking for a roommate may decide he would not like to share his apartment with a woman; or a male manager at a retail store may decide he would not like to work with a female sales clerk. Both of these decisions may reflect the man's pursuit of his life-style, but they also restrict the choices of particular women interested in the room or the job.

To resolve the question of when sex based decisions are valid, the liberal model relies on the distinction between the private and public domains.<sup>33</sup> The private domain encompasses matters pertaining to the family, home, intimate relationships and friendships — those matters that by consensus society considers personal. The valid ends of decisions within this sphere are subjective and the means of achieving those ends are relatively insulated from governmental or other direct societal regulations.<sup>34</sup>

The public sphere encompasses the production and distribution of goods and services that are used to fulfill personal aims within the private domain. The valid ends of the public domain are defined more objectively by using economic markets and political processes to aggregate the aims of disconnected individuals that comprise the liberal conception of society. The means used to achieve these ends are subject to direct regulation to ensure individuals are treated fairly and to coordinate the activities of the participants in the public sector, thereby improving productivity and efficiency.<sup>35</sup> The means should be instrumentally related to the ends and society will scrutinize decisions which restrict the options of a historic

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32. Jaggar, *supra* note 29, at 279.

33. See D. KIRP, M. YUDOF & M. FRANKS, *supra* note 13, at 17-20.

34. *Id.* at 17.

35. *Id.* at 17-18.

underclass, such as women, very closely to ensure that the relationship of means to ends is clearly demonstrated.

Under the liberal model, the distaste for societal interference into the private domain, coupled with the understanding that personal values and attitudes govern private matters, permit gender based decisions. In the public domain, however, the requirements of equal autonomy for men and women, and of means demonstrably related to the objective ends create a presumption against the validity of gender based distinctions.

Different factions of liberals disagree about precisely what justifications overcome this presumption of gender neutrality. Some argue that the history of misogyny and misguided paternalism makes it imperative to require strict gender neutrality within the public sphere.<sup>36</sup> Any other rule will ultimately reinforce the belief in sex-differences and traditional sex roles.<sup>37</sup> Others contend that, in addition to a fair process, individuals must be ensured a relatively equal starting point in the competitive public domain. Historically women have been denied access to this domain and this historic denial has current ramifications: women are not acculturated to acquire the skills they need to compete in the labor market; they lack role models; they are still viewed by many who wield power in the public domain as "outsiders." To overcome these impediments, these liberals would allow temporary gender based rules aimed at equalizing the starting point of men and women in the race of life.<sup>38</sup> But, once equality of the starting point is achieved, the justification for such affirmative action vanishes.<sup>39</sup>

Despite these important variations among proponents of the liberal model, there are two key positions to which all liberals subscribe. First, the ultimate rules governing decisions in the public domain (once equality of the starting points of all participants is achieved) must not attribute any significance to gender.<sup>40</sup> Second, the state may not validly interfere with social values that have been defined by aggregating the preferences of

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36. See, e.g., D. KIRP, M. YUDOF & M. FRANKS, *supra* note 13, at 31; Jaggar, *supra* note 13, at 7; Hoffman & Reed, *Sex Discrimination? The XYZ Affair*, 62 PUB. INT. 21, 23 (1981). Kirp, Yudof and Franks further justify the demand for gender neutral decisions in the public domain by arguing that gender policy must not differentially restrict the domain of choices available to males and females. See D. KIRP, M. YUDOF & M. FRANKS, *supra* note 13, at 136.

37. Feminists outside the liberal model also share this concern. For example, Joan Williams thinks that the cultural feminists' celebration of women's values reflects a return to domesticity that has been used to maintain women as an underclass. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797, 821 (1989). See also *infra* note 65.

38. Jaggar, *supra* note 13, at 8-9.

39. *Id.* at 7.

40. Under the liberal/assimilation model, gender should have no more significance than, for example, eye color. Wasserstrom, *supra* note 6, at 604.

individuals within society through properly working political and economic markets.<sup>41</sup> The liberal model therefore accepts the "structure of American society as it now exists."<sup>42</sup>

### C. *The Feminist Model Of Sexual Equality*<sup>43</sup>

#### 1. The Feminist Critique of the Liberal and Conservation Models

Feminists reject both the emphasis on autonomy and the presumption against significant sexual differences inherent in the liberal model. Autonomous choice supposes the existence of atomistic individuals, separable from the influence of others — of past and present culture. For feminists, however, personhood cannot exist outside of a social context.<sup>44</sup> They view culture as historically derived and in turn as strongly influencing individual values. Thus, social institutions and norms are not the result of choices of contextually free individuals with which government has no principled right to interfere. Rather, they are the result of political choice that reflects historical and current power relationships.<sup>45</sup>

Furthermore, feminists view the reliance on autonomy as a means of

41. See Dworkin, *supra* note 28, at 134; cf. E. WOLGAST, *supra* note 9, at 154.

42. Rossi, *supra* note 9, at 6.

43. The use of the label "feminist" may be somewhat misleading in light of the existence of at least five different rapidly developing feminist schools of thought: liberal feminism, Marxist feminism, socialist feminism, radical feminism, and cultural feminism. See A. JAGGAR, *supra* note 24, at 10-13 (including cultural and radical feminists under different branches of radical feminism); West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, (1988) (drawing distinction between cultural and radical feminism).

The model labelled feminist in this article most closely correlates with what Robin West calls cultural feminism. West, *supra*, this note at 1. Both radical and cultural feminism, however, share a common view of the causes of male domination over women. Therefore, the feminist critique of the liberal and conservative concepts of equality corresponds to the views of radical feminists as well as cultural feminists. See *infra* notes 44-53 and accompanying text. The distinctive feature of cultural feminism is their belief that equality can be "achieved" by incorporating women's values into social institutions of power. See *infra* note 64 and accompanying text.

44. See E. WOLGAST, *supra* note 9, at 153-54. See generally West, *supra* note 43. Leftist philosophers and critical legal thinkers also reject the liberal celebration of autonomy, advocating instead the value of community. See, e.g., R. WOLFF, *THE POVERTY OF LIBERALISM* 183-84 (1968); Gabel, *The Phenomenology of Rights — Consciousness and the Pact of the Withdrawn Selves*, 62 TEX. L. REV. 1563, 1566-67 (1984). But feminists not only deny that autonomy is the paramount value, they deny that individuals, especially women, exist as human beings outside of a social context. For feminists the notion "that the individual is 'epistemologically and morally prior to the collectivity' . . . is not true for women." West, *supra* note 43, at 14.

45. In particular, feminists see gender — sex-based social norms — as an all pervasive institution chosen to maintain males' power and prestige over females. See A. JAGGAR, *supra* note 24, at 85.

justifying men's oppression of women, because historically cultures have valued male attributes and pursuits and denigrated female ones.<sup>46</sup> Women's oppression is further maintained by the liberal skepticism of any publicly meaningful distinctions between males and females. Given the historical elevation of male values, the most women have to look forward to under the liberal model is assimilation into the dominant male culture. Feminists question whether this is truly the achievement of equality.<sup>47</sup> More significantly, they believe that women differ culturally from men in ways that make women less comfortable exhibiting these masculine traits.<sup>48</sup> Thus, the "equality of opportunity" promised by the liberal model appears to be more rhetoric than a real promise. As one feminist legal commentator put it:

[S]ociety . . . first constructs the social categories "male" and "female" and then says to those it has defined as female, "all you have to do to be included is to prove that you 'really' are the same as we are." In other words, "prove that you really belong in the category that we have constructed in order to exclude you."<sup>49</sup>

Feminists also reject the liberal distinction between public and private spheres.<sup>50</sup> Social institutions governing the private sphere — most notably sexual mores, marriage and the traditional family — dictate the fundamental terms on which men and women participate in the public sphere. In sexual intercourse, child-bearing, and other intimate interactions, it is the woman who is penetrated or violated and that profoundly affects how both

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46. See Note, *Toward A Redefinition Of Sexual Equality*, 95 HARV. L. REV. 487, 506 (1981) (liberal model of equality is based on the notion that historically valued male roles are more desirable, while in fact it may be that the roles are more prestigious simply because they are male); Rossi, *supra* note 9, at 6 ("assimilation model . . . makes an assumption that the institutional structure of American society developed over decades by predominately white Protestant males, constitutes the best of all possible worlds"). See, e.g., M. O'BRIEN, *THE POLITICS OF REPRODUCTION* 75 (1981) ("The low social and philosophical value given to reproduction and to birth is not ontological, not imminent, but socio-historical, and the sturdiest plank in the platform of male supremacy.").

47. See Note, *supra* note 46, at 487; Littleton, *Equality and Feminist Legal Theory*, 48 U. PITT. L. REV. 1043, 1054 (1987); cf. Schaar, *Equality of Opportunity and Beyond*, in NOMOS IX — EQUALITY 228, 231 (1967) ("Before one subscribes to the equality-of-opportunity formula, then, he should be certain that the dominant values, institutions and goals of his society are the ones he really wants.").

48. See text accompanying *infra* note 59.

49. Littleton, *supra* note 47, at 1051 (citations omitted).

50. See A. JAGGAR, *supra* note 24, at 101. For example, "feminists argue that the so called private life of the family is political." Z. EISENSTEIN, *FEMINISM AND SEXUAL EQUALITY: CRISES IN LIBERAL AMERICA* 16 (1984); see also *id.* at 205 (to achieve egalitarianism, there can be no separation between family and public life); D. KIRP, M. YUDOF & M. FRANKS, *supra* note 13, at 17.

men and women view women within the public and private spheres.<sup>51</sup> More generally, all aspects of the oppressive structure of male dominated society grow out of the hierarchy of power established within personal relationships. For example, an accepted paradigm of sexual relations is seduction, where the man pursues his goal of "scoring" by overcoming the woman's resistance. This pattern legitimates and reinforces the use of male aggression to overcome women's desires, a lesson, which once learned, pervades all male-female relations, public and private.

Feminists are even less enamored of the conservative model of equality. While they share a recognition of the significance of gender differences, the schools reach diametrically opposite conclusions from those differences. Feminists see social structure as *chosen* to make those gender differences important determinants of social status.<sup>52</sup> Society has structured itself to emphasize those differences in a manner that maintains the domination of men over women.

Having rejected the view that the significance of gender differences is preordained, feminists find untenable the conservative position that these differences justify the relegation of women to traditional feminine roles within a society that clearly and consistently defines these roles as second class. It may be that men and women differ in ways that mean that nurturance and child care will ultimately remain predominately female functions but, for feminists, that implies a need to recognize and celebrate the importance of these functions within society.<sup>53</sup> It does not justify treating these functions as having lower status.

## 2. The Feminist Model Defined

The feminist model calls for a restructuring of society to reflect the values of women on par with those of men.<sup>54</sup> Equality will exist only when

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51. See West, *supra* note 43, at 29-36 (describing the premise of radical feminism as a longing for freedom from the invasion and intrusion that is inherently part of being female).

52. One commentator notes that feminine theory

reveals how male power is exercised and reinforced through such "personal" institutions as childrearing, housework, love, marriage, and all kinds of sexual practices from rape through prostitution to sexual intercourse itself. The assumption that these institutions and practices are "natural" or of purely individual concern is shown to be an ideological curtain that conceals the reality of women's systematic oppression.

A. JAGGAR, *supra* note 24, at 101.

53. *Id.* at 141 (describing one conception of radical feminism); West, *supra* note 43, at 18 (describing "cultural feminism").

54. See Z. EISENSTEIN, *supra* note 50, at 243-44; Rossi, *supra* note 9, at 179-85; Williams, *supra* note 37, at 807-08.

Both cultural feminists, who assert that males and females innately differ, and liberal

the uniquely female life-outlook influences the operation and structure of all social, political and economic institutions. The perspective of both sexes must be represented "in the very conception of what society is."<sup>56</sup>

The feminist model of equality perceives the world as structured around a sexual class struggle in which women comprise the underclass.<sup>56</sup> Women are a class because they share not only different biological functions in reproduction and child-rearing, but also a different physical stature, set of experiences, and socialization from men.<sup>57</sup> They also inherit a common past of oppression.<sup>58</sup> As a result women view their opportunities for self-development and fulfillment differently from men. In turn society attributes different abilities, strengths and weaknesses to women. Thus, women are a sexual class in the sense that being female greatly influences women's opportunity and choices, and results in a segmentation of society into gender appropriate roles for males and females.

The theory of sexual class struggle asserts that patriarchal society has constructed gender specific roles that exclude women from the bastions of power in order to maintain men's position as the dominant class. Viewed as a class, women conceptualize their lives as connected to lives of others.<sup>59</sup> They do not define themselves by their individual achievements but rather by their relationships to others and to society generally. But the institutions of power in society demand independence and individual aggressiveness,

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feminists, who see sex differences as reflecting social inculcation of gender appropriate traits, believe this is the route to sexual equality. The liberals, however, recognize that women share a distinct outlook because of their socialization as an underclass. They support celebration of nurturing, caring and other values that the cultural feminists deem innately female not because these values reflect women's "voice," but because of the inherent poverty of the prevailing icon of "possessive individualism." See Williams, *supra* note 37, at 810-13, 845.

55. E. WOLGAST, *supra* note 9, at 158.

56. See A. JAGGAR, *supra* note 24, at 102. This perspective has labelled the system of male domination as "patriarchy," and its adherents find "[p]atriarchy . . . to be 'everywhere.'" M. Daly, *Gyn/Ecology, the Metaethics of Radical Feminism* 326 (1978); see, e.g., Love & Shanklin, *The Answer is Matriarchy*, in *OUR RIGHT TO LOVE* 183, 185-86 (G. Vida ed. 1978); MacKinnon, *Feminism, Marxism, Method and the State: An Agenda For Theory*, 7 *SIGNS, J. WOMEN IN CULTURE & SOC'Y* 515, 528-29 (1982); Estrich, *Rape*, 95 *YALE L.J.* 1087, 1091 & n.9 (1987).

57. See Z. EISENSTEIN, *supra* note 50, at 146; Garside, *Women and Persons*, in *MOTHER WAS NOT A PERSON* 192, 196 (M. Anderson ed. 1972); see also E. WOLGAST, *supra* note 9, at 133; M. O'BRIEN, *supra* note 46, at 50.

58. A. JAGGAR, *supra* note 24, at 102; Garside, *supra* note 57, at 195-96.

59. West, *supra* note 43, at 14. For examples of how women view themselves as connected to others in particular contexts, see C. GILLIGAN, *supra* note 9, at 25-30; N. CHODOROW, *THE REPRODUCTION OF MOTHERING: PSYCHOANALYSIS AND THE SOCIOLOGY OF GENDER* 167 (1978). For a discussion of how connectedness hypothesis influences moral theory, see *WOMEN AND MORAL THEORY* (E. Kittay ed. 1986).



forcing women to experience a tension between a self-concept that stresses connectedness and a measure of social success that requires treating others as competitors.

For example, women in financial careers find that success virtually precludes retention of traits they have been encouraged to adopt from an early age.

[T]he corporate environment. . . makes few concessions to those with gentle natures. . . . [To succeed women must put in] brutally long hours and burdensome amounts of travel, [and act] with political savvy that advances their careers and a single mindedness that can disrupt families and friendships. The women who embrace this model are often scorned for behavior that is applauded in men.<sup>60</sup>

Moreover, the traditional measure of success implicitly requires a supportive family structure which enables the individual to avoid thinking about anything but a career. This notion of success is inherently inconsistent with a definition of equality that opens success to all: only one representative of the family can achieve success in the labor market.<sup>61</sup> The bottom line is that market structures exclude most females from positions of power within the market and ensure that the few females who do invade this inner sanctum have forsaken their sexual class heritage and adopted the dominant male ethic.<sup>62</sup> These women thus present little threat to continued male domination.<sup>63</sup>

The feminist model of equality recognizes the class distinctions between men and women, but seeks to eliminate the hierarchical relations stemming from those distinctions. It believes that women as a class have developed valuable qualities — such as caring, nurturing, and cooperating — that society should reward. By celebrating these qualities, the model promotes a positive conception of group difference under which members of society are not only formally free to pursue atypical behavior but also

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60. Gross, *Against the Odds: A Woman's Ascent on Wall Street*, N.Y. TIMES MAG. 16 (Jan. 6, 1985).

61. See, Rossi, *supra* note 9, at 183 (under the assimilationist model, men's position in the top strata of business has been possible "only because their own wives were leading traditional lives as homemakers").

62. For women to succeed in patriarchal society "they would have to compete without catching the competitive spirit . . . [which] is a lot to expect." M. MIDGLEY, BEAST AND MAN 330 (1978).

63. See Littleton, *supra* note 47, at 1051-52 ("Equality of identity has provided access for some women into formerly male bastions . . . but has not permitted challenges to the structure of those bastions."); see, e.g., Project, *Law Firms and Lawyers With Children: An Empirical Analysis Of Family/Work Conflict*, 34 STAN. L. REV. 1263, 1273-77 (1982) (historically, women are much more likely to make career sacrifices for family responsibilities than their male counterparts).

under which members of the subgroup (*i.e.*, women) do not have to choose between atypical behavior and a lower status than the dominant group (*i.e.*, men).<sup>64</sup>

Many liberals see recognition of class distinctions between men and women as dangerous because they have been used in the past to justify stigmatic unequal treatment.<sup>65</sup> Recognition of difference makes possible an inference of natural roles, and the resultant limitation of members of each sex to these roles. It thereby fosters hierarchies by further entrenching institutions and stereotypes that those in power have used to obtain their status. It also threatens the liberal respect for autonomy by restricting individual control over the activities one pursues. But feminists assert that that difference need not have these implications. "They engage the meaning of difference itself as a terrain of political struggle," viewing it as something that adds interest and value to society rather than as justifying exclusion and subordination.<sup>66</sup> This suggests that society should pursue representation of both male and female perspectives in its institutions of power because such equality of representation promises to eliminate the stigma of failing to conform to condoned sex roles. It would foster consensus across groups about social values, which in turn discourages hierarchical relationships. Additionally, it would allow society to take advantage of the best of both the male and female outlooks.

Contrary to certain liberal critiques,<sup>67</sup> the feminist model of equality is not based on an inflexible notion of the good society. It does not necessarily reject women's existing values as false consciousness resulting from women's domination under patriarchy.<sup>68</sup> But neither does it accept these values as necessarily reflecting the desires of liberated women.

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64. See Young, *Difference and Policy: Some Reflections In The Context Of New Social Movements*, 56 U. CIN. L. REV. 535, 544-545, 550 (1987).

65. Cf. D. KIRP, M. YUDOF & M. FRANKS, *supra* note 13, at 14. Some cultural feminists also see the dangers of emphasizing difference, and would limit application of the feminist model to situations directly tied to biological sex distinctions. See, e.g., Krieger & Cooney, *The Miller-Wohl Controversy: Equal Treatment, Positive Action and the Meaning of Women's Equality*, 13 GOLDEN GATE U.L. REV. 513, 537-539 (1983).

66. Young, *supra* note 64, at 543.

67. See, e.g., D. KIRP, M. YUDOF & M. FRANKS, *supra* note 13, at 24-26.

68. The positions of the "radical" and "cultural" feminists differ on this point. The radicals assert that while women differ from men in fundamental ways, there is no way to know women's true values because of the pervasive influence of patriarchal society. Cultural feminists, on the other hand, celebrate those feminine attributes that women appear to value despite the relegation of these attributes to a lower status by patriarchal society. This difference is captured in an exchange between cultural feminist Carol Gilligan and radical feminist Catharine MacKinnon, *reprinted in A Conversation*, *supra* note 9, at 74-75. Thus, the cultural feminists do not reject a process oriented definition of the good society. They merely demand that women be an equal part of the process.

Rather, like the liberal model, it allows the members of society to determine what is good. It merely demands that the choice reflect the values of women who have not forsaken their sexual class heritage. Additionally, given the sexual class distinctions between men and women and the long history of male domination, the feminists model asserts "that the perspective of one sex cannot be relied on, in general, to represent the concerns of the other."<sup>69</sup>

## II. RELATIONSHIP BETWEEN MODELS OF EQUALITY AND EMPLOYMENT DISCRIMINATION LAWS

### A. *The Equal Pay Act*

Having developed the conservative, liberal and feminist models of equality, this article now demonstrates that existing employment sex discrimination laws implement the two traditional models of equality and not the feminist ideal. The Equal Pay Act was the first federal antidiscrimination law to address sexual equality in the workplace. The Act requires employers to provide equal pay for male and female employees who perform "equal work on jobs the performance of which requires equal skill, effort and responsibility, and which are performed under similar working conditions."<sup>70</sup> Employers may pay different rates to men and women performing equal work if "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 work; or (iv) a differential based on any other factor other than sex."<sup>71</sup>

Events preceding adoption of the EPA, along with judicial construction of the Act, demonstrate that the EPA is not premised on gender neutrality in the workplace. Rather, it reflects the tension between the conservative view that women's place was in the home and the belief that wages for a job should reflect the characteristics of the job in some objective sense. The impetus for the EPA was the prevailing notion in the male dominated labor market that equal work deserves equal pay, coupled with a reality that forced an increasing proportion of women into the market to support themselves and their families on a relatively permanent basis.

#### 1. Labor Market History Prior To Adoption of the EPA

During the first forty years of the twentieth century, female workers

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69. E. WOLGAST, *supra* note 9, at 135.

70. 29 U.S.C. § 206(d)(1) (1978).

71. *Id.*

were primarily viewed as a group of younger women working to help support their parents while awaiting marriage.<sup>72</sup> According to mainstream thought, women's primary place was in the home and only the failure to marry or exigent circumstances after marriage warranted employment. Because of the interim nature of such work, women were not expected to devote themselves to careers. They worked at low paying jobs and were paid less than men for their skills in anticipation of their leaving the labor market within a relatively short time.<sup>73</sup>

During this era, labor and management both adopted the view that wages should reflect the skill, effort and responsibility objectively required by jobs.<sup>74</sup> Under this view, employees performing equal work under equal working conditions should receive the same wage, except in several limited situations where personal attributes of workers might justify a pay differential. Such personal attributes, however, encompassed little more than seniority, training for future work, and a recognition of different quantity or quality of work by individual workers.

So long as women worked in jobs distinct from those occupied by men, the conservative view of sex roles and the principle of an objective pay scale based on job attributes did not conflict. World War II, however, provided a great impetus for altering the prevailing conception of women's roles in the workplace. With many of America's men in the military, and the economy in the full swing of wartime production, there was a real need for women to join the labor force. They often took jobs replacing or working alongside men,<sup>75</sup> helping to dispel the notion that women were nonessential workers

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72. *Equal Pay For Equal Work For Women: Hearings on H.R. 1584 and H.R. 2438 Before a Special Subcomm. of the House Comm. on Education and Labor*, 81st Cong., 2d Sess. 12 (1950) (statement of Joseph Beirne, President of Communication Workers of America); 108 CONG. REC. 14,760 (1962) (remarks of Rep. Ryan). See also *Equal Pay For Equal Work For Women: Hearings on S. 1178 Before a Subcomm. of the Senate Comm. on Education and Labor*, 79th Cong., 1st Sess. 207 (1945) (Ella Jean Polinsky's selections from master's thesis submitted to American University); M. GREENWALD, *WOMEN, WAR AND WORK* 5, 155 (1980).

73. *Equal Pay For Equal Work For Women: Hearings on H.R. 4273 and H.R. 4408 Before Subcomm. No. 4 of the House Comm. on Educ. and Labor*, 80th Cong., 2d Sess. 65 (1948) (Statement by Olive Huston, Executive Secretary of the National Federation of Business and Professional Women's Clubs). See W. FOGEL, *THE EQUAL PAY ACT: IMPLICATIONS FOR COMPARABLE WORTH* 13 (1984).

74. During the period between the World Wars, and after World War II, the prevalence of this view manifested itself in the increased use of job evaluation systems to set pay. See S. EVANS & B. NELSON, *WAGE JUSTICE* 24-25 (1989); R. HENDERSON, *COMPENSATION MANAGEMENT: REWARDING PERFORMANCE* 231 (4th ed. 1985); see also Northrup, *Comparable Worth and Realistic Wage Setting*, in *ISSUE FOR THE 80's*, *supra* note 2, at 94-96 (War Labor Board's implementation of job evaluations to analyze wage adjustments increased their use).

75. W. FOGEL, *supra* note 73, at 13-14.

in jobs geared toward their temporary status in the workplace. Coupled with the newly accepted notion that pay should objectively reflect the job one performs, the War experience demanded that women receive the same wages as their male predecessors and counterparts—wages inconsistent with previous levels of women's pay premised on their role as homemakers.

The War's influence was directly reflected in the policies of the National War Labor Board (NWLB). Executive Order 9250 prohibited employers from increasing or decreasing wages without prior approval of the Board.<sup>76</sup> But the NWLB authorized "[i]ncreases 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 operations."<sup>77</sup> Despite the call for equal pay for comparable work, the Board initially allowed equal pay adjustments only in jobs where women replaced men or worked side by side with men; the rates for jobs that were performed only by women were presumed correct in relation to other jobs in a plant.<sup>78</sup> Eventually, however, the NWLB, relying on its more general authority to eliminate intra-plant wage inequities, ordered management and labor to renegotiate the pay for women's work.<sup>79</sup>

The NWLB thus implemented a comparable worth standard without disavowing the propriety of the conservative model. The Board permitted and even expected employers to treat men and women differently.<sup>80</sup> In its investigation of pay discrepancies, the Board viewed a longstanding differential, especially one that resulted from collective bargaining, as evidence that women's pay was not out of line with that for men.<sup>81</sup> The

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76. Order No. 9250, 3 C.F.R. 1213-14 (1938-43) (Stabilization of Wages and Salaries, issued Oct. 3, 1942).

77. General Order No. 16, Wages of Female Employees, 24 WAR LAB. REP. xii (adopted Nov. 24, 1942, amended Jan. 3, 1944 and Aug. 20, 1945).

78. See Equal Pay For Women: Effect of Executive Order 9238 on General Order 16, 8 WAR LAB. REP. xxviii (1945) (letter from WLB Chairman to Secretary of Labor, made public June 4, 1943); Brown & Sharpe Mfg. Co., 3 WAR LAB. REP. 321, 325 (1942).

79. See General Elec. Co., 28 WAR LAB. REP. 666, 669-77 (1945); Aluminum Co. of America, 14 WAR LAB. REP. 176, 177 (1944). The Board maintained a theoretical distinction between its "equal pay" and "intra-plant inequity" principles. It generally allowed broader discretion to employers under the second principle, which may have reflected the problems created by relying on job evaluations where dissimilar work is compared. See Smith Wood Prod. Co., 13 WAR LAB. REP. 16, 19 (1943).

80. See, e.g., General Motors Corp., 3 WAR LAB. REP. 348, 356 (1942) ("[I]t is often impossible or inadvisable for female employees to undertake heavy physical labor. . ."); Brown & Sharpe Mfg., 3 WAR LAB. REP. at 325. Even in cases where the Board compared dissimilar jobs, it acknowledged that the wages paid for female work might fall below that for the lowest paid male work requiring no skills. See General Elec. Co., 28 WAR LAB. REP. at 675. But see Aluminum Co. of America, 14 WAR LAB. REP. at 178 ("irrespective of sex, qualified workers should receive same rates for each job. . .").

81. See General Elec. Co., 28 WAR LAB. REP. at 677; Bendix Aviation Corp., 11 WAR

Board did not premise its "comparable worth" cases on the inherent equality of women in the workplace; rather the NWLB premised the standard on the overriding belief that wages should be objectively related to the job performed and its willingness to rely on job evaluation to identify wage inequities.

After the War, the NWLB experiment with a comparable worth standard ended. In the years between World War II and enactment of the EPA, however, women did not return to their previous work roles. Although they went back to working primarily in sex-segregated jobs, women continued to join the workforce in disproportionate numbers, so that by 1962 one third of all women earned wages.<sup>82</sup> Many of these women headed their own households and the wages of many more represented significant contributions to their families' income.<sup>83</sup> Thus, following the War, women's increased participation in the workforce pressured society to make comparisons between male and female workers that the conservative model deemed inappropriate.<sup>84</sup>

Just as the NWLB did not have to disavow the conservative model of sexual equality, neither did the circumstances following World War II mandate a wholesale jettisoning of the model. The post War notions of pay equity demanded only that men and women be considered "similarly situated" when they performed equal work. Society could maintain its traditional view of sex roles and differential treatment of men and women so long as it did not condone payment of different wages for jobs that prevailing job analyses classified as the same. Because most women entered the workforce to perform jobs whose core functions differed from those of male jobs, the influx of women into the labor market did not force any radical departure from essentially the conservative model of sexual equality.

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LAB. REP. 669, 670 (1943). By recognizing this justification for wage differentials, the Board essentially allowed different pay practices for male and female workers where such practices had been condoned by labor and management prior to the War.

82. *Equal Pay Act of 1962: Hearing on S. 2494 and H.R. 11,677 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 87th Cong., 2d Sess. 8 (1962) (prepared statement of Esther Peterson, Assistant Secretary of Labor).

83. *See Equal Pay Act of 1963: Hearings on S.882 and S.910 Before the Subcomm. of the Senate Comm. on Labor and Public Welfare*, 88th Cong., 1st Sess. 16 (1963) (prepared statement of W. Willard Wirtz, Secretary of Labor); 109 CONG. REC. 9199 (1963) (statement of Rep. Green); *see also* S. EVANS & B. NELSON, *supra* note 74, at 23 (noting significantly increased participation of older and married women).

84. Some commentators contend that the real impetus for equal pay legislation was the threat that lower pay for women working the same jobs as men would depress the men's wages. *See Legislation, N.Y. Labor Law, Section 199-a: "Equal Pay For Equal Work"*, 46 COLUM. L. REV. 442 (1945); *cf.* W. FOGEL, *supra* note 73, at 21.

## 2. Legislative History

By 1963, the conception that women's place was in the home had eroded. Thus, the EPA's legislative history contained several calls for an expanded market role for women.<sup>85</sup> At the same time, however, many EPA proponents appeared to accept the view that differences between men and women justified explicit sex-based distinctions by employers outside of the wage-setting context.<sup>86</sup>

The extent to which employers should maintain sex-based distinctions was controversial and the social views were in a state of flux; but Congress structured the Act to avoid this controversy. Having accepted the notion that wages should reflect the attributes of a job, Congress could not justify employers paying men and women in the same job different wages. Women's role as wife or mother simply became irrelevant when removed from principles of pay based on employees' needs and demands to pay based on the benefit to the employer.<sup>87</sup> Thus, while some individual legislator's statements seemed to conflict with the conservative view of women as homemaker, proponents of the EPA explicitly noted that the Act avoided any inconsistency with this conception of separate spheres for women and men.

For example, in 1962 Representative St. George proposed an amendment to substitute the term "equal work" for "comparable work." The amendment passed and remained in the Act adopted a year later. In support of this amendment, Congresswoman St. George remarked:

Now, I agree, and I have always agreed, and it has always been my premise and that, I think, of most of the people, that what we really want is equality. We do not want favors. There are certainly many things that men can do better than women, and before the majority of the House gets too thrilled by that statement, there are very many things that women can do much

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85. For example, Senator Randolph lauded the Corning Glass Company for hiring women as executives, managers, draftsmen, and scientists, and not just as secretaries. 109 CONG. REC. 8916 (1963).

86. See, e.g., *id.* at 9212 (remarks of Rep. Cohelan); *id.* at 9205 (remarks of Rep. Griffin). *But cf.* 108 CONG. REC. 14,762 (1962) (remarks of Rep. O'Hara that "[m]ost jobs today can be done by any worker, whether man or woman").

