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Wage Discrimination, Job Segregation, and Title VII of the Civil Rights Act of 1964

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WAGE DISCRIMINATION, JOB SEGREGATION, AND TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

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WAGE DISCRIMINATION, JOB SEGREGATION, AND TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

Ruth G. Blumrosen*

Federal law has prohibited some forms of employment discrimination with respect to wages since the passage of the Equal Pay Act of 1963.¹ However, neither the EPA, nor the more general prohibition on employment discrimination because of race, sex, religion, or national origin contained in Title VII of the Civil Rights Act of 1964,² has been applied to the question of wage rates paid for jobs into which minorities and women have been traditionally segregated.

Most of the jobs to which women have been allowed access are

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Valuable assistance in the preparation of this paper was provided by Kenneth Shear, Rutgers Law School, class of 1978. Unpublished papers prepared by Rutgers Law School students Sherry Glazer, John Logan, Emily Bass, Kenneth Shear, Gerry O'Kane, Elaine Sederlund, and Denise Reinhardt in a seminar conducted by Professor A. Blumrosen, Rutgers Law School in 1977 were also of assistance. Unless otherwise specified, Alfred Blumrosen is the author of the law review articles cited herein by that surname. The views expressed herein are those of the author and not necessarily those of any government agency.

¹ Pub. L. No. 88-38, 77 Stat. 56 (codified at 29 U.S.C. § 206(d)(1) (1976)) [hereinafter cited as EPA]. The EPA provides in part:

No employer having employees subject to any provision of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided*, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

² Pub. L. No. 88-352, 78 Stat. 253 (codified at 42 U.S.C. § 2000e (1976)). The act provides in part:

§ 703(a) 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; . . .

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

different from the jobs which men have traditionally done.³ Therefore, the EPA, which has been interpreted to apply only where men and women work on similar jobs, has had little impact. It has, however, been used by courts to restrict the scope of the broad prohibition on discrimination contained in Title VII when the question of wage rate discrimination has been raised.⁴

Consequently, the major problem confronting women at work and an important problem confronting minorities — the relatively low rates of pay for jobs which have been traditionally reserved for women or minorities as compared to rates paid for work traditionally performed by males or whites — has not been addressed at all by federal anti-discrimination laws. Yet the low rates of pay associated with such segregated jobs constitute the major explanation for the “earnings gap” between minority and female workers on the one hand, and white males on the other. This gap has long been considered a major benchmark as to the extent of employment discrimination.⁵

³ Half of all working women work in occupations that are over 70% female. Weisskoff, “*Women’s Place*” in the Labor Market, 62 AMER. ECON. REV. 161, 163 (1972). More than one-quarter of all women workers work in jobs that are 95% or more female, WOMEN’S BUREAU, U.S. DEPT. OF LABOR, HANDBOOK ON WOMEN WORKERS, 89-91 (1975). Occupational sex-typing has been termed “one of the most pervasive and consequential of all cultural attitudes relating to sex.” Bermann & King, *Diagnosing Discrimination*, in SOME NEW PERSPECTIVES ON EQUAL EMPLOYMENT OPPORTUNITY: THE A.T. & T. CASE 60 (P. Wallace ed. 1975) [hereinafter cited as EQUAL EMPLOYMENT OPPORTUNITY]. See also B. BABCOCK, E. NORTON & S. ROSS, SEX DISCRIMINATION AND THE LAW 193-229 (1975) [hereinafter cited as BABCOCK]; J. KREPS, SEX IN THE MARKETPLACE: AMERICAN WOMEN AT WORK (1971); Laws, PSYCHOLOGICAL DIMENSIONS OF WOMEN’S WORK FORCE PARTICIPATION, in EQUAL EMPLOYMENT OPPORTUNITY, *supra*; Sawhill, *The Economics of Discrimination Against Women: Some New Findings*, 8 J. HUMAN RES. 383 (1973).

On race segregated jobs see G. MYRDAL, AN AMERICAN DILEMMA (2 vols. paperback ed. 1964); I H. HILL, BLACK LABOUR AND THE AMERICAN LEGAL SYSTEM (1977); R. MARSHALL, THE NEGRO AND ORGANIZED LABOR (1965). For studies of blacks in specific industries, e.g., construction, rubber, electrical, manufacturing, see W. GOULD, BLACK WORKERS IN WHITE UNIONS, (1977); H. NORTHRUP, THE NEGRO IN THE RUBBER TIRE INDUSTRY (1969); U.S. EQUAL EMPLOYMENT OPPORTUNITY COMM’N, PROMISE AND PERFORMANCE: A STUDY OF EQUAL EMPLOYMENT IN THE NATION’S ELECTRIC AND GAS UTILITIES. For white collar employment, see A. BLUMROSEN, BLACK EMPLOYMENT AND THE LAW (1971); Brimmer, *Economic Situation of Blacks in the United States*, FEDERAL RESERVE BULLETIN (March 1972); Brimmer, *The Economic Position of Black Americans: 1976*, in JOBS FOR AMERICANS (E. Ginzberg, ed. 1976) [hereinafter cited as JOBS FOR AMERICANS]. See also *Steelworkers v. Weber*, ____ U.S. ____, 99 S. Ct. 2721 (1979) (judicial findings of exclusion from crafts on racial grounds are so numerous as to make the exclusion a subject for judicial notice). In this recent case the Court upheld the validity of an employer’s training program for filling craft openings which provided that at least 50% of the trainees were to be black until the percentage of black skilled craft workers in the employer’s plant approximated the percentage of blacks in the local labor force. The respondent, a white production worker, alleged that because the affirmative action program resulted in junior black employees receiving training in preference to more senior white employees, the program discriminated in violation of §§ 703(a) and (d) of Title VII. The Court held that Title VII’s prohibition does not condemn all private, voluntary, race-conscious affirmative action plans.

⁴ See cases cited in note 257 *infra*.

⁵ See, e.g., S. REP. NO. 92-415, 92d Cong., 1st Sess. 4-8 (1971); H. REP. NO. 92-238, 92d Cong., 1st Sess. 3-5 (1971). These Reports are both part of the legislative history of the Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 104, *amending*

One reason why this problem has not been addressed is that the question of wage discrimination has not been viewed as a part of the problem of job segregation. Rather, wage discrimination and job segregation have usually been viewed as two separate and distinct matters. Remedies for wage discrimination have been considered to be available only in cases falling within the EPA.⁶ Remedies for job segregation have been considered to include promotional opportunities, and back pay for lost opportunities, but have not included any consideration of whether the rates paid for traditionally segregated jobs were themselves discriminatorily depressed.⁷

It is the thesis of this article that job segregation and wage discrimination are not separate problems, but rather are intimately related. Wherever there is job segregation, the same forces which determine that certain jobs or job categories will be reserved for women or minorities also and simultaneously determine that the economic value of those jobs is less than if they were "white" or "male" jobs. Thus, those women and minorities who are channelled into segregated jobs are not only deprived of initial hiring opportunities in other jobs and meaningful transfer opportunities, but are also paid wages for the jobs that they get which are discriminatorily depressed.

Part I of this article establishes the factual aspects of the thesis that wage rates of jobs into which women and minorities have been historically segregated are likely to be depressed because those jobs are occupied by "disfavored groups." To establish this proposition, historical, anthropological, sociological, and

Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, 78 Stat. 241 (codified at 42 U.S.C. § 2000e (1976)). The Reports state that Congress enacted Title VII in order to improve the economic and social conditions of minorities and women by providing equality of opportunity in the work place. These conditions were part of a larger pattern of restriction, exclusion, discrimination, segregation, and inferior treatment of minorities and women in many areas of life. The legislative histories of Title VII, the Equal Pay Act of 1963, and the Equal Employment Act of 1972 contain extensive analyses of the higher unemployment rate, the lesser occupational status, and consequent lower income levels of minorities and women. EEOC, LEGISLATIVE HISTORY OF TITLES VII AND XI OF CIVIL RIGHTS ACT OF 1964 (1965) [hereinafter cited as LEGISLATIVE HISTORY]; HOUSE COMM. ON EDUCATION AND LABOR, 88TH CONG., 1ST SESS., LEGISLATIVE HISTORY OF THE EQUAL PAY ACT OF 1963 (Comm. Print 1963); SENATE SUBCOMM. ON LABOR OF THE COMM. ON LABOR AND PUBLIC WELFARE, 92D CONG., 2D SESS., LEGISLATIVE HISTORY OF THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972 (Comm. Print 1972, [hereinafter cited as HISTORY OF EEO]).

⁶ See cases cited in note 257 *infra*.

⁷ See generally Jones, *Title VII, Seniority, and the Supreme Court: Clarification or Retreat?*, 26 KANSAS L. REV. 1 (1977); W. GOULD, *supra* note 3; Blumrosen, *Quotas, Common Sense and Law in Labor Relations; Three Dimensions of Equal Opportunity*, 27 RUTGERS L. REV. 675 (1974). See also *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977); *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *United States v. N.L. Indus., Inc.*, 479 F. 2d 354 (8th Cir. 1973); *United States v. Jacksonville Terminal Co.*, 451 F.2d. 418 (5th Cir. 1971), *cert. denied*, 406 U.S. 906 (1972); *Quarles v. Phillip Morris, Inc.*, 279 F. Supp. 505 (E.D. Va. 1968).

economic studies of the process of valuation of work done by disfavored groups are reviewed and analyzed. The conclusion of this review is that it is more probable than not that where jobs have been segregated, the valuation of the worth of those jobs has been influenced by the fact that they are the jobs of a disfavored group.

Part II of this article builds on this premise in examining the law of employment discrimination, both under the EPA and under Title VII. The major conclusion of Part II is that minorities or women who demonstrate that they have occupied traditionally segregated jobs have established a *prima facie* case that the wage rate paid for those jobs is discriminatorily depressed, thus shifting the burden of demonstrating that the rate is *not* influenced by discriminatory factors to the employer. Various defenses which may be raised, including the most common assertion that the rate is a product of market forces, are examined. Those defenses which apparently are influenced by the same discriminatory considerations that set the rate for the job in question are identified. Finally, the application of the EPA and its relation to Title VII are examined. We conclude that the substantive requirements of the EPA do not constitute a limitation on Title VII, but that an employer with a defense under the EPA may assert it in a Title VII context.

PART I

A. The Nature and Incidence of Job Segregation

Despite the express prohibition in Title VII, job segregation by race or sex remains a major characteristic of industrial life. For the most part, men and women do not do the same kind of work and minority males do not do the same kind of work as white males.⁸

1. Sex Discrimination—Job segregation by sex has a long history in the United States, dating back to the New England textile mills which had segregated jobs for young women employees who both lived and worked at the mill.⁹ One commentator has noted

⁸ See cases cited in note 257 *infra*. It should be noted here that, while the discussion of race discrimination in this article refers primarily to discrimination against blacks, the same points can be made concerning discrimination on the basis of national origin. In the case of some groups, *e.g.*, Hispanics, language differences constitute an additional barrier to non-discriminatory treatment. The discussion concentrates on blacks because discrimination against them is so well documented.

⁹ Job segregation is sometimes defined as an occupational result of sex-typing. One feature is that there is an associated normative expectation that this is how things should be. See REPORT OF SPECIAL TASK FORCE TO THE SECRETARY OF HEALTH, EDUCATION AND

that "from the beginning, women factory workers held jobs that were identified as 'women's jobs.'"¹⁰ From 1900 to 1970, except during wartime, the great majority of female workers were concentrated in occupations that were disproportionately female.¹¹ This pattern persisted as the number of women workers rose from 5.1 million in 1900 to 34.5 million in 1970,¹² and is related to state legislation "protecting" women from certain work situations.¹³ Every state passed legislation regulating what women could do in the workplace. These laws ranged from outright banning of women from some occupations such as mining and bartending, to prohibiting certain activities such as heavy lifting, working at nights, or overtime, to requiring the employer to provide benefits for women such as couches in the rest room and payment for working overtime.¹⁴ This legislation was strongly backed by the unions, and was either supported or unopposed by the then dominant women's organizations.¹⁵ While sex segregation was out-

WELFARE, *WORK IN AMERICA* 49 (1973) [hereinafter cited as *WORK IN AMERICA*]. See also P. MANTOUX, *THE INDUSTRIAL REVOLUTION IN THE EIGHTEENTH CENTURY* 204, 425 (rev. ed. 1961) for first signs of the sex and job segregation wage differential relationship at the very beginnings of the factory system in England. Mantoux says that even before the factory system, in cottage manufactories, jobs had become segregated by sex. (He also notes that there was specialization in certain jobs by the family). The women and children followed their work to the factories where they were paid less than adult men though they could do work the men could not do.

¹⁰ The stability of patterns of sex discrimination in occupations was documented as early as 1910 by a United States Senate investigation. See *THE STATUS OF WOMEN IN THE AMERICAN ECONOMY, REPORT TO THE UNITED STATES SENATE* (1910). The results of this long tradition of sex segregation in the labor market are still apparent today. See A. SIMMONS, A. FREEDMAN, M. DUNKLE & F. BLAU, *EXPLOITATION FROM 9 TO 5—REPORT OF THE TWENTIETH CENTURY FUND TASK FORCE ON WOMEN AND EMPLOYMENT* 43, 45 (1975) [hereinafter cited as A. SIMMONS]. For a standard history text on women in the United States, see E. FLEXNER, *CENTURY OF STRUGGLE* (1959). See also U.S. DEPT. OF LABOR, *GROWTH OF LABOR LAW IN THE UNITED STATES II* (1967).

¹¹ Kahne & Kohen, *Economic Perspectives on the Role of Women in the American Economy*, 13 J. OF ECON. LIT. 1249, 1274 (1975). For further documentation of the compartmentalization of work women do, see V. OPPENHEIMER, *THE FEMALE LABOR FORCE IN THE UNITED STATES: DEMOGRAPHIC AND ECONOMIC FACTORS GOVERNING ITS GROWTH AND CHANGING COMPOSITION* (Population Monograph Ser. 5 1970); Bergmann & Adelman, *The 1973 Report of the President's Council of Economic Advisors: The Economic Role of Women*, 63 AMER. ECON. REV. 509 (1973). See also Gross, *Plus Ça Change . . .? The Sexual Structure of Occupations Over Time*, SOCIAL PROBLEMS 202 (1968).

¹² President's Economic Report for 1973, 11 WEEKLY COMP. OF PRES. DOC. 101 (Jan. 30, 1973).

¹³ See, e.g., *Muller v. Oregon*, 208 U.S. 412 (1908) (holding that the fourteenth amendment was not violated by the limitation of hours women could work in laundries to 10 hours daily, even though if the legislation had also affected male employees it would have been invalid).

¹⁴ For an explanation of these protective laws, see WOMEN'S BUREAU, U.S. DEPT. OF LABOR, *SUMMARY OF STATE LABOR LAWS FOR WOMEN* (1969).

¹⁵ See generally W. CHAFE, *THE AMERICAN WOMAN* 112-32 (1972), on the struggle between "reformers" and "feminists" over the value of state protective laws. For insights on other aspects of the same conflict, see A. KRADITOR, *UP FROM THE PEDESTAL* (1968). Although shortly after their adoption it became obvious that the state protective laws also restricted women's employment opportunities, some women's organizations hesitated to recommend their demise since they did afford some protection for the most marginal women workers against exploitation. See THE PRESIDENT'S COMMISSION ON THE STATUS OF WO-

lawed in 1964, these laws were not declared invalid until the late 1960's.¹⁶ Their imprint on job patterns remains.¹⁷

Reflecting the growing importance of paid work in women's lives, the paid labor participation of women has risen rapidly since World War II.¹⁸ At the same time the composition of the female work force has changed.¹⁹ Married women with children have entered the labor market in increasing numbers. Between 1965 and 1973 participation rates of married women with preschool children increased 40%.²⁰ Although the influx of married mothers into the labor market was remarkable, so was the increase in the number of households headed by women, an increase of 46% between 1962 and 1972. Persons living in female-headed households were more than three times more likely to be in poverty than others.²¹

MEN, U.S. CIVIL SERVICE COMMISSION, REPORT OF THE COMMITTEE OF FEDERAL EMPLOYMENT (1963) [hereinafter cited as PRESIDENT'S COMMISSION ON THE STATUS OF WOMEN]. For various views on the role of labor unions in the securing of protective laws, see BABCOCK, *supra* note 6; M. BEARD, THE AMERICAN LABOR MOVEMENT 192 (1938); E. BROWN, INEQUALITY OF PAY (1977); W. CHAFE, *supra*.

¹⁶ *Rosenfeld v. Southern Pacific Co.*, 444 F.2d 1219 (9th Cir. 1971) (holding that an employment policy which denied opportunities on the basis of characterizations of physical capabilities and endurance violated Title VII). Since 1969 the EEOC Guidelines on Sex Discrimination have taken the position that state laws which prohibit or limit employment of women violate Title VII and will not be considered a defense to a Title VII charge nor the basis for the application of the bona fide occupational qualification exception. 29 C.F.R. § 1604.2(b)(a) (1978). In 1972, the Commission amended the guidelines, restating its position on restrictive laws, but requiring that beneficial state laws such as those dealing with overtime and rest periods be extended to men. *See* 29 C.F.R. § 1604.2(b)(4) (1978). By 1971, the Women's Bureau could report that most states had revised their hours laws in significant ways. WOMEN'S BUREAU, U.S. DEPT. OF LABOR, STATUS OF STATE HOURS LAWS FOR WOMEN SINCE PASSAGE OF TITLE VII OF THE CIVIL RIGHTS ACT OF 1964 (1971).

¹⁷ Indeed, there is some evidence that instead of disappearing, sex polarization is actually on the increase. *See* U.S. COMM'N ON CIVIL RIGHTS, SOCIAL INDICATORS OF EQUALITY FOR MINORITIES AND WOMEN 39-46 (1978) [hereinafter cited as SOCIAL INDICATORS].

¹⁸ The labor force participation rate of women is the percentage, or proportion, of all women 16 years of age and over who are in the labor force. Over the past 25 years it has risen from 33.9% to 46.3%. WOMEN'S BUREAU, EMPLOYMENT STANDARDS ADMINISTRATION, U.S. DEPT. OF LABOR, THE EARNINGS GAP BETWEEN WOMEN AND MEN 1 (1975) [hereinafter cited as EARNINGS GAP].

¹⁹ A. SIMMONS, *supra* note 10, at 44. Today a profile of working women looks very much like the total female population in terms of age, racial composition, educational attainment, marital and family status, and other characteristics.

