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# GENDER INEQUALITY AND WAGE DIFFERENTIALS BETWEEN THE SEXES: IS IT INEVITABLE OR IS THERE AN ANSWER?

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## I. INTRODUCTION

Labor compensation for many individuals in the United States is still determined by gender, despite over thirty years of civil rights legislation.<sup>1</sup> Specifically, women in the United States labor under an employment system in which they earn comparatively less than men.<sup>2</sup> In the early 1960s, women earned about 59¢ for every dollar earned by men.<sup>3</sup> In 1992, women earned about 71¢ for every dollar earned by men.<sup>4</sup> College-educated women in 1993 earned only roughly \$2000 more than high-school-educated white men.<sup>5</sup> More puzzling, however, is that as women mature, and presumably gain work experience, the

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1. *The Fair Pay Act of 1994: Joint Hearing on H.R. 4803 Before the Subcomm. on Select Education and Civil Rights on Educ. and Labor and Subcomm. on Compensation and Employee Benefits on Post Office and Civil Service*, 103d Cong., 2d Sess. 52, 53 (1994) [hereinafter *Fair Pay Hearings*] (statement of Michele Leber, Treasurer, Nat'l Comm. on Pay Equity).

2. *Id.*

3. *Id.*

4. *Id.* During their lifetimes, women lost approximately \$420,000 because of unequal pay. *Id.*

5. *Id.* In addition, college-educated women receive 29% less than their male counterparts. *Id.*

wage differential between men and women grows larger.<sup>6</sup> Young women between the ages of fifteen and twenty-four earn 93% of the wages earned by men similarly aged, while older women between the ages of fifty-five and fifty-nine earn only 62% of the wages earned by men their age.<sup>7</sup>

Congress' first attempt to address the pay disparity between men and women was the Equal Pay Act of 1963 (EPA).<sup>8</sup> The EPA's purpose is to prohibit pay disparity between men and women who perform "equal work."<sup>9</sup> The EPA prevents an employer from paying a woman, solely because she is a woman, less than a man when they perform essentially similar jobs.<sup>10</sup> Simultaneously, however, the EPA's equal work requirement limits the ability to challenge discriminatory wage disparity

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6. *See id.* When a woman is compensated for her work experience, she receives an increase of 30 cents per hour; a man with experience receives an increase of \$1.20 per hour. *Id.*

7. *Id.*

8. Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (codified as amended at 29 U.S.C. § 206 (1994) (amending the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-19 (1994))). The Equal Pay Act provides:

No employer having employees subject to any provisions of this section shall discriminate . . . between employees on the basis of sex by paying wages to employees . . . at a rate less than the rate at which he pays wages to employees of the opposite sex . . . for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.

29 U.S.C. § 206(d)(1) (1994). An employer can pay employees of the opposite sex different wages if the differential is based on a factor other than sex, such as a seniority or merit system, or differences in the quantity or quality of production. *Id.* If an employer violates § 206, it may not reduce an employee's wage rate in order to remedy the wage disparity. *Id.*

9. 29 U.S.C. § 206(d)(1). Equal work requires "equal skill, effort and responsibility . . . performed under similar working conditions." 29 C.F.R. § 1620.13(a). If two employees are performing equal work, the employer must pay them the same rate. § 1620.13(c). When determining whether two employees are performing equal work, an employer should consider the time each employee spends performing various duties, and how the skills, efforts, and responsibilities of the positions differ. § 1620.14.

10. *See, e.g.*, 29 C.F.R. § 1620.13(b)(1) (distinguishing between "male jobs" and "female jobs" is discriminatory); § 1620.13(b)(2) (noting a prima facie violation if an employee replaces another employee of the opposite sex and receives less pay); § 1620.13(b)(3) (applying EPA when the employer removes one sex from a department even though the job could be performed by both sexes); § 1620.13(b)(4) (establishing a violation if one employee succeeds another employee of the opposite sex but receives a higher wage).

between men and women performing work which is not exactly similar.<sup>11</sup> Hence, the EPA is both a sword and a shield.

Title VII of the Civil Rights Act of 1964<sup>12</sup> is another piece of legislation used to combat pay disparity. Congress proposed Title VII to combat racial discrimination in the workplace,<sup>13</sup> but, prior to passing the act, it added language to ban "sex" discrimination.<sup>14</sup> In fact, members of Congress added the language in a failed attempt to defeat the statute.<sup>15</sup> Despite its inauspicious beginning, Title VII's broad scope is effective in combatting many discriminatory employment practices.<sup>16</sup> Unlike an EPA claim, a Title VII wage-discrimination claim does not have an equal work requirement.<sup>17</sup> A plaintiff can bring a Title VII

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11. See generally Robert H. Cohen, Note, *Pay Equity: A Child of the 80s Grows Up*, 63 *FORDHAM L. REV.* 1461, 1467-69 (1995) (discussing the limits of the EPA and recovery).

12. Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, § 703, 78 Stat. 249, 255 (codified as amended at 42 U.S.C. § 2000e-2(a) (1994)). Title VII provides:

It shall be an unlawful employment practice for an employer—

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

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

*Id.*

13. See *County of Washington v. Gunther*, 452 U.S. 161, 171-72 (1981) (stating that the draft provision of Title VII extended only to "discrimination based on race, color, religion, or national origin").

14. *Id.* at 172. The Court noted that "[j]ust two days before voting on Title VII, the House of Representatives amended the bill to proscribe sex discrimination, but did not discuss the implications of the overlapping jurisdiction of Title VII, as amended, and the Equal Pay Act." *Id.*

15. *County of Washington v. Gunther*, 452 U.S. 161, 190 n.4 (1981) (Rehnquist, J., dissenting).

16. *Id.* at 170. The Court stated, "Title VII's prohibition of discriminatory employment practices was intended to be broadly inclusive, proscribing 'not only overt discrimination but also practices that are fair in form, but discriminatory in operation.'" *Id.* (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971)).

17. *County of Washington v. Gunther*, 452 U.S. 161, 168 (1981). The Court accepted the respondents' theory that "claims for sex-based wage discrimination can be brought under Title VII even though no member of the opposite sex holds an equal but higher paying job, provided that the challenged wage rate is not based on seniority, merit,

wage discrimination claim by alleging his or her employer pays a member of the opposite sex differently solely because of that person's sex.<sup>18</sup> Regardless of the theory the plaintiff is pursuing under Title VII,<sup>19</sup> however, the plaintiff challenging an employment practice always bears the burden of proving intentional discrimination.<sup>20</sup>

Both the EPA and Title VII have been ineffective in eliminating wage disparity between men and women because neither statute allows a plaintiff to state a claim based on a "comparable worth" theory.<sup>21</sup> Comparable worth is a method of ranking jobs based on objective factors and paying comparable salaries to comparably rated jobs.<sup>22</sup> Thus, if the

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quantity or quality of production, or 'any other factor other than sex.'" *Id. See, e.g., American Nurses' Ass'n v. Illinois*, 783 F.2d 716, 721 (7th Cir. 1986) (permitting a Title VII cause of action despite the failure to show equal work).

18. *Lloyd v. Phillips Bros., Inc.*, 25 F.3d 518, 524-25 (7th Cir. 1994).

19. Title VII allows plaintiffs to pursue their claims under either the disparate treatment or disparate impact theories. See *infra* parts II.A. and II.B. for a complete discussion on these theories. In a disparate-treatment case, "[t]he ultimate burden of persuading the trier of fact that the defendant *intentionally* discriminated against the plaintiff remains at all times with the plaintiff." *St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742, 2747 (1993) (emphasis added) (quoting *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981)).

In a disparate-impact case, "the employer carries the burden of producing evidence of a business justification for his employment practice. The burden of persuasion, however, remains with the disparate impact plaintiff." *Wards Cove Packing Co., Inc. v. Antonio*, 490 U.S. 642, 659 (1989).

20. *Hicks*, 113 S. Ct. at 2747-48; *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *Lloyd v. Phillips Bros., Inc.*, 25 F.3d 518, 524-25 (7th Cir. 1994) ("There must be an *intent* to discriminate . . . an actual desire to *pay* women less than men because they are women."). In *McDonnell Douglas*, the Supreme Court set forth the allocation of burdens for proving an intentional discrimination claim. The plaintiff must first establish a *prima facie* case by showing (1) he is a member of a protected class; (2) he was qualified and applied for a job; (3) the employer rejected him; and (4) the employer kept the job open. *McDonnell Douglas*, 411 U.S. at 802. After the plaintiff establishes a *prima facie* case, the burden shifts to the employer to articulate a "legitimate, nondiscriminatory reason" for not hiring the plaintiff. *Id.* If the employer meets this burden, the plaintiff has the ultimate burden of proving the employer's stated reason was a pretext for discrimination. *Id.* at 804. See *infra* notes 103, 115-16 and accompanying text.

21. See *Cohen*, *supra* note 11, at 1469, 1474-75 (proposing that comparable worth claims would fail under the EPA and Title VII). See, e.g., *EEOC v. Madison Comm. Unit Sch. Dist. No. 12*, 818 F.2d 577, 587 (7th Cir. 1987) (noting that Title VII does not recognize comparable worth); *American Nurses Ass'n v. Illinois*, 783 F.2d 716, 721 (7th Cir. 1986) (disapproving a comparable worth cause of action in Title VII claim).

22. *American Nurses*, 783 F.2d at 719 (comparable worth raises "the ratio of wages in traditionally women's jobs to wages in traditionally men's jobs"). In *Madison Comm.*

skills, working conditions, and intellect required for a job traditionally held by women are the same as those required for a job traditionally held by men, then employees in each position should receive the same salary.<sup>23</sup> Courts have refused, however, to engage in comparable worth analyses when deciding wage disparity cases under the EPA or Title VII.<sup>24</sup>

The absence of a comparable worth statute contributes to the

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*Unit Sch. Dist. No. 12*, the Seventh Circuit considered a wage disparity claim under Title VII. 818 F.2d at 586-89. The court defined comparable worth as "paying higher wages in jobs held mostly by men than in jobs held mostly by women." *Id.* at 587. The court viewed this practice of wage disparity discriminatory unless the jobs required different skills, duties, and working conditions. *Id.* See *infra* notes 137-46 and accompanying text.

23. See *Fair Pay Hearings*, *supra* note 1, at 71 (testimony of Judith L. Lichtman, President, Women's Legal Defense Fund) (advocating the Fair Pay Act of 1994 because it prohibits discriminatory pay disparities between dissimilar jobs that have equivalent requirements and value to the employer). See also *Madison Comm. Unit Sch. Dist. No. 12*, 818 F.2d at 587.