87. The principle that men's and women's different roles in society were irrelevant to wage setting provided the foundation for the Act. See S. REP. NO. 176, 88th Cong., 1st Sess. 1, reprinted in 1963 U.S. CODE & ADMIN. NEWS 687. See also 108 CONG. REC. 14,763 (1962) (remarks of Rep. Granahan comparing justification of sex based wage differentials based on women's lesser need for pay with Communist principle "from each according to his abilities, to each according to his needs").

better than men. As a woman, I do not particularly want to be compared to a man, and I am quite sure that that goes for my male colleagues as well.<sup>88</sup>

The following year, the House Report was accompanied by the statement that employers might refuse to hire women if required to pay them an equal wage because of the “indisputable fact that women are more prone to homemaking and motherhood than men.”<sup>89</sup> Representative Green, a sponsor of the equal pay legislation, found that remark “delightful — most intriguing — and . . . suspect[ed] it [would] not be challenged on either side of the aisle.”<sup>90</sup> Her serious response, however, was that Congress was not debating the question of whether women should work, but rather addressing the inequity of paying women a different wage when they performed the same work as men.<sup>91</sup>

Furthermore, the legislative history also evidenced congressional concern that the EPA not undermine employers’ use of systematic job evaluations to set pay. In particular, Congress amended the Bill to incorporate terms of art from the industrial relations literature on job evaluation in explaining the concept of “equal work.”<sup>92</sup> Congress thereby structured the Act to preclude judicial scrutiny of employer decisions to pay jobs at different rates pursuant to accepted job evaluation plans.

The legislative history does not present a picture of a consensus of understanding about sexual equality. But it clearly depicts that Congress intended to corral the comparisons of men’s and women’s work well within bounds established by job evaluation plans used by employers in 1963. Further, it shows that Congress tried to avoid the controversy that might result from a bill which implemented a gender neutral view of women’s role in the workplace. Thus, the view of sexual equality that supported the EPA scheme appears similar to that underlying the War Labor Board decisions — the conservative view of sexual equality modified to allow comparison between men and women performing substantially the same work.

### 3. EPA Case Law

Cases implementing the EPA, by and large, remain true to the jurisprudential underpinnings reflected in the Act’s legislative history. They allow job comparisons in a fairly narrow context, borrowing from

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88. 108 CONG. REC. 14,768 (1962).

89. H.R. REP. NO. 309, 88th Cong., 1st Sess. 10, *reprinted in* 1963 U.S. CODE & ADMIN. NEWS 687, 692 (additional views of Rep. Findlay).

90. 109 CONG. REC. 9199 (1963).

91. *Id.*

92. *See id.* at 9195 (statement of Rep. Frelinghuysen); *Corning Glass Works v. Brennan*, 417 U.S. 188, 201-02 (1974) (discussing congressional use of these terms of art).



traditional job evaluation methodologies to delineate the extent to which "different" jobs may be considered equal. Moreover, they have relegated the issue of an employer's explicit use of gender to a relatively unimportant role in determining liability, thereby implicitly rejecting a model of equality based on gender neutrality.

To establish a *prima facie* case, a plaintiff must show that an employee of the opposite sex performs equal work and receives a higher wage.<sup>93</sup> While the statute directs the courts to look at the level of skill, effort and responsibility a job entails, EPA opinions have required that a plaintiff's job involve the same core functions as the job with which the plaintiff claims it is equal.<sup>94</sup> If the jobs do not entail an overlap of core tasks, the plaintiff loses; if they do entail the same core tasks but are not identical, then the courts will consider the statutory factors to determine whether the jobs are substantially equal.<sup>95</sup>

Therefore, courts have interpreted equal work more broadly than the requirement of identical jobs that appears in the legislative history.<sup>96</sup> But it is still sufficiently narrow to exclude comparisons of jobs when, under the historical notion of objective job value, the pay for the two jobs is seen as legitimately reflecting employer discretion. If courts were to compare two jobs involving distinct core tasks they would have to question the employer's discretionary assignment of compensable factors and the weights assigned to these factors — decisions that traditional job evaluations

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93. *Brock v. Georgia Sw. College*, 765 F.2d 1026, 1033 (11th Cir. 1985); *Ridgway v. United Hosp.-Miller Div.*, 563 F.2d 923, 926 (8th Cir. 1977); *see, e.g., Corning Glass*, 417 U.S. at 195; *Hodgson v. Behrens Drug Co.*, 475 F.2d 1041, 1048 (5th Cir. 1971), *cert. denied*, 414 U.S. 822 (1973); *Hodgson v. American Bank of Commerce*, 447 F.2d 416, 420 (5th Cir. 1971).

94. *See Brewster v. Barnes*, 788 F.2d 985, 991 (4th Cir. 1986); *Brobst v. Columbus Serv. Int'l*, 761 F.2d 148, 156 (3d Cir. 1985), *cert. denied*, 108 S. Ct. 777 (1988); *Brennan v. City Stores, Inc.*, 479 F.2d 235, 239 (5th Cir. 1973); *Sullivan, The Equal Pay Act of 1963: Making and Breaking a Prima Facie Case*, 31 ARK. L. REV. 545, 571 (1978).

95. *See, e.g., Horner v. Mary Inst.*, 613 F.2d 706, 714 (8th Cir. 1980); *Brennan v. South Davis Community Hosp.*, 538 F.2d 859, 861-62 (10th Cir. 1976); *Hodgson v. Brookhaven Gen. Hosp.*, 436 F.2d 719, 725 (5th Cir. 1970), *aff'd*, 470 F.2d 729 (5th Cir. 1972). The Supreme Court noted that these statutory factors should be construed as terms of art from the science of job evaluation. *Corning Glass Works*, 417 U.S. at 201. The Court explicitly recognized that the ambit of equal work under the EPA must respect differentials justified by prevailing job evaluation methodologies. *Id.* at 200-01.

96. *See* 109 CONG. REC. 9197 (1963) (statement of Rep. Goodell noting that to be equal jobs must be virtually identical). In fact, despite judicial statements to the contrary, the "substantial equality" standard is essentially the same as the limited comparable work standard initially applied by the War Labor Board. *See supra* notes 80-81 and accompanying text.

methodologies consider appropriately left to the employer.<sup>97</sup> If core tasks are the same, however, the courts have some baseline for comparison which severely limits the need to evaluate the worth of particular job functions.<sup>98</sup> Significant overlap of job tasks also often allows courts to use the employer's own implicit weighing of job factors to evaluate whether the wages assigned to the compared jobs are consistent.<sup>99</sup> Thus, the requirement that a plaintiff compare herself to a male worker performing substantially equal work ensures that the EPA's provisions do not conflict with the norms established by traditional job evaluation systems.

EPA doctrine also eschews reliance on the liberal model's precept of sex-neutrality by minimizing the significance of an employer's use of an employee's sex in setting wages. An employer may face liability even if he, in good faith, based pay on factors other than sex, and conceivably could escape EPA liability even if he used sex as a factor to set pay. The relative insignificance of the employer's motive is best demonstrated by its irrelevance to the plaintiff's prima facie case. The plaintiff meets her burden simply by identifying employees of the opposite sex that get higher wages for equal work, regardless of how that situation arises. A showing of unequal pay for equal work may suffice even where the totality of the employer's pay policy fails to manifest a sex-based disparity.<sup>100</sup> EPA doctrine treats the incongruity of unequal pay for equal work as presumptively discriminatory even where that incongruity does not logically support an inference of sex-conscious decisionmaking.<sup>101</sup>

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97. See *infra* notes 194-203 and accompanying text for a description of traditional job evaluation.

98. Cf. Sullivan, *supra* note 94, at 580-81 (where two jobs entail a large common set of core tasks, courts can compare the value of additional tasks performed by the favored sex with those performed by the disfavored sex without engaging in "wholesale judicial job evaluation"). Courts have been willing to make assessments about the "economic value" of incidental tasks as part of their determination of equal work. See, e.g., Usery v. Allegheny County Inst. Dist., 544 F.2d 148, 152 (3d Cir. 1976), *cert. denied*, 430 U.S. 946 (1977); Hodgson, 436 F.2d at 725.

99. See, e.g., Shultz v. Wheaton Glass Co., 421 F.2d 259, 263 (3d Cir.), *cert. denied*, 398 U.S. 905 (1970); Sullivan, *supra* note 94, at 576-80.

100. See M. PLAYER, EMPLOYMENT DISCRIMINATION LAW 164 (1988) ("[EPA] presupposes that plaintiff will compare herself to a single employee."). A plaintiff may even meet her burden of establishing a prima facie case by demonstrating that an employer pays *both men and women* more than he pays *other men and women* where all perform equal work. See Sullivan, *supra* note 94, at 557.

If courts did not implement this doctrine an employer could consistently hire women at a lower rate than men but gain protection by paying a few "token women" equally with men. See Hodgson v. American Bank of Commerce, 447 F.2d 416, 421 (5th Cir. 1971); see also Peters v. City of Shreveport, 818 F.2d 1148 (5th Cir. 1987), *cert. dismissed*, 108 S. Ct. 1101 (1988).

101. For example, the Tenth Circuit confirmed a trial court finding that the defendant

Conversely, an employer may have a bona fide pay plan under which a female employee would earn more than a male employee performing equal work, for instance due to greater seniority. Under EPA doctrine, if the employer lowers the woman's salary to equal the man's because he did not want to pay her more, the women could not establish an equal pay claim.<sup>102</sup> The irrelevance of motive to the plaintiff's prima facie case supports the contention that the Act is premised more on industrial relation's theory about pay policies than on a jurisprudentially grounded norm of gender neutrality.

It may be contended that focusing on the prima facie case does not give a true picture of EPA doctrine, especially since the Act includes a specific defense for pay decisions based on "any other factor other than sex." But courts have interpreted this defense narrowly, requiring that the purported reason for the pay difference legitimately further the employer's business interest in some generally accepted manner.<sup>103</sup> The precise

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did not appear "to have determined Plaintiff's rate of pay based on her sex," but still violated the EPA. *Sinclair v. Automobile Club of Okla., Inc.*, 733 F.2d 726, 729 (10th Cir. 1984). *Cf. Hein v. Oregon College of Educ.*, 718 F.2d 910, 921 (9th Cir. 1983) (employer can meet his burden of proof by justifying a lower starting wage for the particular individual in question, regardless of an overall pattern of male faculty members earning more than female faculty members).

102. While there is no case presenting such a scenario, this result follows from the language of the Act — outlawing only *unequal* pay — and the doctrine that courts have developed to implement it. Such a pay policy, however, would clearly violate Title VII. *See infra* note 131 and accompanying text.

103. *See EEOC v. J.C. Penney Co.*, 843 F.2d 249, 253 (6th Cir. 1988) (adopting the "legitimate business reason" standard set in *Kouba*"); *Kouba v. Allstate Ins. Co.*, 691 F.2d 876, 878 (9th Cir. 1982) ("An employer . . . cannot use a factor which causes a wage differential absent an acceptable business reason."); *see also* Player, *Exorcising the Bugaboo of "Comparable Worth": Improperly Motivated Pay Distinctions Under Title VII*, 41 ALA. L. REV. 321, 343 (1990) (reason for pay differential must be a "legitimate business reason" to constitute a "factor other than sex").

Some courts have viewed the first three EPA defenses — pay differentials based on a seniority, merit, or on quantity/quality of production system — as indicative of the relationship a pay factor must have to an employer's business interest to constitute a factor other than sex. In doing so, these courts effectively limit the fourth defense to factors that employers have traditionally used to determine wages. *See, e.g., Glenn v. General Motors Corp.*, 841 F.2d 1567, 1571 (11th Cir.) (" 'factor other than sex' exception applies when the [wage] disparity results from unique characteristics of the . . . job; (i.e.,) from [individual] experience, training or ability . . ."), *cert. denied*, 109 S. Ct. 378 (1988); *EEOC v. First Citizens Bank of Billings*, 758 F.2d 397, 401 (9th Cir.) ("[E]xperience" qualifies under the fourth defense, but college education does not where the "main qualities necessary for the job are speed and accuracy."), *cert. denied*, 474 U.S. 902 (1985); *Strecker v. Grand Forks County Soc. Serv. Bd.*, 640 F.2d 96, 104 (8th Cir. 1980) (Heaney, J., dissenting) (education and experience requirements for the state's personnel classification system must be reasonably related to job duties).

Other courts have upheld factors that do not directly relate to business efficiency or job

territory of this fourth EPA defense is as yet uncharted, but an employer clearly falls outside its bounds if he maintains a wage differential between males and females based on idiosyncratic factors.<sup>104</sup>

Furthermore, the "factors other than sex" defense is affirmative and the employer bears the burden of proving that the legitimate factor explains the challenged wage disparity.<sup>105</sup> Employers often cannot present sufficient evidence to convince the trier of fact that a gender-neutral factor explains the pay differential.<sup>106</sup> Coupled with the absence of any requirement that the plaintiff present evidence of use of sex to set pay, the burden of having to prove absence of discriminatory motive exposes an employer to a significant likelihood of EPA liability, even where the employer did not consciously base wages on an employee's sex.

## B. Title VII

### 1. Legislative History

Only one year after it enacted the EPA, Congress passed Title VII, prohibiting among other things employment discrimination based on sex.<sup>107</sup> Yet it premised Title VII on an entirely different concept of equality than that underpinning the EPA. No dramatic shift in the legislators' understanding of sexual equality explained the different philosophical groundwork for Title VII. Rather, the different conceptual basis reflected Congress' desire for Title VII to implement the prevailing liberal model of

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performance, but have required that the factor be a reasonable basis for allocating employee benefits or setting pay. *See, e.g., Covington v. Southern Ill. Univ.*, 816 F.2d 317, 322 (7th Cir.) (salary retention policy which maintains employee's salary upon change of university position "qualifies as a factor other than sex"), *cert. denied*, 484 U.S. 848 (1987); *Bence v. Detroit Health Corp.*, 712 F.2d 1024, 1030-31 (6th Cir. 1983) (company policy which compensates women at lower commission rate than men for selling identical product is at least partially based on sex), *cert. denied*, 465 U.S. 1025 (1984). *See also id.* at 1032 (Engel, J., dissenting in part) (differences between markets for men's and women's health spa memberships could justify disparity in commissions to membership salesmen and saleswomen).

104. *Player*, *supra* note 103, at 344.

105. *See Corning Glass Works v. Brennan*, 417 U.S. 188, 196-97 (1974).

106. *See, e.g., EEOC v. Madison Community Unit School Dist. No. 12*, 818 F.2d 577, 585 (7th Cir. 1987) (evidence that women were discouraged from coaching male teams outweighs defendant's rare prior employment of female coaches for male teams); *Brock v. Georgia Sw. College*, 765 F.2d 1026, 1037 (11th Cir. 1985); *EEOC v. Whiting Mach. Works*, 635 F.2d 1095, 1098 n.6 (4th Cir. 1980); *Pearce v. Wichita County*, 590 F.2d 128, 134 (5th Cir. 1979); *Shultz v. Wheaton Glass Co.*, 421 F.2d 259, 266-67 (3d Cir.), *cert. denied*, 398 U.S. 905 (1970).

107. Title VII—Equal Employment Opportunity, Pub. L. No. 88-352, 78 STAT. 253 (1964) (codified as amended at 42 U.S.C. §§ 2000e-1 to -17 (1982)).

racial equality, requiring formally equal treatment of blacks and whites in the public domain.

Title VII's proscription of sex discrimination was the result of an amendment from the floor of the House of Representatives which added "sex" to the language outlawing discrimination based on race, color, religion and national origin.<sup>108</sup> Representative Smith of Virginia proposed the amendment only two days before the House passed its initial version of the bill.<sup>109</sup> That the House subsequently had to add the term "sex" eight more places in the Bill to perfect the amendment indicates the level of thought that went into it.<sup>110</sup>

The debate on this amendment did not evidence any new found consensus about an appropriate model of sexual equality. The amendment was supported in part by legislators who advocated gender neutrality in the labor market.<sup>111</sup> But Representative Smith appeared to have proposed the amendment as a means of adding controversial baggage to the whole bill, thereby increasing the chances of its defeat.<sup>112</sup> Many Congressmen who supported the amendment had gone on record a year earlier in opposition to the more circumscribed Equal Pay Act.<sup>113</sup> Thus, the amendment passed not because of a consensus about the propriety of applying Title VII's provisions to sex discrimination, but because of a coalition of two legislative factions that represented opposite extremes on the spectrum of views about sexual equality.<sup>114</sup>

Most significantly, the debate did not result in any special considerations posed by the unique nature of sex discrimination. With two limited

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108. 110 CONG. REC. 2577 (1964).

109. The amendment was proposed on February 8, 1964. *Id.* The House approved its initial version of the bill that became Title VII on February 10, 1964. *Id.* at 2804-05.

110. *See id.* at 2718. Representative Smith admitted that these omissions were mistakes made "in the hurry of preparing [the] amendment." *Id.*

111. *E.g., id.* at 2579 (remarks of Rep. Griffiths); *id.* at 2580-81 (remarks of Rep. St. George).

112. Proponents of Title VII generally opposed the addition of "sex" to Title VII's provisions, recognizing Smith's amendment as a strategic ploy to bog down the whole bill. *E.g., id.* at 2578 (remarks of Rep. Celler); *id.* at 2581-82 (remarks of Rep. Green). This led to the anomalous situation that many Representatives who voted for Title VII opposed the amendment that became part of the statute.

113. *See id.* at 2581, 2584 (remarks of Rep. Green).

114. The supporters of Title VII emphasized that differences between men and women might make the simple addition of sex to Title VII's provisions unwise. *E.g., id.* at 2577-78 (remarks of Rep. Celler); *id.* at 2584 (remarks of Rep. Green); *see also* Letter from the U.S. Dept. of Labor, Office of the Secretary, *reprinted in id.* at 2577 ("In view of [the] policy conclusion reached by representatives from various women's organizations and private and public agencies to attack discriminations based on sex separately . . . [the proposed amendment] would not be to the best advantage of women at this time.").

exceptions subsequently added to the bill as technical amendments, the same provisions that prohibit race discrimination also apply to sex discrimination.

One of the two exceptions allows an employer to use an employee's sex as a criterion of an employment decision when it is a "bona fide occupational qualification" (BFOQ).<sup>115</sup> The exception indicates that Congress recognized some distinction between the appropriate models of sexual and racial equality. Debate on the BFOQ defense revealed a congressional expectation that the defense would allow an employer to rely on strongly held perceptions of sex-appropriate behavior. But the debate also manifested a congressional understanding that the defense would apply only in the limited circumstance of universally held beliefs about the propriety of particular sex-based employment restrictions and that it was not intended to modify the whole legislative scheme of Title VII as it applied to nonracial discrimination.<sup>116</sup>

The second exception, known as the Bennett Amendment, provides that conduct authorized by the Equal Pay Act shall not constitute a violation of Title VII.<sup>117</sup> The legislative history surrounding this amendment made it clear that it was not meant to revamp the application of Title VII to sex discrimination in any significant manner. The Bennett Amendment only affects the proscription of pay discrimination. Senator Bennett proposed it as a technical amendment to ensure that "in the event of conflicts, [between the Equal Pay Act and Title VII], the provisions of the Equal Pay Act shall not be nullified."<sup>118</sup> There was no indication in the legislative history that the Bennett Amendment addresses concerns raised

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115. 42 U.S.C. § 2000e-2(e)(1) (1982).

116. In proposing to include a BFOQ for sex-conscious decisions, Representative Goodell stated:

There are so many instances where the matter of sex is a bona fide occupational qualification. For instance, I think of an elderly woman who wants a female nurse. There are many things of this nature which are bona fide occupational qualifications, and it seems to me they would be properly considered here as an exception [to the general rule against sex-based decisions].

110 CONG. REC. 2718 (1964). The example given by Representative Goodell indicates an intent to limit the defense to situations where employment decisions extend beyond the public sphere to directly affect an individual's personal life. Senators Case and Clark, however, issued an interpretive memorandum describing the BFOQ defense as limited in nature, covering discrimination like the preference of a French restaurant for a French cook or a professional baseball team for male players. *See id.* at 7213. This indicates that the defense was to apply even in nonprivate contexts involving widely held beliefs that certain jobs should be staffed by workers of a particular sex.

117. 42 U.S.C. § 2000e-2(h) (1982).

118. 110 CONG. REC. 13,647 (1964).

by potential controversies over the appropriate model of sexual equality.<sup>119</sup> Thus the model of equality underlying Title VII's provisions barring sex discrimination is the model Congress thought applicable to race discrimination — the liberal assimilation model of equality.<sup>120</sup>

At the time Congress enacted Title VII, race-neutral treatment was already well ensconced as the prevailing paradigm of racial equality. Dating as far back as the abolitionists, some proponents of racial equality advocated a race-neutral model.<sup>121</sup> During the New Deal, Congress prohibited race based decisions in the context of certain federal job and training programs,<sup>122</sup> and in 1940, President Roosevelt issued an executive order barring use of race within the Federal Civil Service system.<sup>123</sup> World War II acted as a major catalyst destroying the legitimacy of segregation of blacks<sup>124</sup> so that by the War's end some states began adopting legislation prohibiting racial and religious discrimination in private hiring and promotion.<sup>125</sup> By 1954, the Supreme Court had definitively ruled that the equal protection clause required government to treat blacks just as it treated whites.<sup>126</sup>

Not surprisingly then, the debate over Title VII did not hinge on any challenge to the propriety of formally equal treatment for blacks and whites as the proper model of equality. Instead the debate focused on the extent to which the government could impose this race-neutral conception on the decisions of private employers. Opponents argued that Title VII

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119. The entire debate in the Bennett Amendment took only two or three minutes. The amendment was viewed as a "technical correction" that merely recognized the EPA's exception to the requirement of equal pay for equal work. *Id.* at 13,647 (remarks of Sen. Bennett and Sen. Dirksen).

120. *See id.* at 2599 (remarks of Rep. Goodell). Rep. Goodell noted a problem with the age discrimination proscriptions of Title VII, since "the whole framework [of Title VII's antidiscrimination provisions] . . . [were] drawn especially to meet the very peculiar problems of discrimination on the basis of race, creed, or color."

121. *See* J. MCPHERSON, *THE STRUGGLE FOR EQUALITY: ABOLITIONISTS AND THE NEGRO IN THE CIVIL WAR AND RECONSTRUCTION* 147 (1964).

122. One such New Deal federal job program was the Unemployment Relief Act of 1933, ch. 17, 48 STAT. 22 (1933-34); *but cf.* J. POLE, *supra* note 26, at 255 ("[T]here was more articulate concern to restore conditions of equality during the earlier Progressive era than during the New Deal.")

123. Exec. Ord. 8587, 5 Fed. Reg. 4445 (1940) (revoked by Exec. Ord. 9830, 12 Fed. Reg. 1259 (1947)).

124. After World War II American ideals were conceptualized as diametrically opposed to those of Nazi-Germany. This led to a deeper respect of the American commitment to individual rights and a rejection of a society premised on racial hierarchy. At the same time, the manpower needs created by the War gave blacks an opportunity to show they were deserving of equal status. *See* J. POLE, *supra* note 26, at 256-57.

125. *See* J. POLE, *supra* note 26, at 260-62.

126. *See* *Brown v. Board of Educ.*, 347 U.S. 483 (1954).

would unwisely and impermissibly interfere with employers' liberty to run their businesses as they saw fit.<sup>127</sup> Proponents responded by noting that the ability to earn a living was a prerequisite for minorities to enjoy their other "civil rights" promised by the fourteenth amendment.<sup>128</sup> Coupled with the premise that legitimate bounds of liberty did not encompass freedom to deny others the opportunity to enjoy their own liberty, proponents concluded that imposing race neutrality on employer decisions — decisions made within the public domain — did not unduly restrict liberty.<sup>129</sup>

With regard to racial equality, the arguments that prevailed thus closely paralleled the liberal justification for the public-private distinction. Title VII's proponents accepted individual liberty as the foundation for civil rights, but believed the nature of the labor market necessitated restricting employers' liberty to arbitrarily deny minority workers jobs for which they qualified. Title VII's proscription of race discrimination followed from a straightforward application of the liberal model of equality: employer decisions fall within the public sphere; race discrimination in the public sphere denies blacks the opportunity to exercise their autonomy and is not demonstrably related to legitimate employer goals such as profit maximization; therefore the government should scrutinize employers' decisions to ensure they are not race based.

## 2. Case Law

Judicial construction of Title VII generally has respected Congress's inadvertent endorsement of the liberal model of sexual equality. With a few notable exceptions, courts have treated sex and race as equally invidious classifications and applied the same doctrinal analysis to discrimination based on either classification.<sup>130</sup>

Courts have developed two distinct doctrines under which a plaintiff may bring a Title VII claim. One is the disparate treatment doctrine, which prohibits employers from intentionally basing employment decisions on

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127. See, e.g., H.R. REP. NO. 914, 88th Cong., 1st Sess. 69 (1963) (House Judiciary Comm. Minority Rep.); 110 CONG. REC. 13,825 (1964) (remarks of Senator McClellan).

128. See H.R. REP. NO. 914, 88th Cong., 1st Sess., pt. 2, at 29 (1964) (additional views of Reps. McCulloch, Lindsay, Cahill, Schriver, MacGregor, Mathias and Bromwell in support of the Civil Rights Act) ("The rights of citizenship mean little if an individual is unable to gain the economic wherewithal to enjoy or properly utilize them.").

129. See 110 CONG. REC. 13,082 (1964) (remarks of Sen. Case); *id.* at 13,080 (remarks of Sen. Clark); *id.* at 1512 (remarks of Rep. Madden).

130. The Supreme Court has stated that "under Title VII a distinction based on sex stands on the same footing as a distinction based on race unless it falls within one of a few narrow exceptions [*i.e.*, the BFOQ defense or the Bennett Amendment] . . ." *Arizona Governing Comm. v. Norris*, 463 U.S. 1073, 1083-84 (1983).



sex. The second is the disparate impact doctrine, which prohibits employers from using criteria that are sex neutral on their face but have a disproportionate adverse impact on women. As this article will show, the disparate treatment doctrine squarely adopts the liberal model of equality underlying congressional adoption of Title VII. The disparate impact doctrine goes beyond merely requiring sex neutrality and upon cursory view seems premised on a different model. A closer inspection, however, reveals that it too is based on the liberal model, coupled with a recognition that employment practices may effectively deny women equal job opportunities without explicitly relying on sex as a decisionmaking criterion.

*(a) The disparate treatment doctrine*

The disparate treatment doctrine encompasses three different types of discrimination claims. The first and most straightforward involves an employer who treats an individual female worker differently from a male worker because of her sex.<sup>131</sup> Since an employer may try to hide use of sex as an employment criteria, a plaintiff does not need to show directly that the decision was motivated by sex to make out a prima facie case. She need only show that the employer treated her differently than a similarly situated man.<sup>132</sup> For example, a woman who demonstrates that she was qualified for an available job, that she was not hired, and that a man was hired, has satisfied her initial burden of presenting a prima facie case.<sup>133</sup>

Plaintiff's initial burden in such a case is similar to that under Equal Pay Act where motive is not crucial. But unlike under EPA doctrine, this does not shift the burden of proof to the defendant. Rather the defendant need only articulate some nondiscriminatory explanation for the different treatment.<sup>134</sup> Once he does so, the burden shifts back to the plaintiff to show that the defendant's explanation is a pretext or to otherwise rebut the defendant's evidence.<sup>135</sup> Thus, Title VII's prima facie case reveals little about the model of equality underlying the statute. Rather it is part of a series of shifting evidentiary burdens that the court devised "to facilitate the orderly consideration of relevant evidence, . . . intended progressively to sharpen the inquiry into the elusive factual question of intentional

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131. See *Price Waterhouse Corp. v. Hopkins*, 109 S. Ct. 1775, 1780-81 (1989).

132. If un rebutted, this difference in treatment implies discriminatory motive. See, e.g., *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981).

133. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (formulating this test for individual race case); *Burdine*, 450 U.S. at 252-53 (reemphasizing the burdens stated in *McDonnell Douglas* in the context of sex discrimination).

134. *Burdine*, 450 U.S. at 254-54.

135. *Id.* at 256.

discrimination."<sup>136</sup> Most significantly, unlike EPA doctrine, the ultimate issue is whether the defendant based the decision on the employee's sex; the defendant will prevail so long as the plaintiff cannot show by a preponderance of the evidence that the decision was sex-conscious.<sup>137</sup>

In the second type of disparate treatment claim, the plaintiff must allege that an employer engaged in a pattern or practice of discrimination. To make a prima facie pattern-or-practice case, a plaintiff must present evidence from which one can infer that the employer routinely based employment decisions on sex.<sup>138</sup> Frequently the plaintiff will base her claim on statistical evidence showing gross disparities between similarly situated male and female employees without showing any explicit violation of the liberal model's sex-neutrality prescription.<sup>139</sup> The plaintiff, however, must account for the effects of factors one would expect to have a substantial impact on hiring decisions, otherwise the trier of fact cannot conclude that the disparity reflects an employer's sex-conscious decision.<sup>140</sup> Evidence of

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136. *Watson v. Fort Worth Bank & Trust Co.*, 108 S. Ct. 2777, 2784 (1988) (citation omitted).

137. *See United States Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 715-16 (1983).

138. The plaintiff has the ultimate burden of proving "more than the mere occurrence of isolated or 'accidental' or 'sporadic' discriminatory acts. It ha[s] to establish by a preponderance of the evidence that racial [or sexual] discrimination was the company's standard operating procedure — the regular rather than the unusual practice." *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 336 (1977).

139. *See Hazelwood School Dist. v. United States*, 433 U.S. 299, 307-10 (1977); *Teamsters*, 431 U.S. at 339-40 n.20.

140. *See Valentino v. United States Postal Serv.*, 674 F.2d 56, 69 (D.C. Cir. 1982); *Payne v. Travenol Labs., Inc.*, 673 F.2d 798, 822-23 (5th Cir.), *cert. denied*, 459 U.S. 1038 (1982); *EEOC v. Hartford Fire Ins. Co.*, 31 Fair Empl. Prac. Cas. (BNA) 531 (D. Conn. 1983). Plaintiffs' statistical showing might not satisfy the requirements of a prima facie case if, for other reasons, the statistical comparison does not support a reasonable inference of discriminatory treatment. *See, e.g., Spaulding v. University of Wash.*, 740 F.2d 686, 704 (9th Cir.) (expert's assumption, *inter alia*, that all masters degrees are of equal worth destroyed the probative value of statistics), *cert. denied*, 469 U.S. 1036 (1984); *Coble v. Hot Springs School Dist. No. 6*, 682 F.2d 721, 733 (8th Cir. 1982) (plaintiff's selective choice of comparison groups undercut the inference of discrimination); *Wilkins v. University of Houston*, 654 F.2d 388, 408-10 (5th Cir. 1981) (plaintiff's statistics were insufficient because they failed to include all employees subject to the employer's decision), *cert. denied*, 459 U.S. 822 (1982).

The court in *EEOC v. Sears, Roebuck & Co.* affirmed the trial judge's conclusion that a statistically significant disparity between the percentage of women in the company's commissioned sales force and in the underlying labor pool resulted from the women's voluntarily tendency not to seek sales jobs. 839 F.2d 302 (7th Cir. 1988). The trial court gave credit to testimony that women's natures made them less likely than men to apply for these jobs and discounted the likelihood that Sears' recruiting techniques discouraged women. *EEOC v. Sears, Roebuck & Co.*, 628 F. Supp. 1264, 1305-17 (N.D. Ill. 1986). While *Sears* may be read as a mere application of the rule that the plaintiff must convince

particular instances of sex-conscious decisionmaking are probative of the employer's propensity to discriminate and hence help support a pattern-or-practice case.<sup>141</sup> The defendant can rebut a prima facie showing either by impugning the plaintiff's evidence or by presenting additional statistical evidence showing that the disparity results from factors other than sex,<sup>142</sup> since either showing casts doubts on the plaintiff's allegation that the employer intentionally discriminated.

Thus, while a plaintiff may prevail without explicitly showing sex entered into the employer's decision, intentional discrimination is at the heart of the pattern or practice case.<sup>143</sup> The mere fact that gross disparities between men and women employees exist is not in itself sufficient reason to find a violation of Title VII. Such disparities are relevant only to the extent they imply that the employer considers an employee's sex.<sup>144</sup> As with the individual disparate treatment case, while the plaintiff may prove her case by circumstantial evidence, she retains the burden of proving intentional discrimination.