²⁰ About one-third of all married women with children under age 6, and 50% of those with children 6 to 17 years old, were in the labor force in 1973, an increase from earlier rates of 15.5% and 32.2% respectively in 1953. U.S. DEP'T OF LABOR, MANPOWER REPORT OF THE PRESIDENT, 1974.

²¹ SOCIAL INDICATORS, *supra* note 17, at 64. The Commission notes that "[f]or women and minority men, poverty problems are especially pervasive." In 1974, black people were also almost three times more likely to be poor than whites. *See also* WOMEN'S BUREAU, U.S. DEPT. OF LABOR, FACTS ABOUT WOMEN HEADS OF HOUSEHOLD AND HEADS OF FAMILIES (1973).

The pattern of sex segregation in jobs is well known.²² In a suburban school, for instance, the classroom elementary teachers tend to be women, the principal a man, the maintenance workers minority males. In a hospital, the doctors typically are majority males, the nurses are female, orderlies are minority males, and nurses' aides minority (probably black or Hispanic) women. Such sharply defined compartmentalization of sex- and race-related work may be found in a variety of industries and appears to have been even more common in the past.²³ It was not until the late 1960's that the newspapers stopped running segregated "Help Wanted—Male" and "Help Wanted—Female" classified advertisements.²⁴ Today the extent of occupational segregation is so great that for men and women to be doing the same work, about two-thirds to three-fourths of the working women would have to change occupations.²⁵

Most women work in "women's jobs," and despite the breakthrough for women into non-traditional (male) jobs that has received so much media attention, the concentration of women in women's jobs seems to be increasing and the range and kinds of jobs open to women continue to be restricted.²⁶ Between 1940 and

²² SOCIAL INDICATORS, *supra* note 17, at 39. See SOCIAL INDICATORS, *supra* note 17, at 39, 44 & 119-20 for an explanation of the "index of dissimilarity" used by the Commission. The indicator of occupational segregation allows measurement of the degree to which occupational segregation exists and has changed in the recent past for minorities and women. Each group is compared to majority male occupations. See also Gross, *supra* note 11.

²³ See generally SOCIAL INDICATORS, *supra* note 17.

²⁴ See *Pittsburgh Press Co. v. Human Relations Comm'n*, 413 U.S. 376 (1973), in which the Court held that help-wanted advertisements are commercial speech and that any first amendment interest which might be served by advertising an ordinary commercial proposal was absent.

The present EEOC Guidelines on Sex Discrimination, which drastically limit use of sex-specific classified advertisements, were not adopted until 1968. See 29 C.F.R. § 1604.5 (1978). See also Hernandez, *The Women's Movement, EEOC Symposium*, 10th Anniversary, Rutgers University Law School, 1975 (unpublished manuscript on file at Rutgers University Law School). See generally; Note, *Elimination of Sexually Segregated Employment Ads: A Step Toward Equal Employment Opportunity*, 26 FLA. L. REV. 577 (1974); Note, *Sex Discrimination in Help Wanted Advertising*, 15 SANTA CLARA LAW. 183 (1974).

²⁵ SOCIAL INDICATORS, *supra* note 17, at 42, 44-46. The Commission indicators are based on 1976 statistics, but there are some indications that sex lines, at least, may be wavering. Even if they are, however, it will probably be a long time before there is significantly noticeable change. Female admissions to medical, law, and other graduate schools from which they have traditionally been excluded or on restricted admission have increased until at many schools one-third of the entering class are women.

The Commission on Civil Rights also estimates that between one-third and one-half of the minority males would have to change occupations to match majority work patterns. It has been estimated that it will take approximately seven generations for blacks and whites to have similar occupational distributions, even if discrimination were to stop immediately. See Lieberman & Fuguitt, *Negro-White Occupational Differences in the Absence of Discrimination*, 73 AMER. J. SOC. 188 (1967).

²⁶ R. SHAEFFER & E. LYNTON, *CORPORATE EXPERIENCES IN IMPROVING WOMEN'S JOB OPPORTUNITIES 15-17* (1979) [hereinafter cited as CONFERENCE BOARD REPORT]. See also SOCIAL INDICATORS, *supra* note 17, at 45-46.

1970, the number of occupations with a high proportion of women (70-80%) and those with a high proportion of men both rose markedly.²⁷ While half of the men worked in more than sixty-three occupations, half of the women were concentrated in only seventeen occupations.²⁸ In 1974, approximately twenty-four million of the thirty million women in non-agricultural employment were in three industry groups: services — 7.4 million; trade — 7.0 million; and government — 6.3 million.²⁹ Within these industries women are sex-segregated into various occupations.³⁰

Occupations for women are found closely linked to their homemaking role³¹ or to their socialization as male helpmates.³² Such functions include teaching children, nursing the sick, or preparing food.³³ It is not surprising that the blue-collar food processing industries have large numbers of female-typed jobs,³⁴ and female professionals tend to be employed as non-college teachers, nurses, and dieticians;³⁵ or that secretaries are called "office wives."³⁶ In 1973, nearly two-fifths of all women workers worked as secretaries, retail trade sales-workers, bookkeepers, private household workers, elementary school teachers, waitress-

²⁷ Kahne & Kohen, *supra* note 11, at 1272.

²⁸ See note 40 and accompanying text *infra* for a list of some of these 17 occupations.

²⁹ WOMEN'S BUREAU, U.S. DEPT. OF LABOR, THE ROLE AND STATUS OF WOMEN WORKERS IN THE UNITED STATES AND JAPAN 5 (1976).

³⁰ CONFERENCE BOARD REPORT, *supra* note 26, at 9, 10. The report says that within the corporate sector three-quarters of all women work in female-intensive industries — banking, insurance, real estate (residential), communications, and manufacturing and retailing of non-durable goods — where women have long constituted a larger proportion of the work force than in other male-intensive industries such as mining, construction, electric and gas utilities, transportation, wholesale trade, and manufacturing and sale of durable goods. According to the report, female-intensive industries have large numbers of low-paying, low-status jobs that have been predominantly filled by women — jobs such as clerical employees, retail sales clerks, semi-skilled machine operators, or service workers. Even where women hold most of the jobs, however, the boss is usually a man. Male-intensive industries, on the other hand, evidently hire fewer women even in traditionally female jobs such as clerical jobs than do the female-intensive industries. *Id.* at 10.

³¹ Society's attitude toward housework is divided. On the one hand, it is Mom and apple pie, the Madonna and the pedestal, while on the other hand, society thinks it is worth exactly what is paid for it. See B. FREIDAN, THE FEMININE MYSTIQUE (1963). When similar work is done out of the home for pay, the latter view is likely to dominate. See the discussion of the Dictionary of Occupational Titles vis-a-vis coding and evaluating such work, at text accompanying notes 152-53 *infra*. See also M. WITT & P. NAHERNY, WOMEN'S WORK—UP FROM .878 at 13 (1975) [hereinafter cited as UP FROM .878] and John Kenneth Galbraith's analysis of the "convenient social virtue" and the function it plays in shaping the roles and expectations of women as "crypto-servants" and consumers, J. GALBRAITH, ECONOMICS AND THE PUBLIC PURPOSE 30-37 (1973).

³² WORK IN AMERICA, *supra* note 9, at 49.

³³ See generally Waldman & McEaddy, *Where Women Work—An Analysis by Industry and Occupation*, 97 MON. LAB. REV. 3 (1974).

³⁴ J. LYLE & J. ROSS, WOMEN IN INDUSTRY 74 (1973) [hereinafter cited as WOMEN IN INDUSTRY].

³⁵ BNA DAILY LAB. REP. NO. 230, at B-1, Nov. 29, 1976.

³⁶ See generally BENET, THE SECRETARIAL GHETTO (1972); Ginder, Factors of Sex in Office Employment, in OFFICE EXECUTIVE 11 (1961) (suggesting that sex appeal has been a qualification for women in more than a few office jobs).

es, typists, cashiers, seamstresses and stitchers, and registered nurses.³⁷ One-quarter of all employed women worked in only five jobs: secretary-stenographers, household workers, elementary school teachers, bookkeepers, and waitresses.³⁸

Even when men and women do roughly the same kind of work they rarely do so at the same time³⁹ 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."⁴⁰ One economic study of male-female wage differentials in professional employment has concluded:

It is difficult for a discriminating organization to give male and female employees the same titles and pay them different amounts. It is far easier to assign women to lower job levels and then set up a pay structure by level that is the same for both sexes The assignments to job

³⁷ WOMEN'S BUREAU, U.S. DEPT. OF LABOR, HANDBOOK ON WOMEN WORKERS 91 (Bull. No. 197, 1975).

³⁸ Hedges, *Women Workers and Manpower Demands in the 1970's*, 93 MON. LAB. REV. 19 (1970).

³⁹ WORK IN AMERICA, *supra* note 9, at 50. See also A. SIMMONS, *supra* note 10, at 51. The authors point out the arbitrary manner in which jobs are often sex-typed, noting that efforts to justify the exclusion of one sex from a job on the basis of differences in training or ability will have to reconcile the evidence that in different locales, industries, or companies, a "man's job" may be a "woman's job." The same observation would seem to apply to attempts to reconcile and justify female wage differentials. Moreover, the U.S. census data tend to underestimate the extent of sex segregation in the labor market, because they meld what are really segregated jobs into a single apparently integrated category. In the process of reporting, the 35,000 titles recognized in the Dictionary of Occupational Titles were compressed to 441 for the 1970 census. See BUREAU OF THE CENSUS, U.S. DEPT. OF COMMERCE, 1970 CENSUS OF POPULATION, CLASSIFIED INDEX OF OCCUPATIONS AND INDUSTRIES (1971). For many purposes, moreover, the categories are reduced further to 12. See SOCIAL INDICATORS, *supra* note 17, at 34 n.11.

The Civil Rights Commission notes that "while it may appear that males and females have similar occupations, actually this 'equality' is simply an artifact of a classification system that combines divergent occupations." *Id.*

⁴⁰ STAFF REPORT, U.S. COMMISSION ON CIVIL RIGHTS, WOMEN AND POVERTY 7 (1974) [hereinafter cited as WOMEN AND POVERTY]. Different job titles thus may also hide almost identical work. Courts under the EPA have recognized that it is appropriate to go behind job titles to determine whether jobs with different titles are "substantially equal," as defined in the EPA. See *Shultz v. Wheaton Glass Co.*, 421 F.2d 259 (3d Cir. 1970), *cert. denied*, 398 U.S. 905 (1970) (holding that a violation of the EPA was established where the Secretary of Labor showed that male selector-packers received a pay rate 10% higher than female selector-packers); cf. *Angelo v. Bacharach Instrument Co.*, 555 F.2d 1164, 1175 (3d Cir. 1977) (though the court held that the evidence did not establish a violation of the EPA, it observed that "the concept of equality embraces job content.")

Former EEOC Commissioner Aileen Hernandez has observed: "I learned the difference between a 'job title' and the 'real job' as I found that men were called administrative assistants and paid at professional salary levels, while women doing exactly the same, or more complex work, were called secretaries and paid at much lower clerical salaries." *Hearing Before the U.S. Equal Employment Opportunity Commission on Discrimination in White Collar Employment*, 90th Cong., 2d Sess. 129 (1968). See also S. TSCUCHIGANE & N. DODGE, EMPLOYMENT DISCRIMINATION AGAINST WOMEN IN THE UNITED STATES 50 (1974) which studied men and women in the same job titles.

levels can most plausibly be interpreted as the mechanism by which the discrimination takes place.⁴¹

Occupational segregation is, however, rarely total. Recently there has been some movement of women into traditionally male jobs and vice versa.⁴² Where a job has been traditionally considered the province of one sex or the other, however, employers are likely to continue to think of it and treat it as they always have. The "interlopers" will be treated as deviants, unless and until there are so many of them that the job begins to change its character.

During the post-World War II period, one of the most startlingly complete "turnings" has been in the job of bank teller.⁴³ Before the war, tellers were almost exclusively white men; the job had high prestige, and was a step toward bank officer. Since that time banks have begun to hire white women and minorities (male and female) as tellers. Tellers' pay has not kept pace with other predominantly male jobs; further, the promotion ladder has been sawed off. Thus, today future bank officers are more likely to be hired from recent college or MBA graduates than from among the tellers.

⁴¹ Malkiel & Malkiel, *Male-Female Pay Differentials in Professional Employment*, 63 AMER. ECON. REV. 693, 704 (1973).

⁴² Stone, "A Backlash in the Workplace," N.Y. Times, June 11, 1978 § F, at 3, col. 1; See also NATIONAL COMMISSION ON THE OBSERVANCE OF INTERNATIONAL WOMEN'S YEAR, ". . . TO FORM A MORE PERFECT UNION. . ." 58 (1976) [hereinafter cited as TO FORM A MORE PERFECT UNION]; Waldman & McEaddy, *supra* note 33; Hedges & Bemis, *Sex Stereotyping: Its Decline in Skilled Trades*, 97 MON. LAB. REV. 14 (1974). On May 8, 1978, the Office of Federal Contract Compliance Programs [hereinafter cited as OFCCP] issued guidelines for government contractors under Executive Order 11375, setting specific hiring goals for women in construction. See 41 C.F.R. § 60-20.1—20.6 (1978).

⁴³ WORK IN AMERICA, *supra* note 9, at 50. The report notes: "[S]chool teaching, telephone operating and clerical work were once male occupations in the United States. More recently the occupations of bank teller and school crossing guard have been feminized."

A woman's job may result from a downgrading of what once was a traditional man's job. Thus, a job may be "turned" by assigning women to it and discouraging men by either lowering the wage rate, or, more often, not raising the rate for that job when other job rates are raised. Sometimes minor parts of the job are also changed, and typically the job will be disassociated from its former promotion ladder. If the employer has given on-the-job training, prior educational requirements will often be substituted. TO FORM A MORE PERFECT UNION, *supra* note 42. For an example within the insurance industry, see WOMEN IN INDUSTRY, *supra* note 34, at 8 (1973).

The position of "financial officer," a position once staffed by men who were given considerable responsibility in the signing off of loans, has been transformed into a "woman's job." In the process, the job has been relegated to a lower portion of the firm's corporate organization chart and to a narrowed range of salary levels.

"Turning a job" is analogous to "tipping" a residential neighborhood or school. This concept has been well recognized and statutes prohibiting "blockbusting" or deliberately "tipping" a predominantly white area by suggesting that minorities are moving in are common. There seems to be a point at which a block or school is perceived as no longer "white," but rather as a "black" neighborhood or school. Historically, this has often been accompanied by "white flight," as whites leave and the formerly integrated area becomes resegregated as a minority neighborhood. The tipping point for neighborhoods and schools is generally accepted to be the ratio of 70 whites to 30 blacks.

2. *Race Discrimination*—Segregation of jobs by race is one aspect of the heritage of slavery. In the post-Civil War South, blacks were restricted and excluded from the preferred “white work” and confined to jobs which were considered appropriate to their inferior status.⁴⁴ This southern pattern of considering as jobs suitable for blacks the lower paying, strenuous, and uncomfortable work demonstrates the connection between segregation and wage rates.⁴⁵ The jobs to which blacks were assigned were, because of the fact of black assignment, paid at a low rate.

The extent of occupational segregation by race was documented in the Truman Committee on Civil Rights Report in 1947:

Discriminating in hiring has forced many minority workers into low paying and often menial jobs such as common laborer and domestic servant . . . Farmers, farm laborers and other laborers constituted 62.2% of all employed Negro men and only 28.5% of all employed white men Skilled craftsmen represented 15.6% of employed white men [but] only 4.4% of employed Negro men.⁴⁶

The report noted that in Houston, returning Negro veterans had average incomes of \$30 per week while white veterans averaged \$49.⁴⁷ In 1963, a House Report on the bill which eventually became Title VII stated, *inter alia*, “among Negroes who are employed, their jobs are largely concentrated among the semi-skilled . . . occupations.”⁴⁸ This pattern of overt restriction of jobs by race persisted openly until the early 1960’s. It was made illegal by the passage of Title VII in 1964.

As administered, Title VII remedied job segregation by providing for promotional opportunities for blacks into previously white jobs. But it did not require that blacks who had been hired into segregated jobs be allowed to move forthwith into other jobs. It was construed to permit movement of blacks, who were qualified, to their “rightful place” — meaning where they would have been but for their color — but only as vacancies arose for which they had more length of service than their white counterparts. But this degree of mobility was limited by the Supreme Court in 1977.⁴⁹

⁴⁴ See G. MYRDAL, *supra* note 3, *passim*.

⁴⁵ See H. HILL, *supra* note 3, at ch. 1.

⁴⁶ REPORT OF THE PRESIDENT’S COMMITTEE ON CIVIL RIGHTS, TO SECURE THESE RIGHTS 57 (1947) [hereinafter cited as TO SECURE THESE RIGHTS].

⁴⁷ *Id.*

⁴⁸ H.R. REP. NO. 914, 88th Cong., 1st Sess., pt. 2, at 27 (1963).

⁴⁹ International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977) (holding that the Teamsters had engaged in a nationwide pattern of employment discrimination against minority members in violation of Title VII, and awarding retroactive seniority to those minority workers who had been discriminated against).

3. *Current Status of Sex and Race Segregation*—In 1978, the Civil Rights Commission concluded:

Minorities and females are segregated from the majority in the types of occupation they have. At least one-third of the minority males and two-thirds to three-fourths of the minority females would have to change their occupations in order for their groups to have occupational distributions similar to the majority males.⁵⁰

Thus, the highest degree of occupational dissimilarity can be found between the female groups and majority males.

Summing up its assessment of the current status of minorities and women, the Commission said:

In the area of education, minorities and women are more likely to be . . . educationally overqualified for the work they do, and earning less than comparably educated majority males. . . . [W]omen and minority men are more likely to be unemployed (especially if they are teenagers), to have less prestigious occupations, and to be concentrated in different occupations than [sic] majority males. With regard to income, minorities and women have less per capita household income; lower earnings even after such determinants of earnings as education, weeks of work, age, and occupational prestige have been adjusted to equality among groups [thus inferring that the residual differential is due to sex and/or minority status]; smaller annual increases in earnings with age; and a greater likelihood of being in poverty.⁵¹

The Commission concluded that minorities and females remain segregated from the majority in the types of occupations they hold, and that not only are the jobs women and minorities have different, but the jobs which they typically hold are valued less by society in general.