24. Courts refuse to entertain comparable worth claims under the Equal Pay Act primarily because of the explicit "equal pay for equal work" requirement within the statute. "[A comparable worth] argument is better directed at legislative bodies. This court has no authority to create a social-utility hierarchy of positions. . . . The Equal Pay Act only prohibits employers from paying employees of one sex less than employees of another sex for 'equal work.'" *Beavers v. American Cast Iron Pipe Co.*, 975 F.2d 792, 801 (11th Cir. 1992). See also *Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974) ("[T]he [plaintiff] must show that an employer pays different wages to employees of opposite sexes 'for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.'" (emphasis added); *American Fed'n of State, County, and Mun. Employees, AFL-CIO (AFSCME) v. Washington*, 770 F.2d 1401, 1404 (9th Cir. 1985) [hereinafter *AFSCME*] ("It is evident from the legislative history of the Equal Pay Act that Congress, after explicit consideration, rejected proposals that would have prohibited lower wages for comparable work, as contrasted with equal work.").

Courts similarly refuse to entertain comparable worth claims under Title VII's disparate treatment and disparate impact theories, noting that Congress did not explicitly provide for such a scheme. In addressing the disparate impact claim in *AFSCME*, the Ninth Circuit stated, "the decision to base compensation on the competitive market, rather than on a theory of comparable worth, involves the assessment of a number of complex factors not easily ascertainable, an assessment too multifaceted to be appropriate for disparate impact analysis." *AFSCME*, 770 F.2d at 1406 (citing *Spaulding v. Univ. of Washington*, 740 F.2d 686, 708 (9th Cir. 1984)). In regards to the disparate treatment claim, the court stated, "[t]hrough the comparability of wage rates in dissimilar jobs may be relevant to a determination of discriminatory animus, job evaluation studies and comparable worth statistics alone are insufficient to establish the requisite inference of discriminatory motive critical to the disparate treatment theory." *Id.* at 1407 (citations omitted).

continued pay disparity between men and women.<sup>25</sup> Under a comparable worth system, plaintiffs could attack the major reason for wage disparity: sex segregation<sup>26</sup> of occupations.<sup>27</sup> As noted above, Title VII and the EPA cannot, because of their limitations,<sup>28</sup> attack sex segregation of occupations. In 1994, a congressional committee debated, but failed to pass, a comparable worth statute titled the Fair Pay Act of 1994 (FPA).<sup>29</sup> Despite its death in committee, the debate on the FPA

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25. See *Fair Pay Hearings*, *supra* note 1, at 90 (letter from American Federation of State, County, and Municipal Employees, AFL-CIO) (“[A]dditional legislation is necessary to achieve pay equity.”).

26. Although hard to distinguish, there appears to be a difference between occupational segregation and sex segregation. See *Fair Pay Hearings*, *supra* note 1 at 170-71 (testimony of Heidi L. Hartmann, Director of the Institute for Women’s Policy Research). Ms. Hartmann defines “occupational segregation” as paying females “less than comparable male workers because they work in different occupations.” *Id.* at 170. Ms. Hartmann testified that some occupations, such as secretaries, bank tellers, nurses, are predominately held by women, while other occupations, such as engineers and dentists, are held by men. *Id.* at 170-71. See Sandra J. Libeson, Comment, *Reviving the Comparable Worth Debate in the United States: A Look Toward the European Community*, 16 COMP. LAB. L.J. 358, 362 (1995) (defining occupational segregation as discrimination in the opportunities available in the labor market).

Sex segregation, according to Ms. Hartmann, is “attributed to differences in education and work experience between men and women or to personal choice.” However, sex discrimination also plays a factor in sex segregation. See also Ruth G. Blumrosen, *Wage Discrimination, Job Segregation, and Title VII of the Civil Rights Act of 1964*, 12 U. MICH. J.L. REF. 397, 402-08 (1979) (discussing and identifying historic job segregation and undervaluation of occupations performed by women).

Sex segregation, according to Blumrosen, occurs when certain occupations are filled predominantly by one sex. Historically, this has meant women were relegated to jobs such as elementary school teachers and nurses. These jobs are valued less than jobs which are predominantly filled by men. Thus, men and women earn different wages because the market or other forces value the jobs performed by women as less valuable than those performed by men. Blumrosen, *supra*, at 402-08.

27. *Fair Pay Hearings*, *supra* note 1, at 52, 58 (statement of Michele Leber) (arguing that wage disparity exists because of occupational segregation); Marion Crain, *Confronting the Structural Character of Working Women’s Economic Subordination: Collective Action vs. Individual Rights Strategies*, 3 KAN. J.L. & PUB. POL’Y 26 (1994) (noting Title VII cannot protect women from economic disadvantages such as occupational sex segregation); Robert Nelson, *Law, Markets, and Gender Inequality in Pay*, 10 BERKELEY WOMEN’S L.J. 61, 68 (1995) (suggesting that women should examine the organizational practices that put women in an inferior position); Cohen, *supra* note 11, at 1463 (quoting Marion Crain); Libeson, *supra* note 26, at 362 (recognizing that occupational segregation is causing the wage gap between men and women).

28. See *supra* note 24.

29. H.R. 4803, 103d Cong., 2d Sess. (1994). Representative Eleanor Holmes Norton of the District of Columbia introduced the Act, noting that 30 years after the passage of

illustrates the ongoing interest in comparable worth. This section first examines the operation of the EPA and Title VII and then analyzes the relative merits of a comparable worth system, proposing that such a system could decrease wage disparity between the sexes.

## II. THE EQUAL PAY ACT AND TITLE VII

### A. *The Equal Pay Act of 1963*

The Equal Pay Act of 1963 (EPA)<sup>30</sup> provides that an employer may not pay individuals performing "equal work" differently if the sole reason for the pay difference is gender.<sup>31</sup> Either men or women can use the EPA to attack wage disparity.<sup>32</sup>

Several inherent limitations which restrict the EPA's utility in combatting wage disparity. First, courts have interpreted the term "equal work" to mean, not literal equivalence, but "substantially equal."<sup>33</sup> This reading is an attempt to prevent employers from merely using different job titles<sup>34</sup> to avoid liability under the EPA.<sup>35</sup> Thus, the EPA imposes

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the Equal Pay Act and Title VII, wage discrimination based on sex, race, or national origin still existed. *Id.* at 4.

The FPA was not recommended by the committee for debate on the House floor. Nevertheless, on April 7, 1995, Rep. Norton brought the FPA to the House floor during the time allotted for extension of remarks and retitled her bill the "Fair Pay Act of 1995." 141 CONG. REC. E852 (daily ed. Apr. 7, 1995).

30. 29 U.S.C. § 206(d) (1994).

31. *Id.*

32. The EPA addresses wage disparity based only on gender, not race or national origin. *Fair Pay Hearings*, *supra* note 1, at 3 (statement of Rep. Norton). See *supra* note 8 for text of the EPA. The wage disparity experienced by African-Americans and Hispanics is just as alarming as gender-based wage disparity. During 1992, African-American men were paid 72% of what white men received. *Id.* African-American women received only 64% of what white men received. *Id.* During the same year, Hispanic men earned 65% and Hispanic women earned 55% as much as white men. *Id.*

33. *Miranda v. B & B Cash Grocery Store, Inc.*, 975 F.2d 1518, 1533 (11th Cir. 1992) (requiring an EPA plaintiff to "demonstrate only that the skill, effort and responsibility required in the performance of the jobs are 'substantially equal'"); *Fallon v. Illinois*, 882 F.2d 1206, 1208 (7th Cir. 1989) ("The work need not be identical; it is sufficient if the duties are 'substantially equal.'"). See also 29 C.F.R. § 1620.14 (1995) (recognizing that "equal" and "identical" are not the same).

34. *Dey v. Colt Constr. & Dev. Co.*, 28 F.3d 1446, 1461 (7th Cir. 1994) ("In assessing whether two jobs require equal skill, effort, and responsibility, we look to the duties actually performed by each employee, and not to his or her job description or title.") (citations omitted); *Miranda*, 975 F.2d at 1533 ("Although job titles are entitled to some

liability on the employer if a man and a woman are performing essentially similar tasks but one is paid less solely on the basis of gender.<sup>36</sup>

A second limitation on the operation of the EPA is the definition of "establishment" under the statute.<sup>37</sup> Courts interpret establishment to mean the particular locale where the injured plaintiff works.<sup>38</sup> Thus, the plaintiff is restricted to a comparison of his or her wages to those of other employees of the opposite sex performing equal work at the plaintiff's place of work.<sup>39</sup> The use of this restrictive definition of establishment can be explained as an attempt to remain consistent with the definition of establishment under the Fair Labor Standards Act,<sup>40</sup> a

weight in this evaluation, 'the controlling factor under the Equal Pay Act is job content'—the actual duties that the respective employees are called upon to perform.") (citations omitted); *Laffey v. Northwest Airlines, Inc.*, 567 F.2d 429 (D.C. Cir. 1976) (comparing the job content of company stewardesses and purser).

35. *Laffey*, 567 F.2d at 447-53. See also 29 U.S.C. § 206(d).

36. 29 U.S.C. § 206(d).

37. The EPA provides: "No employer having employees subject to any provisions of this section shall discriminate, within any *establishment* in which such employees are employed, . . ." 29 U.S.C. § 206(d) (emphasis added). See *supra* note 8 for the text of the EPA.

At issue is whether a large employer with offices in several locations must ensure that men and women performing similar jobs in those different locales are paid the same, or whether that employer may compare men's and women's wages within one locale.

38. See *Mulhall v. Advance Sec.*, 19 F.3d 586 (11th Cir. 1994) (defining establishment as "a distinct physical place of business rather than . . . an entire business or 'enterprise' which may include several separate places of business") (quoting 29 C.F.R. § 1620.9(a) (1995)). The regulations state that each separate place of business is an establishment. 29 C.F.R. § 1620.9(a). Two portions of an enterprise that are physically located in a single place may be more than one establishment. 29 C.F.R. § 1620.9(b). In determining whether the two portions are more than one establishment, one must consider whether the two portions engage in separate operations, maintain separate records and employees, and are physically segregated. *Id.* If a central administrative unit hires the employees for two separate portions, sets the wages, and assigns the employees to a particular location, the two portions may be one establishment. *Id.* See *Brennan v. Goose Creek Consol. Indep. Sch. Dist.*, 519 F.2d 53 (5th Cir. 1975) (finding the school district is one establishment).