The third type of disparate treatment claim prohibits an employer from perpetuating a discriminatory practice the establishment of which was legal only because it predated the applicability of Title VII.<sup>145</sup> For example, where an employer pays a worker in part according to past

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the trier of fact that the employer made sex-conscious decisions, the trial court's willingness to accept differences between men and women is at odds with the liberal model's suspicion of gender based disparities. Some of the testimony about sex differences came from feminist scholars. *Id.* at 1307-08. However, the use of such differences to relegate women to jobs of inferior status and pay is not consistent with the feminist model of equality since it imports into Title VII the dictates of the conservative model. The extent to which other courts will follow *Sears'* propensity to rely on "natural" sex differences to keep women out of higher status positions remains to be seen.

141. See *Teamsters*, 431 U.S. at 338-39; *Catlett v. Missouri Hwy. & Transp. Comm'n*, 828 F.2d 1260, 1265-66 (8th Cir. 1987), *cert. denied*, 108 S. Ct. 1574 (1988); *Coser v. Moore*, 739 F.2d 746, 752-53 (2d Cir. 1984); *Travenol Labs.*, 673 F.2d at 817.

142. See, e.g., *Penk v. Oregon State Bd. of Higher Educ.*, 816 F.2d 458, 464 (9th Cir.), *cert. denied*, 108 S. Ct. 158 (1987); *Palmer v. Shultz*, 815 F.2d 84, 99 (D.C. Cir. 1987).

143. See, e.g., *Teamsters*, 431 U.S. at 335 n.15 ("Proof of discriminatory motive is critical, although it can in some situations be inferred."); *AFSCME v. State of Wash.*, 770 F.2d 1401, 1405 (9th Cir. 1985).

144. As the Court explained in *Teamsters*:

[T]he statistical evidence was not offered or used to support an erroneous theory that Title VII requires an employer's work force to be racially balanced. Statistics showing racial or ethnic imbalance are probative in a case such as this one only because such imbalance is often a telltale sign of purposeful discrimination; absent explanation, it is ordinarily to be expected that nondiscriminatory hiring practices will in time result in a work force more or less representative of the racial and ethnic composition of the population in the community from which employees are hired.

431 U.S. at 339-40 n.20.

145. See *Bazemore v. Friday*, 478 U.S. 385 (1986).

salaries initially based on sex, “[e]ach week’s paycheck that delivers less to a [female] than a similarly situated [male] is a wrong actionable under Title VII.”<sup>146</sup> Use of such a practice is illegal even if it does not presently rely on sex based distinctions because it continues the initial discriminatory scheme. A particular decision made pursuant to the challenged practice has the same effect as if the employer discriminated anew. The underlying premise of this third type of claim thus also springs from the impropriety of treating women differently from men in the labor market. Therefore individual claims alleging disparate treatment, a pattern-or-practice of discrimination, or perpetuation of past intentional discrimination all take aim at use of sex as an employment factor, the precise conduct that the liberal model of equality deems unjustifiable.

*(b) The bona fide occupational qualification defense*

While the disparate treatment doctrine generally demands race-neutral and sex-neutral decisionmaking, Title VII allows employers explicitly to base decisions on workers’ sex where sex is a bona fide occupational qualification.<sup>147</sup> Since the BFOQ defense does not apply to

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146. *Bazemore*, 478 U.S. at 395-96 (making statement about blacks and whites). See also *Hazelwood School Dist. v. United States*, 433 U.S. 299, 309-10 n.15 (1977) (“proof that an employer engaged in racial discrimination prior to the effective date of Title VII might in some circumstances support the inference that such discrimination continued. . .”); *Pitre v. Western Elec. Co.*, 843 F.2d 1262, 1267 (10th Cir. 1988) (where employment decisionmaking process underwent no substantial changes, a court may properly utilize past discrimination as evidence of present discriminatory intent); *Sobel v. Yeshiva Univ.*, 839 F.2d 18, 29 (2d Cir. 1988) (pre-Title VII discriminatory employment practices in setting initial salaries or increasing them essentially resulted in disproportionate impact on women), *cert. denied*, 109 S. Ct. 3154 (1989).

147. 42 U.S.C. § 2000e-2(e). The statute allows a bona fide occupational qualification (BFOQ) defense for religion and national origin as well as sex, but not for race or color. *Id.*

The Supreme Court has also deviated from requiring employer’s decision to be based on strict sex and race neutrality by allowing affirmative action plans. See *Johnson v. Trans. Agency*, 480 U.S. 616 (1987); *United Steelworkers v. Weber*, 443 U.S. 193 (1979); see also Schwartz, *The 1986 and 1987 Affirmative Action Cases: Its All Over But The Shouting*, 86 MICH. L. REV. 524 (1987).

With the possible exception of Justice Stevens, however, those justices who have voted to permit affirmative action plans have clearly articulated that valid plans must aim only to undo the effects of past discrimination. See *Johnson*, 480 U.S. at 637-38 (majority opinion of Justice Brennan in which Justices Marshall, Blackmun, Powell and Stevens joined) (plan at issue intended only to attain a balanced workforce in jobs that had been traditionally segregated, and not to maintain a balanced workforce once attained); *id.* at 650 (O’Connor, J., concurring) (valid plan must aim at undoing effects of past discrimination by the employer). *But cf. id.* at 646-47 (Stevens, J., concurring) (contending there are legitimate reasons for affirmative action other than elimination of past discrimination (citations omitted)).

Thus, the affirmative action cases merely recognize the position of one faction of the

race based decisions, it might indicate a deviation from the liberal model of equality for Title VII's sex discrimination provisions. Cases that permit sex-based distinctions under the BFOQ defense, however, do not undercut the conclusion that Title VII adopts the liberal model of sexual equality. Rather, allowance of sex based distinctions indicates the problem of universally placing employment decisions within the public domain, rather than any limitation or rejection of the premises of the liberal model.

An employer may claim the BFOQ defense in a variety of contexts, for instance in attempts to justify hiring only women as airline stewardesses or men as guards in male prisons. To prevail under the BFOQ defense, an employer who refuses to hire women for a particular job must prove that he had a factual basis for believing that all or substantially all women could not perform the job in question.<sup>148</sup> In addition, he must show that the job duties that women cannot perform are of such a nature that hiring women for the job would undermine the essence of his business.<sup>149</sup> Even if an employer clears these two difficult hurdles, a court might refuse to recognize the defense if it finds that the defendant could reasonably rearrange job duties to avoid precluding hiring women for the job.<sup>150</sup> This

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liberal model — that race or sex may be relevant factors in the public domain until the starting position of blacks and women in the workforce is made equal to that of white men.

148. *See, e.g., Weeks v. Southern Bell Tel. & Tel. Co.*, 408 F.2d 228, 235 (5th Cir. 1969); *Jaczak v. Ochburg*, 540 F. Supp. 698, 703 (E.D. Mich. 1982); *EEOC v. Mercy Health Center*, 29 Fair Empl. Prac. Cas. (BNA) 159, 163 (W.D. Okla. 1982); *accord Dothard v. Rawlinson*, 433 U.S. 331, 333 (1977) (citing *Weeks*' formulation of the BFOQ test with approval); *see also Western Air Lines, Inc. v. Criswell*, 472 U.S. 400, 414 (1985) (applying *Weeks* formulation to age qualifications); *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 388 (5th Cir.), *cert. denied*, 404 U.S. 950 (1971); P. COX, EMPLOYMENT DISCRIMINATION ¶ 10.02 (1988).

149. *Eg. Levin v. Delta Air Lines, Inc.*, 730 F.2d 994, 997 (5th Cir. 1984) (Delta's policy of removing pregnant flight attendants would be justified if it could be shown to increase the safety of air travel, the essence of an airline's function, but not merely because it satisfies patrons' desire for physically attractive stewardesses); *Fernandez v. Wynn Oil Co.*, 653 F.2d 1273, 1276 (9th Cir. 1981); *Jaczak*, 540 F. Supp. at 704 (no BFOQ for child care worker whose primary function was teaching and ancillary functions were sex education and counseling).

150. *See United States v. Gregory*, 818 F.2d 1114, 1118 (4th Cir.), *cert. denied*, 108 S. Ct. 143 (1987); *Hardin v. Stynchcomb*, 691 F.2d 1364, 1370-71 (11th Cir. 1982); *Gunther v. Iowa State Men's Reformatory*, 612 F.2d 1079, 1086 (8th Cir.), *cert. denied*, 446 U.S. 966 (1980); *Fesel v. Masonic Home of Del., Inc.*, 447 F. Supp. 1346, 1351 (D. Del. 1978), *aff'd mem.*, 591 F.2d 1334 (3d Cir. 1979); *see also Dothard*, 433 U.S. at 346 n.5 (Marshall, J., concurring in part and dissenting in part).

This third prong of the BFOQ defense requires that the employer alter the structure of jobs to remove barriers to women's employment. As such it goes beyond the liberal model requirement of simple gender neutrality in the existing workplace structure. Several courts have responded to concerns that the employer purposely structured jobs to limit women's opportunities for hire and promotion in the work place. *See, e.g., Hardin*, 691 F.2d at 1369-

three part test for a BFOQ is consistent with judicial statements that the defense is extremely narrow,<sup>151</sup> so narrow in fact that for practical purposes it does not alter Title VII's prescription of gender neutrality.

Beyond reinforcing the narrowness of the BFOQ defense, the test is not helpful in delineating the model of equality underlying judicial recognition of the sex-based BFOQ. Courts have applied the same test to religious and age discrimination claims.<sup>152</sup> Yet notions of religious freedom and justice for the elderly reflect different conceptions of equality than do concerns for sexual and racial equality. Thus the BFOQ test merely provides a judicially malleable framework that courts shape to fit the case before them, rather than a doctrine that elucidates the concepts of equality used to decide sex-based BFOQ cases.

Nonetheless, courts' application of the BFOQ test in particular sex discrimination cases is instructive. The liberal model of equality presumes that within the public sphere sex should not matter, but within the private sphere it may. For example, because sexual conduct falls within the private domain, it is legitimate for individuals to distinguish by sex in choosing their intimate partners. Similarly, conduct related to excretory functions or involving display of genitalia are private in nature; the liberal model therefore permits segregated toilets and locker-rooms.

Virtually no case has found sex to be a BFOQ where the job did not implicate interests that the liberal model places in the private domain.<sup>153</sup> When an employer uses sex as a proxy for employee abilities that do not

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70 & n.18 (suggesting sheriff's job assignment policy was designed to eliminate almost all opportunity for women to gain employment as deputies); *Gunther*, 612 F.2d at 1087 (noting that position plaintiff sought was a necessary step for any women to advance to higher levels of employment); see also P. Cox, *supra* note 148, at ¶ 10.02 & n.28. Thus this third prong of the BFOQ may reflect the need to remedy employers' sex-conscious decisions about job structures explicitly meant to keep women in low ranking positions.

151. *Dothard*, 433 U.S. at 334; *Gregory*, 818 F.2d at 1118; *Garrett v. Okaloosa County*, 734 F.2d 621, 624 (11th Cir. 1984).

152. See, e.g., *Western Airlines, Inc. v. Criswell*, 472 U.S. 400 (1985) (age); *Pime v. Loyola Univ. of Chi.*, 803 F.2d 351 (7th Cir. 1986) (religion); *Usery v. Tamiami Trail Tours, Inc.*, 531 F.2d 224 (5th Cir. 1976) (age); *Kern v. Dynallectron Corp.*, 577 F. Supp. 1196 (N.D. Tex. 1983) (religion).

153. The term "sex" as used in this article does not include distinctions based on pregnancy. The appropriate model of just treatment of pregnant women is different than that for treatment of women generally. Some have argued that the Pregnancy Discrimination Act's amendments to Title VII require special treatment that is more consistent with the feminist model of equality than with the liberal/assimilation ideal. See *Kay*, *supra* note 6, at 40-41; Note, *supra* note 30, at 690.

There is one case which upholds a sex based BFOQ outside the privacy context. See *Hill v. Berkman*, 635 F. Supp. 1228, 1239-40 (E.D. N.Y. 1986). In *Hill*, the court found sex to be a BFOQ for military positions involving combat risk in order to avoid conflicts with statutory provisions that required the armed forces to discriminate by sex for combat

involve private or personal concerns, courts have applied the three part BFOQ test strictly. They define adequate job performance to exclude satisfying customer preferences to be served by members of a particular sex.<sup>154</sup> They also reject correlations between ability to perform job functions and employee gender, asserting that Title VII prohibits reliance on sex stereotypes in evaluating individual applicants or employees.<sup>155</sup> Courts have even found employers in violation of Title VII when they base decisions on accurate group statistics related to biological differences between men and women.<sup>156</sup>

When jobs affect interests traditionally viewed as within the private domain, however, courts apply the three part test more laxly.<sup>157</sup> Some have

positions. But *Hill* is an anomaly that has little bearing on the BFOQ in usual circumstances or the consistency of the BFOQ defense with the liberal model of sexual equality.

154. See *Gedom v. Continental Airlines, Inc.*, 692 F.2d 602, 609 (9th Cir. 1982), cert. dismissed, 460 U.S. 1074 (1983); *Fernandez v. Wynn Oil Co.*, 653 F.2d 1273, 1277 (9th Cir. 1981); *Diaz v. Pan Am. World Airways, Inc.*, 442 F.2d 385, 389 (5th Cir.) cert. denied, 404 U.S. 950 (1971); *Jatczak v. Ochburg*, 540 F. Supp. 698, 703-04 (E.D. Mich. 1982); *Wilson v. Southwest Airlines Co.*, 517 F. Supp. 292, 301 (N.D. Tex. 1981). See also *Sirota, Sex Discrimination: Title VII and the Bona Fide Occupational Qualification*, 55 TEX. L. REV. 1025, 1051 (1977) (describing various tests used to determine whether a BFOQ exists in cases of sex discrimination in the workplace).

155. See *Thorne v. City of El Segundo*, 726 F.2d 459, 468 (9th Cir. 1983), cert. denied, 469 U.S. 979 (1984); *Berkman*, 635 F. Supp. at 1239 (dicta); see also 29 C.F.R. § 1604.2(a)(1)(ii) (1989) (denying application of BFOQ exception where an employer refuses to hire an individual based on sex characterizations).

156. The Supreme Court invalidated a pension plan requiring greater contributions from female than male workers due to women's greater expected longevity. *City of Los Angeles, Dept. of Water & Power v. Manhart*, 435 U.S. 702 (1978). While *Manhart* did not directly involve the BFOQ defense, the Court stated: "Even a true generalization about the class [*i.e.*, women] is an insufficient reason for disqualifying an individual to whom the generalization does not apply." *Id.* at 708. See also 29 C.F.R. § 1604.2(a)(1)(ii) (1989); *Developments in the Law — Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1178-79 (1971).

157. For example, the Supreme Court found female guards' "very womanhood" posed a threat to security at a maximum security male prison in Alabama. The Court asserted, apparently from its own predilections along with some anecdotal evidence of prison attacks on women, that there was a substantial "likelihood that inmates would assault a woman because she was a woman." *Dothard v. Rawlinson*, 433 U.S. 321, 336 (1977). The Court used this assertion to overturn the trial court's decision that sex was not a BFOQ without ever even alluding to the "clearly erroneous" standard that normally governs review of such factual questions. *Id.* at 336-37.

The Seventh Circuit remanded a determination by the district court that the defendant had failed to meet its burden of showing that women correctional officers were required to further the rehabilitative goals at a women's maximum security prison. *Torres v. Wisconsin Dep't of Health & Soc. Serv.*, 859 F.2d 1523 (7th Cir. 1988) (en banc), cert. denied, 109 S. Ct. 1133 (1989). The only objective evidence on the issue showed that having female correctional officers in the positions in question had not altered the recidivism rate at the prison. *Id.* at 1532, n.4. But the court nonetheless held defendants did not have to present

defined adequate job performance to include respecting the interests of clientele in being served by members of a particular sex.<sup>158</sup> Others find functions that workers occasionally perform to be essential to the nature of the defendant's business.<sup>159</sup> Therefore, while in the abstract the test for a sex based BFOQ does not vary with the public or private nature of the implicated interest, courts are less troubled by upholding employer sex based distinctions when it truly protects a private domain interest. The courts have thus applied the BFOQ defense consistently with the liberal model, allowing sex based decisions only if they are justified by interests that fall within the personal rather than public domain.

(c) *Gender explicit grooming codes*

Courts have also recognized an exception to Title VII's sex neutrality requirement in cases which involve an employer establishing separate grooming codes for male and female workers. Unlike the BFOQ cases, however, the doctrine on grooming codes represents a true deviation from the liberal paradigm.

Grooming code decisions have endorsed an employer's reliance on societal norms and customer preferences under the guise of recognizing employers' interests in his "business image"<sup>160</sup> — reasoning that is

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"objective evidence" that employing women officers furthered the rehabilitative goals of the facility. *Id.* at 1531. It was willing to give "substantial weight" to the testimony of the defendant that in her judgement a female corrections staff was needed. *Id.* at 1533-34. To support its holding, the court explicitly noted that "[t]he Supreme Court has never hesitated to recognize sex-based differences, particularly in cases involving physiology, marriage, childbirth, or sexuality" — in short, where cases involved the private domain. *Id.* at 1527. Without any support on the record, the court simply asserted "that the presence of unrelated males in living spaces where intimate bodily functions take place is a cause of stress to females." *Id.* at 1531.

158. *See, e.g., Jones v. Hinds Gen. Hosp.*, 666 F. Supp. 933 (S.D. Miss. 1987) (sex is BFOQ for hospital orderlies who perform tasks involving intimate contact with patients); *Norwood v. Dale Maintenance Sys., Inc.*, 590 F. Supp. 1410 (N.D. Ill. 1984) (washroom attendants); *Brooks v. ACF Indus., Inc.*, 537 F. Supp. 1122 (S.D. W. Va. 1982) (janitors who clean men's bathhouses); *EEOC v. Mercy Health Center*, 29 Fair Empl. Prac. Cas. (BNA) 159 (W.D. Okla. 1982) (nurses in labor and delivery area); *Backus v. Baptist Med. Center*, 510 F. Supp. 1191 (E.D. Ark. 1981) (same), *vacated as moot*, 671 F.2d 1100 (8th Cir. 1982); *Fesel v. Masonic Home of Del. Inc.*, 447 F. Supp. 1346 (D. Del. 1978), *aff'd. mem.*, 591 F.2d 1334 (3d Cir. 1979) (nurse's aide at retirement home).

159. *See, e.g., Jones*, 666 F. Supp. at 935-36; *Fesel*, 447 F. Supp. at 1352-53.

160. *See, e.g., Wislocki-Goin v. Mears*, 831 F.2d 1374, 1380 (7th Cir. 1987) (employer's image justified gender explicit grooming code), *cert. denied*, 108 S. Ct. 1113 (1988); *Craft v. Metromedia, Inc.*, 766 F.2d 1205, 1215 (8th Cir. 1985) (en banc) (same), *cert. denied*, 475 U.S. 1058 (1986); *Devine v. Lonschein*, 621 F. Supp. 894, 897 (S.D.N.Y. 1985) (contemporary fashions are an appropriate standard for gender explicit dress codes), *aff'd*, 800 F.2d 1127 (2d Cir. 1986); *cf. O'Donnell v. Burlington Coat Factory Warehouse*,



inconsistent with other Title VII cases. One might think that this deviation from gender neutrality, like that in cases upholding a BFOQ defense, reflects the liberal model's public/private distinction. But the only privacy interest on which grooming codes intrude is that of the employees to dress as he or she see fit — the very interest the courts allow the employer to restrict. Therefore, cases upholding such restrictions do conflict with the liberal's respect for autonomy in the private sphere.

The inconsistency between grooming and other Title VII cases probably reflects an overriding societal consensus regarding sex-appropriate appearance.<sup>161</sup> Because of the universality of this consensus, conformity is not seen as a great burden to the employee.<sup>162</sup> Thus the grooming code cases adopt a conservative view of separate sex-appropriate standards, rather than the liberal model underlying the rest of Title VII case law.<sup>163</sup> In short, courts will not stretch Title VII's liberal model framework to interfere with societal norms in this limited context.<sup>164</sup> But these cases represent a very narrow, almost trivial exception to the disparate treatment doctrine's insistence on gender neutrality and do not represent a substantial deviation from the precepts of the liberal model.

*(d) The disparate impact doctrine*

To make out a disparate impact claim, a plaintiff must identify some practice of the employer and show that it disproportionately affects women.<sup>165</sup> Once the plaintiff identifies such a practice, an employer will be held to have violated Title VII unless the practice can be justified by the

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Inc., 656 F. Supp. 263, 266 (S.D. Ohio 1987) (smock requirement for female sales clerk violated Title VII because not justified by commonly "accepted social norms").

161. As one judge put it: "until that dreadful day when unisex identity of dress and appearance arrives," employers are entitled to differentiate between males and females in dress codes. *Devine*, 621 F. Supp. at 897.

162. See *Willingham v. Macon Tel. Pub. Co.*, 507 F.2d 1084, 1091 (5th Cir. 1975) (if employee objects to grooming code he can either look elsewhere for employment or subordinate his preference by accepting the code as part of the job); see also Note, *Employer Dress and Appearance Codes and Title VII of the Civil Rights Act of 1964*, 46 S. CAL. L. REV. 965 (1973) (arguing that under Title VII, an employer is not prevented from imposing reasonable grooming requirements on his employees).

163. But see *Kay*, *supra* note 6, at 80 (grooming codes still achieve the goal of equality of treatment, both sexes being subject to standards of appearance).

164. See *Carroll v. Talman Fed. Sav. & Loan Ass'n.*, 604 F.2d 1028, 1038 (7th Cir. 1979) (Pell, J., dissenting) (applying Title VII to dress codes is an example of "extreme applications bordering on the ridiculous where no meaningful discrimination exists"), *cert. denied*, 445 U.S. 929 (1980).

165. *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115, 2124 (1989); *Connecticut v. Teal*, 457 U.S. 440, 446 (1982); *United States v. Town of Cicero*, 786 F.2d 331, 333 (7th Cir. 1986); *Lowe v. City of Monrovia*, 775 F.2d 998, 1004 (9th Cir. 1986).

employer's "business necessity."<sup>166</sup> Unlike the disparate treatment doctrine, the disparate impact doctrine does not focus on the employer's use of sex in decisionmaking. Rather, the impact doctrine restricts the employer's use of facially sex-neutral criteria that have a greater adverse impact on women as a group, than on men.<sup>167</sup> Because the doctrine focuses on the effects of decisionmaking practices on a protected group of employees, instead of ensuring equal treatment of individual employees, it appears to aim at implementing proportional representation of women within employment classifications established by the employer.<sup>168</sup> To the extent that the proof of a disparate impact claim focuses on the overall representation of women in job or pay classifications, it goes beyond the liberal notion of individual opportunity independent of gender.<sup>169</sup> To the extent the employer can escape liability only by showing that the challenged criteria are necessary to the viability of his business, the doctrine seems to require restructuring of the employer's methods of operation to accommodate this principle of proportional representation. Such a mandate might reflect a reasonable accommodation between the goal of "equality of result" and a realization that women employees and the employer both are worse off if the employer is driven out of business, but it would be inconsistent with the liberal model's respect for the market values and structure developed by the dominant (i.e. white male) class.

This superficial analysis of the disparate impact doctrine, however, ignores some of the essential components that tie it to the liberal ideal. While a plaintiff's proof under the impact doctrine necessarily considers the effect of decisionmaking criteria rather than the decisionmaking process itself, a violation under the doctrine does not hinge simply on a disparity between women's representation in the employer's workforce and their representation in the relevant labor market. The plaintiff has the burden of identifying a specific employer practice and showing that the practice, and not some other factor beyond the employer's control, caused

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166. *Teal*, 457 U.S. at 446-47; *Dothard v. Rawlinson*, 433 U.S. 321, 331 n.14 (1971); *Lynch v. Freeman*, 817 F.2d 380, 383 (6th Cir. 1987). See also Comment, *The Business Necessity Defense To Disparate-Impact Liability Under Title VII*, 46 U. CHI. L. REV. 911 (1979).

167. See *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977); *Colby v. J.C. Penney Co.*, 811 F.2d 1119, 1126 (7th Cir. 1987); *Segar v. Smith*, 738 F.2d 1249, 1266 (D.C. Cir. 1984), *cert. denied, sub. nom. Meese v. Segar*, 471 U.S. 1115 (1985).

168. See, Cox, *The Future of the Disparate Impact Theory of Employment Discrimination After Watson v. Fort Worth Bank*, 1988 B.Y.U. L. REV. 753, 760-61.

169. While a goal of proportional representation goes beyond the liberal model, it is not synonymous with the feminist model, which demands alteration of the very structure of the workplace.

the disparity.<sup>170</sup> Once such a practice is identified, the employer cannot escape liability by showing that women are proportionately represented in his workforce.<sup>171</sup> Thus, in reality the impact doctrine focuses on the relationship of the employer's challenged practice to the employment opportunities of members of the protected class and not ultimate disparities in representation. The doctrine does not simply condemn disproportionate representation. Instead its structure aims to ensure the instrumental relationship between the employer's legitimate ends and his means of achieving those ends by eliminating the evil of employer reliance on overbroad or otherwise inexact criteria that unnecessarily restrict a woman's employment opportunities.<sup>172</sup>

Judicial construction of the business necessity defense further supports the idea that the disparate impact doctrine addresses unnecessary restrictions on employment opportunities and does not aim to implement equality of result. Despite its label, this defense does not require that the employer justify use of employment criteria as necessary to the survival of his business. Rather, as clarified by the Supreme Court, the employer need only significantly relate the challenged employment practice to legitimate employment goals.<sup>173</sup> Courts have not used this defense to question the

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170. *Wards Cove Packing Co. v. Antonio*, 109 S. Ct. 2115, 2124 (1989); *Eastland v. Tennessee Valley Auth.*, 704 F.2d 613, 619 (11th Cir. 1983), *cert. denied*, 465 U.S. 1066 (1984).

171. *Cf.*, *Connecticut v. Teal*, 457 U.S. 440, 450 (1982) (racially proportional "bottom line" did not provide a defense to Title VII where a written examination used in the promotion decision had a disparate impact on blacks).

172. The courts have explicitly rejected the view that Title VII demands proportional representation. *See Allen v. Prince George's County*, 737 F.2d 1299, 1304 (4th Cir. 1984); *Zahorik v. Cornell Univ.*, 729 F.2d 85, 96 (2d Cir. 1984); *Eastland*, 704 F.2d at 619. Instead they have repeatedly emphasized that use of proxies for job related skills may arbitrarily deny individuals equal job opportunities. *See Teal*, 457 U.S. at 448; *Griggs v. Duke Power Co.*, 401 U.S. 424, 430 (1971); *Howard v. International Molders & Allied Workers Union*, 779 F.2d 1546, 1552 (11th Cir.), *cert. denied*, 476 U.S. 1174 (1986).

173. *See Wards Cove*, 109 S. Ct. at 2125-26. The term "business necessity" is derived from the Court's statement in *Griggs*, that for assessing the validity of criteria shown to have a disparate impact on a protected class, "[t]he touchstone is business necessity." 401 U.S. 424, 431 (1971). Despite this dicta, the Court itself has relied on *Griggs'* alternative formulation that the challenged practice need only bear a manifest relationship to the job in question. *See New York City Transit Auth. v. Beazer*, 440 U.S. 568, 588 n.31 (1979); *see also Watson v. Fort Worth Bank and Trust*, 108 S. Ct. 2777, 2790 (1988). Nonetheless, until *Wards Cove*, courts had not resolved whether the defense required the employer to substantiate some sort of necessity or merely to show the practice was employment related. *Compare Davis v. Richmond, Fredericksburg & Potomac R.R. Co.*, 803 F.2d 1322, 1328 (4th Cir. 1986) (requiring "a 'compelling' business necessity" for the practice) and *Williams v. Colorado Springs, Colo. School Dist. No. 11*, 641 F.2d 835, 842 (10th Cir. 1981) ("[t]he practice must be essential, the purpose compelling") with *Shidaker v. Tisch*, 833 F.2d 627, 633 (7th Cir. 1986) (remanded to allow Postal Service to "show the job-

employer's definition of job functions, to require that an employer justify the structure of his jobs, or to mandate that he restructure job classifications to mitigate the disproportionate impact these classifications have on minorities or women.<sup>174</sup>

This does not mean the business necessity defense has provided an easy escape route for employers. Employers cannot simply assert the relation of the decisionmaking factor to the job in question; they must present objective evidence of the relationship between the factor and job performance under their definition of job responsibilities and successful job performance.<sup>175</sup> Even if the employer presents such evidence, the plaintiff may prevail if she demonstrates alternative decisionmaking criteria that serve the employer's interests and have a lesser impact on women.<sup>176</sup> In evaluating the employer's evidence and the plaintiff's proffered alternative, courts impose an external standard that requires a connection between the decisionmaking criterion and job performance. But the defense unquestioningly accepts the employer's job structure and the values inherent in that structure, consistent with the liberal model's acceptance of the institutional structures and values that have developed under male domination of the market.<sup>177</sup> The defense does not balance a

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relatedness of its promotion standards"), *cert. denied*, 108 S.Ct. 2900 (1988) and *Gillespie v. Wisconsin Dept. of Health & Soc. Serv.*, 771 F.2d 1035, 1040 (7th Cir. 1985) (written employment test should be "job related"), *cert. denied*, 474 U.S. 1083 (1986).

174. Even cases that purportedly required employers to show business necessity generally did not question the structure of jobs in the workplace or the employer's definition of job responsibilities. *See, e.g., Furnco Constr. Corp. v. Waters*, 438 U.S. 567, 578 (1978); *Nash v. City of Houston Civic Center*, 800 F.2d 491, 496 (5th Cir. 1986); *Zahorik*, 729 F.2d at 96.

175. *See Griggs*, 401 U.S. at 431; *Bernard v. Gulf Oil Corp.*, 841 F.2d 547, 564 (5th Cir. 1988). *But see Davis v. City of Dallas*, 777 F.2d 205, 217 (5th Cir. 1985) ("Because of the professional nature of the job, coupled with the risks and public responsibility inherent in the position, we conclude that empirical evidence is not required to validate the job relatedness of the educational requirement."), *cert. denied*, 449 U.S. 872 (1986).

176. *See Albermarle Paper Co. v. Moody*, 422 U.S. 405, 425 (1975). *See, e.g., Zuniga v. Kleberg County Hosp.*, 692 F.2d 986, 992 (5th Cir. 1982); *Harless v. Duck*, 619 F.2d 611, 617 (6th Cir. 1980), *cert. denied*, 449 U.S. 872 (1980). *Wards Cove* stated that by demonstrating the employer had such an alternative, the plaintiff essentially proved that the employer used the challenged practice as a pretext for discrimination. *Wards Cove*, 109 S. Ct. at 2126. *Wards Cove* does not clarify whether the plaintiff has the heavier burden of actually proving that the practice was illicitly motivated or the traditional showing of an alternative with lesser impact.

177. Judicial reluctance to question the employer's structure of the workplace went so far as to allow the Supreme Court to hold that sex was a BFOQ for guards in an Alabama prison because of the unconstitutional conditions in the prison. *Dothard v. Rawlinson*, 433 U.S. 321 (1977). *See also, EEOC v. Sears, Roebuck & Co.*, 628 F. Supp. 1264, 1291 (N.D. Ill. 1986) (trial court did not question employer's classification of sales jobs into commission and noncommission sales).

tension between a desire for equality of result and the realization that no one is better off if the employer's business folds, but rather directly focuses on the reasonableness of the employer's use of factors that disproportionately restrict the opportunities of women. It therefore reemphasizes that the impact doctrine's central concern is minimizing unnecessary restrictions on a woman's opportunities, and not guaranteeing proportional representation.