4. *Job Segregation and the Male-Female, Black-White Wage Differential*—Simultaneously with the increase in job segregation, there has been a widening of the earnings gap between men and women. Women are generally over-represented among those workers whose earnings are low. Their median full time earnings in 1955 totaled 64% of men's income; but by 1973 women earned only about 57% of men's earnings.⁵² In 1974, they were 3.7 times

⁵⁰ SOCIAL INDICATORS, *supra* note 17, at 45.

⁵¹ *Id.* at 45, 86.

⁵² UP FROM .878, *supra* note 31, at 5. See also EARNINGS GAP, *supra* note 18; WOMEN AND POVERTY, *supra* note 40.

as likely as men to be earning between \$3,000 and \$4,999, accounting for 63% of workers at that pay level, and 3.0 times as likely to be within the \$5,000 to \$6,999 earnings range, accounting at this level for 58% of the workers. Fifty-three percent of women, but only 18% of men earned less than \$7,000; and 82% of women, but only 38% of men earned less than \$10,000. Of all full time, year-round workers earning more than \$15,000, only 5% were women.⁵³ Only approximately 18% of these differences have been attributed to the lower pay of women doing the same job as men.⁵⁴

Recent reports also indicate that during periods of reduced economic growth, lower income black families receive a smaller proportion of total money income⁵⁵ than do lower income white families, which is due in part to the rapidly increasing proportion of black families that are headed by females. There is more similarity in kinds of jobs, degree of segregation, and income earned between racial and ethnic groups than between the sexes. The earnings gap between men and women in every group is greater than is the gap attributable to racial or ethnic differences.⁵⁶

After almost fifteen years of federal legislation prohibiting discrimination in compensation and segregation of jobs, the wage gap is larger now than it was before the legislation. The growing gap has been explained by the continuing predominance of women in lower status jobs of a traditional nature, and the dynamic rise in women's labor force participation which puts many new women workers at or near the entry level.⁵⁷ But this argument assumes that as these new workers stay in the labor

⁵³ EARNINGS GAP, *supra* note 18, at 1,6 (table).

⁵⁴ See notes 218-20 and accompanying text *infra* for a discussion of economic studies which find only insignificant amounts of "pure" wage discrimination, *i.e.*, lower pay for the *same* job. U.S. News & World Report simply states that the "basic reason for the [earnings] gap is occupational segregation." U.S. NEWS & WORLD REP., Jan. 15, 1979, at 64.

⁵⁵ "Total money income" refers to the sum of wages, welfare payments, and money from other sources.

⁵⁶ SOCIAL INDICATORS, *supra* note 17, at 53, 90. See generally EARNINGS GAP, *supra* note 18.

⁵⁷ Women were hired for about two-thirds of the 3.4 million new jobs created during 1978, according to the N.Y. Times, Feb. 20, 1979, §A, at 10, col. 1. Thus, though women were replacements in some jobs, the bulk of the new women workers are in new jobs in areas historically open to women, see CONFERENCE BOARD REPORT, *supra* note 16, at 9-11, or in newly created service industries doing work that was formerly done at home, such as restaurants, hospitals, or paid care for the young and the old. See WOMEN AND POVERTY, *supra* note 40, at 27; UP FROM .878, *supra* note 31. Thus, much of the new paid work in these areas has already been pegged as women's work. The Civil Rights Commission notes that service occupations are the lowest paid, least likely to be unionized, and most heavily female, see WOMEN AND POVERTY, *supra* note 40, at 27, but that even among service workers, women's earnings are substantially lower than men's. While earnings of male service workers in 1972 were \$7,630, female service workers earned only \$1,833, or only 24% of men's earnings. *Id.* at 7.

force their pay will improve. For workers in men's jobs this is a realistic assumption. Most white males over a lifetime do have a steadily rising income curve.⁵⁸ Minority men also have an upward sloping curve, though their lifetime wage curve tends to be lower than that of white males.⁵⁹ For most women's jobs, however, there has been no financial ladder.⁶⁰ The female curve of wages is almost flat, indicating that most women's jobs are dead end, with little promotional opportunity and few instances in which wages increase as a function of time or seniority.⁶¹ As long as women continue to be channeled into traditionally structured segregated jobs identified as women's work, their entry level pay will probably continue to approximate their average lifetime real earnings, with little prospect of long term relative wage gains.

In at least one predominately female occupation, as the degree of segregation has increased, so has the gap between what men and women earn. Coincident with a rapid concentration of women in clerical jobs⁶² women's relative earnings dropped sharply as a proportion of men's earnings. In 1973, the median wage for women clerical workers was 61% of that for men employed in clerical work; the proportion was 69% in 1962, and 72% in 1956.⁶³ Thus, for the largest concentration of women workers, the long term trend would indicate a broadening rather than a closing of the gap, if the feminization continues unchecked.

The argument that minorities and women as recent entrants into the work force are still at entry pay levels also implies that many minorities and women have broken into non-traditional jobs where they can expect work and wage histories similar to majority males. In terms of numbers, the significance of most of the breakthroughs into the non-traditional jobs appears to be exaggerated. While white women have increased their share of the higher paying jobs at a rate slightly faster than their representa-

⁵⁸ SOCIAL INDICATORS, *supra* note 17, at 56-60.

⁵⁹ *Id.*

⁶⁰ *Id.* For some female ethnic groups, the lifetime earnings curve actually tends to drop close to age 45. *Id.* at 60. None of the female groups had annual earning increments above 25% of those of majority males in 1975, and according to the Civil Rights Commission there are no signs that the indicator values will improve in the future.

⁶¹ *Id.* Compare the statement in the text with the characteristics of women's jobs described by V. OPPENHEIMER, *THE FEMALE LABOR FORCE IN THE UNITED STATES: DEMOGRAPHIC AND ECONOMIC FACTORS GOVERNING ITS GROWTH AND CHANGING COMPOSITION* 131 (1970), *e.g.*, low pay, worker must possess skills before taking job, no continuity, little specialization. See generally, P. DOERINGER & M. PIORE, *INTERNAL LABOR MARKETS AND MANPOWER ANALYSIS* (1971) [hereinafter cited as *INTERNAL LABOR MARKETS*]. The authors also note the dead-end characteristic of jobs identified for blacks or women.

⁶² Between 1962 and 1970, the percentage of women in clerical jobs rose from 69% to 75%. *HANDBOOK ON WOMEN WORKERS*, *supra* note 3, at 132.

⁶³ *Id.*

tion in total employment,⁶⁴ and for professional workers the proportion of women's to men's earnings rose from 60% in 1960 to 67.5% in 1972,⁶⁵ most women and most minorities are still going into traditionally segregated work.⁶⁶

Moreover, many corporations reporting successful efforts to place women in non-traditional jobs, including managerial and professional positions, have reported that hiring from outside was easier and tended to be more successful than upgrading present employees. Upgrading clericals, even those with good academic credentials was reported to be difficult, because fellow employees continued to treat them as clericals.⁶⁷ This would suggest that even if more women are hired into managerial-professional positions, women already employed as clericals will stay in those jobs.

Shortly after the passage of the Civil Rights Act of 1964, there was a dramatic improvement in the rate at which minorities, particularly black males, became upwardly mobile.⁶⁸ However, by 1975 there were warnings that the change seemed impressive only because they had started so far behind.⁶⁹ It was further claimed that both minority males and females had not done nearly as well as had white women in gaining access to professional and managerial jobs.⁷⁰ Much of the improvement in black income was attributed to the increased number of families where both husband and wife had one or more college degrees and each was working.⁷¹ Although by 1970 such families' income had reached parity with that of two-degreed white families, slightly more black wives

⁶⁴ JOBS FOR AMERICANS, *supra* note 3, at 154. See also A. SIMMONS, *supra* note 10, at 3.

⁶⁵ Kahne & Kohen, *supra* note 11, at 1274. See also CONFERENCE BOARD REPORT, *supra* note 26, at 19-45. The Conference Board noted that while there has apparently been improvement in job opportunities open to women, particularly in the lower echelons of the managerial, professional, and sales representative categories, very little is known about moving sizable numbers of women into higher managerial levels. Most corporations seem to be stressing lower management, professional, and sales positions for women. These are considered non-traditional jobs for women, and are areas in which representation of women was reported improved by at least one full percentage point. Skilled blue collar jobs such as truck driver, welder, or apprentice were rarely mentioned as areas in which any sizable number of women had been successfully introduced.

⁶⁶ See text accompanying notes 37-38 *supra*. See also CONFERENCE BOARD REPORT, *supra* note 26, at 17.

⁶⁷ CONFERENCE BOARD REPORT, *supra* note 26, at 53-55 & 68-69.

⁶⁸ SOCIAL INDICATORS, *supra* note 17, at 44.

⁶⁹ JOBS FOR AMERICANS, *supra* note 3, at 154. See also SOCIAL INDICATORS, *supra* note 17, at 44. The Commission on Civil Rights reports that occupational segregation actually increased for all groups studied from 1960-70, except the groups that had experienced the greatest initial segregation in 1960 (Blacks, Puerto Ricans and Chinese Americans).

⁷⁰ JOBS FOR AMERICANS, *supra* note 3, at 144.

⁷¹ Wattenberg & Scammon, *Black Progress and Liberal Rhetoric*, 55 COMMENTARY 35, 41 (April 1973). See also R. FREEMAN, THE CHANGING LABOR MARKET FOR BLACK AMERICANS, 148 (1972). See generally BROOKINGS PAPERS ON ECONOMIC ACTIVITY 67, 118-20 (1973).

worked than did white wives.⁷² Improvement in black income was also attributed to increases in the number of black craftsmen and white collar personnel.⁷³ Many of these were black women who were hired as clericals, jobs previously largely barred to blacks.⁷⁴ There has also been a noticeable shift of black women out of private housework, and of black men and women off the farm. Black women still, however, hold more than their share of low paying, low status operative, laborer, and service jobs outside private homes.⁷⁵

In 1975 the black economic picture over the previous fifteen years was described as a "mosaic of both progress and stagnation."⁷⁶ In general, blacks were moving ahead economically, but a number of divergent trends were discerned even then.⁷⁷ By 1978-79 fears were being voiced that the upward trend into better paying, higher opportunity jobs had slowed or even been reversed.⁷⁸

The wage differential has also been attributed to different work patterns and attitudes between the sexes: women, it is said, put in less overtime, only work part time, have different kinds of training, education, and counseling, and fewer years of work/life experience.⁷⁹

However, the earnings gap widens for both majority women and minorities when the median number of school years completed is the same for men and women or minorities. For both women and minority males, the return on an investment in education is considerably less per year of education than for majority males.⁸⁰ Available data reveal that women's part time employment is too limited to account for the earnings gap.⁸¹ For those who do work part-time the gap is larger than it initially appears

⁷² Wattenberg & Scammon, *supra* note 71, at 36.

⁷³ *Id.* Black workers in those categories went from 2.9 million in 1960 to 5.1 million in 1970. See also JOBS FOR AMERICANS, *supra* note 3, at 148-49.

⁷⁴ *Id.* at 154.

⁷⁵ *Id.* at 150.

⁷⁶ *Id.* at 142.

⁷⁷ *Id.*

⁷⁸ SOCIAL INDICATORS, *supra* note 17, at 45-46.

⁷⁹ WOMEN AND POVERTY, *supra* note 40, at 6. Most of the same arguments and stereotypes are also used to explain the earnings gap for minorities. See text accompanying notes 101-03 *infra* for a discussion of the similarity of stereotypes and perceptions of minorities and women.

⁸⁰ Joint Economic Committee Hearings, *Economic Profile of Women*, 93d Cong., 1st Sess. pt. 2, at 2 (1973). Women with four years of college in 1974 had lower median incomes than men who had only completed the eighth grade. Women's median income was far below that for men at every educational level. See EARNINGS GAP, *supra* note 18, at 2-3; HANDBOOK ON WOMEN WORKERS, *supra* note 3, at 134. Minorities' income, like women's, was far below what white males with far less schooling earned. SOCIAL INDICATORS, *supra* note 17, at 27.

⁸¹ WOMEN AND POVERTY, *supra* note 40, at 6.

because part-time work rarely carries fringe benefits, which may add over one-third to the value of the pay check.

The rationale that the lower incomes of minorities and women reflect less experience simply restates the belief discussed above that wages improve with time worked. This assumption is unwarranted because, in the typical "women's" job, experience is irrelevant and unrelated to wages.

Even those economists' studies that have given full weight to experience and have adjusted for these and other factors such as age, region, and industrial concentration agree that much of the male-female earnings differential remains unexplained by conventional economic analysis.⁸² Even if the pervasive socialization and channeling into "proper" occupations that occur for both minorities and women through the operations of various institutions, including education and counseling, were to explain why women or minorities are found only in certain occupations, this would not explain why the wages associated with those occupations are depressed.⁸³ If the evidence of the social sciences discussed in the following section is credible, it is the fact that the jobs are segregated, without regard to how the segregation occurred, which permits the attitude toward minorities and women with whom the jobs are identified to influence the value put on those jobs.

B. Links Between Job Segregation and Wage Discrimination

1. The Findings of the Social Sciences and Empirical Studies—Job segregation remains the most common characteristic of women's work, and continues to be a major factor in the work situation of minorities. Furthermore, these segregated jobs are concentrated in the lowest paying of the occupations. It is this concentration in lower paying segregated jobs which accounts for most of the wage differentials between men and women, blacks

⁸² See notes 217-20 and accompanying text *infra* for a discussion of the economic studies of discrimination. See also SOCIAL INDICATORS, *supra* note 17, at 53-56. Even after adjustments for differences in level of education, working time, and other factors between minorities and females on one hand and majority men on the other, a gap remains. For women, the ratios after controlling for differences indicate that women earned half of what majority males with similar work-related characteristics earned in 1970.

⁸³ Economists do not recognize such "premarket" discrimination in discussing either demand or supply aspects of labor market discrimination. Such factors, however, are recognized by the law. Where pre-act discrimination is perpetuated by present practices, Title VII is violated. See, e.g., McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Griggs v. Duke Power Co., 401 U.S. 424 (1971) (for a detailed discussion of Griggs, see note 222 *infra*). Even where the employer itself has not discriminated, it may take action to ameliorate societal discrimination which manifests itself in historically segregated jobs. See, e.g., Steelworkers v. Weber, ___ U.S. ___, 99 S. Ct. 2721 (1979).

and whites. It is necessary to determine whether a link can be found between the fact that the jobs are segregated and the rates of pay associated with them.

The fact that women have lower social status than men in our society and that both sexes tend to value men and male characteristics, values, and activities more highly than those of women, has been documented by authorities in a number of disciplines.⁸⁴ It has been well established that a division of labor between the sexes exists in every known society, that in every society the value put on the work reflects the status of those traditionally allocated that work, and that work identified with women is always considered less valuable than that done by men, regardless of its difficulty or its contribution. Psychologists support these conclusions, finding that the socialization process works so well that women as well as men tend to perceive work associated with women to be of less value than that done by men.⁸⁵

Classical studies in cultural anthropology show that although in every culture there is a division of labor and of roles along sex lines there is no consistency about which jobs are allocated to men and which to women. Thus, although the people in any particular culture may believe that the way they do things is divinely ordained, there is an almost infinite variety of ways of dividing labor. The anthropologists of both modern and primitive life have found that however work is divided the allocation determines the status attached to kinds of labor.⁸⁶

Thus, it is the sex factor that determines the status of the work, not the great diversity in the level and pattern of men's and women's work. It is important to note that this perception of men's

⁸⁴ See M. HUGHES, *THE SEXUAL BARRIER: LEGAL, ECONOMIC, AND SOCIAL ASPECTS OF SEX DISCRIMINATION* (1977) [hereinafter cited as *THE SEXUAL BARRIER*]. This prizewinning bibliography has over 117 entries listed under "sex roles" and over 30 under "attitudinal data," all but two done since 1970. There are, altogether, 17 chapters of more than 8,000 entries. The extent of this bibliography indicates not only the depth of present concern about the subject and the pervasiveness of attitudes detrimental to and derogatory of women, but also how recent is the consciousness that such stereotypes and attitudes constitute a problem.

⁸⁵ NATIONAL RESEARCH COUNCIL/NATIONAL ACADEMY OF SCIENCES, *JOB EVALUATION: AN ANALYTIC REVIEW* (Interim Report to the Equal Employment Opportunity Commission) 52 (1979) [hereinafter cited as *NAS REPORT*].

⁸⁶ Thus, the anthropological conclusion is that "[i]n a culture where men weave and women fish, just as in a culture where men fish and women weave, it is axiomatic that whichever activity is assigned to the male is the activity with the greater prestige, power, status, and rewards." K. MILLETT, *SEXUAL POLITICS* 224 (1970) (citation omitted). The leading anthropologist Margaret Mead adds, "One aspect of the social valuation of different types of labor is the differential prestige of men's activities and women's activities. Whatever men do—even if it is dressing dolls for religious ceremonies—is more prestigious than what women do and is treated as a higher achievement." Mead, *Prehistory and the Woman*, *Barnard C. Bull.*, Supp. 7 (April 30, 1969). See generally M. MEAD, *SEX AND TEMPERAMENT IN THREE PRIMITIVE SOCIETIES* (1935) and MEAD, *MALE AND FEMALE* (1949), which apply cultural anthropological insights to modern culture.

work as the more important is not confined to our culture. In the USSR and Eastern Europe, where there are a greater percentage of women, physicians, engineers, and lawyers, lawyers are not a high status profession, and the women in medicine and engineering occupy the lower ranks.⁸⁷

In a 1975 report, the International Labour Conference stated:

Almost everywhere there remains a clear division of labour by sex with jobs labeled as "men's work" and "women's work." While the line of demarcation may vary with time and place, what is significant is the persistence of distinctions based on sex stereotypes [J]ob labelling of this kind is both dangerous and discriminatory. It leads to recruitment based on sex rather than on capacity, and it perpetuates unproven beliefs about women's abilities and inabilities as workers. It creates a situation in which work traditionally done by men commands higher pay and prestige while that traditionally done by women is accorded lower pay and prestige and is consistently undervalued. It has no inherent logic.⁸⁸

The International Labour Conference draws the same conclusion often recognized by social scientists, that unproven and unquestioned assumptions and prejudices about women's capacities and inclinations are held by both men and women.⁸⁹ For example, in a psychological study in which female college students were asked to assess two identical groups of professional articles for value, competence, persuasiveness, and writing style, where the articles had been attributed to a male author in one group and a female author in the other, the articles in the "female-authored" group received significantly lower ratings.⁹⁰ This result had been

⁸⁷ See H. SMITH, *THE RUSSIANS* 166-95 (1976); Fry, *Structure of Medical Care Services in the U.S.S.R.*, 2 INT'L. J. HEALTH SERV. 243 (1972). In Russia, women who constitute 75% of medical personnel are most often in primary care: 80% of the physicians assigned to primary care are women. Storey, *USSR People's Court and Women Lawyers*, 48 WOMEN LAW J. 21 (1962) (states that law was one profession that generally was demoted in status after the revolution in the U.S.S.R.). The status of women in many countries has been well documented by the United Nations and others in conjunction with International Woman's Year. For a bibliography, see generally THE SEXUAL BARRIER, *supra* note 84.