39. *Foster v. Arcata Assocs., Inc.*, 772 F.2d 1453, 1464 (9th Cir. 1985), *overruled by* *Bishena v. Marriott Corp.*, 959 F.2d 239 (9th Cir. 1992). In holding that an employer's two field offices were not the same establishment, the Ninth Circuit stated, "[w]hen considering the single establishment issue, federal courts have consistently rejected the extension of the statutory establishment requirement to separate offices of an employer that are geographically and operationally distinct." *Id.*

40. 29 U.S.C. § 201. Because the EPA is an amendment to FLSA, establishment is defined in reference to the recognized definition of establishment under FLSA. See 29

recognition that a broad definition would impose a disproportionate burden on large employers,<sup>41</sup> or a recognition that different geographic locales may have different market forces driving the wage disparity.

The EPA contains four textual exceptions which allow an employer to justify a wage disparity between men and women performing equal work.<sup>42</sup> If the wage disparity exists because of: (1) a seniority system, (2) a merit system, (3) a system in which quantity or quality of production determines wages, or (4) any factor other than sex,<sup>43</sup> then the employer may avoid liability.<sup>44</sup> These justifications are the sole

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C.F.R. § 1620.9.

41. For example, a large employer with multiple offices in different locales could be required to pay comparable salaries among the employees at the various offices, whereas a small employer would only have to pay comparable salaries within the single establishment. The burden occurs when an employee in New York and an employee in South Dakota are paid the same salaries despite the cost of living.

42. 29 U.S.C. § 206(d)(i)-(iv). The Supreme Court explained that Congress created these exceptions to the EPA so as "to incorporate into the new federal Act the well-defined and well-accepted principles of job evaluation so as to ensure that wage differentials based upon bona fide job evaluation plans would be outside the purview of the Act." *Coming Glass Works v. Brennan*, 417 U.S. 188, 201 (1974).

43. 29 U.S.C. § 206(d)(i)-(iv). While three of the listed exceptions to the EPA (seniority system, merit system, and system based on quantity or quality of production) are fairly straightforward, the fourth exception—a factor other than sex—has provoked a considerable amount of litigation. The circuits are split on the proper framework with which to analyze a "factor-other-than-sex" defense. Jack A. Friedman, *Real Gender-Neutrality for the Factor-Other-than-Sex Defense*, 11 N.Y.L. SCH. J. HUM. RTS. 241 (1994) (arguing that the gender-neutral test is the proper standard for the factor-other-than-sex defense).

The circuits have applied three different standards to the factor-other-than-sex defense. *Id.* The Fourth, Seventh, and Eighth Circuits permit the defense if the challenged wage classification system is gender-neutral and equally applied. *Id.* See, e.g., *Covington v. Southern Illinois Univ.*, 816 F.2d 317 (7th Cir. 1987).

The Second and Eleventh Circuits require an employer to show that the challenged wage classification system is related to the performance of the employee's job duties if the employer plans to assert the factor-other-than-sex defense. *Id.* See, e.g., *Tom K. v. Seiler Corp.*, 66 F.3d 1295, 1313 (2d Cir. 1995); *Glenn v. General Motors Corp.*, 841 F.2d 1567, 1571 (11th Cir. 1988).

The Third, Sixth, and Ninth Circuits require the employer to show a legitimate business reason for the challenged wage classification system to qualify for the factor-other-than-sex defense. *Id.* See, e.g., *EEOC v. J.C. Penney Co.*, 843 F.2d 249, 253 (6th Cir. 1988); *Maxwell v. City of Tucson*, 803 F.2d 444, 447 (9th Cir. 1986); *Hodgson v. Robert Hall Clothes, Inc.*, 473 F.2d 589, 594 (3d Cir. 1973).

44. 29 U.S.C. § 206(d)(1).

means by which an employer can avoid liability under the EPA.<sup>45</sup>

The burdens of proof required under the EPA are straightforward.<sup>46</sup> The plaintiff has the initial burden to establish a prima facie case by showing that an employer pays a person of the opposite sex within the employer's establishment a higher wage for substantially equal work.<sup>47</sup> After the plaintiff meets the equal work and establishment requirements, the burden shifts to the employer to justify the wage disparity.<sup>48</sup> The employer must prove, by a preponderance of the evidence, that it was justified under one of the four recognized exceptions.<sup>49</sup> If the employer fails to justify the wage disparity, the EPA imposes strict liability, and the plaintiff does not have to prove discriminatory intent.<sup>50</sup>

Despite the plaintiff-friendly burdens of proof, the EPA fails to deal effectively with the wage disparity between men and women.<sup>51</sup> The EPA's failure stems from several factors that limit the statute's reach: First, the equal work standard prevents the EPA from reaching problems

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

46. *Id.* at 195.

47. *Id.* See, e.g., *Strag v. Board of Trustees*, 55 F.3d 943, 948 (4th Cir. 1995) (outlining EPA prima facie case); *Meeks v. Computer Assocs. Int'l*, 15 F.3d 1013, 1018 (11th Cir. 1994) (quoting *Corning Glass* prima facie case); *Tidwell v. Fort Howard Corp.*, 989 F.2d 406, 409 (10th Cir. 1993) (identifying necessary elements of *Corning Glass* prima facie case); *EEOC v. Romeo Community Sch.*, 976 F.2d 985, 987 (6th Cir. 1992) (quoting *Corning Glass* prima facie case); *Miranda v. B & B Cash Grocery Store, Inc.*, 975 F.2d 1518, 1526 (11th Cir. 1992) (explaining that plaintiff's burden is higher in EPA prima facie case than under Title VII); *McKee v. Bi-State Dev. Agency*, 801 F.2d 1014, 1019 (8th Cir. 1986) (same); *Plemer v. Parsons-Gilbane*, 713 F.2d 1127, 1136 (5th Cir. 1983) (same).

48. *Corning Glass*, 417 U.S. at 196.

49. *Strag*, 55 F.3d at 948; *Meeks*, 15 F.3d at 1018. See *supra* text accompanying note 42 for a list of the four exceptions. Employers most frequently invoke the factor-other-than-sex defense. Factors other than sex which courts have recognized as legitimate "include shift differentials, red circle rates, temporary reassignments, and training programs." Judge Debra H. Goldstein, *Sex-Based Wage Discrimination: Recovery Under the Equal Pay Act, Title VII, or Both*, 56 ALA. LAW. 294, 296 (Sept. 1995) (examining the EPA and Title VII and their relationship within the Eleventh Circuit).

50. *Miranda*, 975 F.2d at 1533; Goldstein, *supra* note 49, at 295-97. If the employer violates the EPA, the employer must comply with the Act by raising the wages of the lower paid sex. 29 C.F.R. § 1620.25 (1995). The employer may not remove or transfer the higher-paid employee, nor may it transfer other employees to perform the lower-paid jobs. *Id.*

51. See Cohen, *supra* note 11, at 1469; *Fair Pay Hearings*, *supra* note 1, at 90 (Letter from American Federation of State, County, and Municipal Employees, AFL-CIO).

such as sex segregation in the workplace.<sup>52</sup> Thus, female employees who work in segregated occupations performing similar work as male employees in other occupations have no recourse under the EPA for wage disparity.<sup>53</sup> Second, the restrictive definition of establishment prevents employees at a specific locale from addressing wage disparities for equal work in a large company with offices in several locales.<sup>54</sup> Therefore, employees cannot compare themselves with persons of the opposite sex who perform an equal job in another office, and thus cannot take advantage of the strict liability afforded by the EPA.<sup>55</sup>

Third, the recognized exceptions to the prohibition on wage disparity operate particularly to the disadvantage of women.<sup>56</sup> For example, an employer may justify a wage disparity under the EPA by showing that the disparity is based on a seniority system.<sup>57</sup> The seniority system perpetuates male domination, however, by basing compensation on the historic bias toward men in the United States employment system.<sup>58</sup> Furthermore, a seniority system penalizes individuals who take time away from their careers to raise children.<sup>59</sup>

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52. See *supra* note 26 for an explanation of sex segregation.

53. See *Fair Pay hearings*, *supra* note 1, at 35 (statement of Mr. Sturdivant, National President of the American Federation of Government Employees). Women in low-paying, female-dominated jobs cannot compare their salaries with the higher paying jobs held predominantly by men. *Id.* “[W]omen as well as men tend to perceive work associated with women to be of less value than that done by men.” Blumrosen, *supra* note 26, at 416.

54. See *supra* notes 37-41 and accompanying text.

55. *Id.*

56. See *supra* text accompanying notes 42-45 for discussion of the fair justifications for wage disparity.

57. See *supra* text accompanying note 43.

58. See generally Blumrosen, *supra* note 26, at 402-08 (discussing the historical classification of occupations by sex dating back to the beginning of the industrial revolution). Blumrosen states that “[e]ven when men and women do roughly the same kind of work they rarely do so at the same time nor do the jobs have the same titles. Thus, women are ‘cooks’ while men are ‘chefs’; women are ‘hostesses’ while men are ‘maitre d’s’; women are ‘secretaries’ while men are ‘administrative assistants.’” *Id.* at 407.

59. *Id.* Indeed, Blumrosen postulates that the United States employment system is structured so as to ensure that women take off time to raise a family. See *id.* at 420. Women work in low-paying occupations, thus a woman is more likely than a man to sacrifice her job to provide care for a couple’s family and children because her job provides “secondary income.” *Id.* at 421. Blumrosen also argues that society has an underlying assumption that women should perform work closely linked to a homemaking role: e.g., as teachers, nurses, and secretaries. *Id.* at 406.

Because the great majority of such individuals are women, the seniority system justification in the EPA serves to perpetuate the wage disparity between men and women.<sup>60</sup>

The Equal Pay Act of 1963 establishes a system whereby an employee receiving unequal wages for equal work performed by a member of the opposite sex can challenge the wage disparity. However, its greatest power is also its greatest limitation, for only where the particular facts fit the equal work definition can a plaintiff claim the protection of the EPA's provisions.