Viewed as a means of eliminating inexact proxies for job performance that unnecessarily restrict women's work opportunities, the disparate impact doctrine comports with the liberal model of sexual equality. Since the model posits that gender is irrelevant within the labor market, employment criteria that affect women as a group more harshly than men are suspect. That criteria do not operate in a gender neutral manner indicates the likelihood that they rely on traits that should not matter in the public domain. Thus a presumption that criteria adversely affecting women are invalid unless shown to be instrumentally related to the employer's legitimate business interests is consistent with a variation of the liberal model. The disparate impact doctrine can be seen as implementing precisely this variation.<sup>178</sup>

Recently, the Supreme Court seems to have limited the disparate impact doctrine, placing on the plaintiff the ultimate burden of "disproving an employer's assertion that the adverse employment action or practice was based solely on a legitimate neutral consideration."<sup>179</sup> Prior to this pronouncement, the impact doctrine presumptively forbade adverse actions and the employer had to overcome this by showing that the action furthered substantial business interests. Now, however, adverse practices appear presumptively valid and the plaintiff may have to convince the trier of fact that the employer used them to distinguish employees by sex. Thus the doctrine may now proscribe not all overbroad or unjustifiable decisions that tend to harm women, but only those used to hide the employer's discriminatory motive.<sup>180</sup>

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178. See P. Cox, *supra* note 148, at 759 (impact theory can be interpreted as concerned with the substantive regulation of "merit"); see also *Griggs*, 401 U.S. at 431 (impact analysis aims to eliminate "artificial, arbitrary and unnecessary barriers").

179. *Wards Cove*, 109 S. Ct. at 2126; see also *Watson v. Fort Worth Bank & Trust*, 108 S. Ct. 2777, 2784 (1988).

180. Even prior to the *Wards Cove* and *Watson* decisions, commentators and courts recognized that the impact doctrine served to screen out hidden intentional discrimination. *Gutierrez v. Municipal Court of the S.E. Judicial Dist., County of L.A.*, 838 F.2d 1031, 1040 (9th Cir. 1988). See P. Cox, *supra* note 148, at 757; Rutherglen, *Disparate Impact Under Title VII: An Objective Theory of Discrimination*, 73 VA. L. REV. 1297 (1987); cf. *Segar v. Smith*, 738 F.2d 1249, 1278 (D.C. Cir. 1984) (statistical disparities are a crucial

While it remains to be seen whether recent Supreme Court decisions have limited the disparate impact doctrine to address only hidden disparate treatment,<sup>181</sup> it is clear that the impact doctrine still comports with the liberal model. While evidence at trial need not focus on employer intent, the limited form of the doctrine restricts Title VII liability to those instances where an employer used facially neutral employment practices to achieve what would have occurred had he been permitted to base his decisions explicitly on sex. It thus fits comfortably within the liberal model's intolerance for outcomes that result from sex differentiated treatment.

*(e) Conclusions regarding Title VII doctrine*

In sum, Title VII doctrine implements the liberal model's ultimate goal that an individual's sex be irrelevant in the labor market. Presently there is intense controversy in case law about the reach of Title VII's provisions. But the debate concerns the extent to which the statute allows interim deviations from the liberal model's prescription of sex neutrality or prohibits decisionmaking facially consistent with that prescription that

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method of proof, since discrimination now works more subtly than in "[t]he days of Bull Connor").

181. The majority's language in *Wards Cove* appeared to adopt this limited role for the impact doctrine. *Wards Cove*, 109 S. Ct. at 2126. Both *Wards Cove* and *Watson*, however, involved challenges to subjective employment criteria and employers' entire hiring systems. *Id.* at 745; *Watson*, 108 S. Ct. at 2782. These challenges did not identify particular practices that operate objectively and allow the trier of fact confidently to assess the relation of the practice to the employer's needs. Since by definition a court cannot know the mechanism by which a subjective practice applies to individual job applicants, it is very difficult for the courts to assess and monitor the merits of such a system. Essentially, in cases challenging subjective employment decisions, the courts are forced to choose between requiring employers to maintain a work force roughly in balance with the underlying labor pool or limiting liability to cases where the evidence allows the fact finder to infer that the employer in fact distinguished employees or job candidates by sex. The Court in *Wards Cove* implicitly recognized this and, after noting the similarity of proof there and in *Hazelwood*, demanded the same outcome that would result under the disparate treatment doctrine. 109 S. Ct. at 2121.

When a plaintiff challenges a relatively objective employment criterion, like a minimum height requirement or starting salary based on previous pay, a court can more easily understand how the criterion operates and whether it is related to the employer's legitimate business needs. In these cases the impact doctrine can serve the liberal model's goal of prohibiting overbroad, non-merit based employment criteria. Additionally, the fear of imposing a bottom line requirement on employers can be ameliorated without adopting a strict causation requirement. It remains to be seen whether the courts will continue to employ a relaxed causation requirement to claims challenging particular objective employment criteria.

nonetheless adversely affects women, *in order to achieve ultimately that very goal of sex neutrality in the workplace.*

The judiciary adheres so strongly to the liberal model as the foundation of Title VII that courts have restricted the BFOQ defense to situations directly affecting an individual's private interests despite indications that Congress intended a broader application. Most significantly, Title VII's legislative history and case law demonstrate that neither Congress nor the courts see the statute as a means of altering the competitive work ethic or the workplace institutions established by the male dominated economy over the years.

### III. THE HOWS AND WHYS OF COMPARABLE WORTH

Unlike Title VII and the EPA, comparable worth does not encompass particular statutory provisions or legal doctrines. Rather it refers to a theory by which one can identify and remedy sex-based wage discrimination. The theory proceeds from the belief that an employer should pay an employee according to the worth of the attributes of the job she performs. It asserts that an employer engages in sexual discrimination if he pays female jobs at a lower rate than he pays male jobs relative to this intrinsic measure of job worth.<sup>182</sup>

Antecedents of the theory of comparable worth date back at least as far as Adam Smith's *The Wealth of Nations*, in which he noted five "principal circumstances," corresponding roughly to skill, effort, responsibility, and working conditions, that explain wage differentials.<sup>183</sup> The question of equal pay for women's work was addressed as well by F.Y. Edgeworth, who noted that in a truly competitive market pay would reflect the "disutility to the employee," which would equal the "utility to the employer."<sup>184</sup> In 1945, the National War Labor Board first applied a comparable worth theory to correct gross pay inequities based on sex

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182. Comparable worth does not require that the employer pay precisely the evaluated intrinsic worth of each individual job. It only requires that he not devalue women's work more than men's work relative to the intrinsic measure of worth. For example, one formulation of comparable worth would simply require that an organization pay women "the same percentage of men's pay that the [intrinsic] value of their work bears to the [intrinsic] value of the men's work." PAY EQUITY AND COMPARABLE WORTH 18 (B.N.A. 1984) (Special Report).

183. See Killingsworth, *Economic Analysis of Comparable Worth and Its Consequences*, in INDUSTRIAL RELATIONS RESEARCH ASSOCIATION SERIES, PROCEEDINGS OF THE THIRTY-SEVENTH ANNUAL MEETING 183 (1984) [hereinafter IRRA PROCEEDINGS], quoting from A. SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 116-17 (Campbell, Skinner & Todd eds. 1976).

184. Edgeworth, *Equal Pay to Men and Women for Equal Work*, 32 ECON. J. 431, 433 (1922).

during a period when wages were otherwise frozen.<sup>185</sup> Based in large part on the War Labor Board experience, Congress enacted the Equal Pay Act in 1963, but limited its scope to substantially equal jobs rather than jobs of comparable worth.<sup>186</sup> The issue of comparable pay for work of comparable worth then lay moribund until the late 1970's.

The persistence of the wage gap between male and female workers rekindled the current interest in comparable worth. In simplest terms, on average a full time working woman earned about sixty three percent of the pay of a full time working man in 1956 and, despite the enactment of the Equal Pay Act and Title VII, this ratio has held relatively steady to the present.<sup>187</sup> Comparable worth advocates attribute a substantial portion of this gap to undervaluation of jobs held by women, rather than to legitimate business practices or discrimination barring women from obtaining employment in correctly priced higher paying jobs. Despite Title VII outlawing refusals to hire or promote women because of their gender, the national labor market remains overwhelmingly sex-segregated.<sup>188</sup> Since women tend to work in lower paying jobs, it is undisputed that wages vary

185. See *supra* notes 76-80 and accompanying text.

186. See *supra* notes 85-92 and accompanying text.

187. According to census data, the ratio of annual earnings was 63.9% in 1955 and 65% in 1987. See NATIONAL COMM. ON PAY EQUITY, BRIEFING PAPER NO. 1: THE WAGE GAP 3 (1989). This ratio dropped in the 1960's, as women without experience entered the labor market, but has risen from 58.9% in 1977, apparently in response to increases in women's average work experience as well as to a greater propensity of women to enter historically male occupations. See *id.* at 3, 7; see also Cowan, *Poll Finds Women's Gains Have Taken a Personal Toll*, N.Y. Times, Aug. 21, 1989, at 1, col. 1.

188. Based on national data, aggregating employers in different industries and size, as of 1981, 61% of all female workers would have to shift occupations for women to be proportionally distributed across occupations. See Beller, *Trends in Occupational Segregation by Sex and Race, 1960-1981*, in SEX SEGREGATION, *supra* note 27, at 14. This percentage (the index of segregation), which had been declining slowly until 1970, dropped more quickly (over 5%) between 1971 and 1981. *Id.* This drop reflected an increased probability of younger women entering the job market and taking jobs in predominately male occupations — especially professional and managerial jobs. *Id.* at 23. This trend indicates that women are now more willing and able to avail themselves of the job opportunities opened by Title VII. But, given the extent of sex-segregation, the effect is not large. Beller, *Occupational Segregation and the Earnings Gap*, in ISSUE FOR THE 80's, *supra* note 2, at 26 (noting that even at the increased rate of job integration, it would take 75 to 100 years to fully integrate the labor market).

In addition, sex segregation occurs vertically within occupations. Women with equal education and experience tend to occupy lower ranking jobs within an occupation. For example, while women have entered the ranks of college professors in moderate numbers, a disproportionately small number occupy tenured positions. See WOMEN, WORK, AND WAGES: EQUAL PAY FOR JOBS OF EQUAL VALUE 24, 52 (D. Treiman & H. Hartmann eds. 1981) [hereinafter WOMEN, WORK & WAGES] (report of the Committee on Occupational Classification and Analysis, Assembly of Behavioral and Social Sciences, National Research Council); F. BLAU & M. FERBER, THE ECONOMICS OF WOMEN, MEN, AND WORK



inversely with the percentage of females working in an occupation.<sup>189</sup> Thus, comparable worth views employment discrimination as involving more than barriers to women's entry into high paying jobs, and more than a lag in women's acquisition of the skills necessary to take advantage of formally equal job opportunities. It sees the problem as the devaluation of pay for female jobs because of their gender association and aims to remedy that directly by increasing the pay for those jobs.

While some governmental entities have implemented comparable worth for their own workers, neither courts nor legislatures have adopted comparable worth as the underlying basis for identifying and remedying pay discrimination.<sup>190</sup> At the same time, some feminists have focused on comparable worth as one means of achieving equality in the workplace. The reasons for both phenomena are the same: comparable worth, in at least some of its guises, holds the potential to go beyond the conservative and liberal models of equality and to implement aspects of the feminist ideal.

In order to evaluate comparable worth under the lens of our three models of equality, we must first understand what implementation of comparable worth entails. In particular, any comparable worth doctrine must rely on some process of job evaluation. Additionally, from certain jurisprudential perspectives, the requirements and limitations of the evaluation methods will affect the desirability of implementing comparable worth theory. The reasons women receive lower pay for jobs of comparable intrinsic worth will also affect the efficacy of adopting the theory since, depending on the model of equality to which one subscribes, those reasons may reflect legitimate business rather than personal decisions or sex discrimination. Therefore, it is helpful to postpone the evaluation of comparable worth until after a review of the relationship of

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157-61 (1986). This vertical segregation is masked by aggregation of different jobs within occupations in the national data.

189. See S. WILLBORN, A COMPARABLE WORTH PRIMER 18-19 (1986); WOMEN, WORK & WAGES, *supra* note 188, at 28-30.

190. At least twenty-eight state legislatures have ordered comparable worth studies for state employment. Twenty of these have authorized implementation of some type of pay equity plan for state workers. S. EVANS & B. NELSON, *supra* note 74, at 3. Minnesota also requires all local jurisdictions (e.g., counties, municipalities, and school boards) to make comparable worth studies and implement a remedy if needed. *Id.* The Canadian province of Ontario recently required employers with more than 10 workers to assess predominately female jobs based on the "skill, effort, responsibility and working conditions" of the jobs. Freudenheim, *A New Ontario Law Matches Women's Wages With Men's*, N.Y. Times, July 27, 1989, at 1, col. 5. No jurisdiction in the United States has yet required private employers to implement comparable worth. *Id.*

the theory to the process of job evaluation and the causes of the gap between the average wages of working men and women.

*A. Implementation of Comparable Worth: The Relationship of Comparable Worth and Job Evaluation*

Comparable worth attempts to use the process of job evaluation to determine the value of a job in terms of its intrinsic attributes. Job evaluation is an established practice: steel companies first used it to help set wages over 100 years ago,<sup>191</sup> and since the mid 1950's, most large organizations have relied extensively on it in setting wages.<sup>192</sup> The *raisons d'être* for job evaluation are to attract and retain well qualified workers, establish a pay scale that employees find equitable,<sup>193</sup> and rationalize pay policy to resolve disputes as the jobs in the organization change. But use of the job evaluation process to alleviate discriminatory low pay for female jobs stretches the process, perhaps beyond the realm of validity, and such use at least demands modification from its application by employers today.

1. Job Evaluation as Applied Does Not Provide a Purely Intrinsic Objective Measure of Job Worth

The goals of efficiency, equity and rationality shape the design and implementation of any job evaluation plan and thereby constrain employer's pay prerogatives. To maintain a pay scale employees consider fair, and to attract and retain good workers, a job evaluation explicitly relates the employer's internal pay policy to the external labor market.<sup>194</sup> To the extent workers perceive jobs at the firm as similar to those at other organizations, the firm will have to provide favorable pay to keep its work force complacent. For entry level jobs, for which applicants do not have firm specific skills, the firm must pay a wage that compares favorably with

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191. See R. HENDERSON, *supra* note 74, at 231.

192. D. TREIMAN, *JOB EVALUATION: AN ANALYTIC REVIEW* 4-5 (1979); R. HENDERSON, *supra* note 74, at 258. See also E. JOHANSEN, *COMPARABLE WORTH: THE MYTH AND THE MOVEMENT* 12-13 (1984); Northrup, *supra* note 74, at 95.

193. See R. HENDERSON, *supra* note 74, at 231; D. TREIMAN, *supra* note 192, at 4-5; Blumrosen, *Wage Discrimination, Job Segregation, and Title VII of the Civil Rights Act of 1964*, 12 U. MICH. J.L. REF. 397, 428 (1979); Milkovich, *The Emerging Debate*, in *ISSUES AND ALTERNATIVES*, *supra* note 2, at 27; Williams, *Discussion*, in *IRRA PROCEEDINGS*, *supra* note 183, at 200.

194. See Hildebrand, *The Market System*, in *ISSUES AND ALTERNATIVES*, *supra* note 2, at 91; R. HENDERSON, *supra* note 74, at 339-40.

other jobs that require the same education and experience or the firm will not attract the most qualified workers.<sup>195</sup>

Job evaluations tie the wages at the firm to those of the external market by identifying key jobs which are "common throughout the industry or in the general locale under study and the content[s] of which [are] commonly understood."<sup>196</sup> The evaluation is designed so that the wages for these key jobs conform to market rates.<sup>197</sup> A job evaluator will first choose compensable factors which almost universally fall into four groups: skill, effort, responsibility and working conditions.<sup>198</sup> He will next express the key jobs in terms of levels of each factor (i.e. assign points for each factor).<sup>199</sup> These job evaluation points are then compared with the market wages for the key jobs. The factor weights may be changed, or key jobs dropped or added, to arrive at an acceptable fit between job ranking and market wages.<sup>200</sup> Only then does the job evaluator rate the non-key jobs under the evaluation plan.

Viewed as a means of resolving disputes, job evaluation serves as a flexible set of rules within which management and employees can work out

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195. See Schwab, *Job Evaluation and Pay Setting: Concepts and Practices*, in ISSUES AND ALTERNATIVES, *supra* note 2, at 55.

196. R. HENDERSON, *supra* note 74, at 262. See also Beatty & Beatty, *Some Problems with Contemporary Job Evaluation Systems*, in TECHNICAL POSSIBILITIES, *supra* note 2, at 70 (defining "benchmark jobs"); Schwab, *supra* note 195, at 55 (key jobs are "characterized by a standardized . . . stable content.")

197. See D. TREIMAN, *supra* note 192, at 3; Schwab, *supra* note 195, at 64-67; Beatty & Beatty, *supra* note 196, at 70.

198. D. TREIMAN, *supra* note 192, at 6-7. Studies have shown that many evaluation systems really rank jobs according to a single, or at most a few, dominant variables. Organizations, however, continue to employ systems that purportedly rely on as many as 10-15 factors because of their concern that use of a single factor system will not be acceptable to employees. *Id.* at 33-34. See also Livernash, *supra* note 2, at 11 (suggesting that "market rates" are a dominant factor and level of "responsibility" is often used as a "fudge factor" to "modify skill ratings to fit the market").

199. The influence of a factor on the final point total in the job evaluation is called its "weight." See Schwab, *supra* note 195, at 64. *But cf.* Beatty & Beatty, *supra* note 196, at 71 (defining the weight as the *maximum* relative value a factor can have, rather than the actual contribution to the evaluation plan). An evaluator can explicitly assign specific weights to each factor, which is known as the *a priori* method of evaluation. D. TREIMAN, *supra* note 192, at 31. Alternatively, the evaluator can perform a multiple regression analysis of the key job market rates in terms of the compensable factors, which will automatically assign weights to each factor in a manner that best fits the relationship of market wages for the key jobs. This method is known as the policy capturing approach. *Id.*; see Clauss, *supra* note 2, at 50-52; see also Schwab, *supra*, at 65-66 (describing the regression procedure). The job's final evaluation is the sum of the points for each factor multiplied by the corresponding factor weight.

200. See Schwab, *supra* note 195, at 67.

differences.<sup>201</sup> To perform this role, organizations seek a consensus between management and labor regarding the design and application of job evaluations.<sup>202</sup> Thus, several steps in the process reflect subjective judgments, worked out between management and employees, rather than objective choices based on a "science" of job evaluation. Subjectivity enters the process in the descriptions of all the evaluated jobs, the choice of key jobs, the choice of compensable factors, the determination of whether the system sufficiently comports with the market and, for *a priori* systems, the choice of factor weights.<sup>203</sup>

## 2. Inconsistencies Exist Between the Theory of Comparable Worth and Job Evaluation Techniques as Applied

Because job evaluation methodologies, as applied, depend on job values in existing labor markets and a process of consensus between management and labor factions that presently wield power, they do not provide the intrinsic measure of job worth needed to implement comparable worth. In many ways, job evaluation techniques merely cement existing prejudices about women's work into a bureaucratic bulwark resistant to any pressures for change in compensation practices. Thus, at the same time comparable worth relies on job evaluation methods to measure job worth, it presses for modification of those very methods in order to increase the pay for female jobs.<sup>204</sup>

Comparable worth would require a change in the methods by which compensable factors are chosen. In traditional job evaluations, these factors tend to reward the types of skill and effort necessary to perform traditional male jobs and fail to reward skill and effort found in female jobs. Job evaluators tend to overlook skills associated with historically domestic responsibilities, especially those of taking care of children, and do not include them as compensable factors.<sup>205</sup> Evaluations also describe skill

201. Cf. Schwab, *Using Job Evaluations To Obtain Pay Equity*, in *ISSUE FOR THE 80's*, *supra* note 2, at 89.

202. This consensus is best achieved by involving labor in the job evaluation process. See D. TREIMAN, *supra* note 192, at 5; Bellak, *Comparable Worth: A Practitioner's View*, in *ISSUE FOR THE 80's*, *supra* note 2, at 78.

203. See R. HENDERSON, *supra* note 74, at 268; Schwab, *supra* note 201, at 89.

204. See D. TREIMAN, *supra* note 192, at 30 (While "job evaluation methods *may* be useful tools for assessing job worth . . . under a theory of comparable worth," they have "troublesome features, . . . which . . . require that each system be carefully analyzed to ensure that it is applied fairly and without bias.").

205. For example, the third edition of the United States Department of Labor *DICTIONARY OF OCCUPATIONAL TITLES* overlooked important characteristics of female jobs because job evaluators did not consider them "job related *skills*, but rather as *qualities intrinsic to being a woman*." Steinberg, *Identifying Wage Discrimination and Implement-*

factors in terms that allow greater differentiation, and hence greater weight, for male jobs.<sup>206</sup> Similarly, effort variables often focus on physical strength rather than on stamina and fatigue, again permitting greater differentiation among men's jobs.<sup>207</sup> To the extent that a job evaluation uses male oriented factors, it will undervalue female jobs.

Once a job evaluation specifies factors, it weights them to conform to the market wage distribution for key jobs. Therefore, the evaluation captures any biases in the relative wages for these jobs and perpetuates undervaluation of the attributes associated with female jobs.<sup>208</sup> Furthermore, positive attributes for female jobs may be neutral or even negative for male jobs. If so, the selection of key jobs influences the weighting of factors, and inclusion of too few female key jobs leads to a decrease in the weight of such attributes.<sup>209</sup>

Even after a job evaluation plan specifies and weights factors, job descriptions manifest sex-stereotyping in each factor assigned to women's work. To the extent evaluations rely on supervisors or professional evaluators to describe jobs, rather than on incumbent workers who have more knowledge of what their jobs entail,<sup>210</sup> the descriptions often omit important tasks and duties. These omissions occur more often for female jobs because supervisors of male jobs are more likely to have been promoted from the jobs they supervise. Therefore, the ultimate effect is likely to be biased against female jobs.<sup>211</sup> Evaluations also often give credit to men's

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*ing Pay Equity Adjustments*, in *ISSUE FOR THE 80's*, *supra* note 2, at 104. *See generally* Remick, *Dilemmas of Implementation: The Case of Nursing*, in *TECHNICAL POSSIBILITIES*, *supra* note 2, at 90.

206. For example, manual skill factors stress the ability to use tools and not the more general category of manual dexterity. *See* D. TREIMAN, *supra* note 192, at 32.

207. *See* D. TREIMAN, *supra* note 192, at 45-46; *see also* Beatty & Beatty, *supra* note 196, at 73-74 (physical exertion is often used as a compensable factor while fine motor skill is not).

208. *See* Schwab, *supra* note 201, at 87; Remick, *supra* note 205, at 100; *see also* D. TREIMAN, *supra* note 192, at 33; Steinberg, *supra* note 205, at 103.

209. A comparable worth study for Pennsylvania public employees, which used a regression analysis on male key jobs to derive factor weights, found a negative correlation between pay and the "people-orientation" of jobs. When the evaluation was implemented, the rating of the predominately female job of licensed practical nurse, which involves significant amounts of personal interaction, was significantly depressed. *See* Pierson, Koziara & Johannesson, *A Policy Capturing Application in a Union Setting*, in *TECHNICAL POSSIBILITIES*, *supra* note 2, at 135.

210. *See* D. TREIMAN, *supra* note 192, at 39; *see also* Beatty & Beatty, *supra* note 196, at 73 (also noting the problems of relying on self-interested incumbents to describe jobs).

211. *Cf.* D. TREIMAN, *supra* note 192, at 39. Treiman notes experiential differences between secretaries and the executives who are asked to describe clerical jobs are particularly significant. *Id.*

jobs, but not women's, for skills learned outside of the workplace.<sup>212</sup> In assessing effort, they tend to stress strength rather than stamina even where the factors permit recognition of endurance.<sup>213</sup> Finally, although there is a universal view of female jobs as clean and free from adverse environmental conditions,<sup>214</sup> many of these jobs involve the disposal of human waste, exposure to suffering and disease, and unpleasant interpersonal interactions.<sup>215</sup>

These problems of job evaluation methodology underscore a more fundamental inconsistency between job evaluation and comparable worth. Job evaluation is an inherently subjective process.<sup>216</sup> A job may receive very different rankings under two job evaluation systems depending on the compensable factors and the factor weights used, the key jobs selected, the method of describing jobs and the individuals performing the description and the evaluation.<sup>217</sup> The success of an evaluation is measured by its credibility; it works only so long as employees and management accept the equity of the resulting job ranking.<sup>218</sup> But comparable worth rejects the priorities dictated by the market, the subjective desires of the employer, or consensus between labor and management as mechanisms for job evaluations because they have been infected by gender stereotypes and historically biased expectations. Therefore, comparable worth must replace these mechanisms with some other means of making the subjective choices that shape its intrinsic measure of job worth.

### 3. Potential Methods of Implementing Comparable Worth

There are several means of implementing comparable worth which differ in large part according to whom they give the responsibility of making the choices necessary to evaluate jobs. One possibility would simply require an employer to base pay for all jobs on a single quantitative

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212. For example, one job evaluation rated "typist" as requiring one month of on-the-job training before a worker could perform the job under normal supervision, while it rated "truck driver" as requiring twelve months of on-the-job training. See D. TREIMAN, *supra* note 192, at 45.

213. Job evaluations rate the physical effort involved in female jobs lower than male jobs that do not require strength. For example, one evaluation rated "draftsman" and "truck driver" as requiring similar effort but "typist" as requiring less effort. See D. TREIMAN, *supra* note 192, at 46.

214. E.g., O'Neill & Sider, *The Pay Gap and Occupational Segregation: Implications for Comparable Worth*, in IRRA PROCEEDINGS, *supra* note 183, at 195.

215. See Foged, *Discussion*, in IRRA PROCEEDINGS, *supra* note 183, at 206.

216. See R. HENDERSON, *supra* note 74, at 268; D. TREIMAN, *supra* note 192, at 30; Schwab, *supra* note 195, at 59.

217. See D. TREIMAN, *supra* note 192, at 34-35, 41; Schwab, *supra* note 195, at 59-61.

218. See Bellak, *supra* note 202, at 77-78; Williams, *supra* note 193, at 200.

job evaluation.<sup>219</sup> This would leave the decision of how to structure and implement the job evaluation to the employer. It would not eliminate cultural biases and pervasive market undervaluation of women's work captured by traditional job evaluation. But it would at least force the employer to review the bases for his pay policies and encourage change of the most blatant devaluation of female jobs.<sup>220</sup>

A second possible mechanism, similar to that advocated by proponents who see Title VII as including comparable worth, would rely on private actions to induce employers to provide comparable pay for female-dominated jobs of comparable worth. A plaintiff would present comparable worth studies showing her job is underpaid in relation to male jobs. The employer could rebut this either by attacking the validity of the plaintiff's job evaluation or by presenting his own evaluation showing the female job is not undervalued.<sup>221</sup> This scheme would vest the responsibility for the numerous subjective decisions underlying any job evaluation with the parties and the authority to approve these choices with the arbiters of the claim — the courts.

This approach has some facial appeal in that it presents comparable worth as a doctrine of antidiscrimination law to be developed and applied much as the courts have developed Title VII doctrine. But it requires courts to make the ultimate subjective decision about the validity of the job evaluations presented in deciding which of the two parties' evaluations better measures job worth.<sup>222</sup> While subjective choices are not foreign to

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219. See WOMEN, WORK & WAGES, *supra* note 188, at 87-88; Treiman, Hartmann & Roos, *supra* note 2, at 149.

220. See WOMEN, WORK & WAGES, *supra* note 188, at 87 (“[t]his ensures that all jobs in a firm are compensated on the basis of the same criteria”); *cf.* Treiman, Hartmann, & Roos, *supra* note 2, at 151 (table showing that adjusting national average wages to conform to an unadjusted job evaluation would increase women's wages from 57% to 70% of men's wages).

221. *Cf.* Clauss, *supra* note 2, at 73 (advocating that a plaintiff should be deemed to have shown discrimination under Title VII if pay for women's work is less than predicted by plaintiff's job evaluation derived by using a policy capturing approach applied to the firm's male jobs).

222. See M. RUBINSTEIN, EQUAL PAY FOR WORK OF EQUAL VALUE 96-98 (1984); D. TREIMAN, *supra* note 192, at 39 (job evaluation ultimately rests on subjective judgments).

One commentator contends that the use of a policy capturing job evaluation determines which factors an employer uses to set wages. It thereby relieves the courts of the obligation of independently deciding which factors are most appropriate. Policy capturing evaluation is based on the “art” of regression analysis which *assumes* the functional form and the independent variables (*i.e.* compensable factors) used to explain the dependent variable (*i.e.* pay). There is no objective way to determine on what variables pay is actually based or the functional form of the relationship between these variables and pay. Clauss, *supra* note 2, at 73-4. See also R. PINDYCK & D. RUBINFELD, ECONOMETRIC MODELS AND ECONOMIC FORECASTS 128 (2d ed. 1981). See generally Campbell, *Regression Analysis in*

judges, at present there appears to be no principle to guide such choices.<sup>223</sup> Traditional constraints guiding the design and implementation of job evaluations are not the “stuff” of which most judicial decisions are made.<sup>224</sup>

A third alternative relies on the legislature to define the evaluation system underlying comparable worth. This scheme would require organizations to set wages for jobs according to an evaluation plan defined by statute or by an administrative agency established for that purpose. One major impediment to this mechanism is the difficulty of designing a plan that satisfies the equitable concerns of proponents of comparable worth and remains flexible enough to apply to the vast array of jobs and organizational structures that characterize the workplace. Recent studies of job evaluation processes and their application of to state public employees suggest that this hurdle may be surmountable.

The statutory mechanism would first have to define a set of compensable factors broad enough to cover the wide variety of jobs found throughout the economy. Many private employers already use a “canned” set of factors.<sup>225</sup> Washington, Minnesota and New York have conducted comparable worth studies using a single set of factors to cover most of their job titles,<sup>226</sup> which closely approximate the diversity of jobs in the economy

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*Title VII Cases: Minimum Standards, Comparable Worth, and Other Issues Where Law and Statistics Meet*, 36 STAN. L. REV. 1299 (1984).

223. In practice, the validity of job evaluations is determined solely by their acceptability to both employers and employees. To a large extent, this will depend on how well they comport with expectations based on existing (and, in all likelihood, historically biased) wage hierarchies. See also WOMEN, WORK & WAGES, *supra* note 188, at 94-96 (comparable worth approach is problematic because “there are no definitive tests of the ‘fairness’” in choice of job evaluations, so job worth is “a matter of values”). See *supra* notes 191-222 and accompanying text.

224. See *American Nurses’ Ass’n v. Illinois*, 783 F.2d 716, 720 (7th Cir. 1986); Weiler, *supra* note 1, at 1170 & n.161. But see M. RUBINSTEIN, *supra* note 222, at 101 (despite employers’ need for broad discretion in setting wages, courts could review employers’ implementation of job evaluation for reasonableness).

225. Over 4,000 organizations use the Hay Plan, a job evaluation system using standardized factors and weights. R. HENDERSON, *supra* note 74, at 311-13.

226. Washington’s study used four factors — “knowledge and skills,” “mental demands,” “accountability,” and “working conditions” to evaluate 121 job classifications. N. WILLIS, STATE OF WASHINGTON COMPARABLE WORTH STUDY 4-6 (1974) [hereinafter WASHINGTON STATE STUDY]. Minnesota used the Hay job evaluation system to evaluate 1800 job classifications. Rothschild, *Pay Equity — The Minnesota Experience*, 20 U. MICH. J.L. REF. 209, 210 (1986). New York considered 35 factors, but ultimately used only 15 factors (plus “proportion female” and “proportion minority” in models aimed at identifying the explicit effect of these variables on pay) to evaluate 2898 job titles. CENTER FOR WOMEN IN GOVERNMENT, SUNY, ALBANY, NEW YORK STATE COMPARABLE WORTH STUDY 26, 198 (1985) [hereinafter NEW YORK STATE STUDY].



generally.<sup>227</sup> These private and state studies strongly suggest that statutes or regulations can specify an acceptable universal set of compensable factors.