⁸⁸ INTERNATIONAL LABOUR OFFICE, *EQUALITY OF OPPORTUNITY AND TREATMENT FOR WOMEN WORKERS*, REPORT VIII 20 (Int'l Labour Conference, 60th Sess. 1975).

⁸⁹ *Id.*

⁹⁰ Goldberg, *Are Women Prejudiced Against Women?*, 5 TRANSACTION 28-30 (1968). Professor Goldberg's study was replicated, with the same results, with both male and female students. The conclusion which the researchers reached was that men and women are likely to exhibit similar prejudices against women. See Bem & Bem, *Training the Woman to Know Her Place: The Power of a Nonconscious Ideology*, in REPORT OF THE NEW YORK CITY COMMISSION ON HUMAN RIGHTS, *WOMEN'S ROLE IN CONTEMPORARY SOCIETY* 101 (1970) [hereinafter cited as NYC HEARINGS]. The hearings provide an excellent review of the state of the art and the understanding of many disciplines.

predicted for articles from traditionally "male" fields such as law and city planning, but women students surprisingly also downgraded articles on dietetics and elementary school education when it was assumed they were written by women.⁹¹

Another study indicates that these attitudes are learned, and that development of such attitudes are considered part of a "normal" growing up. Thus, although the girls studied made better grades in school, their opinions of themselves grew progressively worse as they got older, but their opinion of boys and boys' abilities grew better. Boys, however, have an increasingly better opinion of themselves and worse opinion of girls as they grow older.⁹²

The fact that women do have lower social status than men in

⁹¹ Goldberg, *supra* note 90, at 28-30. The conclusions of Goldberg and the Bems have since been substantiated by several similar studies. In each, identical work attributed to men was better received and given higher ratings than when attributed to a woman. See Jones & Moyel, *Men's and Women's Affective Response to Photographed Subjects Who Differ in Iris-color, Pupil-size, and Sex*, 37 PERCEPTUAL AND MOTOR SKILLS 483-87 (1973). In this study, male and female students were shown photographs of both men and women. Both groups were more likely to respond positively to the pictures of men than to those of women. In Fidell, *Empirical Verification of Sex Discrimination in Hiring Practices in Psychology*, 25 AMER. PSYCHOLOGIST 1094 (1970), descriptions of 10 psychologists with varying male and female names affixed to the same description were sent to 155 psychology department chairpersons who were asked to indicate whether and at what level each person might be hired. Male names were approximately 10% more likely to be evaluated as deserving appointment at the tenured level (associate or full professor) than were the female names. See also Rosen & Jerdee, *Effects of Applicant's Sex and Difficulty of Job on Evaluations of Candidates for Managerial Positions*, 59 J. APPLIED PSYCH. 511 (1974). The authors found that when male undergraduate business students were asked to rate job applicants with both male and female names, male applicants got higher ratings for general suitability, potential for long service, and potential for fitting in well in the organization. Sex differences became more pronounced as the jobs under consideration were deemed more demanding. In Rosen, Benson, & Jerdee, *Influence of Sex Role Stereotypes on Personnel Decisions*, 59 J. APPLIED PSYCH. 9 (1974) [hereinafter cited as *Stereotypes on Personnel Decisions*], in order to test the influence of sex role stereotypes in organizational situations, male bank managers at a management institute were asked to respond to situations requiring managerial judgment. Persons with male names were favored for promotion, and were more likely to be chosen to attend a professional conference and to have their recommendations regarding a supervisor-subordinate conflict accepted. A leave of absence for family reasons was seen as more appropriate for female than for male employees. In Rosen, Benson, & Jardee, *Sex Stereotyping in the Executive Suite*, 52 HARV. BUS. REV. 45 (1974) [hereinafter cited as HARVARD], a survey of HARVARD BUSINESS REVIEW subscribers, using a somewhat different and larger set of management situations, yielded results similar to those in *Stereotypes on Personnel Decisions*, indicating that time-worn ideas of what is the proper place for men and women, both in the home and at work, suffuse managerial judgments. In another study, Signori & Butt, *Ratings of the Social Images of Disadvantaged Groups by Males and Females*, 30 PSYCH. REP. 575-80 (1972), both men and women rated women on characteristics relevant to employability. Male evaluators rated women less favorably than did the women evaluators. The authors suggest this indicates that men in hiring positions may be less objective in evaluating female applicants. But see Arvey, Passino, & Lounsbury, *Job Analysis Results as Influenced by Sex of Incumbent and Sex of Analyst*, 62 J. OF APPLIED PSYCH. 411 (1977) [hereinafter cited as JOB ANALYSIS].

⁹² Smith, *Age and Sex Differences in Children's Opinion Concerning Sex Differences*, 54 J. OF GENETIC PSYCH. 17 (1939). See also G. ALLPORT, *THE NATURE OF PREJUDICE* (1958).

our society and that both sexes tend to value men and male characteristics, values, and activities more highly than those of women, has been documented by authorities in a number of disciplines.⁹³ The data confirming that sexual bias affects the evaluator's perception of the work is now so clear that the National Academy of Sciences states that

the evidence for sex stereotyping in job related contexts is certainly strong enough to suggest the likelihood that sex stereotyping will pervade the evaluation of jobs strongly identified with one sex or the other. That is, it is likely that predominately female jobs will be undervalued relative to predominately male jobs in the same way that women are undervalued relative to men.⁹⁴

Some sociologists have even claimed that the sexual division of labor within the family and society together with persisting sexual stereotypes establish a caste-like system. In such a system, the low-ranking race or sex is not only defined as being unable to perform certain types of prestigious work, but propriety is violated if it does.⁹⁵ Thus, one consistent element in the assignment of jobs to men, even in modern societies is that "whatever the strictly male tasks are, they are defined as *more honorific* Moreover, the task of control, management, decision, appeals to the gods — in short the higher level jobs that typically do not require strength, speed or traveling far from home — are male jobs."⁹⁶ The caste analogy has more often been applied to race than to sex, and is now widely accepted as an accurate portrayal of the racial situation in the United States, particularly in the South, prior to the passage of Title VII.

The dogma of racial inferiority inherited from slavery has saturated all of our legal, social, and economic institutions, and our behavior and thought patterns, according to Gunnar Myrdal, a leading sociologist.⁹⁷ The study suggests that there is a parallel between the status and societal expectations for blacks and for

⁹³ See NYC HEARINGS, *supra* note 90. See generally THE SEXUAL BARRIER, *supra* note 84.

⁹⁴ NAS REPORT, *supra* note 85, at 52.

⁹⁵ W. GOODE, THE FAMILY 70 (1965). Talcott Parsons, dean of American sociology, also notes the corollary that in a society like the United States, an individual's occupation, and the monetary rewards it commands, are given overwhelming importance in the allocation of status and prestige. T. PARSONS, ESSAYS IN SOCIOLOGICAL THEORY 95 (1954). For further exploration of the idea of sex as a caste, see Freeman, *The Legal Basis of the Sexual Caste System*, 5 VAL. U.L. REV. 203 (1971). Empirical sociologists have recently begun to investigate the relationship between male/female occupational, prestige, segregation, and wage differentials. See, e.g., S. McLaughlin, Occupational Characteristics and the Male-Female Income Differential (1975) (Unpublished Ph.D. thesis on file with Washington State University).

⁹⁶ GOODE, THE FAMILY, *supra* note 95 (emphasis in the original).

⁹⁷ G. MYRDAL, *supra* note 3, *passim*.

women.⁹⁸ Others have also described similarities between the characteristics expected of blacks in the society and those expected of women,⁹⁹ and have suggested that these are traits that the majority typically expects of the underclass.¹⁰⁰ These expectations, in turn, give rise to stereotypes and distorted perceptions.

2. *The Persistence of Stereotypes*—Empirical studies of management attitudes confirm the analysis of the social scientists. The President's Commission on the Status of Women¹⁰¹ reported that employer attitudes included beliefs that a woman's primary commitment is to her family, which limits her effectiveness on the

⁹⁸ *Id.* at 110 (Appendix 6).

⁹⁹ G. ALLPORT, *supra* note 92. See also K. MILLETT, *supra* note 86, at 229, which quotes and analyzes studies comparing personality traits of men and women. Millett points out that all the traits chosen as desirable are also the traits attributed to men: thus passivity, manipulateness, and slyness are female traits; clear thinking, initiative, candor, and honesty are male traits.

¹⁰⁰ G. ALLPORT, *supra* note 92. One consequence of being part of a class which is considered inferior by the majority is that the members of the group develop self-hate. The tendency of members of subordinate groups to ward self-hatred may explain the results of one study reported by the NAS REPORT. The study was designed to test the hypothesis that the sex of a job's incumbent would affect the ratings of the job in a structured job analysis. The job tested was administrative assistant. Both men and women evaluators rated the same job with both men and women as the administrative assistant. The sex of the job holder seemed to make less difference than the sex of the evaluator. Women tended to grade more harshly. The authors suggested that if jobs are consistently analyzed exclusively by either male or female analysts, there may be over- or under-valuation of the jobs, compared to the evaluations if the evaluators are of both sexes. NAS REPORT, *supra* note 85, at 43. See also *Job Analysis*, *supra* note 91, at 411.

While these findings themselves indicate the many ways in which bias can creep into the essentially subjective phases of job evaluation, this particular study may not be relevant to whether sex or race stereotyping affects the evaluation of jobs traditionally thought of as female or black, since the job of administrative assistant is usually thought of as either neutral or as a man's job.

Other studies indicate that women may be less down-rated if they have been certified as exceptionally competent by independent sources. In one study, subjects were shown paintings and told they were (1) contest entrants, or (2) winners. Paintings identified as entrants were more favorably regarded if attributed to men, but there was no difference by sex of painter for those described as winners. Pheterson, Kiesler, & Goldberg, *Evaluation of the Performance of Women as a Function of Their Sex, Achievement, and Personal History*, 19 J. PERSONALITY SOC. PSYCH. 114 (1971). This "go with a winner" psychology may account in part for the lack of sex difference in ratings of the administrative assistant job above. If that job is typically thought of as being a man's job, then in a real sense the very fact that a woman is in the job may constitute a certification that she is extraordinary, offsetting any contrary tendency to downgrade the job because the incumbent is a woman. See text following note 42 *supra*, where it is suggested that an employer's views and attitudes toward a job will not change with the first entrant of the "wrong" sex or race, although it may change after a new identification is established for the job. Two similar studies, see NAS REPORT, *supra* note 85, at 51-52, submitted applications to a professional "job fair" and to colleges. Both studies reported that among applicants with outstanding qualifications both men and women were chosen, but from among applicants with more modest credentials men were more likely to be admitted or asked for an interview. However, neither these studies nor the study indicating that the sex of the painters did not affect attitudes toward paintings identified as winners (though it did for those that were only contest entrants) evidently attempted to determine how the sex would affect rankings. Would sex make a difference in who was chosen first? The answer to that seems to lie in the other group of experiments which indicate that when males and females have the same credentials the males are perceived as superior. See NAS REPORT, *supra* note 85, at 50-51.

¹⁰¹ PRESIDENT'S COMMISSION ON THE STATUS OF WOMEN, *supra* note 15, at 65.

job; that a woman is suited by temperament and skill to certain jobs such as electronic work, but not others such as surgery, though both demand dexterity; that men should not be subordinate to women; and that intimate groups (except those based on family or sexual ties) should be limited to membership of either sex, but not both.

The belief that woman's *real* life work is her home and family, and that man is the chief breadwinner, also leads to the belief that a woman is the secondary source of family income. It then follows that since she is only working for "pin money" she doesn't need to be paid much, and that since hers is the secondary income, women workers should be fired before male workers in case of an economic recession.

However, findings indicate that differences in productivity, absenteeism, and labor costs between men and women as well as between the races in reality are quite low. Most differences that the stereotypes attribute to sex and race characteristics appear to be attributable to the job. Low paying, dead-end, marginal jobs with little future prospects have high rates of turnover, absenteeism, and tardiness, no matter who is in the job.¹⁰² By restricting the demand for women workers and "crowding" them into women's jobs, sex stereotyping has kept the wages lower for those jobs.¹⁰³

3. *The Factor of Historical Overt Wage Discrimination*—While the preceding section suggests that unconscious factors have devalued work assigned to women and minorities, there are a number of instances where such devaluation occurred openly. When seemingly "neutral" wage setting practices are applied against a background of overtly discriminatory wage rates, the effect is to perpetuate the differentials into the present. This process is most evident in the case of sex discrimination, but may also exist in connection with race discrimination. The period of overt wage discrimination was prior to the passage of the EPA and the Civil Rights Act of 1964. Until passage of these Acts, management personnel talked openly about how good their company was to women, how it had "accommodated" them by structuring jobs so they would have to do no heavy work (while paying men disproportionately more for picking up the slack) and by allowing

¹⁰² See A. SIMMONS, *supra* note 10, at 52-55; S. TSCUCHIGANE & N. DODGE, *supra* note 40; PRESIDENTS' COMMISSION ON THE STATUS OF WOMEN (1963), *supra* note 15, at 55; WOMEN'S BUREAU, U.S. DEP'T OF LABOR, FACTS ABOUT WOMEN'S ABSENTEEISM AND LABOR TURNOVER 550 (1969).

¹⁰³ Weisskoff, *supra* note 3, at 161. From her empirical studies the author simply concludes that "women earn less because they are in women's jobs." See also F. BLAU, EQUAL PAY IN THE OFFICE (1977).

women to work at pay that suited them.¹⁰⁴

During the same period, particularly in the South, segregation of black jobs was not only overt, but was often mandated by law. The operation of the market was also said to justify paying black teachers less than white, and black jobs generally less than white.¹⁰⁵

Industry representatives testifying at hearings prior to the passage of the EPA admitted and defended the practice of paying women less than men for equal work on the ground that it cost more to employ women.¹⁰⁶ They also justified their pay practices on the basis that the free market rate for women was less than for men because women would work for less.¹⁰⁷ In hearings before

¹⁰⁴ W. CHAFE, *supra* note 15, at 62. The author suggests that even "experts" who should have known better publicly voiced the persistent and widely held belief that women worked just to earn pocket money. He quotes Ralph G. Hulin, writing in a report on employment for President Hoover's Committee on Recent Social Trends, that women looked for jobs "as only semi-casuals, seeking pin money, commonly receiving subsidies from home."

¹⁰⁵ See generally G. BECKER, *THE ECONOMICS OF DISCRIMINATION* 84-100 (2d ed. 1971).

¹⁰⁶ *Hearings on H.R. 3861 Before the Special Subcomm. on Labor of the House Comm. on Education and Labor*, 88th Cong., 1st Sess. 139, 194, 243, 252, 258-259 (1963); *Equal Pay Act of 1963: Hearings on S. 882 and S. 910 Before the Senate Subcomm. on Labor of the Comm. on Labor and Public Welfare*, 88th Cong., 1st Sess. 142, 145 (1963). See also *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702 (1978) for a discussion of the legislative history on the question of whether the additional cost of employing women is a defense under the EPA or Title VII. *Manhart* concerned a female employee's challenge to the defendant's policy of requiring its female employees to make significantly larger pension fund contributions than its male employees, because it had determined that, as a class, females outlive males. As a result, female employees took home less pay than male employees earning the same salary. The Court held that even though it is true that women as a class live longer than men, the defendant's practice violated § 703(a)(1) of Title VII since fairness to particular individuals rather than fairness to classes is the appropriate focus of § 703(a)(1), and because the differential was not based on a factor "other than sex." The cost justification for male/female wage differentials had been recognized by the National War Labor Board (NWLB) which during World War II had authority to regulate wage increases in order to correct inequalities. The Board endorsed the principle of equal pay for "comparable quality and quantity of work on the same or similar operation," so long as this did not increase the price ceiling. Thus, the Board rejected the then common practice of automatically paying women less in the belief that no woman was worth as much as a man, and required employers to justify differentials by demonstrating that females' "production is so different from the male[s] as to result, when the rates are the same, in an increased unit cost." *Bendix Aviation Corp.*, 11 WAR LAB. REP. 669, 672 (1943). Thus, when women got an extra rest period, they could be paid 4.5 cents less per hour. *Id.* at 672.

¹⁰⁷ *Cf. Coming Glass Works v. Brennan*, 417 U.S. 188 (1974) (where the challenged collective bargaining agreement provided for perpetuation of differential wage rates, the Court held that the employer violated the EPA by paying a lower base wage to female day shift inspectors than to male night shift inspectors, and that this violation was not cured by permitting women to work as night shift inspectors nor by equalizing day and night inspector wage rates but establishing higher "red line" rates for existing employees working on the night shift). Employers have repeatedly but unsuccessfully urged under the EPA and before the EEOC that they should be able to pay women less because labor market competition has resulted in higher rates for males than for females. See, e.g., *Brennan v. Victoria Bank and Trust Company*, 493 F.2d 896 (5th Cir. 1974); *Brennan v. City Stores, Inc.*, 479 F.2d 235, 241 n.12, 242 (5th Cir. 1973); *Hodgson v. Brookhaven Gen. Hosp.*, 436 F.2d 719 (5th Cir. 1970).

the National War Labor Board (NWLB) during World War II, General Motors (GM) explained that its dual wage structure dated back to the days when there was a surplus of female labor. However, after the hearings, GM continued to pay women less than men, simply substituting the categories "heavy" and "light" for "male" and "female."¹⁰⁸

The perpetuation of separate categories was often encouraged by the unions.¹⁰⁹ Although the United Auto Workers (UAW) and other industrial unions tended to fight for equal pay when women took the jobs of men who had gone to war, whenever possible they insisted that women be grouped together in distinct job classifications with separate seniority lists. A 1944 UAW contract provided that "men and women shall be divided into separate, non-interchangeable occupational groups unless otherwise negotiated locally."¹¹⁰

Despite the equal pay policy it had adopted, the NWLB was concerned with wage differentials between male and female jobs only when this issue was a matter of dispute between the employer and union.¹¹¹ Where both requested approval of a wage

¹⁰⁸ General Motors Corp., 11 WAR LAB. REP. 744 (1943). See Section *e infra*, for a discussion of economist Barbara Bergmann's "crowding" theory, which relates a surplus of black or female labor to depressed wages. See also Aluminum Co. of America, 5 WAR LAB. REP. 85 (1943), in which the company argued that the new minimum wage secured in an agreement negotiated with the aid of the predecessor board of the NWLB, the National Defense Mediation Board, had not been intended to be applied to the female members of the bargaining unit because the company had an established company policy to maintain a differential between men and women, and that to include women in the agreement would place the wage schedule in the plant out of line with comparable plants in the area. Stating that the intent of the parties should be the controlling factor in deciding whether women were covered by the agreement, the referee decided that neither the union nor the company had paid any attention to female workers in the agreement. Neither, evidently, had the government people who had helped reach the wage settlement then in dispute. *Id.* at 89. The company's action in adding the negotiated wage increase to the female minimum wage rather than introducing the new minimum wage as the floor for everyone, as well as the union's failure to act on the discrepancy for nine months, indicated that neither the union nor the employer intended to include women.