### B. Title VII of the Civil Rights Act of 1964

Congress originally intended Title VII of the Civil Rights Act of 1964<sup>61</sup> to prohibit racial discrimination in employment.<sup>62</sup> Although there is little legislative history to indicate how plaintiffs may use Title VII to attack the wage disparity between men and women,<sup>63</sup> courts have permitted Title VII wage-disparity claims.<sup>64</sup> Under Title VII claims, plaintiffs may attack wage disparity under either the disparate

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60. In *American Nurses' Ass'n v. Illinois*, 783 F.2d 716, 719 (7th Cir. 1986), Judge Posner commented that a major cause of pay differentials is the fact that women interrupted their careers to raise children. He stated:

[V]irtually the entire difference in the average hourly wage of men and women, including that due to the fact that men and women tend to be concentrated in different types of job, [sic] can be explained by the fact that most women take considerable time out of the labor force in order to take care of their children. As a result they tend to invest less in their "human capital" (earning capacity); and since part of any wage is a return on human capital, they tend therefore to be found in jobs that pay less.

*Id.*

61. 42 U.S.C. § 2000-e2. See *supra* note 12 for the language of the EPA.

62. *County of Washington v. Gunther*, 452 U.S. 161, 172 (1981). Congress also intended the Act to prohibit discrimination based on religion, national origin and color. *Id.* Prior to passing the Act, however, the House of Representatives revised the bill to include sex. *Id.* See *supra* note 14.

63. *Gunther*, 452 U.S. at 172. Because the House of Representatives amended the bill two days prior to voting on Title VII, neither chamber of Congress was able to analyze Title VII and its relation to the EPA. *Id.*

64. See, e.g., *Gunther*, 452 U.S. at 161; *Ryan v. Equity Bank for Savings*, No. 95-6096, 1996 U.S. App. LEXIS 7551, at \*10 (10th Cir. Apr. 11, 1996); *Walk v. Rubbermaid Inc.*, No. 94-4306, 1996 U.S. App. LEXIS 5494, at \*7 (6th Cir. Feb. 8, 1996); *Tomka v. Seiler Corp.*, 66 F.3d 1295, 1310-13 (2d Cir. 1995); *Meeks v. Computer Assoc., Int'l*, 15 F.3d 1013, 1016-21 (11th Cir. 1994).

treatment or disparate impact theories.<sup>65</sup> The plaintiff's prima facie case depends upon the theory used.

### 1. DISPARATE TREATMENT

Disparate treatment occurs when an employer treats an employee differently because of the employee's sex.<sup>66</sup> A disparate treatment claim requires the plaintiff to allege that an employment practice treats one sex differently than the other solely because of gender.<sup>67</sup> For example, in the wage context, a plaintiff may allege that an employer's practice of paying male truck drivers more than female office workers is based solely on gender. Title VII has a potentially broader reach than the EPA because a Title VII wage-disparity claim does not require the plaintiff to show that the opposite sex is performing equal work as required by the EPA.<sup>68</sup> However, Title VII has not been effective in

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65. See e.g., *St. Mary's Honor Center v. Hicks*, 113 S. Ct. 2742 (1993) (recognizing a Title VII wage disparity claim under disparate treatment rationale); *Wards Cove Packing Co. Inc., v. Atonio*, 490 U.S. 642 (1989) (recognizing a Title VII wage disparity claim under disparate impact rationale). See *infra* notes 63-120 and accompanying text.

66. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977). "Undoubtedly disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII." *Id.* (citing 110 CONG. REC. 13088 (1964) (remarks of Sen. Humphrey)).

67. Requiring women to contribute more money into a pension than men "does not pass the simple test of whether the evidence shows 'treatment of a person in a manner which but for that person's sex would be different.'" *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978) (quoting *Developments in the Law, Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 HARV. L. REV. 1109, 1174 (1971)).

68. *Gunther*, 452 U.S. at 168 (accepting respondents' argument that, "claims for sex-based wage discrimination can be brought under Title VII even though no member of the opposite sex holds an *equal* but higher paying job . . ." (emphasis added)). *Gunther* gave early hope that, although a plaintiff could not pursue a comparable worth theory under the EPA, a comparable worth theory might be pursued under Title VII due to the absence of the equal-pay-for-equal-work requirement. In *Gunther*, the petitioner argued that a wage discrimination claim under Title VII could only be brought if the plaintiff satisfied the equal work standard set forth in the EPA. *Id.* at 178. The Court rejected this argument. Otherwise, an employer could hire a "woman for a unique position" and "then admit [ ] that her salary would have been higher had she been male," leaving the woman with no legal redress. *Id.* at 178-79.

In addressing Title VII claims, the courts apply a "relaxed standard of similarity between male and female-occupied jobs." *Miranda v. B & B Cash Grocery Store, Inc.*, 975 F.2d 1518, 1526 (11th Cir. 1992). The employee still has the ultimate burden of proving *intentional* sex discrimination. *Id.*

eliminating sex-based wage disparities because the plaintiff's burden of proof is much more difficult to satisfy.<sup>69</sup>

The Supreme Court established a model for a Title VII disparate-treatment claim in *McDonnell Douglas Corp. v. Green*.<sup>70</sup> This model is a "three-step procedure of shifting evidentiary obligations."<sup>71</sup> First, the plaintiff must establish a prima facie case<sup>72</sup> by showing the employer's practice results in disparate treatment.<sup>73</sup> Once the plaintiff makes a prima facie showing, the burden of *production* shifts to the defendant.<sup>74</sup> The defendant merely has to "articulate some legitimate nondiscriminatory reason" for engaging in the challenged practice.<sup>75</sup>

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69. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) (requiring Title VII plaintiffs to prove the employer *intended* to discriminate). See *supra* note 20.

70. 411 U.S. 792 (1973).

71. MARK A. PLAYER, *EMPLOYMENT DISCRIMINATION LAW* § 5.40, at 329 (Practitioner's ed., 1988).

72. *McDonnell Douglas* was a case of racial discrimination rather than sex discrimination. The plaintiff's prima facie case for racial discrimination is equally applicable to sex discrimination cases:

(i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after the rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications.

*McDonnell Douglas*, 411 U.S. at 802. The plaintiff must establish the prima facie case by a preponderance of the evidence. *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 252-53 (1981). If the plaintiff establishes a prima facie case, there is an inference the employer engaged in discriminatory conduct. PLAYER, *supra* note 71, at 329. However, if the employee fails to establish a prima facie case, the court will grant the defendant a judgment in its favor. *Id.* See, e.g., *Reynolds v. Tele-Communications, Inc.*, No. 95-1077, 1996 U.S. App. LEXIS 2802, at \*3 (10th Cir. Feb. 22, 1996); *Pruitt v. Howard County Sheriff's Dep't*, No. 95-1193, 1996 U.S. App. LEXIS 1266, at \*4-\*6, \*12 (4th Cir. Sept. 29, 1995).

73. *McDonnell Douglas*, 411 U.S. at 802.

74. *Id.*

75. *Id.* at 802. The employer's burden is "exceedingly light," because the employer does not have to convince the jury or the judge of its motive. Peter R. Corbin & John E. Duvall, *Employment Discrimination*, 44 MERCER L. REV. 1165, 1167 (1993) (quoting *Perryman v. Johnson Prod. Co.*, 698 F.2d 1138, 1142 (11th Cir. 1983)).

An employer may not, however, offer an explanation for the pay disparity based on stereotypical notions of the abilities of men and women. *Price Waterhouse & Hopkins*, 490 U.S. 228, 251 (1989) (quoting *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)). For example, an employer could not justify a higher salary for a male based on the assumption that a male is the primary breadwinner in most families. See *Price Waterhouse*, 490 U.S. at 251. The Supreme Court stated, "employ-

The burden then shifts back to the plaintiff to show that the challenged practice is a result of intentional discrimination by the employer.<sup>76</sup> The plaintiff may use direct or circumstantial evidence to show that the discrimination is intentional.<sup>77</sup>

The Supreme Court in *County of Washington v. Gunther*<sup>78</sup> further explained the requirements of a Title VII wage disparity claim while examining the relationship of Title VII and the EPA.<sup>79</sup> Specifically, the Court examined the Bennett Amendment to Title VII<sup>80</sup> and the affirmative defenses outlined in the EPA.<sup>81</sup> The sole issue in *Gunther* was whether an employee could pursue a wage disparity claim under Title VII if the employee could not establish the equal work requirement necessary for an EPA claim.<sup>82</sup> The Bennett Amendment prohibits a Title VII wage disparity claim if the employer's conduct is authorized by one of the four listed exceptions of the EPA.<sup>83</sup> The Court held that a

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ment decisions cannot be predicated on mere 'stereotyped' impressions about the characteristics of males and females. Myths and purely habitual assumptions about a woman's inability to perform certain kinds of work are no longer acceptable reasons for refusing to employ qualified individuals, or for paying them less." *Manhart*, 435 U.S. at 707. The Court further stated, "[e]ven a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply." *Id.* at 708.

76. *McDonnell Douglas*, 411 U.S. at 804. "It is important to note, however, that although the *McDonnell Douglas* presumption shifts the burden of *production* to the defendant, '[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff.'" *St. Mary's Honor Ctr. v. Hicks*, 113 S. Ct. 2742, 2747 (1993) (quoting *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981)).

77. *Burdine*, 450 U.S. at 256. The employee may either directly prove that a discriminatory reason motivated the employer's conduct, or the employee can indirectly prove that the employer's reason is unworthy of credence. *Id.*

78. 452 U.S. 161 (1981).

79. *Id.*

80. 42 U.S.C. § 2000e-2(h) provides:

It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of title 29.

*Id.*

81. *Gunther*, 452 U.S. at 167-68. See *supra* notes 42-45 and accompanying text for the four affirmative defenses under the EPA.

82. *Gunther*, 452 U.S. at 166 n.8.

83. 42 U.S.C. § 2000e-2(h). See *supra* notes 42-45 for exceptions to the EPA.

Title VII wage disparity claim does not require equal work.<sup>84</sup> The Bennett Amendment incorporates *only* the EPA exceptions into a Title VII wage disparity claim.<sup>85</sup> The Supreme Court's interpretation makes Title VII potentially more far-reaching than the EPA in challenging sex-based wage disparities.<sup>86</sup>

The Supreme Court did not specifically address what the standards of proof are in a wage-disparity disparate-treatment claim.<sup>87</sup> As a result, various circuits apply different standards of proof for wage-disparity claims. In *Plemer v. Parsons-Gilbane*,<sup>88</sup> the Fifth Circuit analyzed *Gunther* and concluded that an employee alleging a Title VII wage-disparity claim must provide direct evidence supporting her claim that the employer intentionally paid her a lower wage because of her sex.<sup>89</sup> Similarly, the Seventh Circuit, in *EEOC v. Sears Roebuck &*

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84. *Gunther*, 452 U.S. at 168-71. The petitioners argued that the Bennett Amendment restricted Title VII sex-based wage discrimination claims to only those claims valid under the Equal Pay Act. *Id.* at 168. In essence, the petitioners were arguing that claims not arising from equal work were prohibited. *Id.* The court rejected this argument, stating, "[t]he Bennett Amendment was offered as a 'technical amendment' designed to resolve any potential conflicts between Title VII and the Equal Pay Act." *Id.* at 170.