Once the law specifies the factors, it would next have to provide the means to determine factor weights. It could do so using the *a priori* approach, setting the weights by legislative fiat.<sup>228</sup> In some situations, however, this might result in job rankings that deviate sufficiently from employee's notions of relative job worth to cause worker dissatisfaction and workplace disruptions.<sup>229</sup> A better solution would be to modify the policy capturing approach to reduce the devaluation of female jobs. This could be accomplished by regressing only pay for male key jobs against the compensable factors to derive factor weights.<sup>230</sup> An alternative means would add an independent variable linked to the percentage of job incumbents who are female and base pay on the regression line derived by keeping the percent-female variable at a fixed level.<sup>231</sup>

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227. For example, New York's study covered managerial/ confidential (nonunion) positions and those within six bargaining units: (1) security services, (2) administrative services, (3) operational services, (4) institutional services, (5) professional, scientific and technical services, and (6) security supervisors. NEW YORK STATE STUDY, *supra* note 226, at 25. The Minnesota study covered 16 bargaining units based on occupational groups represented by 11 different unions. Rothschild, *supra* note 226, at 209.

228. Minnesota and Washington used *a priori* evaluation systems. See WASHINGTON STATE STUDY, *supra* note 226, at 8; Rothschild, *supra* note 226, at 210 (noting the use of the Hay system, a standardized *a priori* system).

229. See Livernash, *supra* note 2, at 13 (Due to present institutionalized wage relationships, any legislative prescription of comparable worth will "meet very substantial resistance and would be highly disruptive.").

230. Viewing male dominated jobs as untainted by discrimination implies that these jobs reflect a "correct" relation between compensable factors and pay. Therefore, regressing pay for such jobs against these factors will give unbiased market-based factor weights. See WOMEN, WORK & WAGES, *supra* note 188, at 86. Graphically, this "male pay policy" approach fits male and female jobs to two separate (and unrelated) regression lines and then demands that pay for female jobs be set according to the male job regression line.

This approach is not without its disadvantages. This method will not compensate female jobs for attributes not readily found in male jobs. Even worse, these attribute may be considered detrimental in male jobs. In that case, basing weights on a regression of pay for male key jobs would penalize the female jobs. See Treiman, *Effect of Choice of Factors and Factor Weights in Job Evaluation*, in TECHNICAL POSSIBILITIES, *supra* note 2, at 88-89. For example, the New York Study found that the complexity of mental demands differentiated female dominated clerical jobs from one another, but did not correlate significantly with pay for male jobs. Using the male pay policy approach would not reward these job attributes thereby underpaying clerical jobs. See NEW YORK STATE STUDY, *supra* note 226, at 203-04; see also *supra* note 209 (noting Pennsylvania study penalized "people orientation").

231. See WOMEN, WORK & WAGES, *supra* note 188, at 88; Treiman, Hartmann & Roos, *supra* note 2, at 150. This "overall pay line" adjustment is premised on the notion that employers should compensate factors identically for all jobs regardless of the percentage of male or female incumbents. It assumes the same relationship between compensable factors

The third, and perhaps the most difficult, aspect of a statutorily mandated evaluation plan concerns the analysis of a job's compensable factors. Most evaluations rely on a combination of incumbent and supervisor descriptions and evaluator job studies to generate these analyses.<sup>232</sup> While all subjectivity probably cannot be eliminated, regulations could specify procedures to guard against bias in the evaluations. Studies suggest that job analyses might be done by having supervisors or incumbents answer a specific set of close-ended questions about the jobs they perform or supervise.<sup>233</sup>

### *B. Causes of Lower Pay For Women's Work*

Putting implementation problems aside, the wisdom of adopting comparable worth depends on the reasons pay for female jobs is less than for male jobs. The premise of comparable worth is that women's work is undervalued, and much of the present debate hinges on commentators' beliefs regarding the economic mechanisms that underlie this premise. The literature presents two major competing models of wage determination to explain the pay differential between men's and women's work: a neoclassical microeconomic model and an institutional model.<sup>234</sup>

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and wages for every level of the variable "percent female." Graphically, this approach results in parallel regression lines relating wages to evaluation points for female and male jobs and moves the (presumably lower) female line up to the male line.

Like the male pay policy approach, this overall pay line adjustment may not be a panacea. Because pay for female jobs reflects biased evaluations of the jobs' worth, the regression line used to set the wages for all jobs incorporates those biases into the pay line adjustment. Moreover, if we believe male and female jobs do not need identical treatment, but only that neither should be devalued with respect to the other, this method may overly restrict an employer's discretion to formulate pay policies in a manner that best reflects the contributions of each job to his firm.

232. See NEW YORK STATE STUDY, *supra* note 226, at 17; D. TREIMAN, *supra* note 192, at 39-40.

233. See WOMEN, WORK & WAGES, *supra* note 188, at 119-23 (minority report of Ernest J. McCormick). Closed-ended questionnaires have been used to evaluate broad ranges of jobs. See E. MCCORMICK, P. JENNERET & R. MECHAM, POSITION ANALYSIS QUESTIONNAIRE (1969) ("Position Analysis Questionnaire" (PAQ)); Pierson, Koziera & Johannesson, *supra* note 209, at 123-25 (variant on the PAQ used for a pilot pay equity study in Pennsylvania); NEW YORK STATE STUDY, *supra* note 226, at 17-24 (questionnaire developed for the New York comparable worth study).

234. See WOMEN, WORK & WAGES, *supra* note 188, at 51-52. This article uses the term "institutional view" to refer loosely to theories that depend on exogenous market structures and noneconomic factors that affect human behavior. A thorough review of the economic debate between neoclassical theory and competing models of the labor market is provided by Cain, *The Challenge of Segmented Labor Market Theories to Orthodox Theory: A Survey*, 14 J. ECON. LIT. 1215 (1976).

### 1. Neoclassical Microeconomic Theory and the Human Capital Model

Neoclassical economics assumes that wages are set according to supply and demand. Prices give the labor suppliers (workers) and labor buyers (employers) signals that allow the market to reach equilibrium. Except to the extent that there are market imperfections that restrict the ability of workers and employers to react to prices, employers will set wages for a job equal to the revenue product of the marginal worker. Unfortunately, employers cannot usually determine the marginal revenue product of an employee, so instead they rely on proxies for productivity — worker attributes like education and job experience.<sup>235</sup>

The human capital model applies this neoclassical theory to the supply side of the market as well. It views workers as producers of labor who can maximize their income by investing in productivity related capital.<sup>236</sup> This explains why many individuals forego immediate income to continue their education or take jobs with lower starting pay but with greater opportunities for on-the-job training. The human capital model in its simplest form predicts equal returns on education, training and other productivity related attributes regardless of the type of training or the field of education. For example, if the return on engineering school exceeded that on nursing school, then the model predicts that individuals would enter engineering school in greater numbers until the increased supply of engineers drove their wages down to a point where the returns on the types of education were equal.<sup>237</sup>

Unlike the ideal profit maximizing producer, however, workers do not necessarily measure the value they derive from a job in purely monetary terms.<sup>238</sup> Returning to our previous example, if workers generally derive satisfaction from the task of nursing, this satisfaction is added to the lower monetary wage and yields an “equal return” in terms of satisfaction but not

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235. For an elementary exposition of the neoclassical model of labor markets, see generally L. REYNOLDS, S. MASTERS & C. MOSER, *LABOR ECONOMICS AND LABOR RELATIONS* 36-224 (9th ed. 1986).

236. See generally G. BECKER, *HUMAN CAPITAL* 9-11 (2d ed. 1975). For a less technical description of the human capital model, with an emphasis on its implications for sex-based wage differentials, see F. BLAU & M. FERBER, *supra* note 188, at 182-220.

237. Some of the complexities that lead to predictions of unequal rates of return on human capital are discussed below. In addition, individual differences in innate ability will cause differentials in returns. For instance, we would expect professional athletes to earn higher than average returns on their training. An influx of potential athletes will not occur to lower the return because few individuals have the natural ability to take advantage of this earning opportunity. See L. THUROW, *DANGEROUS CURRENTS* 173-80 (1983).

238. See F. BLAU & M. FERBER, *supra* note 188, at 184.

dollars. Similarly, if a job entails psychic costs, such as risks to health or safety, or entails unpleasant working conditions, the employer must provide a "wage compensating differential" in order to bring the satisfaction from the job up to the going rate.

Since workers do not behave as profit maximizing producers in a purely monetary sense, the possibility that individuals will value particular attributes of jobs differently must also be considered. For example, one person might find working with sick and dying people day after day very depressing, while another might find helping such people rewarding. Even if the distributions of workers' tastes for the attributes of two jobs are identical, the fact that there is a distribution implies that wages for the jobs will depend on the demand for them.<sup>239</sup> In other words, even if the average individual would find the two jobs comparable in terms of the required human capital investment and working conditions, the job with the greater demand will pay more and therefore yield a higher return.

*(a) Gender correlated preferences of human capital investment and job choice*

The human capital model tries to explain the relationship between sex-segregation of jobs and the wage gap by recognizing that men and women exhibit different extra-market preferences. For example, within the family, women shoulder more of the burdens of housework and child bearing and rearing, while men bear greater responsibility for earning money.<sup>240</sup> This differentiation between market-work and home-work, and specialization of each spouse in one or the other, makes economic sense

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239. See Killingsworth, *supra* note 183, at 184-86.

240. During the first half of the 1970's married working women spent 2.3 to 4.0 hours per day on housework while husbands spent 0.6 to 1.9 hours a day working around the house. Married working men spent 6.9 to 7.1 hours per day doing market work, while working wives spent 5.0 to 6.5 hours per day on the job. F. BLAU & M. FERBER, *supra* note 188, at 126. Different survey results for 1975-1976 and 1981-1982 do indicate, however, that among couples where both adults work, men have begun to perform more housework and women more market work. *Id.* at 127-28. Data on earnings differences between married individuals and those who never married support the hypothesis that extra-market sex roles explain a good portion of the wage gap. In 1970, working women who never married earn about 98% of the pay of men who never married. Polachek, *Women in the Economy: Perspectives on Gender Inequality*, in *ISSUE FOR THE 80's*, *supra* note 2, at 43. Married women's pay decreased below that of women who never married by three percent for every decade married, while married men's pay increased above that for men who never married by four percent for every decade married. Polachek, *Potential Biases in Measuring Male-Female Discrimination*, 10 *J. HUM. RESOURCES* 205, 215-16 (1975). This, however, may merely reflect that marriage correlates with potentially discriminatory factors that affect earnings.

since it allows a couple to produce more than its members could produce separately.<sup>241</sup> Given the difference in outlook of men and women, they are expected to invest in different types of skills and to work in different types of jobs. Moreover, because the market does not represent women's only choice for work, it can be expected that they will earn lower wages for their market work.

For instance, if women expect to take time off from the labor market to raise children, they should invest in skills that do not depreciate rapidly during interruptions in labor force participation. This would maximize their return on human capital given their choice of family role.<sup>242</sup> They might also invest in skills that they can use in both their home and market roles. They would then derive a monetary return from the labor market and a non-monetary return from the use of the same skill at home. The skill's overall return then equals that for skills in which men invest even though its market return was less than that for the masculine skill.

In addition, a woman who takes on a dual home/market role may have to choose to act non-optimally in one role to satisfy the other. If women have to spend appreciable amounts of time doing housework and raising children, they cannot devote that time to training for work or to work itself.<sup>243</sup> Women in this dual role may not work as productively as men.<sup>244</sup>

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241. See F. BLAU & M. FERBER, *supra* note 188, at 40-45; Polacheck, *supra* note 240, at 51; see also G. BECKER, *THE ECONOMIC APPROACH TO HUMAN BEHAVIOR* 209-11 (1976). Differentiation and specialization may have their costs as well. Housework may be inherently less satisfying. Monetary earnings may translate into power in the relationship since they bestow greater flexibility than nonmarket earnings. Specialization may not make economic sense in the long-run, given life style changes. Additionally, if the marriage breaks up, specialization may be disastrous especially for the person who specialized in the less marketable skills associated with home and family. See F. BLAU & M. FERBER, *supra* note 188, at 46-52.

242. See generally Polachek, *Occupational Self-Selection: A Human Capital Approach to Sex Differences in Occupational Structure*, 63 *REV. ECON. & STAT.* 60 (1981) (developing a human capital model that correlates occupation of a worker with withdrawals from the workforce); Polachek, *Occupational Segregation Among Women: Theory, Evidence, and A Prognosis*, in *WOMEN IN THE LABOR MARKET* 137 (C. Lloyd, E. Andrews & C. Gilroy eds. 1979) (explaining occupational segregation as reflecting job choices that maximize lifetime earnings given expected workforce interruptions); cf. Mincer & Polachek, *Family Investments in Human Capital: Earnings of Women*, 82 *J. POL. ECON.* S76, S103 (1974) (explaining about half of the wage gap as due to differences in returns on human capital for male and female workers).

243. See O'Neill, *An Argument Against Comparable Worth*, in *ISSUE FOR THE 80's*, *supra* note 2, at 181. That full-time working women work 8%-10% fewer hours than full time working men may reflect the constraint of the dual role on women's work time. This difference in hours worked explains about 5 of the 36 percentage points of the wage gap. See O'Neill, *The Trend in the Male-Female Wage Gap in the United States*, 3 *J. LAB. ECON.* S91, S93-94 (1985).

Women may also choose jobs that allow them flexibility to perform both roles. Data showing that women tend to take jobs requiring less of a commute and allowing more flexibility to take time off is not surprising.<sup>245</sup> But, if women restrict their choice of jobs to those with these desirable attributes, the human capital model hypothesizes that they cannot expect to earn an equal monetary return on their education, experience and work efforts.

*(b) Sex role socialization as an explanation of sex-segregation and lower pay for women's work*

Sex role socialization is an alternative to the human capital model. It explains differences between men and women in the workplace as a response to the pervasive inculcation of gender specific roles by society rather than as the results of purely voluntary choices aimed at maximizing utility in light of exogenously determined tastes and preferences. The socialization process influences the jobs women occupy in several ways: by instilling gender appropriate personality traits, by reinforcing the home as the focus of women's role in society, and most directly by defining these jobs perceived to be women's work. Society teaches girls to depend on others and to value interpersonal relationships, while it encourages boys to be independent.<sup>246</sup> It reinforces women who develop a "feminine personality" — subordinate, nurturing, and emotionally sensitive. It discourages women who strive to dominate, be aggressive, and put personal achievement ahead of concern for others.<sup>247</sup> By high-school, not surprisingly, men and women ascribe different values to types of work: men place greater

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244. See Becker, *Human Capital, Effort, and the Sexual Division of Labor*, 3 J. LAB. ECON. S33, S43 (1985).

245. See O'Neill & Braun, *Women and the Labor Market: A Survey of Issues and Policies in the United States*, reprinted in *Pay Equity: Equal Pay for Work of Comparable Value, Parts I & II, Joint Hearings on the Subcomms. on Human Resources, Civil Service, Compensation and Employee Benefits of the House Comm. on Post Office and Civil Service*, 97th Cong., 2d Sess., 1449 (1982) (men commute on the average 3.9 hours per week and women 2.8 hours per week); Berger, *Comparable Worth at Odds with American Realities*, in *ISSUE FOR THE 80's*, *supra* note 2, at 69 (women occupy jobs that offer part-time work and flexible hours). Proponents of the human capital model even suggest that factors such as the absence of easy access to a telephone in blue collar jobs have kept women out of such jobs. See UNITED STATES COMMISSION ON CIVIL RIGHTS, *COMPARABLE WORTH: ISSUE FOR THE 80's, A CONSULTATION, VOLUME 2: PROCEEDINGS 31* (1985) (Statement of Simon Polachek, Professor of Economics, SUNY at Binghamton).

246. L. WEITZMAN, *SEX ROLE SOCIALIZATION: A FOCUS ON WOMEN 18-19* (1979); Marini & Brinton, *Sex Typing in Occupational Socialization*, in *SEX SEGREGATION*, *supra* note 27, at 210.

247. L. WEITZMAN, *supra* note 246, at 18; England, *Socioeconomic Explanations of Job Segregation*, in *TECHNICAL POSSIBILITIES*, *supra* note 2, at 29.

value on job status, earnings, freedom from supervision, and leadership, while women value more highly working with people, helping others and using their abilities creatively.<sup>248</sup> These gender distinctions in "appropriate" personality traits push women into, and keep men from, occupations that emphasize those traits.<sup>249</sup> Because the socialization process does not aim at maximizing women's earning potentials, women tend to develop skills for which the labor market does not pay a premium.

Sex role socialization also teaches women that the source of personal satisfaction should be family rather than work. Children learn from parents, teachers, even picture books and television, that women bear primary responsibility for housework and raising children.<sup>250</sup> Deviations from gender appropriate roles elicit negative responses and create discomfort and anxiety, which discourage women from rejecting the traditional role of homemaker.<sup>251</sup> Society's gender dependant notions of success in turn encourage women to continue to focus on the family; for a woman to succeed she must raise and nurture her family, career achievements come second.<sup>252</sup> Thus, socialization explains women's orientation toward the home that leaves them lacking skills or with conflicting obligations that prevent them from entering high paying male jobs.

Socialization also directly encourages job segregation by identifying certain jobs, such as nurse or teacher, as feminine and appropriate for women, and other jobs, such as truck driver or construction worker, as masculine and therefore inappropriate for women. In a sample of children in the second, fourth and sixth grades, fifty-four percent of the girls indicated they planned to be teachers, nurses, housekeepers, secretaries or waitresses, while one percent of the boys planned to work in these occupations. Fifty-seven percent of the boys and only four percent of the girls saw themselves growing up to be firefighters, policemen, car mechan-

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248. Marini & Brinton, *supra* note 246, at 207, (citing Lueptow, *Social Change and Sex-Role Change in Adolescent Orientations Toward Life, Work and Achievement: 1964-1975*, 43 *SOC. PSYCH. Q.* 48, 54 (1980)).

249. For example, in 1970 women accounted for 38% of the national labor force but comprised 73% of all workers in nurturant occupations. Thus, a women was about four times as likely to work in a nurturant occupation than a man. See England, *supra* note 247, at 30-31.

250. See L. WEITZMAN, *supra* note 246, at 8-10.

251. *Id.* at 14; Berg & Ferber, *Men and Women Graduate Students: Who Succeeds and Why?*, 54 *J. HIGHER EDUC.* 629, 636-37 (1983); Becker, *Barriers Facing Women in the Wage Labor Market, A Reply to Fischel and Lazear*, 53 *U. CHI. L. REV.* 934, 940-41 (1986); Mason, *Commentary: Strober's Theory of Occupational Sex Segregation*, in *SEX SEGREGATION*, *supra* note 27, at 164-65.

252. L. WEITZMAN, *supra* note 246, at 61-63; M. GOLD, *supra* note 1, at 9; Marini & Brinton, *supra* note 246, at 210-11.

ics, construction workers, or in sports related jobs.<sup>253</sup> Socialization about the gender propriety of jobs may be so effective that most men and women do not even consider working in an occupation dominated by the opposite sex.<sup>254</sup>

*(c) Employment discrimination as a cause of job segregation and lower pay for women's work*

Discrimination against women provides a third explanation for job segregation and the wage gap that is consistent with the price-auction model of neoclassical microeconomics. The labor market may set a wage rate for women below that for men because employers, male workers or customers have a "taste for discrimination." That is, they will pay for the privilege of hiring, working with, or buying from men instead of women.<sup>255</sup>

If the employer maintains the discriminatory preference, he will not hire women for male jobs unless he can pay them sufficiently less than men so that the wage difference makes up for his loss of utility that results from his sex based preference. If the firm's male workers harbor a taste for discrimination, the firm might refuse to hire women to work with these men to avoid dissatisfaction among existing employees that will decrease their productivity<sup>256</sup> or force the firm to pay them a higher wage.<sup>257</sup> Women will be hired into jobs presently filled by men only if they accept a wage sufficiently low to make up for productivity losses and the premium the firm will have to pay the incumbent male workers.<sup>258</sup> Firms that provide services rather than manufactured goods may also find that their customers discriminate against women.<sup>259</sup> For example, a retailer may lose customers

253. England, *Explanations of Job Segregation and the Sex Gap in Pay*, in *ISSUE FOR THE 80'S*, *supra* note 2, at 55; NEMEROWICZ, *CHILDREN'S PERCEPTIONS OF GENDER AND WORK ROLES* 130 (1977). Other studies reveal that high school aged youths aspire to jobs in a manner that mirrors existing sex segregation of occupations, indicating the strong influence of socialization prior to entering the job market on occupational desires. Marini & Brinton, *supra* note 246, at 201-04.

254. *WOMEN, WORK & WAGES*, *supra* note 188, at 53.

255. See G. BECKER, *THE ECONOMICS OF DISCRIMINATION* 14 (2d ed. 1971); F. BLAU & M. FERBER, *supra* note 188, at 244-51.

256. See Bergmann & Darity, *Social Relations in the Workplace and Employer Discrimination*, in *PROCEEDINGS OF THE THIRTY-THIRD ANNUAL MEETING OF THE INDUSTRIAL RELATIONS RESEARCH ASSOCIATION* 155 (1981).

257. See F. BLAU & M. FERBER, *supra* note 188, at 248-49.

258. If the employer can hire all women, or women and nondiscriminating men, without having to bear extra costs of searching for these employees, he should be willing to pay women and men the same rate. Ultimately, employee discrimination would then lead to job segregation on a firm by firm basis, but without discounting women's wages. See G. BECKER, *supra* note 255, at 56.

259. See F. BLAU & M. FERBER, *supra* note 188, at 251.



who hold sex based prejudices if he hires female sales clerks. He will hire a woman only if he can pay her a wage sufficiently below that a man would command to make up for the revenue from the lost sales. Tastes for discrimination may also be more complex than mere dislike of working with or buying from women. They may involve distrust of having women perform certain traditionally male jobs.<sup>260</sup> Therefore, tastes for discrimination can discourage hiring women into particular jobs as well as decreasing women's wages in relation to those of men.

Even without tastes for discrimination, a profit maximizing employer may nonetheless engage in discriminatory behavior. An employer may practice "statistical discrimination" against women by judging individual job candidates according to the qualifications he attributes to the "average" women candidate.<sup>261</sup> Most employers perceive women employees as less committed to their work and having fewer traits associated with success in male jobs.<sup>262</sup> Thus, statistical discrimination makes an employer more likely to hire a man than a woman for male jobs, or if he hires a woman, to pay her less than he would a man.

The effects of discrimination by employers, fellow workers, and customers, in the aggregate, may depress the wage not only for individual

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260. In the context of sex discrimination, it seems strange to assert that men require some premium to associate with women at work, given that men and women freely associate outside the workplace. Taste for discrimination makes more sense as a preference for hiring men and women into gender appropriate jobs. F. BLAU & M. FERBER, *supra* note 188, at 244.

261. See Phelps, *The Statistical Theory of Racism and Sexism*, 62 AM. ECON. REV. 659 (1972). An employer may engage in statistical discrimination to save the costs of having to determine the traits of individual job candidates. To the extent the savings in information costs exceeds the costs imposed by (i) errors in the employer's perceptions, (ii) deviations of individuals' productivity from that predicted by group averages, and (iii) risk costs due to the greater uncertainty in employee productivity, the use of these perceived group traits is economically efficient. See Schmid, *The Political Economy of Labor Market Discrimination: A Theoretical and Comparative Analysis of Sex Discrimination*, in SEX DISCRIMINATION AND EQUAL OPPORTUNITY: THE LABOR MARKET AND EMPLOYMENT POLICY 278 (G. Schmid & R. Weitzel eds. 1984); see also Arrow, *The Theory of Discrimination*, in DISCRIMINATION IN LABOR MARKETS 3, 26, 28-30 (O. Ashenfelter & A. Rees eds. 1973) (statistical discrimination may result in a stable equilibrium in which wages for blacks [or women] are lower than for whites). Since the use of accurate perceptions of group averages generally will not result in the aggregate wage rate for the group exceeding its aggregated marginal revenue product, some economists do not consider this sex discrimination. See Aigner & Cain, *Statistical Theories of Discrimination in Labor Markets*, 30 INDUS. & LAB. REL. REV. 175, 177-78 & n.8. Aigner and Cain, nonetheless, present models in which the disfavored group, in aggregate, is paid less than favored groups because of greater uncertainty about how the members of the disfavored group will perform. *Id.* at 180-83; see also Schmid, *supra*, at 279-80.

262. See Rosen & Jardee, *Perceived Sex Differences in Managerially Relevant Behavior*, 4 SEX ROLES 837 (1978).

women, but for female jobs themselves. If discrimination is sufficiently pervasive, it may crowd women into a limited number of jobs.<sup>263</sup> The supply of labor for these jobs will thus be greater than it would be if women could freely choose their occupations, and the supply for male jobs will be less. Crowding will therefore cause a decrease in the market clearing wage for women's work below the level that would result absent the barriers to mobility, and a corresponding increase in the pay for male jobs.

Evidence also indicates that the labor market is not very competitive and that "monopsony may be widespread in the industries in which many of the most important female-dominated occupations are found, and may be a common characteristic of the internal labor markets of large organizations."<sup>264</sup> This allows firms to pay below workers' marginal revenue products. In that situation, firms benefit from dividing their workers into groups having supply curves with different elasticities. They can pay separate wages to each group and, in essence, price discriminate.<sup>265</sup> Women then will receive lower wages than men if the elasticity of supply for women is lower than that for men.<sup>266</sup> Employers may structure their

263. See Bergmann, *The Economic Case For Comparable Worth*, in *COMPARABLE WORTH: NEW DIRECTIONS FOR RESEARCH* 71 (H. Hartmann ed. 1985) [hereinafter, *NEW DIRECTIONS*]; Bergmann, *The Effect on White Incomes of Discrimination in Employment*, 79 *J. POL. ECON.* 294, 297-98 (1971). Approaching Bergmann's model from a neoclassical perspective requires positing an extreme and widespread taste for discrimination that results in virtual exclusion of women from men's jobs. See Blau & Jusenius, *Economists' Approaches to Sex Segregation in the Labor Market: An Appraisal in WOMEN AND THE WORKPLACE: THE IMPLICATIONS OF OCCUPATIONAL SEGREGATION* 184 (M. BLAXALL & B. REAGAN eds. 1976). Crowding, however, also applies if strong supply side barriers, such as sex role socialization, exist, or if we abandon neoclassical theory in favor of other models, such as Lester Thurow's queuing model, under which absolute exclusion of women from male jobs seems more plausible. See L. THUROW, *GENERATING INEQUALITIES* 91-97 (1975).

264. Holzhauser, *The Economic Possibilities of Comparable Worth*, 53 *U. CHI. L. REV.* 919, 924 n.10 (1986). See also Devine, *Manpower Shortage in Local Government Employment*, 59 *AM. ECON. REV.* 538, 542 (1969); Hurd, *Equilibrium Vacancies in a Labor Market Dominated By Non-Profit Firms: The "Shortage" Of Nurses*, 55 *REV. ECON. & STATISTICS* 234 (1974); Link & Landon, *Monopsony and Union Power in the Market For Nurses*, 41 *S. ECON. J.* 649 (1975); cf. Dunlop, *Industrial Relations and Economics: The Common Frontier Of Wage Determination*, in *IRRA PROCEEDINGS*, *supra* note 183, at 12-14 (neoclassical assumption of competitive labor market is inconsistent with the large existing differentials between the pay of workers performing similar work for different firms and industries).

265. For a comprehensive treatment of sex based wage discrimination by a monopsonist in the labor market, see J. MADDEN, *THE ECONOMICS OF SEX DISCRIMINATION* 69-85 (1973). See also Bergmann, *The Economic Case for Comparable Worth*, *supra* note 263, at 71; Madden, *Discrimination — A Manifestation of Male Market Power?*, in *SEX, DISCRIMINATION, AND THE DIVISION OF LABOR* 146, 153 (C. Lloyd ed. 1975).

266. Madden hypothesizes that females may have less ability to move into male jobs because of extra-market choices such as family commitments. See J. MADDEN, *supra* note

jobs to segregate men from women and to decrease the mobility of women into men's jobs, which decreases the elasticity of the female supply curve.<sup>267</sup> Even absent rigid barriers preventing women from moving from one employer to another, employers will benefit from price discrimination so long as no other employer hires women workers away by offering them a higher wage. Thus, socialization that leads to the belief that women employees are less valuable also provides a mechanism which prevents wage competition for women workers. This induces employers to offer women wages based on shared perceptions of women's value rather than on marginal revenue product.<sup>268</sup> Thus, employers benefit by reinforcing the perception that female workers are worth less than male workers. Employers receive an economic incentive to maintain job segregation and lower pay for female jobs which in turn strongly reinforce this perception.

*(d) Direct devaluation of women's work*

Gender association of female jobs may directly depress the wages for these jobs below the level that would have prevailed had men historically performed them. This devaluation cannot be verified directly since it is impossible to know what the wages for women's work would have been had

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265, at 22, 65. But the elasticity of the supply of female labor may be greater "since women have a socially acceptable occupation (housewife) outside the labor force," so "their relative immobility within the labor force could be counterbalanced by their greater ability to move in and out of the labor market altogether." Blau & Jusenius, *supra* note 269, at 189. If we relax the usual assumption of exogenous tastes, women may acclimate to a lower wage, in which case we might reasonably assume that most of the women who can enter the market would have done so if offered a wage equal to that which would prevail absent discrimination. If so, then the elasticity of the female supply curve would be less than that of the male supply curve, *at this wage*, and occupational wage discrimination will increase the monopsonist employer's profits.

267. See J. MADDEN, *supra* note 265, at 77-81.

268. The constraints socialization places on employers act like an agreement between employers to set separate wages for their male and female workforce. See P. DOERINGER & M. PIORE, *INTERNAL LABOR MARKETS AND MANPOWER ANALYSIS* 22 (1971); Bielby & Baron, *A Woman's Place Is With Other Women: Sex Segregation Within Organizations*, in *SEX SEGREGATION*, *supra* note 27, at 29. Antitrust law has long recognized that even absent explicit agreement, firms can fix prices by "conscious parallelism." See generally Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals To Deal*, 75 HARV. L. REV. 655 (1962). Socialization provides a means for employers to benefit by unconscious parallel price discrimination. Moreover, socialization of employees' and employers' alike to perceive of women workers as less valuable can result in a stable economic equilibrium in which this perception becomes a self fulfilling prophesy. See Blau, *Occupational Segregation and Labor Market Discrimination*, in *SEX SEGREGATION*, *supra* note 27, at 123; Arrow, *supra* note 261, at 26; Arrow, *Economic Dimensions of Occupational Segregation: Comment I*, 1 SIGNS J. WOMEN IN CULTURE & SOC'Y no. 3, pt. 3, at 234 (1976).

history evolved differently. But circumstantial evidence demonstrates the likelihood that pay for female jobs is directly deflated.

Anecdotal evidence prior to the passage of the Equal Pay Act indicates that major companies in the electrical industry explicitly reduced wages for jobs because they were occupied predominantly by women.<sup>269</sup> While such wage reductions are now illegal, the method by which firms set wages tends to perpetuate the effects of such discrimination.<sup>270</sup> In addition, controlled studies have conclusively demonstrated that evaluators of both sexes tend to rate work lower when they believe it to be the product of a woman rather than a man.<sup>271</sup> The most relevant studies presented identical job descriptions to evaluators but manipulated the associated gender of the jobs by having female incumbents present the description to one group of evaluators and male incumbents to another group. The first study found no significant difference in the ratings by the two groups,<sup>272</sup> although this may have reflected some weaknesses in the experimental design. A second study, tailored to reduce these weaknesses, indicated that the sex of the incumbent describing the job did significantly affect evaluations of relative job worth.<sup>273</sup>

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269. In the 1930's, for example, Westinghouse maintained a totally sex segregated labor force. It performed a job evaluation, and then explicitly set wages for women's jobs below the wages paid to men's jobs that had received equal evaluations. See Newman & Vonhof, *supra* note 5, at 292-94.

270. See Newman & Vanhof, *supra* note 5, at 291; see also *International Union of Elec. Workers v. Westinghouse Elec. Corp.*, 631 F.2d 1094, 1096 (3d Cir. 1980), *cert. denied*, 452 U.S. 967 (1981); cf. *Bazemore v. Friday*, 478 U.S. 385 (1986) (discussing Title VII's failure to alleviate historical salary disparities between blacks and whites).