¹⁰⁹ W. CHAFE, *supra* note 15, at 155. There is considerable information about this period since the equal pay policy focused attention on the discriminations routinely practiced against women who had taken jobs in the war industries. Chafe notes other ways in which employers continued to discriminate in pay practices against women during the war years. At the Brooklyn Navy Yard, for example, women who replaced men were "helper trainees" instead of the higher-paid male "mechanic learner." Other companies substituted "light and repetitive" for "skilled," and paid accordingly. Only one out of four Bridgeport, Connecticut manufacturers offered women the same starting salary as men, and in some plants women received less pay than males they were training. Forty-one steel companies paid female clericals an average of \$60 a month less than men doing comparable work. *Id.* at 156. A brief by the United Electrical Workers to the NWLB in 1945 suggested that many unions supported equal pay for female replacements so that when the soldiers came home they would not find their jobs reclassified as women's work with a woman's wage. *Id.* at 158.

¹¹⁰ W. CHAFE, *supra* note 15, at 157.

¹¹¹ Aluminum Co. of America, 14 WAR LAB. REP. 176 (1944).

differential, the NWLB approved it.¹¹² Moreover, the NWLB seems to have applied the doctrine of equal pay primarily to those instances where as part of the war effort, women were doing what had been a man's job.¹¹³ They refused to extend it to jobs traditionally held by women.¹¹⁴ Nor did the equal pay principle apply to correct wage differences when men in one plant were paid more than women doing the same job for the same employer, but in another plant.¹¹⁵ For jobs to which only women had historically been assigned, the NWLB would presume "the rates . . . to be correct in relation to other jobs in the plant."¹¹⁶ Applying this approach, the NWLB held that "the doctrine [of equal pay for equal work] is not to be invoked to abolish wage differentials between jobs which have historically been performed by women almost entirely and jobs which have been recognized in the industries as jobs limited for the most part to men."¹¹⁷

Thus, what one commentator has called "the worst form of discrimination against female workers,"¹¹⁸ the differential in wage rates paid to women doing historically female work, was almost unaffected by wartime equal pay policies. Not only did such practices continue unabated into the postwar era, but the government policies probably encouraged employers to set up special women's jobs whenever possible to avoid the bite of equal pay.

Even when a woman's job was evaluated according to an em-

¹¹² *In re* Westinghouse Elec. & Mfg. Co., 4 WAR LAB. REP. 435 (1942). See also Grocery Warehouse Group of Philadelphia, 5 WAR LAB. REP. 381 (1942). In this case the NWLB not only approved a wage differential based on sex, but, in reducing the total cost of the wage settlement, decided that the original percentage relationship should be maintained. The NWLB also refused to order equal pay where a contract limited rates for women to two-thirds of male rates and the contract had no reopener clause. Houston Bakeries, 12 WAR LAB. REP. 181 (1943).

¹¹³ Aluminum Co. of America, 14 WAR LAB. REP. 176 (1944).

¹¹⁴ Equal Pay for Women: Effect of Executive Order 9328 on WLB's General Order 16, 8 WAR LAB. REP. xxviii (letter from NWLB Chairman to Secretary of Labor, made public June 4, 1943).

¹¹⁵ Northwest Match Cos., 13 WAR LAB. REP. 133, 137-38 (1943).

¹¹⁶ See note 114 *supra*.

¹¹⁷ Rotary Cart Box Shook Indus., 12 WAR LAB. REP. 605, 607 (1943). See also Smith Wood Products Co., 13 WAR LAB. REP. 16 (1943); Spokane Detail and Stock Shops, 13 WAR LAB. REP. 33 (1943).

The presumption that established wages for traditionally female jobs were correct could, however, be overcome by affirmative evidence of existence of an intra-plant inequity. Such a showing was not easy, nor were many undertaken. See American Viscose Corp., 27 WAR LAB. REP. 248 (1945). Women received an entry rate for common labor of \$.15, as against male common laborers' entry rate of \$.73. The panel decided that, though job content was different so that the equal pay principle did not apply, the jobs did require equal skill, and therefore the differential in job content did not justify the wage differential. The panel thus found that an intra-plant inequity existed. See also General Elec. and Westinghouse Elec. Cos., 28 WAR LAB. REP. 666 (1945).

¹¹⁸ W. CHAFE, *supra* note 15, at 157. Chafe explains the premise underlying the NWLB's and many employers' presumptions: "at the root of the disparity was the pervasive assumption that any job historically filled by women had less intrinsic value than a comparable position held by men." *Id.*

ployer's own standards to be worth as much as a man's job, the premise prevailed. During that era, General Electric (GE) used a job evaluation manual which provided for evaluating jobs by assessing points for skill, effort, responsibility, and working conditions without regard to sex. When it came to pricing the job on the basis of points assessed, however, the manual specified, "[f]or female operators the value shall be two-thirds the value for the adult male worker."¹¹⁹ This one-third discount meant that "all but a small fraction of the women's jobs" were rated substantially below male common labor despite the fact that many, if not most, of these jobs clearly involved more skill, mental aptitude, and responsibility than the male common labor jobs.¹²⁰

These historical differentials tend to persist into the present, according to International Union of Electrical Workers (IUE) reports. The IUE contends that 43% of the women employed in plants which it represents still receive less than common labor. In 1970, the average wage of a female employee at GE was less than 70% of the rate of the male employee at the same company.¹²¹

Until the late 70's there had been no substantial change in the *relationship* between male and female rates in many plants since the NWLB days because all increases in wages have been based on the prior dual pay schedule. In 1978, GE settled with the EEOC a nationwide charge of sex discrimination for 30 million dollars, according to the company. Fortune Magazine reported that some of that settlement covered the company's wage discrimination.¹²² The IUE has also negotiated a number of job relationship and rate changes with both Westinghouse and GE. In every case women's jobs have been upgraded on the basis of evaluations. Many women's jobs were re-graded to comparable men's jobs. Where the pay difference was attributed to both sex bias and to less valuable job content, the jobs were upgraded to

¹¹⁹ The manual was quoted in General Elec. Co., 28 WAR LAB. REP. 666, 681 (1945). The price differential between men and women had not changed much since biblical days when "a male between 20 and 60 years old shall be valued at 50 shekels. . . . If it is a female she shall be valued at 30 shekels." *Leviticus* 27:3-4.

¹²⁰ General Elec. and Westinghouse Elec. Cos., 28 WAR LAB. REP. 666, 683 (1945). In *Bowe v. Colgate Palmolive Co.*, 489 F.2d 896 (7th Cir. 1973), the court noted that most of the women there were paid less than common labor.

¹²¹ Weyand, *Sex-Biased Wage Rates and Job Assignments*, in PROCEEDINGS OF 21ST ANNUAL INSTITUTE OF LABOR LAW, THE SOUTHWESTERN LEGAL FOUNDATION (1975). The IUE has charted the changes made in the pay schedules by General Electric and Westinghouse since the hearings before the NWLB in 1945. Separate male and female wage rates were overtly maintained until 1963. After passage of the EPA, the male and female rates were merged into one schedule by placing all the female rates below the lowest male rate even when, according to the company's own evaluation, the jobs were worth equal points. See also Newman, *The Policy Issues*, 1 SIGNS: J. WOMEN CULTURE SOC. 265 (1976).

¹²² Smith, *The EEOC's Bold Foray into Job Evaluation*, FORTUNE, Sept. 11, 1978, at 58.

eliminate the sex bias, but the difference due to content remained.¹²³

GM, GE, and Westinghouse each employ so many people that in most localities where they have plants their pay scales influence the community wage, which is then relied on by other employers in wage setting. Each sometimes takes the role of "leader" in the wage setting through collective bargaining. Other employers and unions are likely to follow the wage pattern thus established.¹²⁴ The fact that these major employers, and others that in the past followed the same pay practices, overtly set one wage for men, and then deliberately marked down the women's wages means that probably until the mid-sixties there was not one but two community wage rates — one for men and one for women. Since most wage increases, including cost of living increases, have tended to be either flat cents per hour or percentages of existing wage rates, the relationship between the jobs, and the real depressed wage position of women's jobs established prior to 1964 and passage of Title VII, remain. It is as much a product today of sex-based wage determinations as when it was first established. Nor has the recent emphasis on the whole compensation package, in which benefits are substituted for money, necessarily altered the depressed character of female compensation. Indeed, one study indicated that because pensions and other benefits are usually calculated as a specific amount, the benefit package, too, only widens the gap. Thus the wage patterns based on outmoded stereotypes of women workers persist.

One of the important mechanisms which turns job segregation

¹²³ Newman, *supra* note 121; conversations of author with W. Newman, 1977-1979. The NLRB had also recognized the appropriateness under the equal pay principle of adjusting wages where changes had been made in job content to accommodate women replacements. It would permit "setting of proportionate rates for proportionate work" based on "a study of job content or job evaluation." See also note 114 *supra*.

¹²⁴ The steel industry now sets wage rates through industry-wide collective bargaining. Pattern bargaining is common among other major industries including the rubber tire, automobile, garment, and meat packing industries. The UAW has in recent years attempted to break GM's wage leadership by "target" or "selective" bargaining, *i.e.*, choosing to negotiate and settle with one of the other big auto companies first — even if it means striking the target — expecting to settle with the others on the model set in the first wage round. See J. DUNLOP, *INDUSTRIAL RELATIONS SYSTEMS* (1958). See also TRADE UNION GOVERNMENT AND COLLECTIVE BARGAINING 241-304 (J. Seidman ed. 1970); Koster, *Relative Wages and Inflation*, in *INDUSTRIAL RELATIONS RESEARCH ASSOCIATION SERIES, PROCEEDINGS OF THE THIRTIETH ANNUAL WINTER MEETING, 193-94* (1977). According to one government study of wage determinants following World War II, some executives believed that wage policies in their companies should conform to broad wage movements throughout all industries. Others looked for guidance mainly to particular firms in their own industry, to companies that competed directly for sales, were in the same geographical area, or drew upon the same supply of labor. See the post-World War II study, *TEMPORARY NATIONAL ECONOMIC COMMITTEE, INDUSTRIAL WAGE RATES, LABOR COSTS AND PRICE POLICIES*, (Monograph No. 5) XV(1946). See also text at note 207 *infra* for a discussion of the use of community wage in wage setting.

into wage discrimination is the practice of relating wage rates of black jobs to one another, rather than to comparable white jobs.¹²⁵ For example, for blacks in the South, this has led to different wage rates for identical jobs, such as elevator operators or forklift truck drivers, which are common to black and white departments, with the lower rate applying to the black jobs. These jobs were generally in different departments, were carried on separate seniority lists prior to 1965, and had different titles. Thus, a white might be assigned to the shipping department as a fork lift operator, while a black also operating a fork lift truck and handling the same loading platform might be assigned to the labor department and be called either a helper or simply a laborer. Each would be paid in accordance with the status of the job title.¹²⁶

This examination of sociology, anthropology, psychology, and history establishes that where jobs are identified as being appropriate for minorities or women, the very designation carries with it an inference that those jobs are of lesser value than jobs which are available for men or whites. The factor of race or sex influences views about the value of the job. Thus, job segregation has as an integral characteristic, the assignment of lower values to the jobs which are available to minorities and women than would otherwise be the case. This evidence establishes that it is more likely than not that where job segregation exists, the wages of

¹²⁵ See, e.g., *Quarles v. Phillip Morris, Inc.*, 279 F. Supp. 505 (E.D. Va. 1968) (wage differential between similar white and black jobs).

Some of the mechanisms that turned job segregation into wage discrimination for blacks in the South have been identified and analysed in INTERNAL LABOR MARKETS, *supra* note 61, at 146. The authors state that, historically, there has been a wider skilled-unskilled wage differential in the South than in any other region of the country. The traditional explanation for this is the relatively greater scarcity of skilled labor in the South, but some portion of this differential is also probably due to the depressing effects of black "spill-over" upon the unskilled wage rate. *Id.* To the extent that discrimination leads to a clear demarcation between black and white jobs, noncompeting groups of jobs are established.

Although it is difficult to estimate the extent to which this separation of markets has affected relative wages, the result of such a market dichotomy must ultimately be reflected in relative wage rates between these groups unless supply and demand change uniformly in both markets over time. In addition, once the jobs are compartmentalized by race, different standards can be applied. The authors say that frequently job evaluation programs would simply omit the black jobs, or would award different points to tasks when done by whites or by blacks. *Id.* at 147.

The authors conclude that, given prevalent attitudes about the tolerance of blacks for unpleasant work, "it would not be surprising if job classifications held by blacks have been undervalued in terms of working conditions. . . ." Conversations with employers and union officials further suggest, they say, that "problems of wage equity and of wage grievances are generally given much less consideration in black jobs than in white jobs." *Id.*

¹²⁶ See, e.g., *United States v. N.L. Indus., Inc.*, 479 F.2d 354 (8th Cir. 1969). The most rampant "dualness" occurred on the railroads where many jobs differed only in title and pay. See, e.g., *Railway Trainmen v. Howard*, 343 U.S. 768 (1952); *Steele v. Louisville & N. R.R.*, 323 U.S. 192 (1944); *Peters v. Missouri Pac. R.R.*, 483 F.2d 490 (5th Cir.), *cert. denied*, 414 U.S. 1002 (1973); *United States v. Jacksonville Terminal*, 451 F.2d 418 (5th Cir. 1971), *cert. denied*, 406 U.S. 906 (1972).

those jobs assigned to minorities and women have been depressed by virtue of the fact of their minority or female status.

C. Translation of Discriminatory Devaluation Into Lower Pay Rates

This section will examine the industrial relations practices which translate a perception of the lesser value of the work done by women or minorities in segregated jobs into specific wage rates. The industrial relations practices which accomplish this result are the standard procedures used in the establishment of wage rates. In order to understand how these procedures produce a discriminatory wage rate for the segregated jobs, it is first necessary to understand their role in modern industrial relations and how they operate.

The objectives of any job compensation policy include (1) attracting and retaining qualified personnel, (2) providing a fair day's pay for a fair day's work, (3) granting equal pay for equal work, and (4) developing commitment to organizational objectives. The structure should be internally equitable, leaving employees satisfied with their place in the structure, while being competitive enough in the external job market to attract and keep people with desired levels of abilities.¹²⁷

All wage setting systems, whether highly structured or very simple, involve two principal elements: a ranking of the relative values of the various jobs in relation to each other and a method of linking the wages within an employer to the wages paid for similar work in the labor market. Either element may allow discrimination to infect the resulting wage structure. The comparison of jobs within an employer permits subjective valuation of jobs by reference to sex and race. The "linkage" to the community wage may transmit existing patterns of wage discrimination into the employer's pay structure.¹²⁸

We will first examine the internal ranking of jobs, then turn to

¹²⁷ R. HENDERSON, COMPENSATION MANAGEMENT 60 (1976).

Professor Henderson's text represents, and is used to represent, the generally accepted principles of compensation management and job evaluation, the currently established view of the field, and to indicate what students who are future managers are learning. Much of the material on job evaluation in this section has been drawn from Professor Henderson's text.

During the editing of this article, NAS REPORT was published. The report reviews and describes current job evaluation practices, and includes a comprehensive reference list at 64-73.

¹²⁸ See notes 171-78 and accompanying text *infra* for discussion of the community wage rate.

examine the "linkage" with the community wage rate.¹²⁹ It is important, however, to keep in mind that these are merely two aspects of a single process. In examining them we will focus on the mechanics of job evaluation, which operate in the same way whether instituted as part of a collective bargaining agreement or unilaterally by management.

1. *How Job Evaluation Systems Compare Jobs*—Internal job evaluation involves "classification," grouping of families with common elements, and "grading," identifying jobs which have different content but are similar with respect to skill, effort, responsibility, and working conditions so as to justify the same wage rate.¹³⁰ Paying comparable wage rates for jobs of the same grade is what is traditionally meant by equal pay for equal work.¹³¹

The process of comparing dissimilar jobs is the heart of job

¹²⁹ Various commonly used synonyms for community wage will be used interchangeably, e.g., "going rate," "market rate," "labor market rate." Each refers to an estimate of what other employers are paying for similar jobs. "Other employers" are those the wage setter considers relevant, and may be in the same geographic location, the same industry, or the same status in the economic society. The community wage therefore may be local, national, or industry-wide, but is probably related to the employers' recruiting area.

¹³⁰ See R. HENDERSON, *supra* note 127, at 151, for a discussion of classification systems in the public sector. See also NAS REPORT, *supra* note 85, at 3, 17-24, discussing public job evaluation systems. On-the-job training is often keyed to advancement through the steps of a classification, with pay associated with skill levels. In job evaluation systems using the "key" or "benchmark" concept, jobs are generally grouped by classification and "keyed" within families. In large organizations grouping and comparing classifications then allows different kinds of jobs to be graded according to skill level across occupations.

The best known classification system is the federal civil service system. That system, which covers most federal white collar jobs, has been predicated on the proposition that jobs should be paid according to the qualifications required and the responsibilities entailed in them, without regard to what comparable jobs command in the private sector. (Some comparability is built in, however, since applicants are placed in jobs at salary levels similar to their last jobs.) The federal blue collar wage system combines a single evaluation system with local wage rates. Proposed federal pay reforms would make the general schedule more responsive to local wages. See NAS REPORT, *supra* note 85, at 19-23.