85. *Gunther*, 452 U.S. at 171. Senator Bennett proposed the Amendment in order to "assure[ ] that the provisions of the Equal Pay Act 'shall not be nullified' in the event of conflict with Title VII . . . . [T]he Amendment as incorporating the [Equal Pay] Act's affirmative defenses, . . . than as engrafting all the restrictive features of the Equal Pay Act onto Title VII." *Id.* at 174-75. See Goldstein, *supra* note 49, at 298 ("Title VII was intended to 'supplement, rather than supplant, existing laws and institutions relating to employment discrimination. . . .") (quoting *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 46-49 n.9 (1974)).

86. Title VII is potentially more far reaching because it is not hampered by the EPA's requirements regarding equal work or establishments. Hence, Title VII allows a plaintiff greater flexibility in drawing comparisons with others.

87. The court stated, "we do not decide in this case how sex-based wage discrimination litigation under Title VII should be structured . . . ." *Gunther*, 452 U.S. at 171.

The respondents argued that the County depressed their wages intentionally because they are women. The respondents offered direct evidence that the County intentionally set their wage scale at a level below the worth the job warranted. *Id.* at 166. The County, however, did not set the male guards wage scale below the worth. *Id.* Although the Court concluded that the respondents did not perform work equal to that of the male guards, it nevertheless found that the evidence proved that the County intentionally discriminated against the female guards because of their gender, in violation of Title VII. *Id.* at 181.

88. 713 F.2d 1127 (5th Cir. 1983).

89. *Plemer*, relying on *Gunther*, alleged her employer intentionally discriminated against her because she received less money than what her job was worth. *Id.* at 1132. The *Plemer* court reviewed *Gunther* and concluded that it requires plaintiffs to offer direct evidence of intentional discrimination. *Id.* *Plemer* failed to meet this standard. The

*Co.*,<sup>90</sup> held that the equal work standard of the EPA applied to Title VII wage-disparity claims if the employee failed to provide direct evidence of intentional discrimination.<sup>91</sup>

The Eighth Circuit in *McKee v. Bi-State Dev. Agency*<sup>92</sup> ruled that the proper framework for a Title VII wage-disparity claim is the framework established by the EPA.<sup>93</sup> Therefore, a plaintiff must establish that the employer pays different wages for equal work.<sup>94</sup> After the plaintiff establishes a prima facie case, the burden shifts to the defendant to rebut the plaintiff's allegations by using one of the EPA's four exceptions.<sup>95</sup> The defendant is liable under Title VII if it cannot satisfy this burden.<sup>96</sup>

In contrast, the Eleventh Circuit in *Miranda v. B&B Cash Grocery Store Inc.*,<sup>97</sup> held that Title VII wage-disparity claims should apply the traditional framework of shifting burdens established in *McDonnell Douglas*.<sup>98</sup> The Eleventh Circuit maintains the ultimate burden of persuasion on the plaintiff, requiring the plaintiff to show that the wage-disparity resulted from intentional discrimination.<sup>99</sup>

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*Plemer* court concluded that Plemer failed to offer direct evidence that her employer paid her less because she was female. *Id.* at 1133.

90. 839 F.2d 302 (7th Cir. 1988).

91. *Id.* The court reviewed the *Gunther* opinion and determined the Supreme Court limited its holding to direct evidence. *Id.* (citing *Gunther*, 452 U.S. 180-81).

92. 801 F.2d 1014 (8th Cir. 1986). In *McKee*, the employee argued that the district court's denial of her Title VII claim was inconsistent with the jury's finding that the employer violated the EPA. *Id.* at 1019. The jury determined that McKee proved sex discrimination under the EPA, which means Bi-State failed to establish an affirmative defense. *Id.* Because Bi-State could not prove an affirmative defense, the district court should not have denied McKee's Title VII claim. *Id.*

93. *Id.* at 1019. See also *Foster v. Arcata Assoc., Inc.*, 772 F.2d 1453, 1465 (9th Cir. 1985).

94. *Id.*

95. *McKee*, 801 F.2d at 1019.

96. *Id.*

97. 975 F.2d 1518 (11th Cir. 1992).

98. *Id.* at 1531. See *supra* note 20 and accompanying text (discussing the *McDonnell Douglas* analysis). See also *Bishena v. Marriott Corp.*, 959 F.2d 239 (9th Cir. 1992) (following *Miranda*). The *Miranda* court rejected the Fifth Circuit's direct evidence standard because a clever employer could still discriminate against women as long as the employer did not directly admit to the discriminatory conduct. *Id.* at 1531.

99. *Id.* at 1529. In *Miranda*, the employee proved that the employer's articulated reasons were a pretext for discrimination. *Id.*

Although the Supreme Court has not specifically addressed the standards of proof in a Title VII wage-disparity claim, in *St. Mary's Honor Center v. Hicks*,<sup>100</sup> the Court reaffirmed the *McDonnell Douglas* burden-of-proof framework in a race-based claim of disparate treatment.<sup>101</sup> In *Hicks*, the employee, following *McDonnell Douglas*, established a prima facie Title VII claim, but the employer articulated two nondiscriminatory reasons for its actions.<sup>102</sup> The district court concluded the employee did not carry the "ultimate burden of proving that *his race* was the determining factor. . . ."<sup>103</sup> On appeal, the Eighth Circuit held the employee was entitled to a judgment once he proved the employer's proffered reasons were pretextual.<sup>104</sup> The Supreme Court, however, rejected the Eighth Circuit's analysis and held that, once the defendant rebuts the plaintiff's prima facie case, the *McDonnell Douglas* framework is irrelevant.<sup>105</sup> The ultimate decision for the trier of fact is whether the employee proved "that the defendant intentionally discriminated against [the employee] because of his race."<sup>106</sup> The Court emphasized that the plaintiff must allege and prove *intentional discrimination*; thus, by implication, it affirmed the Eleventh Circuit's approach to wage disparity claims.<sup>107</sup>

## 2. DISPARATE IMPACT

A claim based on a disparate-impact theory requires the plaintiff to allege and prove that a facially neutral employment practice has a disparate impact on a protected Title VII class.<sup>108</sup> The Supreme Court

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100. 113 S. Ct. 2742 (1993).

101. *Id.* at 2746-47.

102. *Id.* at 2747.

103. *Id.* at 2748.

104. *Id.*

105. *Id.* at 2749.

106. *Id.* (quoting *Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 253 (1981)).

107. See *Miranda v. B & B Cash Grocery Inc.*, 975 F.2d 1518 (11th Cir. 1992).

108. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 335 n.15(1977) (defining disparate impact as a facially neutral employment practice that effects one group more harshly than another group). A protected class under Title VII is a group classified according to race, sex, national origin, color, or religion. See 42 U.S.C. § 2000e-2 (1988). Once a plaintiff can establish that he was discriminated against because of his membership in such a group he has satisfied the protected class requirement. *Id.*

recognized the disparate-impact theory in *Griggs v. Duke Power Co.*<sup>109</sup> In *Griggs*, the employer required new applicants to have a high school diploma or pass a general intelligence exam.<sup>110</sup> African-American employees filed suit alleging the requirement negatively affected a protected class.<sup>111</sup> The Supreme Court held that such requirements violate Title VII, unless the requirements are demonstrably related to the performance of the job.<sup>112</sup> Because the challenged practice in *Griggs* was facially neutral, the Court did not require the plaintiff to show an intent to discriminate.<sup>113</sup> Instead, the plaintiff's prima facie case must identify a particular employment practice that, although seemingly innocuous, has a disproportionate impact on a protected class.<sup>114</sup>

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109. 401 U.S. 424 (1971).

110. *Id.* at 425-26.

111. *Id.*

112. *Id.* at 436.

113. *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642, 645-46 (1989) ("Under this basis for liability, which is known as the 'disparate-impact' theory and which is involved in this case, a facially neutral employment practice may be deemed violative of Title VII without evidence of the employer's subjective intent to discriminate that is required in a 'disparate-treatment' case."). *Griggs*, 401 U.S. at 430 ("[G]ood intent or absence of discriminatory intent does not redeem employment procedures . . . that operate as 'built-in headwinds' for minority groups . . .").

*Wards Cove* operates canneries during the summer months. The company had two job types: cannery jobs (unskilled positions) and non-cannery jobs (skilled positions). The non-cannery jobs, which were filled by whites, paid more than the cannery jobs, which were filled by nonwhites. *Id.* at 647. The nonwhite cannery workers filed a Title VII claim, alleging *Wards Cove* hiring practices caused the racial segregation, thus denying the nonwhites a non-cannery job because of race. *Id.* at 647-48.

114. The Court stated, "[a]s a general matter, a plaintiff must demonstrate that it is the application of a specific or particular employment practice that has created the disparate impact under attack." *Wards Cove*, 490 U.S. at 657. The nonwhite employees alleged that *Wards Cove* engaged in "several 'objective' employment practices (e.g., nepotism, separate hiring channels, rehire preferences), as well as the use of 'subjective decision making'" that had a disparate impact on them. *Id.*

The Ninth Circuit considered whether a disparate impact theory was applicable in a suit where an employer decided to rely on market-determined wages rather than implement wage equalization based on a comparable worth study. *AFSCME*, 770 F.2d 1401, 1405-06 (9th Cir. 1985). *AFSCME* argued that using the market rates to determine wages had an adverse impact on women because women, as a class, have historically received lower wages. *Id.* The Ninth Circuit rejected *AFSCME*'s argument and stated:

Disparate impact analysis is confined to cases that challenge a specific, clearly delineated employment practice applied at a single point in the job selection process. . . . The instant case does not involve an employment practice that yields to disparate impact analysis. . . . [T]he decision to base compensation on the competitive market,

Although a plaintiff in a disparate-treatment suit can establish a prima facie case with circumstantial evidence, a disparate-impact plaintiff must use direct evidence to establish a prima facie case.<sup>115</sup> A disparate-impact plaintiff may rely on statistics to prove his or her allegations.<sup>116</sup> In *Wards Cove Packing Co. v. Atonio*,<sup>117</sup> the Supreme Court raised the evidentiary standard for a disparate-impact plaintiff. In addition to comparing the "racial composition of the qualified persons in the labor market" with those hired,<sup>118</sup> the plaintiff must show that the employer's conduct created the disparate impact.<sup>119</sup>

If the plaintiff establishes a prima facie case, the burden then shifts<sup>120</sup> to the defendant to justify the challenged practice by showing that it legitimately serves the employer's interests.<sup>121</sup> Even if the defendant meets this burden, the plaintiff may still prevail by showing the availability of an alternate practice that would meet the employer's interests without resulting in a disproportionate impact on the protected

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rather than on a theory of comparable worth, involves the assessment of a number of complex factors not easily ascertainable, an assessment too multifaceted to be appropriate for disparate impact analysis.