271. See, e.g., Rosen & Jerdee, *Effects of Applicant's Sex and Difficulty of Job On Evaluations Of Candidates For Managerial Positions*, 59 J. APP. PSYCH. 511 (1974); For more complete references to and synopses of these and other studies, see D. TREIMAN, *supra* note 192, at 44-45; Becker, *supra* note 251, at 942 & nn. 33-34; O'Leary & Hansen, *Trying Hurts Women, Helps Men: The Meaning Of Effort*, in *WOMEN IN THE WORK FORCE* 100, 102-04 (H. Bernardin ed. 1982); Shepela & Viviano, *Some Psychological Factors Affecting Job Segregation and Wages*, in *TECHNICAL POSSIBILITIES*, *supra* note 2, at 52-55.

272. See Arvey, Passino & Lounsbury, *Job Analysis Results as Influenced by Sex of Incumbent and Sex of Analyst*, 62 J. APP. PSYCH. 411 (1977).

273. See McArthur & Obrant, *Sex Biases in Comparable Worth Analyses*, 16 J. APP. SOC. PSYCH. 757 (1986). Other studies have explicitly tested whether the percentage of incumbents affects the prestige or evaluation of a job. All but one found no such effect. See *id.*; see, e.g., Suchner, *Sex Ratios and Occupational Prestige: Three Failures to Replicate A Sexist Bias*, 5 PERSONALITY & SOC. PSYCH. BULL. 236 (1979); White, Crino & DeSanctis, *Ratings of Prestige and Desirability: Effects of Additional Women Entering Selected Business Occupations*, 7 PERSONALITY & SOC. PSYCH. BULL. 588 (1981). But see Touhey, *Effects of Additional Women Professionals On Ratings of Occupational Prestige And Desirability*, 29 J. PERSONALITY & SOC. PSYCH. BULL. 86 (1974) (reporting a significant effect).

The failure of the indicated percentages of female incumbents to effect job ratings may

## 2. The Institutional Theory of Wage Discrimination and the Dual Market

Due to pervasive imperfections in the labor market, the institutional theory of wage determination views the neoclassical model as incomplete in explaining labor market operation.<sup>274</sup> From the institutional view, a set of formal and informal rules governs worker and employer decisions and these rules respond only weakly to external economic influences.<sup>275</sup> A firm fills most of its jobs from within the organization with only limited positions representing ports of entry into the firm.<sup>276</sup> Workers may have to compete to be hired initially by the firm and economic forces do help shape initial hiring criteria. But once inside the firm, workers do not compete with outsiders for continued tenure. They advance along preset job ladders with promotion often dependent on seniority or job tenure.<sup>277</sup> Thus, the

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reflect that people tend to ignore abstract figures on base rates in making social judgments. See McArthur, *Social Judgment Biases in Comparable Worth Analysis*, in *NEW DIRECTIONS*, *supra* note 263, at 58-59. The McArthur and Obrant study found that the evaluators could not even recall the information they received about the percentage of female in the jobs. See McArthur & Obrant, *supra*, at 768. In other words, the failure to find an effect due to the stated percentage of females may reflect that the information on such percentages failed to create an association between "femaleness" and the jobs in the evaluator's minds. Therefore, the information cannot be used reliably to conclude that the pay for "real world" female jobs is not depressed due to the gender association.

274. Post-World War II economists developed the theory described below in an attempt to explain deviations of wages from the results predicted by the neoclassical theory. Therefore, the theory operates within a background of the neoclassical labor market even as it rejects many of the assumptions about the workings of that market. It differs from the purely institutional theory, developed before World War II, which tried to describe labor markets and the role of unions entirely divorced from microeconomic considerations. See Kerr, *The Neoclassical Revisionists in Labor Economics*, in *HOW LABOR MARKETS WORK* 12-13 (B. Kaufman ed. 1988). Some commentators refer to the post war version of the institutional as "neoinstitutional." See, e.g., Cain, *The Challenge of Segmented Labor Market Theories to Orthodox Theory: A Survey*, 14 *J. ECON. LIT.* 1215, 1227 (1976).

275. See Kaufman, *The Postwar View of Labor Markets and Wage Determination*, in *HOW LABOR MARKETS WORK*, *supra* note 274, at 158; Dunlop, *supra* note 264, at 15.

276. For this reason, the institutional view characterizes the firm's labor market as an "internal market." For a comprehensive explanation of the reasons for internal labor markets, and the processes by which they work, see generally P. DOERINGER & M. PIORE, *supra* note 268.

277. That most jobs involve many skills valuable only to workers' present employer helps to explain the internal job market. The employee learns these skills on the job, either through trial and error or from more experienced workers. A firm values an incumbent worker more than a new employee because the new employee has not acquired these firm specific skills. A firm also learns about its employees as they work: it learns which workers are responsible, which have particular skills, and a host of other information not easily obtained without observing employees at work. An employer therefore bears substantial recruiting, screening and training costs if he must hire a new employee to fill a job vacancy. Not only does this explain why a firm tends to fill jobs by internal promotion, but also why it

neoclassical competitive model does not accurately depict the market for non-entry level jobs.

Unlike under the neoclassical model, employers do not attempt to set wages at workers' marginal revenue product.<sup>278</sup> Because many workers contribute to the final product, firms cannot isolate the contribution of any one employee. The problem is more than one of practical concern since the productivity of any employee will depend on the behavior of others and how well the production team works together. It will also depend on worker motivation, and the employer's pay policy itself may affect this motivation. This leads to a complex feedback mechanism in which productivity determines pay which in turn influences productivity.<sup>279</sup> Thus, according to the institutional theory, rather than relying on marginal productivity, an employer focuses on maintaining a satisfied workforce that operates smoothly, with minimum turnover and at a reasonable cost.<sup>280</sup> Workers in turn evaluate wages by looking at the pay of other workers to whom they bear some occupational relation (e.g. their supervisors, those they supervise, others who perform the same job). To satisfy workers, employers must set wages to comport with workers' expectations and notions of equity, which in turn reflect the hierarchical structure of jobs in the workplace.

*(a) The relation of the rigid rules of the institutional market to sex segregation and depression of pay for female jobs*

The customs, traditions and structures central to the institutional view of labor markets prevent rapid change and reinforce existing patterns and hierarchies. In this way, they exacerbate the occurrence and persistence of wage discrimination.<sup>281</sup> For example, most large employers maintain rigid job ladders. They staff entry level positions with new employees, but almost always fill higher level jobs by promoting workers on the same ladder. Once an employee enters the organization within a ladder,

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structures the workplace and wages in order to discourage workers from leaving the firm. See P. DOERINGER & M. PIORE, *supra* note 268, at 13-40.

By the same reasoning, a worker's present firm values her more than would another employer. Thus, the present employer can afford to pay her more than she would earn if she changed firms. If a worker desires to change jobs, she also bears the costs of obtaining information regarding job availability and content. These costs are increased for jobs with other outfits. Moreover, people generally dislike fundamental changes in their routines, thereby imposing a psychic cost of changing jobs. These too will be greater if a worker moves to the less familiar setting of another organization. Thus, the worker as well as the employer reaps substantial benefits from the internal market arrangement. *Id.*

278. See Dunlop, *supra* note 264, at 16-17.

279. See L. THURLOW, *supra* note 237, at 201-04.

280. See Milkovich, *supra* note 193, at 27.

281. WOMEN, WORK, & WAGES, *supra* note 188, at 62-63.

she cannot easily move to a different ladder.<sup>282</sup> By hiring women into one set of entry level jobs and men into another, the firm becomes and remains segregated. It may even channel women into one set of jobs simply by gearing its recruitment effort and hiring criteria to populations that have historically held such positions.<sup>283</sup>

Firms structure job ladders in a manner that not only encourages job segregation but also limits women's potential advancement and ultimate pay. Employers provide fewer on-the-job training opportunities for workers in female jobs. Ladders of predominantly female jobs are shorter than those for male jobs and often start at lower pay.<sup>284</sup> Top managers of female jobs usually do not come from the female ladder but are promoted from male jobs, even though the work experience provided by those male jobs does not necessarily better prepare them to manage the female jobs.<sup>285</sup>

(i) *The dual market*

Institutional economists have also attempted to explain the lower pay for women's jobs in terms of a "dual market".<sup>286</sup> Highly structured internal markets with established criteria for pay and promotion and extensive fringe benefits characterize a certain set of jobs. Large firms, in industries somewhat isolated from competition (e.g. by large capital requirements), tend to place jobs requiring firm-specific skills within internal markets. These jobs comprise the primary segment of the job market.

Jobs at less established firms or that require fewer learned on-the-job skills make up the secondary segment.<sup>287</sup> The secondary market exhibits "relative instability of employment, . . . comparative instability and high unemployment rates of the work force, low wages and poor chances of advancement, . . . paucity of training opportunities, and . . . arbitrariness in the administration of work rules."<sup>288</sup> Hiring, wages and working

282. See England, *supra* note 247, 249, at 40; Roos & Reskin, *supra* note 27, at 236.

283. See England, *supra* note 253, at 59-60.

284. See R. KANTER, MEN AND WOMEN OF THE CORPORATION 136 (1977); Roos & Reskin, *supra* note 27, at 250-51; see also S. PETERSON-HARDT & N. PERLMAN, SEX-SEGREGATED CAREER LADDERS IN NEW YORK STATE GOVERNMENT EMPLOYMENT: A STRUCTURAL ANALYSIS OF INEQUALITY IN EMPLOYMENT 88, 90 (1979).

285. See Roos & Reskin, *supra* note 27, at 247-48.

286. For a comprehensive exposition of the dual market model, see P. DOERINGER & M. PIÖRE, *supra* note 268, at 165-69.

287. WOMEN, WORK & WAGES, *supra* note 188, at 48. Jobs in the primary segment and the secondary segment may exist side by side in one firm. For example, janitorial jobs fall in the secondary segment and exist alongside skilled craft and managerial jobs. *Id.*

288. P. DOERINGER & M. PIÖRE, *supra* note 268, at 170.

conditions in the secondary market respond more readily to competitive forces outside the firm than those in the primary segment.<sup>289</sup>

Whereas the primary market exists because of the convergence of workers' desires for job security and employers' needs for a stable workforce, the secondary market is structured to accommodate instability of both work and workers. It appeals to employers with jobs that demand little on-the-job training and to workers who do not expect a long, uninterrupted tenure in the workforce. But firms may channel women into the secondary segment regardless of whether they plan a long term commitment to the labor force since employers tend to attribute a lack of commitment to all women.<sup>290</sup> Those who find the dual market to be discriminatory posit that employers structure female jobs to minimize the importance of worker loyalty, deny opportunities for advancement and provide a lower return on worker education and skills.<sup>291</sup>

(ii) *Historically lowered expectations*

The institutional model of wage determination posits not only a rigidly structured labor market, but also a "sticky" process of valuing the worth of a job. Supply and demand alone do not determine wages; psychological constructs and political power also have their impact.<sup>292</sup> If demand decreases, the structure of jobs and levels of output and employment react allowing the market to clear.<sup>293</sup> Workers need not necessarily take pay cuts; rather employers may layoff workers or redefine job responsibilities and applicant qualifications to increase productivity. If political factors encourage workers to demand more pay, the wage may go up, even if this causes the employer to substitute other inputs for labor or to raise the price

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289. WOMEN, WORK & WAGES, *supra* note 188, at 47-48.

290. The employer's expectation that a group, like women, will exit the workforce, and the resulting refusal to supply them with training and advancement opportunity, may be a self-fulfilling prophecy. The lack of long term opportunity lowers a woman's opportunity cost for withdrawal from the workforce and therefore encourages the very lack of commitment the employer presupposes. See Arrow, *supra* note 261, at 26; cf. Remick, *Major Issues in a priori Applications*, in TECHNICAL POSSIBILITIES, *supra* note 2, at 117.

291. Consistent with this model of discrimination, "[j]obs traditionally held by women — teaching, nursing, and secretarial work — have . . . features . . . more characteristic of a secondary than a primary pattern." WOMEN, WORK & WAGES, *supra* note 188, at 48.

292. See Kaufman, *supra* note 275, at 158, 161-62, 167.

293. The theory presented is a simplification of Lester Thurow's queuing model. See L. THUROW, *supra* note 263, at 77. This model of how labor markets clear, while not a necessary assumption of institutional or segmented labor market models, is consistent with these models. See P. DOERINGER & M. PIORE, *supra* note 268, at 165-69.



of his product and therefore sell less of it. In each case as the wage goes up, the level of employment in the job goes down until the market clears.

Therefore, the institutional theory sees factors in addition to supply and demand as strongly influencing wage rates. In particular, wage rates depend heavily on the relative rates of pay that employees consider equitable.<sup>294</sup> But historical wage structures condition the laborers' perception of fair wages. Workers', employers' and consumers' attitudes conform to the realities of past prices for a service or product.<sup>295</sup> The result is wage inertia that tends to lock in historical wage relationships.

Because many female jobs entail services perceived as similar to those women have historically performed outside the labor market, society has acculturated to paying little for them. Jobs like day-care and nursing merely provide the kind of care and nurturing women traditionally provided at home to those who need the services outside the home. Services like housecleaning are still not sold in any central market. Traditionally, public entities have provided primary education funded by tax dollars, so individuals have not had to adjust to paying for education. According to the expectancy theory of wage determination, the wages for these jobs will be much lower than for jobs for which we have customarily paid.

The undervaluation does not stop at those jobs which we can identify as historically excluded from the labor market. Pay differentials between jobs reflect wage hierarchies individuals perceive as proper. Workers' wage expectations also depend on the earnings of individuals to whom they compare themselves. In evaluating the equity of wage differentials,

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294. See *supra* note 193 and accompanying text (citing Milkovich and discussing the aims of a compensation system); see also Kaufman, *supra* note 275, at 162. The strong feelings of discord caused by "unfair" wage differentials reflect the fact that workers view wages as "measures of status, power, and self worth," as well as instruments to well being. See Remick, *supra* note 290, at 113; cf. H. PHELPS BROWN, *THE INEQUALITY OF PAY* 141-44 (1977) (pay and status tend to agree since they measure economic and social attributes that society values).

295. See Dunlop, *The Task of Contemporary Wage Theory*, in *THE THEORY OF WAGE DETERMINATION* 21 (1964) ("historical structure[s] of wages . . . condition . . . the labour supply so that the relative rates among contours are regarded as proper"). Interestingly, psychological theories of how individuals resolve cognitive dissonance created by pay inequities predict that individuals will change their perceptions of what is equitable to conform to the existing wage structure. See Adams, *Towards An Understanding of Inequity*, 67 *J. ABNORMAL & SOC. PSYCH.* 422, 427 (1963). Psychological factors regarding wages are so strong that prevailing wage rates can override indications that the rates are too low. For example, the relative pay for nurses in hospitals has remained fairly constant despite prolonged severe shortages. See *Fed Up, Fearful And Frazzled*, 131 *TIME* 77 (Mar. 14, 1988). After finding its wages were competitive, a large employer that was experiencing extremely high turnover in clerical positions refused to increase salaries even though the other employers in the market were also experiencing recruitment and retention difficulties. Remick, *supra* note 290, at 116.

workers tend to compare themselves to other similar workers: those with similar jobs (e.g. craftsman rather than office worker); similar backgrounds and credentials (e.g. high school rather than college graduate); and similar gender.<sup>296</sup> In other words, when women look at what other women earn to develop some idea of their own worth in the market, they see other women working in jobs providing services traditionally done at home earning relatively low pay. Therefore, they generally learn that their labor is worth less than that of men.<sup>297</sup>

#### IV. THE RELATIONSHIP OF THE MODELS OF EQUALITY TO COMPARABLE WORTH

Economic theories reveal several potential causes of the wage gap and illuminate how these might relate to job segregation by sex. Industrial relations literature indicates the extent to which job evaluation systems allow comparisons of job values in terms of intrinsic job attributes. It also reveals how those comparisons might be used to implement the comparable worth doctrine. The question remains, however, whether adoption of comparable worth makes sense in light of the limitations of job evaluation methodologies and the possibility that the wage gap reflects gender differences in extra-market preferences. The answer depends on the model of equality to which one adheres.

The feminist model of sexual equality has driven the recent push for comparable worth. EPA and Title VII doctrine, largely developed throughout the late sixties and seventies, provided no mechanism to implement the feminist ideal. At the same time dissatisfaction with the liberal model rose. Women began to demand more than an opportunity to achieve success as measured by job status and pay: they also wanted the

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296. See Adams, *supra* note 295, at 424-27; Major, McFarlin & Gagnon, *Overworked and Underpaid: On The Nature of Gender Differences in Personal Entitlement*, 47 J. PERSONALITY & SOC. PSYCH. 1399, 1411 (1984).

297. Controlled experiments showed that women paid themselves less than men paid themselves for doing the same work. Additionally, they worked harder than men for a fixed amount of pay when the subjects had discretion to vary the amount of work performed. This led the researchers to conclude that "women's sense of personal entitlement with respect to pay is lower than men's." Major, McFarlin & Gagnon, *supra* note 296, at 1410. This "may stem, in part, from application of same-sex referential comparisons in the absence of other salient comparisons [*i.e.*, information about pay of others for the same tasks]." *Id.* at 1411. This is consistent with several courts' recognition that women historically have been willing to "accept inferior financial rewards for equivalent work." *Laffey v. Northwest Airlines Inc.*, 567 F.2d 429, 451 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978); see also *Marshall v. Georgia Sw. College*, 489 F. Supp. 1322, 1330 (M.D. Ga. 1980) ("this market force defense [is not a factor] . . . especially when it appears the females have been willing to accept lower salaries than males.").

option of having children, raising a family, and, more generally, maintaining aspects of their lives that had previously provided them satisfaction.<sup>298</sup>

Women's call for a more understanding labor market gained support from the market's seeming insensitivity to society's human and personal needs. Shortages of nurses and schools staffed by teachers of questionable qualification became commonplace;<sup>299</sup> while climbing salaries for business consultants and lawyers attracted the best students away from the very jobs plagued by a dearth of qualified personnel.<sup>300</sup> Comparable worth's call for increasing pay for "female" jobs furthered both the interests of women workers seeking greater status for jobs consistent with their lifestyles and a significant segment of society disgruntled by its inability to secure adequate "human" services.

The relationship between the feminist idea of equality and comparable worth explains why comparable worth developed as a means of implementing sexual and not racial equality. The prevailing paradigm of racial equality is the liberal model. Its goal is the assimilation of blacks into the workforce without altering the structure or values of the workplace.<sup>301</sup> Some jobs held predominately by blacks and minorities pay little; like women, on average blacks and other minorities earn significantly less than white men.<sup>302</sup> But if jobs held disproportionately by blacks pay lower wages than those held predominately by whites, few doubt that the job is actually worth less.<sup>303</sup> Jobs held disproportionately by blacks are not perceived as "black" jobs because society does not recognize a black culture that

298. See, e.g., Flick, *The New Feminism and the World of Work*, 71 PUB. INT. 33, 41 (1983) (quoting testimony of Geraldine Ferraro at the "Pay Equity For Women Hearings") ("wouldn't it be nice if [a woman worker] could have the freedom of choice to choose a woman's profession and get equal pay for work at that value?"); Lazarre, *I Am The Mother of Eight, a Housewife, a Feminist — and Happy*, 5 MS. 51 (May 1977); Scanzoni, *How to Live with a Liberated Wife*, 20 CHRISTIANITY TODAY 6, 7 (June 4, 1976); Rubin, *Why My Mother Is Liberated — and I'm Not*, 81 MADEMOISELLE 24 (July 1975).

299. See *An Acute Shortage of Nurses*, 96 NEWSWEEK 93 (Sept. 22, 1980); Musemeche & Adams, *The Coming Teacher Shortage*, 59 PHI DELTA KAPPA 691 (June 1978).

300. See Bok, *A Flawed System of Law Practice and Training*, 33 J. LEG. EDUC. 570, 573 (1983).

301. Kay, *supra* note 6, at 47; see Note, *Sexual Equality Under The Pregnancy Discrimination Act*, *supra* note 30, at 726 (race can be ignored as a salient characteristic but an adequate model of sexual equality always confronts sexual reproductive differences); cf. R. WASSERSTROM, *PHILOSOPHY AND SOCIAL ISSUES* 24-29 (1980) (arguing for "assimilationist ideal" for racial equality but questioning its application to sexual equality).

302. Black males on average earned 60.6% of white male wages from 1955-1959; their earnings rose to 75.3% of white male earnings for 1975-1978. WOMEN, WORK & WAGES, *supra* note 188, at 16.

303. The New York State Study corroborates this impression. It found that the minority percentage had no statistically significant effect on wages and accounted for only

embodies a distinct set of employment related values. This failure to identify black workers as constituting a separate valuable culture explains why comparable worth did not arise as a means of alleviating racial pay disparities.

While the feminist model of equality motivated comparable worth, the debate about the wisdom of comparable worth has taken place mainly within the conservative and liberal frameworks. Perhaps this reflects proponents' strategy of appealing to the judiciary to recognize comparable worth under the EPA or Title VII. Perhaps it reflects that the feminist model was not well developed or widely accepted in legal circles when proponents first developed their theory. Regardless of the reason the philosophies underlying the debate are limited to the conservative and liberal models, this article contends that they bias the outcome against the adoption of comparable worth.

*A. Evaluation of Comparable Worth Under the Conservative Model of Equality*

Comparable worth is antithetical to the conservative view of equality. The conservative model views women's domain as the home, while comparable worth seeks to force the male domain of the market to accept and even celebrate women's values and choices. Comparable worth also measures women workers' worth by the masculine market's measure — dollars. This contradicts the conservative premise that women should assess their worth by how well they care for and nurture their families rather than by how much money they earn. In other words, the conservative perspective sees comparable worth as based on "an exaggerated ideology of work" that tells women it is irrational and misguided to put so much emphasis on the family rather than wages.<sup>304</sup>

From the conservative perspective, extreme job segregation and underpayment of women's jobs in relation to their intrinsic attributes do not indicate sex discrimination. Occupational segregation by sex is the natural result of the differing natures of women and men. Conservatives are bothered by changes in society that require the market to provide services formerly provided at home by women in the "traditional" family.<sup>305</sup> But given this development, the propensity of women to

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two percent of the difference between earnings of minority and white males. NEW YORK STATE STUDY, *supra* note 226, at 204.

304. Berger, *supra* note 245, at 70.

305. See, e.g., Bronfenbrenner, *The American Family in Decline*, 189 CURRENT 39, 40-41 (Jan. 1977); Carlson, *Whatever Happened to the "Family Wage"?*, 83 PUB. INT. 3,10 (1986).

congregate in women's jobs supports the conservative hypothesis that women and men innately differ. Men look at wages as the primary measure of success and job satisfaction. Women derive satisfaction from other job attributes such as feeling needed by those they serve. Because women, more than men, consider more than mere monetary compensation when evaluating the rewards of a job, human capital theory predicts that women will develop skills for jobs that provide non-monetary rewards even when those jobs pay a lower dollar return on their skill investment.

Conservatives buttress their rejection of comparable worth studies by appealing to the competitive market, which constrains an employer to pay wages equal to workers' respective marginal revenue products. If an employer discriminates by paying women's jobs below this amount, competitors will hire employees away from these underpaid jobs. So long as there are a sufficient number of nondiscriminating employers to supply the market demand, the discriminating employer will be driven out of the market. The competitive process could be thwarted only by employers colluding to discriminate, a prospect conservatives deem unlikely.<sup>306</sup> The conservatives' trust in the competitive nature of the labor market leads them to conclude that employers hire women into lesser paying female jobs because women's natural orientation toward the home makes them less valuable as workers. Thus, from the conservative perspective job segregation and the wage gap are natural and justified rather than evidence of pay discrimination for female jobs.

Comparable worth and a conservative model of equality can co-exist only if some form of job evaluation is accepted as an overriding but limited means of comparing male and female jobs. This would require conservative's begrudging acceptance of women's move out of the home and into the labor market and the existence of an overriding job comparison standard within this traditionally male domain. This position is similar to that embodied in the EPA, which accepts natural distinctions between the sexes but demands equal pay for equal work.<sup>307</sup>

Since job evaluations do not really give an objective or even widely accepted measure of a job's economic value, the conservative perspective cannot be extended to allow comparisons of dissimilar work.<sup>308</sup> Because

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306. See O'Neill, *An Argument Against Comparable Worth*, *supra* note 243, at 182-83; Fischel & Lazear, *Comparable Worth: A Rejoinder*, 53 U. CHI. L. REV. 950 (1986); cf. G. BECKER, *supra* note 255, at 44-45 (showing how competition decreases the effect of employer tastes for discrimination on minority wages).

307. See *supra* notes 93-106 and accompanying text.

308. See Beatty & Beatty, *supra* note 196 at 72; Johnson & Solon, *The Attainment of Pay Equity Between the Sexes By Legal Means: An Economic Analysis*, 20 U. MICH. J.L. REF. 183, 194 (1986); WOMEN, WORK & WAGES, *supra* note 188, at 81.

workers have individual preferences for different jobs, the attributes of a job theoretically do not determine its nondiscriminatory market clearing price.<sup>309</sup> Industrial relations experts implicitly recognize this and do not claim that a job evaluation determines the economic worth of a job, but rather that it provides a system for labor and management to reach a workable consensus about fair pay practices.<sup>310</sup> For each employer, a multitude of job evaluation systems may satisfy this "workable consensus" criterion. While the overall job rankings given by these evaluation systems tend to correlate to a great extent, this does not guarantee against significant variations in the relative ranking of any particular job under the different systems.<sup>311</sup> Thus, job evaluations do not arrive at a point total for each job that provides a unique measure of the relative worth of the job to the employer. Even if an advocate of the conservative model conceded to the reality that a majority of women today must work, there is no existing universally accepted intrinsic measure of job worth by which he could compare pay for dissimilar jobs.

The conservative perspective of sexual equality thus leads to a rejection of any form of comparable worth as a viable theory of employment sex-based antidiscrimination law. The strongest rebuttal of this conclusion comes not from arguments consistent with the conservative model, but from those who attack the fundamental tenets of this perspective.

The acceptance of market inequality as due to men's and women's natural occupation of different spheres almost guarantees women's relegation to second class status. There is a built-in hierarchy in the relationship of the home and market. Happiness in the home, and the private sphere more generally, depends on a sufficient level of consumption which requires a sufficient income. Even if women were satisfied to stay at home, economic developments and the breakdown of the traditional family have forced

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309. See Killingsworth, *supra* note 183, at 184-87; see also Fischel & Lazear, *Comparable Worth and Discrimination in Labor Markets*, 53 U. CHI. L. REV. 891, 901 (1986) ("[T]he meaning of 'worth' or 'value' is not well specified. The value produced by the first worker, the average worker and the last worker hired by an employer are all different and are likely to differ further across occupations.").

310. See Schwab, *supra* note 195, at 62; cf. Bellak, *supra* note 202, at 78 (commonly labor and management negotiate agreement on a job evaluation method).

311. See Schwab, *supra* note 195, at 62 (noting that different job evaluation systems "share only two-thirds to four-fifths common variance"); see, e.g., Robinson, Wahlstrom & Mechem, *Comparison of Job Evaluation Methods: A "Policy Capturing" Approach Using the Position Analysis Questionnaire*, 59 J. APP. PSYCH. 633, 635 (1974). Despite finding high correlations between five methods of evaluating jobs, Robinson's results show that the rank of several jobs, for example head animal keeper, meter maid and secretary, greatly varied from one evaluation method to another.

them into the labor market, either as necessary second wage earners or as primary breadwinners. Society also adheres to a notion of "just desserts," according to which the producer of wealth deserves control over decisions regarding consumption—a significant subset of the decisions made within the home sphere. This justification for the wage earner's control over consumption decisions significantly undercuts a homemaker's claim to control decisions within the home. Additionally, the market is inherently "social" and therefore provides visibility and opportunity for greater influence than the home.

Conservatives' appeal to the competitive labor market is no more convincing. Empirical evidence indicates that employers' leeway in setting wages for particular jobs is great enough to account for much of the pay disparity between men and women.<sup>312</sup> Even if the labor market were competitive, discrimination by consumers or socialization of employers and employees to devalue women's work could allow employers to maintain wages below marginal revenue product.<sup>313</sup> Moreover, historically the labor market did not prevent employers from explicitly maintaining lower wages for women than for men who performed identical work.<sup>314</sup> And explanations that job segregation and lower pay for women's work result from women imposing greater costs on employers remain unverifiable.<sup>315</sup>

In short, while some opponents of comparable worth appeal to the conservative model of equality, most proponents reject this appeal because they find the assumptions underlying that model normatively unacceptable or empirically unsound. Few proponents, however, have explicitly adopted the feminist perspective as the framework for comparable worth.<sup>316</sup>

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312. See Clauss, *supra* note 2, at 67 & n.246 (citing National Research Council Report showing that entry level pay for the same occupations in a given locale can vary by 200% to 300%); see also Dunlop, *supra* note 264, at 18 (top wage rates for a defined job classification within a given locality may be two or three times low ones).

313. See BECKER, *supra* note 255, at 45 (employer with a taste for discrimination may not be totally pushed out of a competitive market in the long run unless the costs of production are homogenous of degree one); *id.* at 76 (the market cannot distinguish between discrimination by consumers and other distinctions in consumer tastes); see also *supra* notes 255-73 and accompanying text.

314. See Newman & Vohnhof, *supra* note 5, at 293-94.

315. See Corcoran & Duncan, *Work History, Labor Force Attachment And Earnings Differences Between the Races and Sexes*, 14 J. HUM. RESOURCES 3, 14 (1979) ("Absenteeism due to the illness of others in the family . . . and self imposed limits on job choice or location had virtually no effect on . . . wages."); cf. Foged, *supra* note 215, at 206 (rebutting the argument that women work in lower paying female jobs because such jobs allow them greater flexibility to concentrate on their home duties).

316. There are some notable exceptions, the most noteworthy being Heidi Hartmann, Ronnie Steinberg and more recently Alicc Kessler-Harris. See, e.g., Hartmann, *Capitalism, Patriarchy and Job Segregation By Sex*, in CAPITALIST PATRIARCHY AND THE CASE

Rather, most have turned to the liberal model, relying especially on its suspicion of sex-linked differences, to support their position.

*B. Evaluation of Comparable Worth Under the Liberal Model of Equality*

Tension between the liberal model's distrust of sex differences in the public domain and its acceptance of individual preferences that provide the foundation for market values creates an ambivalence in its outlook on comparable worth. Although the extent of underpayment may vary with methodologies, comparable worth studies almost universally reveal that female jobs are paid less than male jobs relative to their job evaluation scores.<sup>317</sup> Even conceding that job evaluations do not give an objective measure of job worth, the consistent showing that female jobs are underpaid indicates a sex-based differential in the labor market, which the liberal model views as suspect.<sup>318</sup>

This sex-based difference in the relation of pay to job evaluations, however, does not necessarily indicate market discrimination. According to neoclassical microeconomics, market prices ultimately derive from individual preferences in the private domain and the liberal model accepts gender differences in this sphere. It also accepts the aggregation of these values by the market so long as individuals do not make sex-conscious decisions in their market roles. According to institutional labor economics, wages derive from employer and employee expectations and needs. The liberal model of sexual equality takes issue with existing wages only to the extent market institutions are structured in a sex-conscious manner. Under either theory of labor markets, gender distinctions in the private sphere can result in women preferring jobs with relatively low value in the market

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FOR SOCIAL FEMINISM (Z. Eisenstein ed. 1979); Hartmann & O'Neill, *The Comparable Worth Controversy*, in NEW PERSPECTIVES (U.S. Comm. On Civil Rights, Spring 1985); Steinberg, "A Want Of Harmony": *Perspectives On Wage Discrimination and Comparable Worth*, in TECHNICAL POSSIBILITIES, *supra* note 2, at 3, 24-25; Kessler-Harris, *The Just Price, The Free Market and the Value of Women*, 14 FEMINIST STUD. 235 (1988).