¹³¹ Since employees judge the fairness of their pay by its relation to pay in other jobs rather than by its absolute dollar value, management has interests independent of any legal requirement in encouraging a feeling of fairness in compensation and in promoting employee satisfaction by grouping dissimilar jobs into relatively few pay grades. Unions also have an interest independent of meeting legal requirements in pushing the principle of equal pay to eliminate any hint of past personal favor, bias, or accident and to protect workers from arbitrary managerial decision-making. Even though unions may consider management proposals for formal job evaluations as a subterfuge for increasing production rates, they often seek to equalize pay for jobs requiring similar knowledge and responsibility but dissimilar duties and tasks.

For instances of union interest in protection from arbitrary managerial decisions as a reason for seniority systems, see Cooper & Sobell, *Seniority and Testing Under Fair Employment Laws: A General Approach to Objective Criteria of Hiring and Promotion*, 82 HARV. L. REV. 1598 (1969). See generally R. HENDERSON, *supra* note 127, at Ch. 14; INTERNAL LABOR MARKETS, *supra* note 61, at 173.

evaluation methodology.¹³² A number of different methods are used, but each has the objective of identifying compensation factors common to all jobs, which can be evaluated and compared.¹³³

One premise of compensation systems' is that it is the job, rather than the individual who occupies it, that is evaluated.¹³⁴ Thus, if a job requires a high school education in drafting but is held by a college trained engineer, it should still be assessed as are other jobs requiring but a high school education. This "objective" evaluation of the job rather than the person characterizes most systems, particularly those which evaluate blue collar jobs. Occupant specific factors are more likely to be taken into account

¹³² F. JOHNSON, R. BOISE & D. PRATT, *JOB EVALUATION I* (1946). The authors state:

The purpose of job evaluation is to find out exactly what each job is and to measure its true value in relation to all other jobs in the company. When this measure has been determined, the pay rates for all jobs can be established on the basis of equal pay for equal work. . . . [J]ob evaluation determines. . . relative pay rates. . . .

Other scholars note that "every kind of work must be compensated in accordance with its value relative to all other kinds of work in the same organization." E. BENGE, S. BURK & E. HAY, *MANUAL OF JOB EVALUATION 9* (1941).

¹³³ The first job evaluation systems depended on non-quantitative variations of simple pairings and rankings. However, job evaluation systems have become increasingly quantitative, assigning weighted points to each compensation factor deemed important, and computing the total score for each job, which score can easily be translated into dollars and cents per hour. Points may be assigned a priori or may be derived from the "going rate" either by sophisticated regression analysis or by simply estimating the contribution of each factor to the "going rate" for key jobs. See text accompanying notes 142-44 *infra*.

The "linkage" with the community wage, then, may be made early in the process or as a discrete second phase. "Objective" job values are obtained during the internal phase when factor points are determined a priori. Whenever points are related to the community wage in this process, existing sex or race differences will be built in. See NAS REPORT, *supra* note 85, at 8.

For descriptions of some of these systems, see R. HENDERSON, *supra* note 127, at 153-56 & 173-78. They include "time span of discretion," E. JAKES, *TIME SPAN HANDBOOK* (1964); "problem-solving," Charles, *Installing Single-Factor Job Evaluation*, COMPENSATION REV. 9 (1971); "decision levels," Paterson & Husband, *Decision-Making Responsibility: Yardstick for Job Evaluation*, COMPENSATION REV. 21 (1970); "guideline method," R. SMYTH & M. MURPHY, *THE GUIDELINE METHOD OF JOB EVALUATION* (n.d.); "position analysis questionnaire," McCormick, Jeanneret, & Mecham, *A Study of Job Characteristics and Job Dimensions as Based on the Position Analysis Questionnaire (PAQ)*, J. APPLIED PSYCH. 347 (1972); "functional job analysis," Fine & Wiley, *An Introduction to Functional Job Analysis: A Scaling of Selected Tasks from the Social Welfare Field* (Methods for Manpower Analysis Monograph no. 4 1971). The Department of Labor also provides a method for analyzing and classifying jobs. U.S. DEP'T. OF LABOR, *DICTIONARY OF OCCUPATIONAL TITLES* (4th ed. 1978) [hereinafter cited as *DICTIONARY OF OCCUPATIONAL TITLES*]. The Factor Ranking Benchmark Guidechart Evaluation System, used by the U.S. Civil Service, combines job ranking, factor comparison, and the point methods of job evaluation. Some of the methods above are also described and critiqued in the NAS REPORT, *supra* note 85, at 9-34.

¹³⁴ R. HENDERSON, *supra* note 127, at 199. See also NAS REPORT, *supra* note 85, at 28-29. Usually these jobs are measured by relying heavily on personal factors such as age, education, degrees, experience, number of publications, and the number of times and places that articles written by the person in the job being measured have been cited. These methods are known as "person-in-the-job" evaluation systems; one such system is the maturity curve method which uses age as the chief factor.

in connection with evaluation of managerial and professional work where, presumably, experience in the performance of the job has added value.¹³⁵

The factors which are used to compare different jobs are called "compensable factors." They are the elements of the jobs which are considered important to the specific employer, and are defined as "individual elements or parts of a job that, when put together, define a job and determine its value."¹³⁶ The functions and requirements of the different jobs within the organization determine the choice of factors. The choice of compensable factors and the weight given to each component is crucial to the system's operation, because the omission of any relevant element could cause certain jobs to be significantly under-valued relative to other jobs, which would destroy the legitimacy of the entire evaluation program.¹³⁷

This first step in a job evaluation is a job analysis, which is an examination to identify the job's duties and responsibilities, to determine its relationship to technology and other jobs, and to examine the knowledge, employment standards, accountabilities and other job holder requirements necessary to perform it.¹³⁸

From the job analysis, descriptions of each job are prepared which provide a word picture of the job. From these descriptions common job elements will be identified and comparisons made for purposes of evaluation to develop classes and families of jobs and to grade jobs across the plant. The job descriptions accompany requests for pay information made to other employers and are used to define the required qualifications for recruiting and hiring purposes.

The choice of compensable factors to be considered can and

¹³⁵ R. HENDERSON, *supra* note 127, at 118. Compensable factors are those job characteristics that are regarded as contributing to the overall worth of the job, NAS REPORT, *supra* note 85, at 7, as are the factors that create pay differentials, R. HENDERSON, *supra* note 127, at 152.

¹³⁶ R. HENDERSON, *supra* note 127, at 118.

¹³⁷ R. HENDERSON, *supra* note 127, at 118. Installing a job evaluation system is a major and important project in any organization that will usually involve not only the internal compensation and personnel staffs, but outside consultants and representatives from every part of the enterprise to be covered by the system. Policy- and decision-making is always done by a job evaluation committee, made up of top senior management, top operating managers, and their union counterparts. The most successful systems also involve employee participation, NAS REPORT, *supra* note 85, at 5. Professor Henderson suggests that all evaluation systems share a need for expert judgments; success "relates directly to the quality of decision made by those responsible for the design and implementation of the program." R. HENDERSON, *supra* note 127, at 157. The thrust of the NAS critique is to the same effect: the perceptions and judgment of the participants are crucial to the way the jobs are evaluated.

¹³⁸ R. HENDERSON, *supra* note 127, at 86-87. Professor Henderson observes that "in job analysis every effort is made to remove the human factor from the job, *what* is done, not *how*. . . ." *Id.* at 92 (emphasis in original).

does vary widely in different job evaluation plans. Since the factor comparison method was first developed in 1926, a primary objective of job evaluation experts has been to identify common elements that are inherent in the general nature of all jobs.¹³⁹ There is general agreement that three to five such factors, called "universal factors," can be identified: the knowledge required by the job, its mental and physical demands, and the amount and kind of attendant responsibility.¹⁴⁰

While knowledge, effort, and responsibility are components of all jobs, these factors must be subdivided in order to define the similarities or distinctions that a pay scale should recognize. For instance, skill may be measured by the amount of formal education necessary to the job, the amount of formal specialized skill training, length of on-the-job training necessary to become fully competent, extent of trade knowledge, length and kinds of prior work experience, motor and manual skills required, amount of judgment required, and amount of discretion provided in performing the job.¹⁴¹ The sub-factors may be further refined by recogniz-

¹³⁹ *Id.* at 456. Another of the earliest approaches to quantifying a value for each job is M. LOTT, *WAGE SCALES AND JOB EVALUATION* (1926). See also E. BENGE, *JOB EVALUATION AND MERIT RATING* (1946).

¹⁴⁰ For a discussion of the factors which count as "universal factors," see NAS REPORT, *supra* note 85, at 40-46. Some researchers do not include working conditions as universal factors. See, e.g., Hay & Purves, *A New Method of Job Evaluation: The Guide Chart-Profile Method*, PERSONNEL (July, 1954) [hereinafter cited as *Guide Chart Method*]; R. HENDERSON, *supra* note 127, at 114-16. They prefer to award job hardship or hazard pay in a flat sum, regardless of the specific job, for working under dangerous conditions, rather than to give weight to bad working conditions in calculating base pay. Factors considered compensable in job evaluation systems differ considerably from the task-oriented description used by time and motion engineers where job content and description of work methods for performing the various tasks that constitute the job are the subject on inquiry. For job evaluation purposes, the compensation manager considers the "human qualities, characteristics, and knowledge required to perform the job, to establish standards in this area, which eventually determine the base wage for the job and the wage structure for the organization." R. HENDERSON, *supra* note 127, at 49. Many lower courts, in attempting to assess whether jobs are "equal" under EPA standards, seem to look at the kind of information an industrial engineer would use to design a job or do a time and motion study, not the information which experts in the field of job evaluation think pertinent for evaluation purposes. This has happened despite the Supreme Court's statement in *Corning Glass Works v. Brennan*, 417 U.S. 188, 201 (1974), that Congress intended to adopt the words "skill, effort, responsibility and similar working conditions" as terms of art, so that the job evaluation profession should be looked to for the proper construction of these technical terms.

¹⁴¹ The original job evaluation systems using a method of factor comparison was designed to evaluate production jobs in machine shops, which are still the least complicated to analyze and evaluate. The choice of factors reflects their origins in traditional male factory work. Professor Henderson chooses factors aimed at tool use, emphasizing skill factors of experience and manual ability to use tools rather than dexterity. Little attention is paid to mental or visual demands and none to learning time, or human skills. On the other hand, some recent systems have emphasized evaluation of high-level jobs—office or people-oriented jobs—and have emphasized quite different traits. See *Guide Chart Method*, *supra* note 140, at 72-80. This method is designed for higher level professional and managerial jobs. See also Fine & Wiley, *supra* note 133, at 34-37. For a comparison of National Metal Trades Association (NMTA) office and shop plans, see NAS REPORT, *supra* note 85, at 9-10.

ing the relative magnitude of the factor in different jobs. This permits a comparison, for example, of the importance of manual dexterity in electronic assembly with the importance of manual dexterity required by truck driving or neurosurgery.

Once the factors to be considered are chosen, a "compensable rating scale" is established by which the different levels or degrees of each factor is represented and a score assigned. Each compensable factor is then weighted for its importance to the job and its importance to the company. The job score is the sum of all the factor points for that job.¹⁴² Because the compensable factors are chosen, ranked, and weighted by an internal job evaluation committee or come pre-packaged from an outside consultant, both of which use their best subjective judgment, it is clear that, to the extent that compensable factors chosen are associated with traditional women's or minority work, the ranking of those factors could be expected to reflect the attitudes and values of the committee members. When the compensable factor rating scale has been developed by an outside consultant, the evaluation committee's chief function is to evaluate and rank the jobs. The way this is done varies with the system used.¹⁴³

¹⁴² NAS REPORT, *supra* note 85, at 8. The effect of the choice of weights can be seen, for instance, in the weighting of the subfactors of skill in the AAIM plan, R. HENDERSON, *supra* note 127, at 120. That plan emphasizes experience; the difference between the lowest and highest "experience" degree is 88 points, while the difference between the highest and lowest degrees for "responsibility" or "mental or visual demand" is 20 points. Physical effort and working conditions both have a range of 40 points. *See also* NAS REPORT, *supra* note 85, at appendix 1. The total number of points that is needed to evaluate all the jobs is determined by the present dollar spread between the highest and lowest paid jobs. This insures that the total labor cost is within the budget and the basic hierarchy. The point spread used in the evaluation study should be sufficient to reflect the magnitude of this differential, as well as to provide differences between pay steps to reflect perceived differences in the work.

¹⁴³ The Hayes system was designed to evaluate and rank exempt non-teaching positions at colleges and universities. *See, e.g.*, *Christensen v. Iowa*, 563 F.2d 353 (8th Cir. 1977). This system consists of a series of questions about each classification to be evaluated, with predetermined point values for each answer. The questions concern several factors with respect to each job. The points associated with a given factor are weighted to reflect the approximate relative importance of the factor for institutions of higher education. An inside evaluation committee determines the answers guided by explanatory definitions for each question. The total number of points for a given classification is the measure of the relationship of that job to all others within the organization covered by the study. This, in turn, is supposed to guide the assignment of the classification to a salary grade.

The original Bengé system, also called the "weighted-in-money" method, uses a "key" job as the model instead of a point system. The evaluation committee first selects 15-20 key jobs representing the entire range of jobs included in the study. These are then ranked for their importance to the company and dollar amounts are assigned to each job on the basis of a community wage survey. Professor Henderson points out that the individual money value put on each factor is not mathematically derived, but rather is a "meeting of the minds" average. R. HENDERSON, *supra* note 127, at 460.

Having priced each factor, a factor-by-factor monetary scale is set up so that all other jobs can be slotted into the scale as each factor relates to that factor in the key job. The wage for each is then determined by summing the monetary values attributed to each of its factors. For example, if the classification of "doffer" in a textile mill is deemed to rank

While it is theoretically possible to factor, evaluate, and rank each job, this is rarely done. Rather, a full scale inquiry is done for only a relatively few "key" or "benchmark" jobs, and the other jobs are ranked in relation to the key job. Jobs are generally grouped by classification and job family with key jobs representing each grouping. The key jobs are also usually selected by the job evaluation committee on the basis of agreement among members of the committee on the ranking and point worth. In the Bengé system, for example, the committee is instructed that jobs selected for the "key" designation must be susceptible of exact and well-understood definitions, and that no job should be included in the key position list if there is any disagreement about the existing rate.¹⁴⁴

2. *How Internal Phases of Evaluation Systems May Be Discriminatory*—The foregoing analysis identifies at least four stages where the internal evaluation process may incorporate subjective and biased views as to the nature of the job or its relative importance. The job evaluation process is based on the subjective judgments of those who participate in the process. The lack of objectivity is recognized within the profession.¹⁴⁵ The areas in the job evaluation process in which subjective judgments are critical

tenth in skill, sixth in effort, second in responsibility, and sixth as to working conditions among all jobs on the assembly line, its wage elements might take the following configuration. Assuming an average wage of \$2.70 an hour, 24 cents would be ascribed to skills ("s"), 49 cents to effort ("e"), \$1.45 to responsibility ("r"), and 49 cents to working conditions ("w"). Thus, the compensable factor percentage formula would be approximately: 10% for "s", 18% for "e", 54% for "r" and 18% for "w" as they compare with the "key job." *Id.*

One primary distinction between the Bengé system and some of the later models is the timing of the use of the prevailing wage rates. The Bengé system first identifies the prevailing wage for the key job and then establishes the relative worth of each compensable factor as a proportion of that wage. More recently developed systems usually defer comparison with the prevailing wage until an internal "objective" value of the jobs in both absolute and relative terms has been determined. This is done through the a priori assignment of points. Only after the internal evaluation and ranking is completed do these systems go to the third step, a community wage survey. *Id.* at 153-56.

¹⁴⁴ R. HENDERSON, *supra* note 127, at 113 & 160.

¹⁴⁵ Professor Henderson warns that "[t]he entire area of compensation is and always will be one in which subjectivity predominates." *Id.* at 111.

Particularly when there are reasons to believe that discrimination does exist, the trapings of objective scientific quantifications should not obscure the basic nature of the process. On the other hand, where the internal worth of jobs is established through a formal job evaluation system which makes each step explicit, the people involved are more likely to make reasoned judgments than those who evaluate jobs in a wholly informal manner. There is, therefore, some prospect that the results of a job evaluation system may be less biased than a wage structure established in a random manner in a discriminatory environment.

One leading firm, to avoid violations of Title VII and the EPA in job evaluations, omits factors which consistently give higher ratings to predominately male classifications than to predominately female classifications and vice versa. In practice, this policy has resulted in recommendations not to use such factors as physical effort or working conditions, since the traditional definition of these terms gives more weight to classifications where males predominate.

have already been mentioned: job analysis, job description, and the selection and weighting of compensable factors.

a. Job Analysis—Because the data collected in a job analysis are basic building blocks of the evaluation process, all subsequent steps in evaluation depend on the information gathered through the job analysis.¹⁴⁶ The value system and related perceptions of the job analyst influence what information is collected and therefore what is available in later stages of the process. Inaccuracies can be caused intentionally by emphasizing duties seldom, if ever, performed to ensure a high rate of pay for an incumbent, or by making a job look more important than it is, or to assist a manager maintain an “empire.”¹⁴⁷ Unconscious bias can also make male or white jobs look harder or can cause the analyst to underestimate difficulties in women’s or black jobs or to omit information that could influence decisions as to the relative value of the job.¹⁴⁸

The manner in which information is requested can also affect the analyst’s understanding of a job. For instance, Professor Henderson provides a sample questionnaire that inquires about on-the-job demands by asking the employee to check all undesirable physical demands required on his job.¹⁴⁹ Items to be checked include: (1) handling heavy material, (2) awkward or cramped positions, (3) excessive working speeds, (4) excessive sensory requirements (seeing, hearing, touching, smelling, speaking), (5) vibrating. There are no specific questions about manual dexterity or skill in handling intricate and delicate instruments which, for example, typify women’s work in the electronic industry. Nor are there questions about the fatigue which results from boring repetitious work that requires constant attention, such as inspection or sewing. A question concerning “emotional demands” asks only that *undesirable* emotional demands be checked, including: (1) contact with general public, (2) customer contact, (3) close supervision, (4) deadlines under pressure, (5) irregular activity schedules, (6) working alone, and (7) excessive traveling. These questions do not consider the possibility that some of these ac-

¹⁴⁶ See R. HENDERSON, *supra* note 127, at 85-110 (Ch. 6 on Job Analysis); NAS REPORT, *supra* note 85, at 46-54.

¹⁴⁷ R. HENDERSON, *supra* note 127, at 95.