*AFSCME*, 770 F.2d at 1404-05 (citations omitted).

115. See Robert Turner, *Thirty Years of Title VII's Regulatory Regime: Rights, Theories, and Realities*, 46 ALA. L. REV. 375, 448 (1995).

116. See, e.g., *Wards Cove Packing Co. v. Atonio*, 490 U.S. 642 (1989); *Hazelwood Sch. Dist. v. United States*, 433 U.S. 299 (1977); *International Brotherhood of Teamsters v. United States*, 431 U.S. 324 (1977). The use of statistics, however, turns a simple disparate impact claim into a "highly technical issue on which expert testimony . . ." is usually required. Turner, *supra* note 115, at 453 (quoting George Rutherford, *Abolition in a Different Voice*, 78 VA. L. REV. 1463, 1476 (1992)).

117. 490 U.S. 642 (1989).

118. *Id.* at 650. The Court of Appeals erred when it compared the racial composition of one job with that of another job. *Id.* at 651. Otherwise, the Court said an employer would have to adopt a quota to ensure the racial composition was equal among its work force. *Id.* at 652.

119. *Id.* at 657. An employee could not look "at the bottom line" to prove a racial imbalance among the employer's work force. *Id.*

120. Like a "disparate treatment" case, the Supreme Court defined the defendant's burden as a burden of production. *Wards Cove*, 490 U.S. at 659. Defendants need to produce some legitimate business justification for the challenged practice in order to meet their burden. The burden of persuasion, however, remains with the plaintiff. *Id.*

121. *Id.*

class in question.<sup>122</sup> If the employer could have implemented such a practice and did not, the plaintiff may prevail on the disparate-impact claim.<sup>123</sup>

### C. *The Ineffectiveness of Title VII*

There are two reasons why Title VII has not been effective in ending wage disparities between men and women. First, claims under Title VII are difficult to prove.<sup>124</sup> The burden of persuasion in a disparate treatment claim rests at all times on the plaintiff.<sup>125</sup> This is a heightened and difficult burden because the plaintiff must prove intentional discrimination.<sup>126</sup> Similarly, employers easily justify practices challenged under disparate-impact claims. A disparate-impact claim is not very difficult for an employer to justify because the challenged practice is facially neutral.<sup>127</sup>

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122. *Id.* at 660-61. The employee's alternative suggestions must be as effective to meet the employers' objectives as the challenged procedure. *Id.*

123. *Id.* It is important to note that Congress codified the approach for disparate impact claims under Title VII in the employment context in the 1991 Civil Rights Act. Goldstein, *supra* note 49, at 298. However, the 1991 Civil Rights Act provides that the employer's burden in such a case is one of production *and* persuasion. *Id.* The Act provides:

An unlawful employment practice based on disparate impact is established under this subchapter only if—

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity.

42 U.S.C. § 2000e-2(k)(1)(A)(i) (1994).

124. See *Fair Pay Hearings*, *supra* note 1, at 13 (statement of Robert M. Tobias, National President of the National Treasury Employees Union). Mr. Tobias noted the courts have placed an "overwhelming burden" on Title VII plaintiffs because it is difficult to present evidence that an employer intentionally designed a pay system to disadvantage a protected class. *Id.*

125. *St. Mary's Honor Ctr. v. Hicks*, 113 S. Ct. 2742, 2747 (1993) (quoting *Texas Dep't of Community Affairs*, 450 U.S. 248, 253 (1981)).

126. *Id.*

127. See *New York Transit Auth. v. Beazer*, 440 U.S. 568, 587 (1979) (suggesting a "job related" justification). Despite *Beazer*, lower courts still use the "business necessity" standard. *PLAYER*, *supra* note 71, at 368. In order to satisfy the business necessity, the employer must show a compelling business purpose for the practice, the practice must carry on this purpose effectively, and there must not be an available alternative practice

Second, Title VII has been ineffective in ending wage disparity because comparable worth is not a valid claim.<sup>128</sup> Courts have steadfastly refused to permit comparable worth claims to prevail under Title VII.<sup>129</sup> Even if a court were to recognize the comparable worth theory, a Title VII plaintiff would still have to prove that a member of the opposite sex holds a comparatively equal job,<sup>130</sup> and that the employer's failure to pay equally for these comparatively equal jobs was intentional.<sup>131</sup>

### III. THE DEBATE OVER COMPARABLE WORTH

Comparable worth is not a new concept.<sup>132</sup> For as long as Congress has considered equal pay legislation, it has debated comparable worth.<sup>133</sup> During World War II, the National War Relations Board (NWRB) passed regulations requiring employers to provide equal pay for jobs of comparable worth.<sup>134</sup> If pay inequities existed between jobs of comparable worth, the employer was required to correct the disparity by paying equal wages.<sup>135</sup> Yet, after the end of World War II, congressio-

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that would accomplish the business purpose. *Williams v. Colorado Springs Sch. Dist.* No. 11, 641 F.2d 835 (10th Cir. 1981).

128. *Lloyd v. Phillips Bros.*, 25 F.3d 518, 525 (7th Cir. 1994) (citing *EEOC v. Madison Community Unit Sch. Dist.* No. 12, 818 F.2d 577, 587 (7th Cir. 1987)). See also *Cohen*, *supra* note 11, at 1475-76.

129. See, e.g., *Lloyd*, 25 F.3d at 525 ("[C]omparable worth is not a theory of liability under Title VII.").

130. Plaintiffs' burden to demonstrate that their jobs are "comparatively equal" to another, higher paid job, does not mean that the tasks performed in each are "substantially equal" to those of a coworker of the opposite sex. Rather, the jobs are judged to be comparatively equal based on an evaluation of the jobs' attributes, regardless of task similarity. See *infra* notes 137-46 and accompanying text.

131. *Cohen*, *supra* note 11, at 1475.

132. *County of Washington v. Gunther*, 452 U.S. 161, 185 n.1 (1981) (Rehnquist, J., dissenting).

133. *Id.*

134. *Id.* at 185 n.1. The regulations required employers to conduct evaluations of jobs within a plant. *Id.*

135. *Id.* However, the NWRB did not attempt to challenge the wage disparity that existed in jobs which had traditionally been performed by women. Instead, the NWRB only addressed wage disparity where women were performing jobs traditionally performed by men. See generally *Blumrosen*, *supra* note 26, at 423-24 (discussing the NWRB's actions concerning comparable worth during World War II).

nal debates over equal pay<sup>136</sup> failed to result in any legislation until the Equal Pay Act of 1963.<sup>137</sup> The legislative history and the terms of the EPA reveal that Congress specifically rejected comparable worth in favor of an equal-pay-for-equal-work standard.<sup>138</sup>

A comparable worth system analyzes jobs by assessing a set of objective factors, and then ranking the jobs on a point system according to their score on each of the objective factors.<sup>139</sup> For example, a typical comparable worth analysis assigns point values for a particular job within a particular firm by analyzing the job's (1) knowledge and skill requirements,<sup>140</sup> (2) mental demands,<sup>141</sup> (3) accountability,<sup>142</sup> and (4) working conditions.<sup>143</sup> Each job earns points based on its particular attributes.<sup>144</sup> The job is then ranked against other jobs in

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136. *Gunther*, 452 U.S. at 185 n.1.

137. 29 U.S.C. § 206(d). See *supra* note 8 for the text of EPA.

138. See generally *Corning Glass Works v. Brennan*, 417 U.S. 188, 198, 195-202 (1974) (discussing the legislative history and debates before passage of the Equal Pay Act).

139. MARK ALDRICH & ROBERT BUCHELE, *THE ECONOMICS OF COMPARABLE WORTH* 51 (1986). Typically, experts rate every job against certain factors and they rank "each job on a scale for each of the factors" and they add these points for a total score. *Id.* at 51-53.

140. The knowledge and skill requirement calls for an assessment of any special "job knowledge" the employee has acquired through education or training. See ALDRICH & BUCHELE, *supra* note 139, at 53. It also may include interpersonal skills necessary to perform a particular job. *Id.* The more knowledge and skill required, the higher the score. See *id.*

141. The mental demands factor requires an assessment of the cognitive requirements to perform a particular job. See *id.* This includes the amount of independent judgment the employee has to exercise and the extent the employee can engage in decisionmaking and problem solving. *Id.* Thus, a job requiring constant problem solving would score higher than a job requiring standardized routine activities. *Id.*

142. The accountability factor assesses the degree to which the particular job has oversight or responsibility for overseeing other persons. See *id.*

143. Working conditions include any factors that could distinguish one occupation from another. Such factors include exposure to hazards, whether work is performed standing or sitting, and the exertion required to perform the job. See *id.*

144. ALDRICH & BUCHELE, *supra* note 139, at 51-53. The Aldrich and Buchele model gives a point range for each listed factor in a comparable worth analysis. For instance, the possible score for knowledge and skills ranges from 60 to 280 points. For mental demands, the range is 8 to 140 points. For accountability, the range is 11 to 160 points, and for working conditions, the range is 0 to 20 points. *Id.* at 51-53. Each job is scored within these ranges and compared to other jobs to determine which jobs deserve comparatively equal pay. *Id.* For example, a nurse may receive the following scores: 280 for knowledge; 122 for mental demands; 160 for accountability and a 9 for working

order of highest to lowest score.<sup>145</sup> Jobs earning higher point scores warrant higher salaries, while jobs earning lower point scores warrant lower salaries, and jobs earning similar scores warrant similar salaries,<sup>146</sup> even if job titles or descriptions are vastly different.<sup>147</sup>

Women continue to earn less than men because women tend to be segregated into lower paying jobs.<sup>148</sup> Under the current employment system, an employer pays wages based on a combination of market forces and individual skill and knowledge.<sup>149</sup> Unfortunately, men and women tend to occupy segregated positions within the labor force, with jobs dominated by men earning higher wages than jobs dominated by women.<sup>150</sup> Women tend to fill the occupations the market determines

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conditions, which totals 571. A laundry clerk, however, may receive a 70 for knowledge; 10 for mental demands; 11 for accountability and 17 for working conditions, which totals 108. *Id.* at 53.