317. For example, almost all voluntary studies done by various states have concluded that increased female incumbency results in lower rates of pay to job evaluation scores. See Stimpson, *Foreword*, in S. EVANS & B. NELSON, *supra* note 74 (noting that 20 of the states that have begun comparable worth studies have already determined that their studies justified comparable worth adjustments).

318. See Voos, *Discussion*, in IRRA PROCEEDINGS, *supra* note 183, at 202. This is bolstered by the historical evidence that, prior to Title VII's proscription of explicit sex-segregation of jobs, employers decreased the pay for female jobs simply because they were female. Historical evidence also shows that evaluations unconsciously discount the worth of work solely because they believe a woman produced it. See *supra* notes 269-73 and accompanying text.



place. Simply put, the liberal model expects market values to be sex neutral while it recognizes the legitimacy of non-neutral public values that register individual private choices.

Those who adopt the liberal perspective attempt to resolve this tension by isolating the discriminatory causes of the wage gap from those that stem from legitimate sex-conscious private choices and then evaluating whether comparable worth provides a sagacious remedy for the identified discrimination.<sup>319</sup> In evaluating the efficacy of comparable worth, they focus on several basic questions: To what extent does the wage gap result from discriminatory depression of wages for female jobs (i.e. from sex-based occupational wage discrimination)? Do comparable worth analyses of individual employer's pay practices reliably identify instances of such discrimination? Is comparable worth the appropriate means of remedying such discrimination?

### 1. The Influence of Sex-based Occupational Wage Discrimination on the Wage Gap

Under the liberal model, comparable worth is not justified unless the wage gap reflects market discrimination rather than the impact of legitimate private choices. Private choices can effect women's wages when women voluntarily assume different family roles than men which interfere with their productivity in the labor market.<sup>320</sup> Comparable worth advocates, however, point to regression analyses that indicate that productivity related variables, such as experience, education, hours worked, seniority, and employment continuity, explain at most half of the observed wage gap.<sup>321</sup> Opponents respond that women's choice of familial responsibility affects their productivity in subtle ways that do not necessarily show up in the productivity related variables used in regression analyses: variables like intensity of work, concentration on one's job, or dedication to quality are

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319. For a thorough example of this approach, see Weiler, *supra* note 1, at 1779-93. See, e.g., Corcoran & Duncan, *supra* note 315; England, *supra* note 253, at 55; O'Neill, *supra* note 243, at 179; Polachek, *supra* note 242, at 68.

320. See *supra* notes 240-45 and accompanying text.

321. See WOMEN, WORK & WAGES, *supra* note 188, at 19-24; Corcoran & Duncan, *supra* note 315, at 18-19; Blinder, *Wage Discrimination: Reduced Form and Structural Estimates*, 8 J. HUM. RESOURCES 436, 449 (1973); Oaxaca, *Theory and Measurement in the Economics of Discrimination*, in EQUAL RIGHTS AND INDUSTRIAL RELATIONS 1, 25 (1977); see also Beller, *Occupational Segregation by Sex: Determinants and Changes*, 17 J. HUM. RESOURCES 371, (1982) (human capital model does not explain who enters male occupations); England, *The Failure of Human Capital Theory To Explain Occupational Sex Segregation*, 17 J. HUM. RESOURCES 358 (1982) (human capital theory does not explain occupational segregation).

difficult if not impossible to measure.<sup>322</sup> Even variables included in regression analyses may not accurately indicate workers' true contributions to production.<sup>323</sup> For example, a worker's experience in a particular job or department at a particular plant may be a more meaningful predictor of a worker's contribution than overall work experience. These subtle missing or misspecified variables may explain some of the otherwise unexplained residual wage gap. Opponents of comparable worth find strong support for this argument in the fact that the wage gap between never married male and female workers is much smaller than that for married workers because they expect marriage to alter men's and women's commitment to the market in opposite ways.<sup>324</sup>

But in order for omitted variables or biases in the measurement of included variables to account for the residual gap, they must correlate with workers' sex and not correlate strongly with the variables included in the regressions.<sup>325</sup> The lack of a more complete regression that demonstrates the effect of these subtle variables on the wage gap seriously undercuts opponent's contentions that such variables exist. The omitted variable argument essentially asserts that different private choices of men and women result in legitimate sex-based differences in workers' positions in the labor market which cannot be verified. It thus becomes indistinguishable from the conservative position that innate differences explain job segregation and contradicts the liberal suspicion of unexplained sex differences in the labor market. Not surprisingly, proponents of comparable worth do not find the argument convincing.<sup>326</sup>

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322. See Becker, *supra* note 244, at S52-53 (division of labor within the family affects relative intensity of wives dedication to work); Fuchs, *Differences in Hourly Earnings Between Men and Women*, 94 MONTHLY LAB. REV. 9, 14 (May 1971); O'Neill & Sider, *supra* note 214, at 194-95; see also Blau, *supra* note 268, at 127 (possibility of missing variables in regressions results in overstatement of discrimination).

323. WOMEN, WORK & WAGES, *supra* note 188, at 19; Milkovich, *supra* note 193, at 42.

324. See Malkiel & Malkiel, *Male-Female Pay Differentials in Professional Employment*, 63 AM. ECON. REV. 693, 701-02 (1973); see also Gwartney & Stroup, *Measurement of Employment Discrimination According to Sex*, 39 S. ECON. J. 575, 579-80 (1973); Polachek, *supra* note 240, at 215. Weiler concludes from the marriage penalty for women's wages that "one cannot thereby infer that the jobs predominately filled by women are inherently undervalued and underpaid." Weiler, *supra* note 1, at 1787. This conclusion, however, simply ignores the possibility that marriage might not be the causal factor but might simply correlate with other factors that cause the wage gap, such as differences in productivity, related variables or occupational wage discrimination. *Id.*

325. WOMEN, WORK & WAGES, *supra* note 188, at 19 & n.5; Treiman, Hartmann & Roos, *supra* note 2, at 149.

326. See, e.g., Becker, *supra* note 251, at 937; Clauss, *supra* note 2, at 55-56 (concluding that the existence of a legitimate factor explaining the residual wage gap "is

Sex linked choices in the private sphere, such as the choice of accepting day-to-day household responsibilities, may also affect wages in the market because they alter women's career *expectations*, independent of their effect on women's actual work experience. For example, economically rational women who expect to leave the labor force mid-career will seek jobs that maximize their earnings over their entire working lives. Therefore, they will invest in skills that do not depreciate with absence from employment. Even if these women end up not interrupting their careers, they will have invested in slowly depreciating skills and will work in jobs requiring such skills. Those jobs will forgive employment discontinuities but may not yield the same return on education and experience as do jobs that demand employment continuity. Thus, women's early expectations of different home roles can lead them to choose jobs that yield less overall pay than jobs chosen by men or women who plan continuous careers.<sup>327</sup> Attributing the gap to sex differentiated expectations is also consistent with the dual labor market hypothesis that women gear their career plans to the secondary market so they can have greater flexibility to enter and leave the workforce. It also explains the "marriage gap," since one would surmise that women who plan for discontinuous careers tend to place greater emphasis on marriage and family.

Proponents of comparable worth, however, cite empirical analyses that call into question the expectation version of the human capital model. Studies show that actual continuity of work experience does not explain any significant portion of the wage gap.<sup>328</sup> More pointedly, other studies

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highly unlikely and certainly too speculative to rebut the prima facie showing of disparate treatment established by the regression analysis."').

327. See Polachek, *Differences in Expected Post-School Investment as a Determinant of Market Wage Differentials*, 16 INT'L ECON. REV. 451, 466 (1975); Polachek, *Sex Differences in College Major*, 31 INDUS. & LAB. REL. REV. 498, 505 (1978); Mincer & Polachek, *supra* note 242, at 583; Polachek, *supra* note 240, at 42-43; O'Neill, *supra* note 243, at 182.

328. See Corcoran, Duncan & Ponza, *A Longitudinal Analysis of White Women's Wages*, 18 J. HUM. RESOURCES 497, 510 (1983). Analyses reveal a short term depreciation effect due to withdrawal from the workforce, but a rebound in human capital appreciation that virtually eliminates the effect of this depreciation in the long run. *Id.* at 498. Mincer & Ofek, *Interrupted Work Careers: Depreciation and Restoration of Human Capital*, 17 J. HUM. RESOURCES 3, 17 (1982). Corcoran, Duncan and Ponza also found no significant effect on wages due to known prospective withdrawals from the labor force. This directly contradicts the explanation that the wage gap is due to gender differences in expectations of labor force withdrawal. Corcoran, Duncan & Ponza, *supra* this note, at 513-14. *But cf.* Sandell & Shapiro, *Work Expectations, Human Capital Accumulation and the Wages of Young Women*, 15 J. HUM. RESOURCES 335, 350-51 (1980) (young women's future career expectations correlate with their attainment of human capital, making it likely that the wage gap is attributable in part to sex differences in career expectations). Failure to find a statistically significant deviation from the null hypothesis does not permit the conclusion

demonstrate that the depreciation rate of human capital in female occupations does not significantly differ from that in male occupations.<sup>329</sup> Therefore, expected depreciation in skills should not influence economically rational women who plan for career interruptions to seek different jobs than men. Nor does the marriage gap necessarily indicate that different home roles explain job segregation and the wage gap.<sup>330</sup> Perhaps most disturbing, the persistence of the wage gap despite changes in women's outlook about their participation in the market also undercuts the expected career-cycle explanation of the gap.<sup>331</sup>

Thus, from the liberal perspective, empirical studies do not dispel the possibility that discrimination may substantially contribute to the wage gap. But this does not end the inquiry. The liberal model accepts that there is a "correct" wage which would prevail in the absence of market discrimination against women. If discrimination merely channels women into lower paying but correctly priced jobs, there would be no justification for comparable worth's mandate that employers increase pay for female jobs. Therefore, numerous studies have attempted to discern the extent to which occupational segregation explains the wage gap.

Almost all of these studies have concluded that the percentage of female incumbents in an occupation has a statistically significant inverse

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that the effect does not exist. In fact, Corcoran, Duncan and Ponza did find a nonsignificant negative correlation between prospective labor force withdrawals and wages, and noted that the issue deserves further study. Corcoran, Duncan & Ponza, *supra* this note, at 314-315. Also, the Corcoran study focused on the prospective withdrawal of women *workers* and therefore did not test whether the work expectations of young women not yet in the workforce affects women's investment in human capital relative to men.

329. See England, *supra* note 321, at 366; see also Corcoran, Duncan & Ponza, *supra* note 328, at 510.

330. Studies have failed to demonstrate how differing "home roles" lead to lower pay for women. For example, one study hypothesized that women's family obligations might lead them to be absent from work, or to restrict their potential job locations and hours more than men, possibly causing the wage gap. While the study found the expected sex differences in absenteeism, and work hours and location restrictions, it found that these factors did not significantly affect wages. Corcoran & Duncan, *supra* note 315, at 14-15. Other analyses reveal that single women and women without children were no less likely to work in female occupations than married women and women with children, thereby refuting the belief that home roles explain sex-segregation of occupations. See England, *supra* note 321, at 367; Zellner, *The Determinants of Occupational Segregation*, in *SEX, DISCRIMINATION AND THE DIVISION OF LABOR* 125, 139 (C. Lloyd ed. 1975). This conclusion is consistent with the realization that many female jobs such as "[n]urses, telephone operators, and waitresses have long hours, shift work, overtime, little vacation and lack of control over work schedules." Foged, *supra* note 215, at 206.

331. See Blau, *supra* note 268, at 126; Blau & Beller, *Trends in Earnings Differentials By Gender, 1971-1981*, 41 *INDUS. & LAB. REV. REV.* 513, 528 (1988).

correlation with wages for the occupation.<sup>332</sup> From the liberal perspective, this supports an inference that the wages for female jobs fall below the nondiscriminatory rate that would ordinarily prevail. But these studies have disagreed sharply on the magnitude of wage depression for women's jobs. They find that occupational segregation accounts for anywhere from five percent to forty percent of the gap.<sup>333</sup> Therefore, they raise questions about the efficacy of comparable worth as a means of eradicating the wage gap.

Most studies of the relationship of pay to the "femaleness" of jobs regress national wage data against the percentage of females in occupations as well as against other variables that might affect wages. Their conflicting conclusions result in part from their use of different levels of detail in defining occupations. Broadly defined occupational categories tend to aggregate highly sex-segregated jobs into integrated occupations, masking the effect of women's congregation in the more detailed job categories.<sup>334</sup> Use of too detailed a breakdown of occupations, however, may result in a study construing sex-linked success on the job as discrimination due to occupational segregation.<sup>335</sup>

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332. See, e.g., Blau & Beller, *supra* note 331, at 528; Johnson & Solon, *supra* note 308, at 196 & n.15; cf. Fuchs, *supra* note 322, at 13 (finding "percent-female" to be a statistically significant contributor to the wage gap using one regression equation, but to depress wages only to a nonsignificant degree using a second regression equation). *But see* Buchele & Aldrich, *How Much Difference Would Comparable Worth Make*, 24 INDUS. REL. 222, 231 (1985) (finding no difference between women's returns on job characteristics in women's and men's jobs, which "raises some questions about the importance of occupational segregation as a cause of the male-female earnings gap"). Interestingly, Buchele & Aldrich did find men's returns on job characteristics exceeded those of women *in all jobs*, indicating substantial discrimination. *Id.* Thus, their results imply either: (i) employers pervasively violate the Equal Pay Act; (ii) the wage gap is attributable to interfirm sex segregation, with women working for lower paying firms or (iii) the studies job categorization was too broad, so it masked the effects of job segregation. See *infra* note 338 and accompanying text for a discussion on interfirm sex segregation and notes 334-35 and accompanying text for a discussion of the over-breadth of study categorization.

333. Thus, Polachek concludes "at best, occupational segregation explains only 4.6 percent of the gender gap in wages." Polachek, *supra* note 240, at 40, while Treiman and Hartmann conclude that 35% to 40% of the gap is attributable to occupational segregation. WOMEN, WORK & WAGES, *supra* note 188, at 33. See also WOMEN'S WORK, MEN'S WORK: SEX SEGREGATION ON THE JOB 11 (B. Reskin & H. Hartmann eds. 1986) (attributing 18%-24% of the wage gap to occupational segregation); Johnson & Solon, *supra* note 308, at 206 (estimating 8%-24% of the wage gap is due to occupational segregation).

334. WOMEN, WORK & WAGES, *supra* note 188, at 31; see also WOMEN'S WORK, MEN'S WORK, *supra* note 333, at 11.

335. See Polachek, *supra* note 240, at 38. This misinterpretation will occur only if: (1) men tend to be more successful at work; (2) employers reward this success with promotions and corresponding pay increases; and (3) these promotions cause men to move into jobs that

Studies' conclusions also vary with the other independent variables included in their regressions. Analyses that omit detailed job related variables, such as experience or education required for each job, cannot distinguish assignment of women to lower valued jobs from depression of wages for jobs staffed predominately by women. But if a study distinguishes by narrowly defined job-related factors, such as by the educational major or type of experience required by the job (e.g. clerical verses mechanical experience), it will attribute sex-linked pay differentials to differences in these variables rather than to devaluation of "female" type of work.<sup>336</sup> Analyses also should include some personal variables, such as workers' education and experience, to avoid misinterpreting the hiring of workers with fewer productivity related attributes into lower paying jobs as pay discrimination. But inclusion of personal variables ignores the interaction between these variables and discriminatory depression of wages for female jobs.<sup>337</sup>

The extent of wage discrimination attributable to devaluation of female jobs identified by a regression analysis also depends substantially on the degree to which the analysis includes employer related variables, most importantly the identity of the industry or the firm for which employees work. The more detailed the employer description used by a study, the smaller the effect it attributes to sex-based occupational wage discrimination.<sup>338</sup> But employer variables, like job and personal variables, can raise

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the regression analysis characterizes as within different occupations. If instead employers grant such promotions on the basis of personal productivity variables, such as seniority, experience, or on the job training, and the regression includes these as independent variables, then it will not misinterpret success as occupational pay discrimination. Therefore, we should be concerned by a greatly detailed occupational breakdown only if we believe that private lifestyle choices allow men to achieve success in ways not measured by personal productivity related variables.

336. See Milkovich, *supra* note 193, at 41.

337. See Blau, *supra* note 268, at 127. As an illustration of how discrimination may affect productivity related variables, suppose a woman can work only in female jobs that pay half of what her husband can earn in male jobs. Since one spouse must devote less time to earning wages in order to take care of the family, logically the family would choose to have the wife take the time away from her lesser-paying work. This results in a correlation between pay and personal variables like experience, employment continuity and marital status, rather than as a result of occupational wage discrimination.

338. See Johnson & Solon, *supra* note 308, at 197. This corroborates the well documented phenomena that within occupations there is sex-segregation by firms, with women tending to work for firms that pay less. See WOMEN, WORK & WAGES, *supra* note 188, at 39; WOMEN'S WORK, MEN'S WORK, *supra* note 333, at 12 (citing numerous studies demonstrating this phenomenon within various industries, including white collar occupations, clerical jobs, retail clerks, beauty salon operators, college faculty); Weiler, *supra* note 1, at 1792 & nn. 226-29; cf. Bielby & Baron, *supra* note 268, at 27, 35 (detailed study of California employers showing pervasive sex-segregation by firm, as well as within firms).

questions about what constitutes discrimination. For example, if pay for electronics salespeople exceeds that for retail clothing salespeople, and women are more likely to sell clothes, the resulting pay differential can be attributed to a discriminatory devaluation of the more typically female pursuit. Alternatively, the pay differential can be justified by the conclusion that salespeople of electronic goods provide a kind of expertise for which consumers are willing to pay more.

Thus data on the cause of the wage gap do not resolve the question of the extent to which the wage gap reflects sex-based occupational wage discrimination. The number and complexity of the arguably legitimate influences on wages render the empirical analyses necessary to definitively answer the question impractical.<sup>339</sup> More fundamentally, the analyses depend on the liberal model's public/private and personal/market distinctions to define the set of legitimate factors. Yet even within the liberal model there is no consensus on the dividing lines between these spheres.

For example, from the liberal perspective sex-role socialization that influences women to acquire "female" skills, assume home-care responsibilities, and work at sex-appropriate jobs may be viewed as discriminatory. Social institutions reinforce women's conformity with accepted female roles both in the private (*e.g.* family) and public (*e.g.* market) domains. The liberal model condemns these institutions' sex-conscious distinctions in public roles. On the other hand, attributing women's choices to the subtle psychological influences of these institutions contradicts the liberal tenet that human beings are above all else autonomous. Therefore, sex role socialization may be viewed as part of women's voluntary choice of their own lifestyles. The legitimacy of including personal variables, such as number of children or marital status, in regression analyses hinges on which view one takes under the liberal model.

The liberal model also views a consumer's decision about the value she places on goods ambiguously. On the one hand, such decisions represent personal preferences for which the liberal model guarantees respect. If a consumer values tips from her stockbroker more than childcare, government has no business interfering. In order to implement this personal valuation, however, the consumer usually must buy the product on the market and thereby becomes a participant in the public arena. If, however, consumers pay less for childcare simply because it is women's work, the liberal model deems the lesser pay discriminatory. Because of this

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339. See Milkovich, *supra* note 193, at 46; *cf.* Johnson & Solon, *supra* note 308, at 186 (noting that "no one has ever estimated a [comprehensive] model [of the wage gap] . . . because no real world data set contains all the variables that can be considered to influence wages.").

ambiguity, the liberal model provides insufficient guidance about the inclusion of job and employer related variables, such as the type of skills required for the job, or the type of product provided by the employer.

In short, the liberal model's reliance on the public/private and personal/market distinctions to separate allowable sex-conscious decisions from discrimination focuses the comparable worth debate on empirical questions about the causes of the wage gap. But the model does not provide sufficient clarity about the bounds of the dichotomous categories it creates to dictate a resolution of the debate. From the liberal perspective, whether discriminatory devaluation of women's work is sufficiently egregious to justify government intervention remains a controversy.

## 2. Comparable Worth Studies as Indications of Employer Wage Discrimination Against Female Jobs

Even if national wage data indicate that depression of wages for female jobs causes a significant portion of the wage gap, the instances of such discrimination must be identified. Comparable worth would rely on studies of a particular employer's pay practices to demonstrate that the employer engages in occupational wage discrimination. If, after accounting for legitimate job attributes and personal variables, a study showed workers in female jobs were underpaid, that would indicate the employer discriminated against such jobs.

The liberal model, unlike the conservative model, does not permit opponents merely to argue that job attributes do not determine the nondiscriminatory level of pay for particular jobs. Whether one believes the neoclassical or the institutional model of labor economics, he must concede the important part intrinsic job attributes play in determining pay for jobs, as evidenced by their common use in employer's job evaluations.<sup>340</sup> Even if job evaluations do not uniquely determine the worth of particular jobs in a comparable worth study, if a relationship between pay and job attributes for female jobs that differs from the relationship for male jobs is reliably demonstrated, then liberals perceive it as evidence of suspect behavior and demand an explanation of this sex difference.<sup>341</sup>

Some opponents, however, challenge the reliability of comparable worth studies. These opponents question whether even existing job evaluation methodologies yield job ratings that are sufficiently consistent to

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340. See *supra* notes 191-92 and accompanying text.

341. Cf. Voos, *supra* note 318, at 202 (different tastes of male and female workers "would not explain why wages are consistently found to be higher for heavily male occupations, other things equal. . . .").



reliably demonstrate differential treatment of male and female jobs.<sup>342</sup> Consistency requires that a given job evaluation system yield repeatable outcomes when applied by different evaluators to the same set of jobs.

Studies show significant variation in individual analyses of jobs in terms of tasks or compensable factors.<sup>343</sup> Since such job analyses are an integral part of virtually every quantitative job evaluation, this undercuts the repeatability of comparable worth studies. Job evaluations, however, can mitigate the effects of such individual differences by having committees, composed for instance of incumbent employees, supervisors and independent job analysts, perform the requisite job analyses.<sup>344</sup> Careful definition of the intrinsic job attributes by which the system ranks jobs also can eliminate much of the individual variation in job analyses. Advocates of comparable worth point to several studies that have used these techniques to overcome problems with repeatability of outcomes.<sup>345</sup>

Even if a system yields a repeatable outcome, the choice of the system itself might influence the job evaluations it produces. Since different

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342. See Schwab, *supra* note 195, at 59-60.

343. See Hackman & Oldham, *Development of Job Diagnostic Survey*, 60 J. APP. PSYCH. 159, 165 (1975); Jenkins, Nadler, Lawler & Cammann, *Standardizing Observations: An Approach to Measuring the Nature of Jobs*, 60 J. APP. PSYCH. 171, 175 (1975). These two studies, however, focused on job description methods meant to identify problems of worker motivation and worker attitudes and behavior respectively, rather than providing descriptions for setting wages.

Job analyses similar to those used in common job evaluation systems generally exhibit average inter-analyst correlations of 0.50 and higher. NEW YORK STATE STUDY, *supra* note 226, at 93, (quoting O. BUROS, THE EIGHTH MENTAL MEASUREMENTS YEARBOOK (1978)); see, e.g., Lawshe & Wilson, *Studies in Job Evaluation: The Reliability of Two Point Rating Systems*, 31 J. APP. PSYCH. 355, 360 (1947) (average correlation between individual evaluators ranged from 0.51 for ratings of "job hazards" to 0.86 for "learning period"; average correlation for total points was 0.89). Moreover, these inter-analyst correlation for specific job factors may paint an overly pessimistic picture of the reliability of the job analysis process because reliability of total points assigned to jobs generally exceeds that for specific compensable factors. See, e.g., Lawshe & Farbro, *Studies in Job Evaluation: The Reliability of an Abbreviated Job Evaluation System*, 33 J. APP. PSYCH. 158, 160 (1949) (reporting total point inter-analyst correlation of 0.89); Chesler, *Reliability and Comparability of Different Job Evaluation Systems*, 32 J. APP. PSYCH. 465, 471 (1948) (reporting reliability rates for total job evaluation systems of 0.93 to 0.99); McCormick, Jeanneret & Mecham, *A Study of Job Characteristics and Dimensions as Based on the Position Analysis Questionnaire (PAQ)*, 56 J. APP. PSYCH. 347, 365 (1972) (multiple correlations between PAQ and existing wage rates ranged between 0.83-0.90).

344. See Lawshe & Wilson, *supra* note 343, at 361.

345. See, e.g., Clauss, *supra* note 2, at 53 & n.195 (reporting how the Wisconsin Task Force on Comparable Worth achieved very reliable job analyses by using committees to evaluate jobs and by carefully defining compensable factors); see also NEW YORK STATE STUDY, *supra* note 226, at 50-56, 93-95 (describing field studies used to eliminate ambiguities and simplify the job description instrument used in the comparable worth study, and reporting satisfactory reliability of the final questionnaire).

systems depend on different subjective choices, objective consistency also requires that the results from different accepted job evaluation systems "converge."<sup>346</sup> Results from the most prevalent job evaluation systems correlate sufficiently to justify their use in implementing a particular company's pay policy or for comparison of that policy with the pay practices of similar companies.<sup>347</sup> No studies to date, however, have ascertained whether different accepted job evaluation systems yield sufficiently convergent conclusions regarding the relationship of job "worth" and gender of job incumbents to justify the inference of occupational wage discrimination that proponents draw from comparable worth studies. Data on convergence at present indicate only that job evaluation methodologies appear to be promising candidates for a means of identifying such discrimination.<sup>348</sup>

Despite the promising outlook regarding consistency of traditional job evaluations, extending application of job evaluation techniques to separate occupational wage discrimination from legitimate pay decisions may exacerbate reliability problems. Opponents claim that job evaluation methodologies avoid being arbitrary only because they accept and interpolate from existing market values.<sup>349</sup> By abandoning the labor market as potentially discriminatory, comparable worth inherently imposes non-objective judgments about the appropriate value the market should place on particular job attributes.<sup>350</sup> For example, a regression of nurturing required by a job against pay might demonstrate that the labor market places a negative value on this job attribute. This negative valuation, however, might reflect the association of nurturing with women, the very type of discrimination comparable worth means to eliminate. While traditional application of job evaluation would merely accept this as a job factor with negative weight, a decision as to whether and how to include nurturing would have to be made if this job evaluation system were to be used to generate a comparable worth study.

Choices of different compensable factors or factor weights can result in different conclusions regarding whether an employer's pay practices reflect discrimination against female jobs. If such choices are uncon-

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346. See Schwab, *supra* note 195, at 61-62.

347. Robinson, Wahlstran & Mecham, *supra* note 311, at 636. *But cf.* Schwab, *supra* note 195, at 62 (implying opposite conclusion from similar data).

348. *Cf.* WOMEN, WORK & WAGES, *supra* note 188, at 81-82 (concluding that further study of job evaluation techniques, aimed at enabling them to better address sex-based pay discrimination, "would be very valuable").

349. Livernash, *supra* note 2, at 19-20; Schwab, *supra* note 195, at 76-77.

350. See D. KIRP, M. YUDOF & M. FRANKS, *supra* note 13, at 169-70; Hildebrand, *supra* note 194, at 87.

strained, comparable worth studies cannot reliably be expected to indicate discrimination. But constraints on these choices essentially dictate the "values" the studies place on particular job attributes. The liberal model sees the imposition of these values as illegitimate because it contravenes the market's aggregation of legitimate personal preferences and choices in the private domain. Thus, the consistency requirement applied to comparable worth studies leads back to the liberal debates about the proper boundary between public and private spheres and about what constitutes market discrimination rather than legitimate private choice.

### 3. The Propriety of Comparable Worth as a Remedy for Occupational Wage Discrimination

The final question from the liberal perspective addresses the wisdom of adopting a comparable worth doctrine as a remedy for pay discrimination against women's work. For those who accept the neoclassical description of the labor market, the goal of any remedy for discrimination should be efficiency. The best outcome will be that which maximizes social wealth subject to the postulate that tastes for discrimination, which the liberal model deems illegitimate, are accorded no value. If one further assumes that the labor market is, for the most part, competitive, then the "perfect remedy" would alter the market only to the extent of eliminating the influences of these illegitimate tastes for discrimination; any other remedial effects would inefficiently distort the economy.<sup>351</sup>

In the concrete context of occupational wage discrimination, illegitimate sex-conscious decisionmaking can alter economic outcomes via two distinct mechanisms: crowding and direct devaluation of female jobs. Under the crowding hypotheses, discriminatory hiring inflates the labor supply for female jobs above the level that would prevail absent discrimination and lowers the market clearing wage. The same phenomena causes a shortage of the supply for male jobs and inflates the wage for these jobs. The ideal remedy would increase the wage for female jobs and decrease that for male jobs to the level that would prevail absent discriminatory barriers that prevent women from entering other jobs. Under the liberal model, however, comparable worth would set women's wages at the prevailing rate for comparable male jobs, accepting those as an indication of the correct bases for compensation. This would set wages for all jobs, male and female, higher than the "correct" wage, resulting in some

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351. See, e.g., Fischel & Lazear, *supra* note 309, at 901-04 (analyzing the efficiency of the crowding hypothesis assuming an otherwise competitive market).

inefficiency.<sup>352</sup> The wisdom of comparable worth then is reduced to an empirical question of whether the efficiency loss due to discriminatory overcrowding exceeds that which would result from comparable worth.<sup>353</sup> Resolution of this question, like those focusing on the extent to which the wage gap and particular employers' pay practices reflect occupational wage discrimination, requires the ability to establish the "correct" wage for female jobs. The issue again thrusts us into the labyrinth of the debate about what factors legitimately affect wages.

Under the devaluation hypothesis, depression of wages for female jobs results from employers' perception of such jobs as less valuable than the jobs' contributions to productivity and profits. Thus the demand curve for such jobs falls below the nondiscriminatory demand curve and results in a lower wage and under-utilization of female jobs. Comparable worth would force the employer to increase the wage to the nondiscriminatory level. Wage for female jobs will increase but, according to neoclassical economics, employers will respond by decreasing the number of female jobs.<sup>354</sup> Comparable worth will then result in an economic output that is farther from the nondiscriminatory ideal than that without comparable worth.<sup>355</sup> Accepting the liberal goal of achievement of the nondiscriminatory level of production and distribution of wealth, society would be better off by not adopting comparable worth and having the government distribute a lump sum payment to women working in predominately female jobs.<sup>356</sup>

This analysis, however, treats the "correct" wages as determined by productivity alone. It ignores that wages also provide workers a measure of self worth. "[A]n employee . . . may regard his own relative pay as his 'score', with which he is credited; a group of employees may regard the relative pay of their occupation as the measure of the value that society sets

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352. See *id.* at 902-04 (explaining more thoroughly the potential inefficiency that would result from a comparable worth remedy).

353. See Holzhauser, *supra* note 264, at 922-24.

354. Neoclassical microeconomics assumes that individual preferences are exogenous to the economic system — in other words, that consumer tastes do not depend on prices. See E. MANSFIELD, *MICROECONOMICS, THEORY AND APPLICATIONS* 78 (6th ed. 1988). Under this assumption, "taste" for discrimination that causes the depressed demand curve will not change as a result of the increase in pay for female jobs, and employers will continue to operate along this discriminatory curve. The assumption of exogenous tastes parallels the liberal model's assumption of autonomous beings whose preferences and values drive economic and political outcomes rather than being a result of the economic and political systems historically in place.

355. See J. Jacobsen, *The Economics of Comparable Worth: Theoretical Considerations*, in *COMPARABLE WORTH: ANALYSIS AND EVIDENCE* 36, 43 (M. Hill & M. Killingsworth eds. 1989).

356. See Fischel & Lazear, *supra* note 309, at 909-10.

upon their qualifications."<sup>357</sup> Simply giving women as much money as they would earn under a comparable worth scheme will not allow women to achieve the same status or level of self esteem as they would obtain by receiving a greater salary for the work they perform.