¹⁴⁸ NAS REPORT, *supra* note 85, at 39. The Report, which asks how many bosses know in detail what their secretaries do, suggests that clerical jobs in particular are not well understood by their supervisors. One study suggests that men and women analysts may respond differently so that sexually mixed teams should be employed for job analysis. *Id.* at 43.

¹⁴⁹ R. HENDERSON, *supra* note 127, at 100.

tivities may be viewed as assets rather than as liabilities.¹⁵⁰

b. Job Description. The same problems of biased perception and selectivity are applicable to the preparation of job descriptions. Since the job description is based on the information developed in the job analysis, if the same persons do both, or if those who do both each have similar points of view on what is important, any bias in the analysis will appear in the description.¹⁵¹ Any element of the job not mentioned in the job description is not likely to be credited to it.

The job description establishes the qualifications for the job. Stereotypes may influence job qualifications such as education or prior experience. An investigation of the Dictionary of Occupational Titles¹⁵² evaluation of women's jobs such as "foster mother," "homemaker," or "nursery school teacher" found that the jobs had been undervalued. The evaluators had disregarded skills learned in non-paid work or at home, and had defined "required education and training" to include only formal educational programs.¹⁵³

The inclusion of formal education as a qualification for filling the job not only tends to exclude blacks, but may also lead to a lower wage for the jobs which do not require formal education (which blacks are more likely to fill) if the job evaluators believe jobs requiring a high school diploma are worth more than jobs not requiring one.¹⁵⁴

c. Selecting Compensable Factors. Not all elements mentioned in a job description will be included in the selection of compensable factors. The choice of compensable factors may ignore the skills involved in typically women's work. The choice of factors and factor weights can have strong effects on the relative ranking

¹⁵⁰ The Uniform Guidelines for Employee Selection Procedures, 43 Fed. Reg. 38,308 (1978) (to be codified in 29 C.F.R. Part 1607) [hereinafter cited as UGESP], explicitly recognize the problem of biased perception in connection with employee selection procedures. See note 274 *infra*.

¹⁵¹ See UGESP § 14(b) (2).

¹⁵² DICTIONARY OF OCCUPATIONAL TITLES, *supra* note 133.

¹⁵³ The bias toward formal education and experience and against informal education is illustrated in *Leisner v. New York Tel. Co.*, 358 F. Supp. 359 (S.D.N.Y. 1973) in which the court stated:

There is also evidence of the use of criteria, such as prior supervisory experience (apparently not including teaching) and technical degrees, although not required, which would appear to disadvantage women. . . . Thus, Mr. Carbone was asked how he knew that experience as a military officer was more valuable than experience as a teacher. He replied, "I guess I'm paid to make this type of judgment."

Id. at 368-69.

¹⁵⁴ Unless justified, this would seem to be an unfair employment practice. See note 281 and accompanying text *infra*.

of jobs and thus ultimately on the pay received for the job.¹⁵⁵ Charges leveled at the Dictionary of Occupational Titles indicate the selective recognition of job factors.¹⁵⁶ Thus, including lifting in the definition of "physical effort" might advantage certain male titles, while failure to include manual dexterity in the definition of "physical effort" in a plant where women do light assembly will disadvantage the women. Emphasizing strength required rather than fatigue factors may have the same effect. The Dictionary also includes, as a highly-rated skill related to people, "negotiating," which is usually thought to be a man's role, while it disregards people-related skills which are more associated with women, such as "counseling."¹⁵⁷

Even when a factor is identified and selected, the importance of that factor in the job is subject to the vagaries of perception.¹⁵⁸ White or male evaluators are more likely to better understand and appreciate the difficulties of traditional white or male jobs than traditional minority or women's jobs, and are likely to have a traditional disdain for "women's work" or "black jobs."¹⁵⁹

d. Weighting Compensable Factors. Subjective judgment is also involved in determining the relative importance of each factor selected and assigning points indicating the relative worth of each factor. For example, the relative values accorded physical effort and working conditions which include heavy, dirty, or unpleasant physical labor as compared with the values accorded skill and responsibility afford such an opportunity for bias since these factors tend to distinguish male and female jobs.

In many establishments, jobs have been designed to take account of state laws which prohibited women from lifting more

¹⁵⁵ NAS REPORT, *supra* note 85, at 35. The choice of factors may permit more differentiation among male than among female jobs, resulting in women's jobs being entered at the bottom while men's jobs are distributed throughout the pay structure. *Id.* at 37.

¹⁵⁶ UP FROM .878, *supra* note 31, at 13.

¹⁵⁷ See NAS REPORT, *supra* note 85, at 37-38.

¹⁵⁸ *Id.* at 38-45.

¹⁵⁹ *Hodgson v. Daisy Manufacturing Co.*, 317 F. Supp. 538 (D. Ark. 1970), *aff'd in part and rev'd in part*, 445 F.2d 823 (8th Cir. 1971), involved such a biased perception of compensable factors. In setting the pay of male and female press operators, the employer had credited the men with additional "job responsibility" points on the ground that negligence in the moving of parts and equipment could result in accidents and lost time. The district court held that the possibility of carelessness was not properly subsumed under the rubric of "job responsibility." Moreover, the plant in question had an accident-free history in that job line. Female press operators, on the other hand, were the sole operators of the high-speed press and were constantly exposed to a high risk of injury. Such a risk, the district court observed, causes "mental stress and fatigue" and necessitates a "high degree of mental and visual attention." This mental exertion was not required of their male counterparts and should render the differences in job requirements between them "incidental and insubstantial." *Id.* at 544. Having reached this conclusion, the court reduced the allowance for "job responsibility" given the male press operators and increased the point valuation for "effort" allowed the women. This new approach rendered the male and female jobs substantially equal and thus they required equal pay.

than minimal weights, and from working overtime or at night.¹⁶⁰ These jobs were labeled "women's jobs," and women were confined to them. In assessing the value of various jobs to an employer who had engaged in these practices, emphasis on "male" factors such as physical labor, strength, gross manual operations, or even routine operations, rather than on manual dexterity, visual acuity, stress, and fatigue characteristic of the light assembly or high speed press operations — tasks assigned to women¹⁶¹ — would result in higher rates for "male" jobs.

Employers have had wide leeway in deciding the extent to which mechanical aids should supplement physical strength. Machine design can reflect the assumption that men will be the operators. For example, any machine scaled to the average height, reach, and physical strength of men allows most men to clear jams, whereas most women require a platform or other help.¹⁶² The point to be considered, however, is not whether the failure to provide mechanical aids to overcome physical limitations itself constitutes sex discrimination, but what values are assigned to various factors because of resulting sex segregation. If a job has been structured in such a way that it is segregated, the subjective judgment about its value is likely to be affected by the evaluator's attitudes toward the value of men's work and women's work as much as by their views on physical labor versus use of tools.

In plants where there has historically been a division of labor along sex lines, regardless of their designations as men's and women's jobs, heavy and light work, or other sex identified labels, a premium is often paid for the physical labor element of the men's job. This contrasts sharply with the value of physical labor or the discomfort of dirty work in Southern industry. There, instead of being white male jobs, these dirty, physically demanding jobs have historically been black jobs. There *they* are the lowest pay-

¹⁶⁰ See *Equal Pay Act of 1963: Hearings on S. 882 and S. 910 Before the Senate Subcomm. on Labor of the Comm. on Labor and Public Welfare*, 88th Cong., 1st Sess. 149 (1963) (testimony of Fred Edwards, Armstrong Cork Co.).

¹⁶¹ See WOMEN'S BUREAU, U.S. DEPT. OF LABOR, APPRENTICESHIP FOR WOMEN, WHY NOT? (n.d.) which reports that most machine production shops visited had one exclusively female department.

¹⁶²

The ingenuity and flexibility with which industry avails itself of labor saving devices have often been applied to supplement the physical limitations of males. . . . The fact that in most factories the level at which machines cease to do the job and human effort takes over is based on the assumed male height and physical strength suggests that this level is fixed on a sex discriminatory basis.

Weyand, *supra* note 121, at 70.

ing, lowest prestige jobs.¹⁶³ Between white males, moreover, heavy material handling is valued *less* when done by muscle power than by mechanical aids such as fork lifts.

The actual design of the job is also within the control of the employer. Several different operations may be combined into one job, only one non-essential part of which is physically demanding. Given a favored view of "physical labor," that part can add points and therefore dollars to the value of that "heavy" job. For example, a job may involve assembling, machine operation, or welding, all of which require little strength. The employer, however, may have structured the job to require the operator to bring boxes of material to the workplace or to carry away boxes of the finished product. The men doing the job receive higher wages because of the "extra points" that physical effort receives as compared to a job structured for women which does not have the additional element. Even the possibility of having to perform tasks forbidden to women by state laws, though rarely, if ever, required, often results in additional pay for men on the grounds that they give the employer "flexibility."

The use of the "key job" system for ranking and valuing of jobs permits differential treatment of factors which are common to men's and women's jobs.¹⁶⁴ Women's jobs are compared with other women's jobs and men's with other men's. For example, nurses might be compared to dieticians or electricians compared to plumbers, but nurses and plumbers would not be compared. Thus, even if the same compensable factors would be applied

¹⁶³ See *James v. Stockham Valves & Fittings Co.*, 559 F.2d 310 (5th Cir. 1977), *cert. denied*, 434 U.S. 1034 (1978), on wage disparities and the different kinds of work blacks and whites are assigned.

¹⁶⁴ *Schultz v. Wheaton Glass Co.*, 421 F.2d 259 (3d Cir.), *cert. denied*, 398 U.S. 905 (1970), involves one rather obvious example of the assignment of different values to the factor of "lifting," depending on which sex is involved. The entire job of the female inspector packers and the principal job of the male inspector packers in *Schultz* was to inspect each bottle as it came from the oven, discard the defectives, and pack the good bottles in cartons. Men performed 16 tasks that women did not, consisting entirely of material handling: bringing up empty cartons, lifting and stacking filled cartons, and lifting and carting away filled containers of discards. A separate classification of employee, known as "snap-up boy," performed these duties for the female inspector packers. The men inspector packers received a wage rate 10% higher than the women. The wage of the "snap-up boys" was about the same as that of the women packers. Among male workers, lifting was thus valued less than packing, with packers accorded a higher rank in the job hierarchy and therefore a higher wage. However, between women who were full time packers and men who divided their time between packing and the less valued task of lifting, the latter duty was advanced by the employer as justification for a higher, not a lower, wage. The court rejected the justification and held the wage differential invalid under the EPA.

It is useful to compare problems of perception and subjective judgments vis-a-vis men's and women's work with Becker's and Arrow's formulation of the economics of discrimination, based on a "taste for discrimination" or on "perceptions." See notes 189-93 and accompanying text *infra*.

across the board, it is easy to apply them differently to male and female jobs. It is difficult to keep in mind how the same factors apply to jobs in different categories, even if malice or deliberate devaluing is not intended.¹⁶⁵ Also, if a woman's job is keyed to other women's jobs, any undervaluation of that key job will be transmitted to all jobs keyed to it.

On the other hand, using different factors, weighting factors differently, or simply using different evaluation systems, though these tactics may recognize the inappropriateness of a "shop" plan to evaluate office jobs, also means that no direct comparison can be made of the worth of jobs across occupational categories. Since many occupational categories are sex- or race-identified and segregated, the use of separate evaluation systems precludes direct comparisons of traditionally male and female or black and white jobs.¹⁶⁶ The problem is exacerbated where a company has a single wage schedule. Jobs may be evaluated according to different systems such as office and shop jobs,¹⁶⁷ and then pegged into the wage structure according to the "going wage" for the key jobs. This has the same effect as if the compensable factors had been chosen or weighted to reflect directly the going wage. Any historical or community bias is thus imparted into the wage structure. The concept that the ranking of jobs should reflect their objective worth is simply not applied as between groups of dissimilar jobs.

Where multiple evaluation systems are used, jobs may be ranked by: (1) using the community wage as a guide to where the jobs should be slotted in the employer's schedule; (2) intuitively trying to achieve equity (which is subject to all the dangers of stereotyped thinking examined above); or (3) by using the job evaluation technique of classifying and grading — this third system is used by the federal government, many states, and some large private employers to permit cross category comparisons.¹⁶⁸

An alternative to rationalizing and comparing jobs evaluated by different standards is simply to have multiple wage schedules, in which jobs are internally related only to key jobs which can be said to fall within the same labor market.¹⁶⁹ In this alternative, nurses, dieticians, and librarians may be on one schedule, trades

¹⁶⁵ NAS REPORT, *supra* note 85, at 35 & 53.

¹⁶⁶ *Id.* at 53-54. See descriptions of job evaluation systems in the NAS REPORT, *supra* note 85, at 9-34 (particularly at 29).

¹⁶⁷ See note 143 and accompanying text *supra* for a discussion of the Benge System.

¹⁶⁸ R. HENDERSON, *supra* note 127, at 183-87. Jobs are classified (grouped by key job), and key classifications are ranked and paired to determine pay grades. Since ranking and pairing is merely formalized intuition, such grading across categories should be scrutinized as carefully as informal methods.

¹⁶⁹ *Id.* at 230.

and maintenance on another, and physicians on still a third.¹⁷⁰ Multiple schedules can thus obfuscate wage discrimination.

3. *The "Prevailing" or "Community" Wage Rate and its Influence on Employer Wage Structures* —

a. *Use of Community Wage Rates.* Every wage setting process necessarily involves a comparison by the employer of the wages which it proposes to pay for a job and the community or market rates for similar or comparable jobs. Even the smallest employer who sets a rate for a job will inquire what others pay for similar work, often by asking neighbors, checking want ads, or discussing the matter with the local employment service. Formal job evaluation systems used by larger employers approach the process of comparison in two different ways. Some systems first identify the market price of key jobs and then rank the jobs so that the wage structure of the employer closely reflects the market values. Others rank the jobs according to their internal worth and then take the market rates into account in setting the final wage rate. Some employers pay more to establish or maintain a corporate image as a wage leader; some distribute the total wage package differently as between money and fringe benefits; some employers because of their internal needs set wages for many jobs in relation to each other, setting only the entry rate at a level in relation to the market to attract the caliber of personnel desired.¹⁷¹ However it is done, the wages paid in the market which the employer considers relevant for jobs which are considered comparable will inevitably influence the wage rate which the employer pays.

b. *How the Community Rate Is Established.* The prevailing wage is sometimes established by a formal community wage survey, or by reference to surveys produced by federal or commercial agencies or to reports of collective bargaining agreements, which are relied on routinely not only by unions and employers,¹⁷² but also by arbitrators to settle wage disputes in interest arbitrations.¹⁷³

An enormous amount of information concerning the prevailing wage rates is routinely used by management and unions in the wage setting process.¹⁷⁴ The prevailing community wage is thus

¹⁷⁰ See *Lemons v. City of Denver*, CA No. 76-w-1156 (D. Colo. April 28, 1978).

¹⁷¹ *But see* INTERNAL LABOR MARKETS, *supra* note 61. *See generally* note 236 and accompanying text *infra*.

¹⁷² R. HENDERSON, *supra* note 127, at Ch. 10 (community wage surveys).

¹⁷³ I. BERNSTEIN, ARBITRATION OF WAGES, Ch. IV (1954).

¹⁷⁴ The Bureau of Labor Statistics (BLS) publishes surveys at regular intervals. BLS survey information includes as part of its continuing program of reviewing wage gains information on earnings by sex of selected occupational groups in various cities. These include: (a) area wage surveys covering the standard metropolitan statistical areas; (b) in-

an integral factor in determining what any specific wage rate shall be and at what level a specific wage structure should operate.

The process of relating the jobs in the establishment to the general community wage structure transmits any bias which is built into the general wage structure in direct or indirect form to the wage structure of the particular employer. Moreover, if bias has crept into the internal wage setting process of an employer, that bias will become a part of the community wage structure when the employer reports its wage rates to various surveys. The community wage to which the employer relates may be partially a function of its own race- or sex-differentiated wage scales. By integrating that standard into its own wage calculations, the employer not only reproduces the biases of the external labor market, but also contributes to and reinforces those biases. Each employer relies on the available information about the prevailing community wage, contributes to that information pool, and knows that other employers will also set their rates according to the same information.¹⁷⁵ The community wage thus perpetuates patterns of wage differentiation based on sex or race, which may be based on either subjective attitudes toward sex or race roles,¹⁷⁶ past intentional discrimination which affected wage rates,¹⁷⁷ or the continuation

dustrial wage surveys covering fifty manufacturing and twenty non-manufacturing industries in three- and five-year cycles; (c) surveys of professional, administrative, technical, and clerical jobs classified into eighty occupational work levels that relate to specific pay grades in the federal civil service system, so public jobs can be compared with jobs in private industry. BLS surveys provide a wealth of pay data, including weekly work schedules, straight-time rates, rates per hour, hours per week, employer contributions to pension and insurance funds, production earnings, bonuses, commissions, and collective bargaining agreement terms by industry, occupation, and class of job. Such comparative wage information is used by government construction contractors who are required by the Davis-Bacon Act to pay the prevailing community wage, but it is available to any employer. A basic guide for community wage surveys is U.S. DEP'T OF LABOR, BLS HANDBOOK OF METHODS FOR SURVEYS AND STUDIES (Bull. No. 1711) (1971).

The Bureau of the Census publishes data on yearly earnings of full time workers by, *inter alia*, race, sex, age, and education covering over four hundred occupational titles as defined by the Dictionary of Occupational Titles. U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, 1970 CENSUS OF POPULATION, CLASSIFIED INDEX OF OCCUPATIONS AND INDUSTRIES (1971).

To carry out the Federal Reserve Board policy that the pay of their employees be competitive with private employers, each of the twelve Federal Reserve Banks conduct regular compensation surveys of their districts, comparing their most common jobs with comparable jobs in the private sector. These surveys are automatically given to participants and are available to others upon request.

In addition, compensation data is compiled and is available through commercial surveys and professional and trade associations, including the American Management Society and the American Management Association. See R. HENDERSON, *supra* note 127, at 202-07, where he describes these surveys and in addition lists three pages of sources for compensation data.

¹⁷⁵ Where there is a union, the same reliance occurs in the collective bargaining process. See text following note 183 *infra*.

¹⁷⁶ See notes 84-86 and accompanying text *supra*.