145. *Id.*

146. *Id.*

147. *Id.* If an office clerk's score is equal to a truck driver's, although the jobs are vastly different, the particular attributes of the jobs dictate equal pay for the two positions. See ALDRICH & BUCHELE, *supra* note 139, at 51-53.

148. See *supra* notes 25-28 and accompanying text for an explanation of sex segregation among occupations.

149. Under neoclassical economic theory, wage rates are the result of individualized determinations of each worker's skills and abilities, and reflect community prejudices about the relative values of these skills. See Blumrosen, *supra* note 26, at 447. According to this economic theory, wage discrimination in a free market economy is impossible because wage rates reflect the laws of supply and demand. *Id.* at 446. Thus, a discriminating employer would have to overpay some employees, raising the discriminating employers' labor costs above those of the nondiscriminating employer, making the discriminating employer less competitive. Thomas H. McCarthy, Jr., Note, "Market Value" as a Factor "Other Than Sex" in Sex-Based Wage Discrimination Claims, 1985 U. ILL. L. REV. 1027, 1052-53.

150. Women tend to be segregated into the lower-paying jobs in the market. The market does not view "women's work" to be as valuable as jobs traditionally performed by men. *Id.* at 416-20. Accord Jennifer M. Quinn, *Visibility and Value: The Role of Job Evaluation in Assuring Equal Pay for Women*, 25 LAW & POL'Y INT'L BUS. 1403, 1411 (1994) ("In contrast to the institutionalized recognition of the demands of predominantly male jobs, many skills associated with the types of jobs held by women, such as nursing, teaching, and the like, seem to go unrecognized precisely because they mirror traditional duties within the home.").

The Supreme Court stated in *Manhart* that employment decisions based upon "stereotyped" impressions about the characteristics of males and females were improper. *City of Los Angeles, Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 (1978). Nevertheless, even though an employer cannot base an employment decision on a sexual stereotype, these stereotypes still operate in the marketplace to drive women into

are the least valuable, thus causing them to earn less than men.<sup>151</sup>

The EPA and Title VII are not effective in addressing the problem of sex segregation among occupations. Under the EPA, claims arise only when the plaintiff can identify a person of the opposite sex who is performing essentially the same job for a higher wage.<sup>152</sup> Thus, a female office worker can only compare her salary with a male office worker, and not with, for example, a male electrician.<sup>153</sup> Under Title VII, an employer can assert a defense that the disparity in the wages of a female office worker and a male electrician is market-driven.<sup>154</sup> If such a defense is asserted, plaintiffs are helpless under Title VII because courts have held that reliance upon the market to determine wages is

occupations linked to a homemaking role, such as teaching children, nursing the sick or preparing food. Unfortunately, society in general and employers specifically continue to think of certain occupations as "women's work." Blumrosen, *supra* note 26, at 406, 408.

151. Gender enters into wage rate calculation because "women's work" is simply judged less valuable by the community. Blumrosen, *supra* note 26, at 447. The market undervalues women's work because of the historically lower social status of women in society. Quinn, *supra* note 150, at 1407. Thus, women's wages are depressed because they are segregated into jobs which society views as inherently less valuable, either because they are associated with women's traditional duties in the home or because they reflect the historically lower status of women in society. *Id.*

Blumrosen proposes that "the establishment of present or past job segregation . . . should create an inference of wage discrimination sufficient to constitute a prima facie case" under Title VII. Blumrosen, *supra* note 26, at 459. *Contra* Bruce A. Nelson et al., *Wage Discrimination and the "Comparable Worth" Theory in Perspective*, 13 U. MICH. J.L. REF. 233 (1980) (arguing that comparable worth claims should not be allowed under Title VII because the market is an adequate judge of a person's worth).

Comparable worth remains a controversial remedy for wage disparities between men and women. Economists criticize comparable worth as an undue influence on the free market. A recent article noted:

Many economists believe that lower wages in female-dominated jobs are not cause for concern because they are based on actual differences between female and male workers; they argue that women may be simply less productive than men or may prefer traditionally female-dominated jobs, thereby crowding them and driving down wages. Economists generally believe that market forces work well to eradicate those wage differences between people or occupations that are not related to productivity.

Heidi I. Hartmann & Stephanie Aaronson, *Pay Equity and Women's Wage Increases: Success in the States, A Model for the Nation*, 1 DUKE J. GENDER L. & POL'Y 69, 73-74 (1994). See also *American Nurses*, 783 F.2d at 719-20.

152. See *supra* note 47 for plaintiff's prima facie case under the EPA.

153. See *supra* notes 30-36 and accompanying text for a discussion of equal work.

154. *But see* McCarthy, *supra* note 149 (arguing that courts should reject use of market value as a factor-other-than-sex defense under Title VII and the EPA).

insufficient evidence of intentional discrimination.<sup>155</sup>

A comparable worth statute, however, could address the sex segregation among occupations and would be effective in equalizing women's and men's wages.<sup>156</sup> By definition, a comparable worth system ignores present market forces<sup>157</sup> and compares jobs based on objective factors, such as working conditions and the skill and knowledge required to perform a particular job.<sup>158</sup> Therefore, women in lower paying jobs could force their wages up into an equilibrium with other jobs traditionally dominated by men.<sup>159</sup> A comparable worth system would have a two-pronged effect on women's wages. First, women's

155. See, e.g., *International Union v. Michigan*, 886 F.2d 766, 769 (6th Cir. 1989) ("Mere failure to rectify traditional wage disparities that exist in the marketplace between predominantly male and predominantly female jobs is not actionable.") (citing *Spaulding v. University of Washington*, 740 F.2d 686, 706-07 (9th Cir.), cert. denied, 469 U.S. 1036 (1984)). As one court explained:

The inference of discriminatory motive which AFSCME seeks to draw from the State's participation in the market system fails, as the State did not create the market disparity and has not been shown to have been motivated by impermissible sex-based considerations in setting salaries. . . .

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We find nothing in the language of Title VII or its legislative history to indicate Congress intended to abrogate fundamental economic principles such as the laws of supply and demand or to prevent employers from competing in the labor market. *AFSCME*, 770 F.2d 1401, 1406-07 (9th Cir. 1985).

156. See Cohen, *supra* note 11, at 1480 (suggesting comparable worth as a solution to wage disparity).

157. One of the important features of a comparable worth system is a rejection of the reliance on market forces currently used to establish wage rates for individual occupations. See Blumrosen, *supra* note 26, at 428, 441-42 (discussing community wage rate). Under the current system, wages are determined by assessing the skills and abilities of the individual who will fill the job, thus, gender discrimination can enter into the calculation of the market wage. *Id.* at 442. By contrast, under a comparable worth system, each job is itself evaluated by measuring the attributes of the job. *Id.* at 429-34. This process eliminates the possibility that gender considerations enter into the calculation of the proper wage rate. *Id.*

158. See *supra* notes 140-43 and accompanying text for the factors to consider under a comparable worth system.

159. But see *American Nurses' Ass'n v. Illinois*, 783 F.2d 716 (7th Cir. 1986). Justice Posner argues that comparable worth will upset market equilibrium, undermining the goals of a comparable worth system. *Id.* at 719. Specifically, he notes that if wages increase for those jobs that are traditionally held by women, women may not pursue those jobs traditionally held by males. *Id.* In addition, men will start to pursue traditionally women's jobs. *Id.* at 719-20. Eventually, there will not be enough jobs for women seeking traditionally women's jobs. *Id.*

wages would rise to the higher-paying level of jobs dominated by men, thereby helping to eliminate the wage disparity between men and women.<sup>160</sup> Second, the wages of traditionally female-dominated jobs would rise and subsequently attract males into those positions.<sup>161</sup>

#### IV. THE FAIR PAY ACT OF 1994

As others have tried since the end of World War II,<sup>162</sup> Representative Eleanor Holmes Norton proposed the Fair Pay Act of 1994 (FPA).<sup>163</sup> Like the EPA, the FPA would have amended the Fair Labor Standards Act of 1938, instituting a comparable worth system based on skill, effort, responsibility, and working conditions.<sup>164</sup> The FPA defined "equivalent jobs" to mean dissimilar jobs that are equivalent based on the requirements—skill, duties, effort and working conditions.<sup>165</sup> Unfortunately, like every other proposal for a comparable worth system, Congress failed to pass the FPA.<sup>166</sup>

#### V. HOW SHOULD A COMPARABLE WORTH SYSTEM BE IMPLEMENTED?

Thus far, courts have consistently refused to recognize comparable worth systems, citing existing federal legislation addressing pay

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160. This assumes, of course, that a comparable worth scheme would contain a rule like that in the EPA which provides that instead of lowering the higher salary, the lower salary must be raised. 29 C.F.R. § 1620.25 (1995). This remedy may be short-lived, however, because, historically, when women enter an occupation traditionally dominated by men, the wage rate for that occupation drops. Marion Crain, *Between Feminism and Unionism: Working Class Women, Sex Equality, and Labor Speech*, 82 GEO. L.J. 1903, 1922-23 (1994).

161. Logically, by increasing the wages of traditionally female dominated occupations, presumably, men would be more willing to fill those jobs. *American Nurses*, 783 F.2d at 719-20. Economists argue, however, that such a change would disrupt the labor market by causing a rush to fill higher paying jobs, leaving other occupations unoccupied, and more workers unemployed because of the overcrowding in the higher paying occupations. Hartmann & Aaronson, *supra* note 151, at 73-74.

162. See generally Goldstein, *supra* note 49 (discussing congressional efforts to pass equal pay legislation since the end of World War II).

163. H.R. 4803, 103d Cong., 2d Sess. (1994).

164. 141 CONG. REC. E852, 853 (daily ed. Apr. 7, 1995) (remarks of Hon. Eleanor Holmes Norton).