Defenders of comparable worth also do not accept this analysis' underlying premise of a highly competitive labor market.<sup>358</sup> If employers act as monopsonistic purchasers of labor, comparable worth will not only result in a fairer wage to workers in female jobs, but it will also increase the quantity of such jobs toward the optimal nondiscriminatory level.<sup>359</sup>

For those who believe that enough imperfections plague the labor market to make the institutional model more accurate than the neoclassical model, the entire notion of evaluating comparable worth relative to an economically ideal outcome makes little sense. The institutional model rejects the notion that supply and demand determine an efficient market clearing price and quantity. Using this model, the best one can do is compare the potential costs and benefits comparable worth would impose on the existing economy without regard to an efficient ideal.<sup>360</sup>

The costs of comparable worth differ from those imposed by Title VII because, rather than dictate only that employers hire women instead of men, comparable worth requires employers to increase pay to their workforces. Unlike Title VII, comparable worth's prospective remedy imposes a direct cost independent of administrative costs and retroactive relief. And, unlike the EPA, comparable worth would impose this cost on a substantial proportion of employers. It would not be limited to the rare instances of unequal pay for equal work. Estimates of the costs vary from about \$2 billion to \$400 billion.<sup>361</sup> But many of these estimates unrealistically assume that all occupational wage differentials, discriminatory or

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357. H. PHELPS BROWN, *supra* note 294, at 129; *see also* Becker, *supra* note 251, at 943 n.40.

358. *See, e.g.*, Holzhauser, *supra* note 264, at 924 (noting that employers may act as monopsonists); WOMEN, WORK & WAGES, *supra* note 188, at 45 (rejecting the competitive market theory of wage determination because employees often do not know of job opportunities, and face economic and psychological barriers to job mobility); Marshall & Paulin, *The Employment and Earnings of Women: The Comparable Worth Debate*, in ISSUE FOR THE 80'S, *supra* note 2, at 208-09 (recognizing that "inefficient behavior" may be penalized in a competitive labor market, but the fact remains that the labor market is not perfectly competitive in the neoclassical sense.").

359. *See* Holzhauser, *supra* note 264, at 926.

360. Much of the literature therefore simply identifies and balances these costs and benefits. *See, e.g.*, Weiler, *supra* note 1, at 1793-94; Clauss, *supra* note 2, at 92-93; Marshall & Paulin, *supra* note 8, at 210-11.

361. *See* U.S. COMM'N ON CIVIL RIGHTS, COMPARABLE WORTH: AN ANALYSIS AND RECOMMENDATIONS 38 (1985); Newman & Vohnhof, *supra* note 5, at 309; Marshall & Paulin, *supra* note 358, at 210.

otherwise, will be universally and immediately eliminated.<sup>362</sup> These costs can be decreased by limiting the applicability of comparable worth, for example to large employers or governmental entities,<sup>363</sup> and phasing it in over time. Even without such limitations, the realistic costs are not so great that they would cripple the economy.

The primary potential benefit of comparable worth, from the liberal perspective, is its ability to decrease the wage gap between men and women workers. But the ability of comparable worth to reduce the gap is uncertain. Comparable worth addresses only discriminatory depression of pay for female jobs and the extent to which this discrimination contributes to the wage gap is controversial. Discrimination remediable by comparable worth is additionally circumscribed because, as presently envisioned, it will not rectify inter-firm pay differentials. Therefore, it will not remedy that portion of the gap attributable to men working for high paying firms and women for low paying firms, even if this phenomenon results from occupational sex segregation and devaluation of female jobs. Thus, at least one commentator has concluded comparable worth is not justified because it will not appreciably increase women's relative earnings.<sup>364</sup>

This argument, however, has not convinced others who have considered it.<sup>365</sup> While much sex-segregation occurs by particular firms hiring mostly men or mostly women, intra-firm segregation of women into lower

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362. See Blumrosen, *Remedies For Wage Discrimination*, 20 U. MICH. J.L. REF. 99, 153 (1986); Remick & Steinberg, *Technical Possibilities and Political Realities, Concluding Remarks*, in TECHNICAL POSSIBILITIES, *supra* note 2, at 290. The actual costs imposed by a comparable worth remedy depend on the specifics of how the doctrine is implemented. The assumption that it will require employers to totally eliminate the entire wage gap is unrealistic. See *id.* at 290-92. More realistic estimates can be gained from jurisdictions which have adopted some form of comparable worth. For example, Minnesota's adoption of comparable worth for its state workers cost 3.7% of its payroll budget. See S. EVANS & B. NELSON, *supra* note 74, at 3. Moreover, one can interpret the direct costs of a comparable worth remedy as an indication of the extent of occupational wage discrimination. Therefore, the greater the "cost," the greater the need for the remedy. See Marshall & Paulin, *supra* note 358, at 210; Blumrosen *supra*, at 154.

363. Government entities and larger employers in a particular locale often dominate the market for female jobs and establish the going rate of pay for such jobs. See Holzhauer, *supra* note 264, at 924 & n.10. Thus, restricting comparable worth to large employers in a locale may yield the same remedial results as a broader application but entail lower costs.

364. See Weiler, *supra* note 1, at 1792-93.

365. See Sorenson, *The Wage Effects of Occupational Wage Composition: A Review and New Findings*, in ANALYSIS AND EVIDENCE, *supra* note 355, at 57 (critiquing previous studies finding minimal effect of intra-firm occupational segregation on wage gap and concluding that such segregation explains 20%-30% of the gap). See, e.g., Johnson & Solon, *supra* note 308, at 206; WOMEN, WORK & WAGES, *supra* note 188, at 92-93; WOMEN'S WORK, MEN'S WORK, *supra* note 333, at 12-13.

paying jobs is also pervasive.<sup>366</sup> Comparable worth studies of particular organizations' pay practices have revealed significant pay disparities that, if rectified, would provide a sizeable benefit to employees working for these organizations in predominately female jobs.<sup>367</sup>

More fundamentally, from the liberal perspective, opponents' focus on comparable worth's effect on the wage gap, rather than on its effect on pay for women's work, is questionable. Even abandoning the notion of an economically efficient ideal, the liberal model aims to implement the outcome that would result from elimination of discriminatory market processes. The wage gap, however, focuses on results rather than processes; it is a "bottom line" measure that does not comport with the sex-neutral *treatment* mandated by the liberal model.<sup>368</sup> The liberal goal is not necessarily a zero wage gap, but rather female jobs priced independent of the effects of crowding, discriminatory devaluation of women's work, or monopsonist sex-segregation and price discrimination.

By focusing on the wage gap as the indication of comparable worth's efficacy, the debate understates the beneficial effect of comparable worth. Both men and women who work in female jobs would receive greater pay under a comparable worth doctrine. In fact, studies have shown that the average man who works in a female job suffers a greater discriminatory decrease in earnings than the average woman in such a job.<sup>369</sup> Because comparable worth will benefit some men as well as disadvantage some women, its effect on the wage gap will be smaller than its effect on wages of

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366. See Bridges & Berk, *Sex, Earnings, and the Nature of Work: A Job-Level Analysis of Male-Female Income Differences*, 58 Soc. Sci. Q. 553, 555-60 (1978) (white-collar predominately female jobs in Chicago financial firms paid less primarily because they compensated incumbents' job characteristics at a lower rate than those of predominately male jobs); Halaby, *Sexual Inequality in the Work Place: An Employer-Specific Analysis of Pay Differences*, 8 Soc. Sci. Research 79, 94-95 (1979) (female managers in a public utility earned less than male managers primarily because women were in the lower ranks of management to an extent not explained by human capital differences); Malkiel & Malkiel, *supra* note 324, at 702 (one-quarter of the male-female wage differential for professional employees of a single corporation could not be explained by differences in human capital and appears attributable to assignment of women to lower level jobs).

367. See, e.g., S. EVANS & B. NELSON, *supra* note 74, at 98 (reporting a \$2200 average pay equity raise implemented by the comparable worth plan for state workers in Minnesota); WASHINGTON STATE STUDY, *supra* note 226, at 20 (reporting a 20% disparity in pay between female jobs and male jobs); see also Blumrosen, *supra* note 362, at 155 & n.169 (comparable worth studies "have demonstrated a pervasive 20% difference between the evaluated scores for predominately women's jobs and the market rates for comparable jobs.").

368. Cf. *supra* notes 170-72 and accompanying text (noting how the Supreme Court's rejection of a "bottom-line" test under the disparate impact doctrine comports with the liberal model of sexual equality).

369. See Johnson & Solon, *supra* note 308, at 198.

workers, male and female, who work in predominately female jobs.<sup>370</sup> Under the liberal model, however, comparable worth's benefit is the extent to which it increases the wages of all employees, male and female, suffering from wage discrimination of female jobs.

Opponents also argue that the disemployment effect of raising pay for female jobs will decrease benefits from comparable worth. An increase in pay will cause employers to reduce the number of jobs, which might result in women as a group receiving less pay than without comparable worth.<sup>371</sup> Proponents have responded, however, that the disemployment effect depends on the elasticity of demand for the jobs in question. Many women's jobs involve provision of services and therefore are not capital intensive; their elasticity of demand is likely to be low.<sup>372</sup> Moreover, if the institutional view of the labor market is accurate, employers might respond by restructuring job tasks to make female jobs more important rather than reducing their number. Empirical data from organizations that have adopted comparable worth policies seem to indicate that disemployment effects are small.<sup>373</sup>

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370. See Weiler, *supra* note 1, at 1790-91 n.224, citing Johnson & Solon, PAY DIFFERENCES BETWEEN WOMEN'S AND MEN'S JOBS: THE EMPIRICAL FOUNDATIONS OF COMPARABLE WORTH LEGISLATION 9 (1984) (National Bureau of Economic Research Working Paper No. 1472) (concluding that the percentage of females in an occupation depressed the wage of the average worker 9%, but explains only 7% of the wage gap).

371. See D. KIRP, M. YUDOF & M. FRANKS, *supra* note 13, at 171; Killingsworth, *supra* note 183, at 187-88; Weiler, *supra* note 1, at 1776-77 (but noting that the Australian experience with comparable worth resulted in "a sharp net improvement . . . [for] women on the whole").

372. See Remick & Steinberg, *supra* note 362, at 293. "The few econometric studies that have estimated [disemployment] effects indicate [these] . . . effect[s] would be fairly small, at least in the U.S. public sector." See Voos, *supra* note 318, at 202, (citing R. Ehrenberg & R. Smith, COMPARABLE WORTH IN THE PUBLIC SECTOR, *National Bureau of Economic Research* (1984), G. JOHNSON & G. SOLON, PAY DIFFERS BETWEEN MEN'S AND WOMEN'S JOBS: THE EMPIRICAL FOUNDATIONS OF COMPARABLE WORTH LEGISLATION (National Bureau of Economic Resources) (1984); *but cf.* Johnson & Solon, *supra* note 308, at 203 (reporting an econometric model that predicts the major effect of comparable worth would be to transfer income from holders of uncovered women's jobs to those in covered women's jobs).

373. The major empirical evidence comes from Australia's experience after it implemented a comprehensive comparable worth law in the early 1970's. Following this implementation, women's wages increased 30% more than men's wages and women continued to increase their share of the labor market. Gregory & Duncan, *Segmented Labor Market Theories and the Australian Experience of Equal Pay For Women*, 3 J. POST KEYNESIAN ECON. 403, 422 (1981). Opponents, however, challenge this conclusion asserting that without comparable worth women's employment would have grown at a faster pace. See Killingsworth, *supra* note 183, at 188 (reporting that women's employment growth relative to that of men fell from 4.3% to 3.0% and women's unemployment rate was 0.5% higher than it would have been without comparable worth). Limited data from



Proponents contend that comparable worth will indirectly result in a second benefit — a reduction of sex segregation of jobs. Increased wages for female jobs will attract men who demand greater pay than do many women.<sup>374</sup> Comparable worth also reduces monopsonistic employers' incentive to maintain occupational sex segregation by limiting their ability to price discriminate between male and female workers. But, to the extent sex-segregation of jobs results from employer discrimination in job assignment, Title VII's proscription of discriminatory hiring and promotion provides a more direct remedy and avoids the costs and economic distortions that result from comparable worth's direct effect on market prices for labor. And, to the extent that sex-segregation results from sex-role socialization, the liberal model views segregation ambivalently since it may reflect legitimate private choices. The liberal model prefers to address the problem of sex-role socialization by private persuasion of individuals to change their life outlooks and personal preferences rather than by the government mandating conduct that may be inconsistent with those preferences.<sup>375</sup>

#### 4. The Liberal Model's Conclusion Regarding Comparable Worth

The liberal perspective thus entertains comparable worth as a potentially legitimate means of identifying and remedying discrimination that depresses pay for women's work, but remains ambivalent toward comparable worth because no one has yet devised a particular mechanism that adequately distinguishes between the effects of legitimate private choice and sex-based market decisions. The liberal model fails to recognize that the lack of guidance in its definition of discrimination prevents empirical analyses from making these distinctions. In fact, the liberal model attempts to hide its definition's lack of guidance by characterizing it as insufficiency of empirical technique.

The liberal model's respect for private individual choice also leads to its disapproval of interference with social institutions in ways that might frustrate that choice. The regulation of wages and prices, however, directly threatens disruption of market signals that reflect such choices. Therefore, the liberal perspective frowns upon wage regulation except when market imperfections are unavoidable or that regulation is necessary to achieve a public policy of overriding importance. This general disapproval of

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Minnesota's recent implementation for its state workers shows that fears of large disemployment effects appear unfounded. See Rothschild, *supra* note 226, at 214.

374. See Holzhauer, *supra* note 264, at 931; Clauss, *supra* note 2, at 69 & n.259.

375. See D. KIRP, M. YUDOF & M. FRANKS, *supra* note 13, at 172.

governmental interference with wage rates, along with the ambiguity about the causes of the wage gap, leads many liberals to dismiss comparable worth as unnecessary or too costly given its potential benefits.<sup>376</sup>

### C. *The Feminist Response to Liberal Critiques of Comparable Worth*

The feminist model of equality rejects the public/private distinction and the reverence for individual preferences that result in the liberal model's hesitancy to support comparable worth. Because feminists believe that patriarchal institutions have pervasively colored personal values, they generally reject the neoclassical model of labor markets, which builds upon acceptance and respect for consumer and worker tastes. They subscribe instead to the institutional model, which sees the market as composed of institutions that reflect psychological and political influences.<sup>377</sup> From the feminist perspective women and men alike have been acculturated to devalue work done by women. Therefore, the goal of sex-based employment anti-discrimination law should be to alter existing labor market institutions that maintain this devaluation and undo the existing patriarchal impact on the workplace.

#### 1. The Wage Gap as Evidence of Occupational Wage Discrimination

From the feminist perspective, women's tendency to work in jobs that pay less than male jobs indicates discrimination even if it is due to sex-differentiated personal choices made in the private sphere. Extra-market

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376. Judicial treatment of comparable worth under Title VII mirrors the ambivalence of the liberal model underlying the statute. Courts generally have refused to endorse comparable worth as an independent theory of liability. See *American Nurses Ass'n v. Illinois*, 783 F.2d 716, 723 (7th Cir. 1986); *AFSCME v. Washington*, 770 F.2d 1401, 1407 (1985); *Lemons v. City & County of Denver*, 620 F.2d 228, 229 (10th Cir.), *cert. denied*, 449 U.S. 888 (1980). But some courts have treated an employer's pay policy as suspect where plaintiffs show that the difference between pay for two jobs greatly deviates from the expected wage based on the intrinsic attributes of the jobs. See, e.g., *California State Employees' Ass'n v. California*, 682 F. Supp. 1044, 1046 (N.D. Cal. 1987) (plaintiff established prima facie case by comparing female jobs such as stenographer, nurse and librarian with male jobs such as groundskeeper, photographer, and highway equipment cleaner); *Briggs v. City of Madison*, 536 F. Supp. 435, 445 (W.D. Wis. 1982) (plaintiff established prima facie case by comparing nurses to sanitarians since jobs were "of comparable value to an employer").

377. See, e.g., S. EVANS & B. NELSON, *supra* note 74, at 46-53 (describing both neoclassical and institutional approaches as having some advantages, but questioning the neoclassical approach on several grounds); Hartmann, *Research Needs in Comparable Worth*, in *IRRA PROCEEDINGS* *supra* note 183, at 177; Steinberg, *supra* note 205, at 100.

choices that explain the wage gap merely indicate that the workplace is structured to penalize women for their sex-distinct set of personal choices.<sup>378</sup> That patriarchal society defines these extra-market choices, such as the homemaker and child-rearing roles, as appropriately female only exacerbates the problem for it results in women paying a psychological penalty if they attempt to deviate from these roles.

The feminist perspective also views humans as fundamentally connected rather than as isolated autonomous beings whose preferences can be aggregated into a value-neutral set of prices. Thus, the feminist model rejects the liberal focus on objectively calculable benefits as a measure of social "well-being." Instead, its view of society as competing gender classes implies that the definition of social welfare is itself political. It sees societal institutions as chosen to satisfy historically patriarchal political and social goals rather than as evolving to best satisfy individual freedom or to maximize aggregate utility.

The feminist model's rejection of the public/private distinction, combined with its insistence that social welfare is politically defined, implies that society makes political choices about the worth of job attributes. These choices directly influence pay for particular jobs. From the feminist perspective, whether the wage gap evidences discrimination depends on the attributes society chooses to deem as valuable.<sup>379</sup> "At issue in the comparable worth debate are fundamental questions . . . of social priorities. Do we want a social order in which parking attendants earn more than child care attendants, and state liquor clerks more than school teachers. . . ."<sup>380</sup> The feminist model of sexual equality, of course, also requires gender parity. Accordingly, the attributes society chooses to value should respect the lifestyle and preferences (both personal and public) of women. To the extent the wage gap cannot be explained in terms of chosen values that meet the feminist definition of equality, it evidences wage discrimination.

Many of the liberal perspective's legitimate explanations of the wage gap thus become discriminatory from the feminist outlook. The feminist outlook does not tolerate gender distinctions that patriarchal society condones, but which operate to exclude women from equal representation

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378. See Littleton, *supra* note 47, at 1054.

379. *Accord id.* at 1057-58 (feminist model of equality would "support challenge to the overvaluation of 'male' skills (and corresponding undervaluation of female ones) in the job evaluation systems used by employers, . . . rather than limiting challenges to unequal application.").

380. Rhode, *Gender and Jurisprudence: An Agenda For Research*, 56 U. CIN. L. REV. 521, 528 (1987).

in the workplace. For example, marital status, number of children and type of job (where the classifications distinguish between male and female occupations) are themselves discriminatory causes of gender-pay disparities. Therefore, they should be excluded from the set of "legitimate" factors used to explain the gap. Without these factors to explain the wage gap, data clearly support the correlation between women's lower pay and sex-segregation of jobs.<sup>381</sup> Thus, sex discrimination, as the feminist model defines it, plays a significant role in causing pay inequity.

## 2. Consistency of Comparable Worth Studies

The feminist model's answer to the liberal critique that much of the wage gap does not reflect discrimination also responds to the liberal perspective's demand for objectivity of comparable worth studies. Respect for personal values led the liberal model to demand consistency between comparable worth studies premised on different subjective value judgments such as what factors should be included in job descriptions. The feminist model critiques the liberal's requirement of value-neutral measures of discrimination as a political choice, one which by default legitimizes historically developed preferences that feminists perceive as patriarchal and, therefore, discriminatory. The feminist perspective instead views any measure of discrimination as political and hence value laden. It thus is not necessarily bothered by an outcome dependent on value judgments.

The feminist model still requires that the job evaluation system chosen to compare male and female jobs be self-consistent. This means that conclusions drawn by one set of unbiased individuals applying the system must be replicable by others using the same system. Recent comparable worth studies, however, have demonstrated that a system can be designed to give repeatable results even when applied across a wide range of jobs staffed by workers characteristically viewed as participating in distinct labor markets.<sup>382</sup>

From the feminist perspective, a more vexing problem is how to choose between systems that embody different value choices.<sup>383</sup> One answer is to

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381. See *WOMEN, WORK & WAGES*, *supra* note 188, at 34-35 (1970 Census data expanded occupational classifications (479 occupations) indicated that 35-41% of the wage gap resulted from occupational segregation); *WOMEN'S WORK, MEN'S WORK*, *supra* note 333, at 10-11 (current population survey data using a broad occupational classification (24 occupations) indicated that, in 1970 and 1979 respectively, 22%, and 18% of the wage gap was attributable to occupational segregation).

382. See *supra* note 226-27 and accompanying text.

383. The liberal model's reverence for value neutrality, and its resulting requirement

rely on the feminist recognition that this choice is political and leave the choice to the political process — that is to the legislature.<sup>384</sup> The legislature, however, is itself an institution influenced by patriarchy. Therefore, allowing the legislature to make the value choices is unlikely to eliminate patriarchy's impact. An even greater fear is that legislation promoted as beneficial to women will in fact fortify the system society has designed to maintain male dominance.<sup>385</sup> This fear is supported by historical instances of paternalistic legislatures which imposed restrictions on women's opportunities to work in male occupations.<sup>386</sup>

Nonetheless, regardless of the value choices the legislature actually makes, the simple requirement of evaluation of jobs under a specific system brings to light the criterion used to set pay and requires that those criteria be applied consistently. This alone probably would reduce "pay differentials resulting from traditional stereotypes regarding the value of 'women's work.'" <sup>387</sup> Moreover, comparable worth applies to male and female job incumbents alike and does not restrict any individual worker's job opportunities based on sex. Given these characteristics and recognition that wages reflect an employee's status and significance in the workforce, it is difficult to imagine how a legislature could structure explicit efforts to increase pay for female jobs to limit rather than expand women's influence in the workplace. A more convincing reason, however, to allow legislatures to make the value judgments underlying comparable worth is that it is worse to ignore occupational wage discrimination. There appears to be no less biased institution than the legislature to which we can entrust these decisions.<sup>388</sup>

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that the conclusions of different comparable worth studies be consistent, make this issue irrelevant from the liberal perspective.

384. The legislature need not decide on the details of a comparable worth system. It may instead delegate the decisions detailing the implementation and execution of comparable worth studies to agencies or even to courts. For example, in 1981, the Minnesota state legislature established a task force composed of "members of the State House and Senate, representatives of the Department of Employee Relations, union representatives and members of the public" to study pay practices for state employees. Rothschild, *supra* note 226, at 210. This task force completed the comparable worth study for state employees using the Hay job evaluation system. *Id.* The legislature appropriated funds and left detailed implementation to the collective bargaining process between employee unions and the state. *Id.* at 211.

385. *Cf.* Williams, *supra* note 37, at 822 (arguing more generally that relational (*i.e.*, cultural) feminism's recognition of gender differences threatens the continued oppression of women).

386. *See* D. KIRP, M. YUDOF & M. FRANKS, *supra* note 13, at 36-41; J. POLE, *supra* note 26, at 314.

387. WOMEN, WORK & WAGES, *supra* note 188, at 95.

388. Some commentators have suggested that comparable worth be implemented

### 3. The Benefits of Comparable Worth Revisited

From the feminist outlook, the liberal model's lack of historical context and its respect for individual preferences also prejudices its calculation of costs and benefits. The neoclassical notion of efficiency derives from consumers' willingness and ability to pay. It therefore "is a product of existing distributions of wealth, entitlements and preferences, all of which have been affected by discrimination based on gender."<sup>389</sup> As soon as we entertain altering consumer tastes, we no longer have a well-defined concept of efficiency by which to compare outcomes. It may be that an outcome which is Pareto superior to a second outcome given one set of consumer indifference curves is Pareto inferior as measured in accordance with a second set of such curves. Since the feminist perspective looks at comparable worth as a means of changing individuals' valuation of women's preferences and choices, it expands the horizon under consideration beyond that envisioned by neoclassical microeconomics into a realm where efficiency has little meaning.

Thus, we cannot accept the costs cited by opponents to comparable worth as a meaningful indication of the ultimate burden this doctrine may place on society. Such costs may be offset by productivity gains due to comparable worth's effect on the structure of the workplace.<sup>390</sup> More fundamentally, these costs may be reduced by society members' reevaluation of the importance of what they give up for comparable worth. For example, today's opportunity cost of a man working shorter hours so he can take care of his children while his wife works might be seen tomorrow as a benefit for which the man would gladly pay his lost income.

Rather than focus on measurable dollar benefits, the feminist model's goal of alteration of personal tastes also leads it to focus on comparable worth's ability to change societal norms that devalue the worth of women and their work. Because patriarchy is so universal, and at the same time so well ensconced that it hides its influence on many of the day-to-day choices

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through the activities of labor unions without government intervention. *See, e.g.*, Weiler, *supra* note 1, at 1798-1801. Where possible, union involvement in implementing comparable worth is desirable, since it will provide for employee participation and consensus most likely to result in a workable plan. But unions do not represent most women workers and those that do are frequently sex-segregated. *Id.* at 1799. Implementation by unions will at best be piecemeal, and their impact limited by the lack of moral force inherent in the collective bargaining process. Thus, legislative mandating of comparable worth that allows for union participation seems preferable to relying on voluntary union action.

389. Becker, *supra* note 251, at 937.

390. *See* Bergmann & Gray, *Economic Models As A Means of Calculating Legal Compensation Claims*, in TECHNICAL POSSIBILITIES *supra* note 2, at 170; *see also* text accompanying *infra* note 397.

of mainstream society, its subtle effects cannot easily be eliminated. Moreover, matters of taste do not readily lend themselves to reasoned criticism; argument can address only the implications of maintaining such tastes. Value preferences firmly embedded in society cannot easily be changed without a mechanism to allow individuals to experience the changed tastes.<sup>391</sup>

Consistent with the hypothesis that experiential learning is necessary for alteration of personal preferences, "social psychologists have determined that an effective way of changing a person's attitude is not necessarily to present a persuasive communication, but instead to commit the person to behavior that goes against his or her current beliefs."<sup>392</sup> Comparable worth implements such a program to change individual beliefs about the value of women's work by committing employers to pay female jobs at a rate above that consistent with employers' present beliefs. Since consumers ultimately will have to pay relatively more for services provided predominately by women, comparable worth commits society as a whole to behavior inconsistent with most individuals' unconscious evaluation of the worth of women's work. Thus comparable worth holds the radical potential to alleviate the undervaluation of women that patriarchal societies have instilled from time immemorial.<sup>393</sup>

Comparable worth's radical potential should not be surprising since, in the past, workers have used similar commitments of employers to behave at odds with market values to alter societal values. For example, minimum wage legislation has effectively altered societal conceptions of the worth of even the least valuable day's work. Union negotiation for a "living wage" has acculturated workers and employers alike to the notion that no man should work full-time for less money than he needs to provide an adequate lifestyle for himself and his family. This has led to pay "considerably above minimum wage even for such entry level jobs as laborer or custodian."<sup>394</sup> And, of particular note for attempts to alter social norms of equality, perhaps the "greatest effect [of Title VII] has been to change cultural norms; no longer is explicit discrimination on the basis of sex widely regarded as natural and unobjectionable."<sup>395</sup> It is this radical potential of comparable worth that lies at the heart of the liberal model's ambivalence

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391. Cf. F. BLAU & M. FERBER, *supra* note 188, at 71.

392. Zanna & Sande, *The Effects Of Collective Actions on the Attitudes of Individual Group Members: A Dissonance Analysis*, in 5 SOCIAL INFLUENCE: THE ONTARIO SYMPOSIUM 151 (M. Zanna, J. Olson & C. Herman eds. 1987); *see also* L. FESTINGER, A THEORY OF COGNITIVE DISSONANCE 31 (1957).

393. *See* Steinberg, *supra* note 316, at 24-25.

394. Remick, *supra* note 290, at 114.

395. Becker, *supra* note 251, at 939.

toward the theory. It is this radical potential that makes comparable worth so important from the feminist perspective.

In addition to altering societal norms to comport with the feminist model of equality of representation, comparable worth would directly encourage changes in workplace structures to give women greater influence. Increasing wages for female jobs would encourage more women to make a greater commitment to the workplace. According to human capital theory, this in turn would cause a greater commitment by men to nonmarket (i.e., family) responsibilities.<sup>396</sup> According to institutional labor economics, wages do not merely mirror technology and tastes by responding to supply and demand; they also affect employers' decisions about how to structure the workplace. Rather than setting wages equal to the marginal worth of the job, employers often define job tasks so that the marginal worth of the job equals the largely psychologically determined wage. Under this thesis, increases in pay for female jobs will result in a redefinition of job tasks making the jobs more important to the employer.<sup>397</sup> Thus, comparable worth may change the labor market to encourage greater overall participation by women as well as greater involvement of women in fundamental workplace tasks and decisions.

Finally, the feminist perspective sees comparable worth as an important means of increasing women's self esteem. As previously noted, workers view pay as a measure of their worth to society. Increasing women's pay thus should also increase their feeling of self worth. This alone, however, does not distinguish comparable worth from the liberal perspective's preferred remedy of hiring women into better paying male jobs since that too increases women worker's pay and self esteem. But for many women, the increase in self regard that results from the liberal ideal demands that they forfeit aspects of their personal lives that they have chosen and society encourages as gender appropriate. Thus, for many women the self esteem they derive from successful careers is offset by insecurities about their "failings" as wives and mothers.<sup>398</sup> Comparable worth avoids placing women on the horns of this dilemma.

The psychological impact on workers of reevaluating the worth of jobs also differs greatly from the effect of the Title VII remedy of promoting particular women. This is so because pay is both influenced by and influences one's social position.

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396. See F. BLAU & M. FERBER, *supra* note 188, at 40-45.

397. See Bergman & Gray, *supra* note 390, at 170.

398. See Powers, *Sex Segregation and the Ambivalent Directions of Sex Discrimination Law*, 1979 WIS. L. REV. 55, 96; cf. Littleton, *supra* note 47, at 1051 (describing tension between success and roles of child-rearing).



Generally . . . rank ordering of occupations by status will be much the same as that by pay. The similarity in this respect of societies that differ widely in respect of culture and of political and economic organization, indicates a general agreement about which qualities are worth paying more for and which attract the attribution of higher status. . . . [P]ay is regarded as the natural complement to or outcome of status. This is supported by a feedback: the members of an occupation that attains relatively high pay by the working of the market will be enabled by that pay to maintain the kind of lifestyle to which high status is attributed. *The association also tends to maintain itself as it becomes hallowed by custom.*<sup>399</sup>

The feminist model recognizes this psychological relationship between status and pay. It sees comparable worth as an important mechanism for altering the hallowed customs that relegate women to second class citizenry.

#### CONCLUSION

Society today has yet to reach any consensus about the ideology underlying the phrase "sexual equality." Existing employment discrimination law mirrors this societal discord. The Equal Pay Act implements a conservative model of equality that recognizes the significance of sex differences in the workplace. But the Act adheres to a limited but overriding principle that workers performing the same work should receive equal pay irrespective of their needs for income or differing social roles outside the workplace. Title VII adopts the liberal principle that ultimately labor market participants should make decisions in a sex-neutral manner. The call for comparable worth, however, stems in large part from a dissatisfaction with these two traditional views of sexual equality. It reflects the feminist demand that employers accommodate women's choices and preferences in structuring the workplace.

Unfortunately, the debate about whether and how to implement comparable worth has not explicitly invoked the feminist model of equality. As a result, much of the debate appears to focus on empirical questions, such as whether the wage gap results from employer discrimination or from many women voluntarily choosing to emphasize satisfaction of interpersonal relationships at the expense of devotion to the competitive, impersonal workplace. From the conservative or liberal perspectives, this focus almost guarantees the conclusion that comparable worth is not justified. The conservative model presupposes that women make different

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399. H. PHELPS BROWN, *supra* note 294, at 142 (emphasis added).

choices that affect their productivity; the liberal model distrusts government interference with wages and prices unless the existence of illegitimate sex-conscious pay practices are clearly demonstrated. From the feminist perspective, however, equality requires that the workplace accord women's outlook equal respect. Women must participate in and influence the structure of the labor market on an equal footing with men. Feminist ideology supports revaluation of women's work in order to encourage women's participation in the workplace without penalizing them for their choice of lifestyles. Comparable worth provides the method for that revaluation and thus its adoption is a crucial step on the road to sexual equality both in the workplace and beyond.