165. H.R. 4803, § 3.

166. See *infra* note 173 and accompanying text.

disparities.<sup>167</sup> In essence, courts have passed the responsibility to Congress to explicitly create a comparable worth system. Because no movement to recognize comparable worth will come from the federal courts, other alternatives should be explored. This Section will examine three options. First, Congress could implement comparable worth by enacting legislation explicitly creating a comparable worth system. Second, individual states could enact comparable worth statutes. Finally, individual employees could use existing mechanisms provided in the National Labor Relations Act<sup>168</sup> to bargain with their employers to create a comparable worth scheme.<sup>169</sup>

### A. Federal Legislation

The United States had a limited comparable worth system during World War II under the NWRB.<sup>170</sup> In fact, from the end of World War II until the passage of the EPA, the United States did not have any form of equal wage legislation.<sup>171</sup> However, prior to passing the EPA, Congress dismissed the comparable worth idea in favor of equal pay for equal work.<sup>172</sup> The recent failure to pass the Fair Pay Act of 1994<sup>173</sup>

167. See *supra* parts II.A., II.B.

168. 29 U.S.C. §§ 151-69 (1994).

169. Cohen, *supra* note 11, at 1480-88 (asserting that the NLRA is a better vehicle than the EPA for instituting comparable worth); Crain, *supra* note 27 (arguing that collective action is superior to other methods for combating women's economic subordination).

170. *County of Washington v. Gunther*, 452 U.S. 161, 185 n. 1 (1981) (Rehnquist, J., dissenting) (explaining that comparable work was not a new concept in the EPA because during World War II the NWRB enacted regulations to ensure equal pay for comparable work).

171. See § 2, 77 Stat. at 56.

172. One member of Congress explained the purpose of the Equal Pay Act:

What we seek is to insure, where men and women are doing the same job under the same working conditions that they will receive the same pay. . . .

. . . .  
[T]he jobs in dispute must be the same in work content, effort, skill, and responsibility requirements, and in working conditions. . . . [The EPA] is not intended to compare unrelated jobs, or jobs that have been historically and normally considered by the industry to be different.

109 CONG. REC. 9196 (1963) (statement of Rep. Frélinghuysen).

173. H.R. 4803, 103d Cong., 2d Sess. (1994). Section 3 of the Fair Pay Act would have stated:

No employer . . . shall discriminate between its employees on the basis of sex, race,

is evidence of Congress' continuing reluctance to embrace comparable worth. Thus, it is very unlikely that Congress will implement comparable worth legislation in the near future.<sup>174</sup>

### B. State-Sponsored Legislation

Individual states could pass legislation providing a comparable worth system. Since 1981, several states have enacted equal pay statutes prohibiting wage disparity based on sex or for paying one sex in an occupation lower than the other sex who is employed in an occupation of comparable work or character.<sup>175</sup> A few states have enacted compa-

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or national origin by paying wages to employees or groups of employees at a rate less than the rate at which the employer pays wages to employees or groups of employees of the opposite sex or different race or national origin for work in equivalent jobs.

H.R. 4803.

174. It is important to note that the comparable worth debate is not a unique concept. For a discussion of the comparable worth scheme in Ontario, Canada and Great Britain see Quinn, *supra* note 150.

175. See Pay Equity and Comparable Worth, 55 (BNA) (1984). See, e.g., ALASKA STAT. § 18.80.220(5) (1995) (comparable character or work); ARK. CODE ANN. § 11-4-610 (Michie 1995) (comparable work); IDAHO CODE § 44-1702 (1977) (comparable work); KY. REV. STAT. ANN. § 337.423 (Michie/Bobbs-Merrill 1990) (comparable work); ME. REV. STAT. ANN. tit. 26, § 628 (West 1964) (comparable work); MASS. GEN. LAWS ANN. ch. 149, § 105A (West 1996) (comparable character or comparable operations); MINN. STAT. ANN. § 471.992 (West 1994) (comparable work); NEB. REV. STAT. § 48-1219 (1993) (comparable work); N.D. CENT. CODE § 34-06.1-03 (1987) (comparable work); OKLA. STAT. ANN. tit. 40, § 198.1 (West 1986) (comparable work); OR. REV. STAT. § 652.220 (1995) (comparable character); S.D. CODIFIED LAW ANN. § 60-12-15 (1993) (comparable work); TENN. CODE ANN. § 50-2-202 (1991) (comparable work); W. VA. CODE § 21-5B-3 (1996) (comparable character).

These statutes do not incorporate comparable worth. Alaska requires an employer to pay men and women the same wage if they perform "work of comparable character of work in the same operation, business, or type of work in the same locality." ALASKA STAT. § 18.80.220(5). Oregon requires an employer to pay similar wages "for work of comparable character, the performance of which requires comparable skills." OR. REV. STAT. § 652.220(1)(a). Maine, which prohibits wage discrimination for comparable work, compares the skills and responsibilities of each employee. See ME. REV. STAT. ANN. 26, § 628.

The language provided in these state statutes is similar to that of the Equal Pay Act, which prohibits an employer from paying one sex a different wage "for equal work on jobs the performance of which requires equal skill, effort, and responsibility. . . ." 29 U.S.C. § 206(d)(1).

erable worth statutes for public employees.<sup>176</sup>

Although individual states could enact comparable worth statutes, there are several disadvantages to a state-by-state approach. First, for the individual female employee, her ability to receive comparatively equal pay will vary from state to state. Second, without provisions similar to those contained in the EPA that prevent male salaries from being lowered to meet female salaries, bringing wage disparity into equilibrium is politically unpopular.<sup>177</sup> In addition, under such a provision, employers would likely be economically hard pressed to pay the necessary increases to women to bring their wages equal with those of men. Also, if neoclassical economic theory on comparable worth is correct,<sup>178</sup> states must be concerned with disrupting their labor markets by driving up wages, causing businesses to relocate to states without comparable worth statutes.

### C. *Individual Employee Action Through Collective Bargaining*

Employees could use existing national labor statutes, specifically the National Labor Relations Act (NLRA),<sup>179</sup> to implement comparable worth.<sup>180</sup> Rather than relying on federal or state legislation, employees could bargain for comparable worth systems through their labor unions.<sup>181</sup> The NLRA requires employers to negotiate with unions concerning wages and hours, as well as other terms and conditions of

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176. "[Twenty-four] states (including the District of Columbia) have undertaken studies to assess whether women in state government are paid less for their work than men in comparable positions." *Fair Pay Hearings*, *supra* note 1, at 54. Of these 24 states, 20 have "adjusted the wages of women workers to remove pay biases." *Id.* See MONT. CODE ANN. § 2-18-208 (1993) (establishing a comparable worth standard for state government employees). See generally *Pay Equity and Comparable Worth*, *supra* note 175, at 55-61 (discussing state legislation). Originally, several states concentrated on pay equity in the public sector. Some states passed laws requiring a review or restructuring of existing pay systems. Other states, however, issued legislative orders that have indirectly affected the existing pay system. *Id.* at 55.

177. See *supra* notes 156-61 and accompanying text.

178. *Id.*

179. 29 U.S.C. §§ 151-69 (1994)

180. See Cohen, *supra* note 11, at 1480-93 (suggesting the use of the National Labor Relations Act to implement comparable worth).

181. Cohen suggests that employees and their employers, as opposed to federal judges, could develop their own payment schedule in such a way to ensure comparable worth. *Id.* at 1480.

employment.<sup>182</sup> Under this approach, employees could require their labor unions to negotiate a comparable worth system into the labor contract. In this way, a comparable worth system would be implemented on a firm-by-firm basis through each labor union's power to negotiate the employees' rights with the employers.<sup>183</sup>

The advantages of establishing comparable worth through collective bargaining include avoiding restrictive judicial interpretations of legislation.<sup>184</sup> Individual negotiation prevents courts from undercutting a comparable worth system on the basis of contract theory.<sup>185</sup> Individual negotiation also ensures that comparable worth is the benefit that the employees want.<sup>186</sup> For example, under national legislation establishing comparable worth, employees may be required to forego other desirable benefits in order to comply with the comparable worth system.<sup>187</sup> However, under collective bargaining, employees can decide a comparable worth scheme is more important than other possible benefits the employer could provide.<sup>188</sup>

The major disadvantage to the employee action approach is that, historically, women have made up a small number of labor unions' membership.<sup>189</sup> Thus, even though collective bargaining may be an effective tool for implementing comparable worth, unless women can exert power within the labor unions to which they belong, this approach could be largely ineffective in eliminating gender differences in wages.

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182. 29 U.S.C. § 158(a)(5). Under § 158(a)(5) an employer cannot "refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title." Section 159(a) states that the representatives selected to represent the employees may bargain with "respect to rates of pay, wages, hours of employment, or other conditions of employment . . . ." 29 U.S.C. § 159(a).

183. See 29 U.S.C. § 159(a).

184. Cohen, *supra* note 11, at 1481. Because the federal courts are reluctant to view comparable worth as a Title VII cause of action, women and minorities should seek protection from their unions. *Id.*

185. See *id.*

186. *Id.* at 1482.

187. *Id.*

188. *Id.*

189. Cohen, *supra* note 11, at 1483; Crain, *supra* note 27, at 30; Crain, *supra* note 160, at 1942-46.

## VI. CONCLUSION

The United States has had a long history of sex discrimination which continues to this day.<sup>190</sup> The controversy surrounding wage differences between men and women has existed at least since World War II.<sup>191</sup> It is clear that the EPA and Title VII have not proved effective in equalizing men's and women's wages. Women still earn less than men throughout their employed life.<sup>192</sup> Many scholars agree that comparable worth is the only way to combat the wage disparity problem because it squarely addresses the problem of sex segregation between occupations. Sex segregation, caused by sexual stereotypes and the historically-based lower social status of women, is the biggest cause of the continued pay disparity between men and women.<sup>193</sup> However, Congress and the federal courts have been very reluctant to embrace comparable worth because of concerns with its effect on the natural progression of the economy.<sup>194</sup> However, it is clear that women earn less than men under the present economic structure<sup>195</sup> and continuing the status quo will do little to eliminate wage differentials between men and women.

*B. Tobias Isbell\**

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190. Over 120 years ago, a Supreme Court justice wrote:

Man is, or should be, women's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which if founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct independent career from that of her husband. . . .

. . . .  
The paramount destiny and mission of woman are to fulfil [sic] the noble and benign offices of wife and mother. This is the law of the Creator.

*Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 141 (1872).

191. See *County of Washington v. Gunther*, 452 U.S. 161, 185 n.1 (1981) (Rehnquist, J., dissenting). See also Goldstein, *supra* note 49.

192. See *supra* notes 2-7 and accompanying text.

193. See *supra* notes 26-27, 52-53 and accompanying text.

194. See *supra* notes 170-73.

195. See *supra* notes 148-51 and accompanying text.

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