¹⁷⁷ See notes 104-08 and accompanying text *supra*.

of an understanding among employers that they will refrain from "spoiling the market" by bidding up the price of labor.¹⁷⁸

4. *Wage Relationships That Perpetuate the Effect of Prior Dual Pay Systems*—Prior to passage of the EPA and Title VII, it was common in industry to have dual pay structures for blacks and whites, and for men and women.¹⁷⁹ Such pay structures which discriminate between men and women have been clearly illegal since 1963, and all forms of discrimination in wage rates have been illegal since 1964. It is possible, however, that the relationships between men's and women's job rates and between black and white job rates still exist, hidden in the interstices of statistical graphs. Professor Henderson suggests that while multiple pay schedules may be desirable to provide a different scale for production workers and managerial personnel,¹⁸⁰ they can be disruptive of employee morale. A company which wishes to maintain separate pay structures without seeming to do so may adopt "some form of curvi-linear relationship among pay levels"¹⁸¹

This technique may also be used to perpetuate prior discriminatory wage patterns. The establishment of separate wage structures for blacks and whites or male and female jobs according to a mathematical model which retains the same effect is as discriminatory as using segregated lists, though it may be more difficult to detect.

If a structure of this sort is used in a segregated job situation where minority or women's jobs are at the bottom of the pay scale and white or men's jobs are above them, a statistical substitution for a previous dual pay system has taken place and the substituted structure perpetuates past discrimination. An historical analysis of the method by which the relationships were established may reveal that a curvilinear pay structure is a pretext for sex- or race-based wage determinations.

Dual pay structures have also been merged while retaining the subordination of black or female jobs by using a job evaluation

¹⁷⁸ See generally E. BROWN, *supra* note 15.

¹⁷⁹ For a brief discussion of dual pay structures during World War II, see note 109 *supra*.

¹⁸⁰ R. HENDERSON, *supra* note 127, at 230.

¹⁸¹ *Id.* The author states: "The use of a geometric progression develops a pay scale that turns upward on the right hand scale, providing higher grades within one continuous pay structure. This assists in avoiding the disruptive effects of multipay structure systems."

In these models, job points are placed on a linear scale in which equal distances represent equal amounts, but pay scales are on a logarithmic basis in which equal distances represent increasing differences. Thus the pay structure could be plotted in a straight line which on superficial inspection, or to statistically unsophisticated eyes, reflects equality, while in reality the higher the pay the more rapid is the rise and the greater the gap.

system which accepts and uses community wage relationships.¹⁸² Where black or women's jobs are clustered at the low end of the employer's wage scale, a single system could also require no more than that the pay lists, job titles, and grades be merged according to current wage rates, thus maintaining the subordination of women's or black job rates in a single system.¹⁸³

5. *Wage Setting in Collective Bargaining*—One of the factors which has been instrumental in setting wage rates in the last half century has been the decisions of labor organizations in shaping their bargaining demands. The testing of "economic muscle" between labor and management in the collective bargaining sector usually concerns the total size of the "wage package" which the employer will pay in the future and only rarely concerns a specific nonmonetary issue. Thus, the exercise of the workers' collective right to strike usually relates primarily to the overall cost of union proposals to employers. Within this framework, however, there is a broad range of choices as to how to split up the wage package. Choices must be made as to allocation between direct wages and fringe benefits and the nature of fringe benefits to be sought. In connection with direct wages, choices include whether to seek a percentage increase for all employees or an equal amount increase for each employee, or whether to set different base rates for distinct jobs, or to provide incentive rates for some jobs and flat rates for others.

These choices obviously are not made by unions alone. The employer may have an intense interest, for example, in the question of whether or not an incentive system is available and what proportion of the wage package goes into fringe benefits instead of wages. The outcome of these choices in a particular setting is a resolution of the union's and employer's interests. In addition, labor organizations frequently come onto a scene when basic wage relationships between jobs have already been established by unilateral employer action. As the union grapples to secure worker support, it is not likely to want to disturb basic relationships. If these relationships were established with discrimination in mind, union acquiescence in the relationships as a basis for further collective bargaining may tend to perpetuate the relationships.

¹⁸² See NAS REPORT, *supra* note 85, at 8. Thus, a dual system is also perpetuated by weighting the compensable factors to approximate the existing wage for key jobs, by keying men's jobs to men's and women's jobs to women's or whites' jobs to whites' and blacks' jobs to blacks' and, if necessary, by using different weights or different factors for different kinds of jobs.

¹⁸³ See text accompanying notes 213-15 *infra*.

While for 35 years unions have had a duty to represent fairly all employees for whom they bargain,¹⁸⁴ this duty did not apply to sex discrimination before the Civil Rights Act of 1964.¹⁸⁵ Prior to 1964, the duty of fair representation did not require the admission into unions of minorities or women, even though the union had the exclusive authority to bargain for them.¹⁸⁶ In the many instances of historic exclusion of minorities and women, the bargaining committee which shaped the union's perception of alternatives which could go into the wage package would be composed not only of whites/males, but of whites/males who had been selected in a context of official exclusion, and hence devaluation, of the worth of minorities and women. If minorities and women were not worthy of being in the union, it seems unlikely that their worth in collective negotiations would have been highly valued.

Our discussion of the manner of setting of wage rates under collective bargaining leads us to conclude that, to the extent that minorities and women were excluded from meaningful participation in the collective bargaining process, their interests were valued less than would have been the case had they been included. This devaluation could be applied with relative ease to the questions of wage increases where jobs were segregated by race or sex.¹⁸⁷ In the case of segregated jobs and segregated unions, the joint judgments of the union and the employer almost invariably placed minorities' and women's wages below those of whites and males.

6. *Is the "Market Rate" Discriminatory?*—The influence of discrimination on wage structures is well-recognized by virtually all modern economists. They have concluded that the classical economic model which assumed that the market reflected only

¹⁸⁴ *Steel v. Louisville and N. R.R. Co.*, 323 U.S. 192 (1944). See also H. HILL, *supra* note 3, at 106-33.

¹⁸⁵ See, e.g., *Hartley v. Brotherhood of Ry. & S.S. Clerks*, 283 Mich. 201, 277 N.W. 885 (1938), in which the court approved of the railroad policy which permitted layoffs of married women.

¹⁸⁶ See H. HILL, *supra* note 3, at 260. See also Blumrosen, *Legal Protection Against Exclusion from Union Activities*, 22 OHIO ST. L.J. 21 (1961). Section 703(c)(1) of Title VII (codified at 42 U.S.C. § 2000e—2(c)(1) (1976)) prohibits exclusion from unions on grounds of race, color, religion, sex, or national origin. Section 703(c)(2) (codified at 42 U.S.C. § 2000e—2(c)(2) (1976)) prohibits segregation within unions, and § 703(c)(3) (codified at 42 U.S.C. § 2000e—2(c)(3) (1976)) prohibits union pressure to cause an employer to violate the statute. This section would proscribe a union demand that a group of workers be paid less than another group because of their race, sex, religion, or national origin. See *Denicola v. G.C. Murphy Co.*, 562 F.2d 889 (3d Cir. 1977), in which a union rejected the employer's offer to eliminate discriminatory wage differential. It also would proscribe any demand which would otherwise adversely affect any group. See *Allen v. Amalgamated Transit Union*, 554 F.2d 876 (8th Cir.), *cert. denied*, 434 U.S. 891 (1977), in which a union refused to waive the initiation fee and to give seniority credit for prior employment to black workers upon a merger.

¹⁸⁷ See *Denicola v. G.C. Murphy Co.*, 562 F.2d 889 (3d Cir. 1977).

“pure” competitive factors, is simply inadequate to explain the wage setting process.

a. Wage Discrimination and the Competitive Model. The classical economic model held that wage discrimination in a free competitive market is impossible. According to this model, the community wage reflects labor market factors of supply and demand, and constitutes an index of job value based on productivity. Under conditions of perfect competition, the wage rate equals the marginal productivity of the last worker hired. The wage rate is supposedly the result of an individual negotiation, and reflects the bargaining strength of the negotiators, with the employer trying to pay the least possible and the worker seeking the most. For each there are built-in limits to the trade-off. For the employee, the wage must be sufficient to make it worthwhile to give up alternatives, such as leisure time, while for the employer, the wage should be no more than the marginal revenue product or the company loses money with each piece produced. Under competitive circumstances, the employer also loses money if production is not expanded to the point that the increase due to the last worker equals his wage. That is, if increasing the number of workers by one person would increase output by \$7,000 (all other factors being held constant), then the worker should be paid \$7,000. In this theory, it is axiomatic that higher earnings reflect higher productivity of labor and that low pay is indicative of low productivity.

Theoretically, then, the prevailing wage simply tells the employer what price it must pay to hire all the workers it needs. A company then only has to know the sale price for its product in order to know how many workers it should hire. Under these simplified conditions of free competitive markets, the assertion that an employer applying the “going rate” is discriminating would be viewed as sheer nonsense. Any question about what the job is worth would be equally meaningless, since it is worth the price it brings.

b. A “Taste” for Discrimination. Economists no longer hold the competitive view. Even classical economists recognize that there are imperfections in the market and that discrimination is one such imperfection. Beginning in the late 1950’s, economists began to recognize that discrimination may affect wage structures and to develop theories to explain such discrimination.¹⁸⁸ According to one economist of the neoclassical school of pure com-

¹⁸⁸ See generally R. HEILBRONER, *THE WORLDLY PHILOSOPHERS* (4th ed. 1972); P. SAMUELSON, *ECONOMICS: AN INTRODUCTORY ANALYSIS* (10th ed. 1948); L. SILK, *THE ECONOMISTS* (1976).

petition, employers and employees have a "taste for discrimination" which enters into their calculations of what jobs are worth.¹⁸⁹ Thus race or sex becomes a factor in determining wage rates even within the neoclassical competitive economic model. The community wage in this view is more than an index of job values based on productivity, the supply of labor, and demand for the product. It is also a reflection of the price of popular prejudices and ill will toward disfavored groups and a mechanism for their perpetuation.¹⁹⁰

c. Perceptions and Statistics. This neoclassical model has been extended by the suggestion that employers who did not personally object to hiring or working with women or blacks would, nevertheless, differentiate on the basis of race or sex because of the "perceptions" of the group. The idea that these preconceptions, even if inaccurate, motivate employers in their employment decisions led to the theory of "statistical discrimination."¹⁹¹ Under this theory, employers seek to minimize risk of uncertainty inherent in the hiring process. If employers believe women or blacks are less productive than majority men, they will hire blacks or women only if their wage rate is lower than that of white men. An employer has no idea if any particular worker is qualified for the job but believes that the probability that a random white male worker is qualified is greater than the probability that a woman or black is. To avoid costs involved in estimating the potential employee's productivity, the employer assesses the applicant on the basis of preconceptions and stereotypes about the group to which the applicant belongs rather than on the basis of an individualized judgment. Thus, if the employer believes that women or blacks have a looser attachment to the labor market, are likely to be more casual about the job, are more likely to be late or absent, that their turnover will be higher, or that women with preschool children are unreliable employees, they will act on those percep-

¹⁸⁹ G. BECKER, *supra* note 105. The literature on race and sex discrimination has recently been surveyed in three excellent articles. See generally Kahne & Kohen, *supra* note 11 (sex); Marshall, *The Economics of Racial Discrimination: A Survey*, 12 J. ECON. LITERATURE 849 (1974); Oaxaca, *Theory and Measurement in the Economics of Discrimination*, in *EQUAL RIGHTS AND INDUSTRIAL RELATIONS* (L. Hausman, O. Ashenfelter, B. Rustin, R. Schubert & D. Slaiman eds. 1977).

¹⁹⁰ G. BECKER, *supra* note 105, at 15. In focusing on race, Becker theorized that employers, employees, and consumers take account of the psychic cost of being physically close to those they would prefer to avoid, resulting ultimately in segregated work places, but no wage differentials. Cf. Flanagan, *Racial Wage Discrimination and Employment Segregation*, 8 J. of Human Resources 456 (1973).

¹⁹¹ The statistical theory of discrimination was developed independently by Professors Arrow and Phelps. See Arrow, *Models of Job Discrimination*, and *Some Models of Race in the Labor Market*, in *RACIAL DISCRIMINATION IN ECONOMIC LIFE* (A. Pascal ed. 1972); Arrow, *The Theory of Discrimination*, in *DISCRIMINATION LABOR MARKETS* 3-42 (O. Ashenfelter and A. Rees eds. 1973); Phelps, *The Statistical Theory of Racism and Sexism*, 62 AM. ECON. REV. 659 (1972).

tions regardless of their accuracy.¹⁹²

If workers are paid according to their expected productivity, minorities or women would receive a lower wage than white males with the same "true" productivity. Once these persons are on the job, such misconceptions about productivity could be expected to be cleared up through observation, except that the initial perception of productivity differentials has probably led to a different assignment: the black or woman is assigned to a lower paying, "lower productivity" job.¹⁹³ To the extent that different ability or effort does not affect job performance, the person's performance will confirm the employer's perceptions. Moreover, even if the employer should notice increased productivity of individual employees, the perception of the group is unlikely to be affected, and the individual will be considered the exception that proves the stereotype. There will be no accompanying expectation that others of the group will also be "extraordinary."¹⁹⁴ These illustrations of employers' risk-minimizing through reliance on stereotyped perceptions support the conclusion that the community wage will reflect employers' racial/sexual perceptions just as it does their "taste" for discrimination.

d. Imperfect Competition: Market Power, Job Segregation, and Wage Discrimination. The economic analyses discussed above explains the imperfect operations of "free competitive markets." However, the model of pure competition no longer dominates economic thinking. For more than 40 years, the idea of "imperfect" or "monopolistic" competition — domination of markets by a small number of firms that take account of each others' actions — has become a standard model of the economic system.

According to this model, employers exercise their market power to discriminate between groups of workers because it will maximize profits. Firms acting in concert may regulate wages

¹⁹² But see *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702 (1978); *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971); *Pond v. Braniff Airways, Inc.*, 500 F.2d 161 (5th Cir. 1974).

¹⁹³ Phelps, *supra* note 191, at 660. Another model assumes that black and white males are equal in ability, but that predictors of probable productivity, such as years of schooling or test scores, are more variable for blacks than for whites. Thus, a risk-averse, profit-maximizing employer might shift the increased risk of uncertainty to the employees by offering a lower wage to blacks than would be offered to whites. Aigner & Cain, *Statistical Theories of Discrimination in the Labor Market*, 30 INDUS. AND LAB. REL. REV. 175 (1977).

¹⁹⁴ For a similar account of analogous exceptions which "prove" the stereotype, see Wallace, *Sex Discrimination: Some Societal Constraints on Upward Mobility for Women Executives*, in *CORPORATE LIB: WOMEN'S CHALLENGE TO MANAGEMENT* (E. Ginzberg & A. Yohalem eds. 1973).

though they compete in other aspects.¹⁹⁵ Such agreements are usually rough and ready understandings in practice, often only "gentlemen's agreements" not to spoil the market by bidding up wages.¹⁹⁶ They are entered into because an employer can make money (or hire more workers) if the work force can be paid at different rates. Ideally, an employer should make individual bargains with each employee, paying only what is necessary to hire that employee. Thus, people with equal efficiencies may be willing to accept different wages. This is what economists mean by "perfect discrimination."¹⁹⁷

While "perfect discrimination" is rare in buying labor, "imperfect discrimination" may often be found. If additional workers are needed, it may be necessary to offer higher wages. In order to retain incumbent employees everyone will have to be given raises. Thus, each additional person hired may cost more than his or her individually bargained wage. To avoid this increase in the total wage bill without going to individualized bargaining, employers may seek to divide the work force so that some are paid less. Sex or race is an easy and obvious way to differentiate within the work force if men and women or blacks and whites respond differently to changes in wage rates. If, for instance, women are initially willing to accept lower wages, and will not leave if they do not get raises when men do, then in this sense they are more exploitable,¹⁹⁸ and the employer can balance the male and female work force to make the greatest profit from the same total wage bill.¹⁹⁹ The chief mechanism for wage discrimination is thus through occupational differentiation and job segregation.

¹⁹⁵ J. ROBINSON, *ECONOMICS OF IMPERFECT COMPETITION*, 218 (2d ed. 1969). Wage differentials can occur when lack of competition on the employers' side (the demand for labor) allows employers to influence the going rate by their hiring policies. Robinson called the employers' collective power a "monopsony."

¹⁹⁶ See E. BROWN, *supra* note 15. The fact that employers can act in their commonly understood interest without open collusion is well understood by the law, viz., the doctrine of "conscious parallelism" under the Sherman Act (15 U.S.C. § 107 (1976)). See Madden, *Discrimination — A Manifestation of Male Market Power?*, in *SEX, DISCRIMINATION AND THE DIVISION OF LABOR* (C. Lloyd ed. 1975). The analogy is even more forceful because, unlike producers, agreeing on prices, employers, labor, and wage setting have been excluded from the coverage of antitrust law. For example, it is not illegal to agree openly to maintain levels of wages; information about current wages is part of every wage setting; and industry-wide and pattern bargaining techniques are popular in some industries.

¹⁹⁷ To an economist it may be perfect discrimination; to the judge, not illegal discrimination, since, though each employee had an individually bargained rate, there was no concentration of wage rates by either race or sex; white, black, male, and female were scattered through the schedule.

¹⁹⁸ See Madden, *supra* note 196, at 153. See also J. MADDEN, *THE ECONOMICS OF SEX DISCRIMINATION* (1973).

¹⁹⁹ J. ROBINSON, *supra* note 195, at 302-03.

If women and blacks are restricted to narrower ranges of jobs than are males and whites, their supply elasticities will be different by definition. That is, the wider range of job opportunities open to white men makes them potentially more mobile and therefore more likely to respond to changes in the wage rate, while women and minorities have fewer opportunities and will not be as mobile. Therefore, their labor supply will be perceived as relatively inelastic, so that the employer can pay them less. This lower wage is part of the input to the community wage rate for jobs commonly identified as black or female. The circle is completed when employers restrict job opportunities and thus maintain the immobility of minorities and women upon which the lower wage rates depend.²⁰⁰

The restriction on female and minority occupational mobility is accomplished largely by a complex interaction of law and custom that both induces and supports it.²⁰¹ Since certain occupational roles are considered socially appropriate for women or blacks, jobs can be informally identified as "women's work" or "black jobs" to discourage white men from applying.²⁰² In addition, a sex- or race-linked requirement can be set for particular jobs. For example, requiring a high school diploma in an area where few blacks graduate from high school will tend to exclude blacks. In the same way, job requirements inconsistent with women's life styles will tend to exclude women. For example, since women are likely to want time out to bear and possibly to raise children, an employer can separate workers by sex by offering lower wages to workers who are not in "lifetime" jobs and who are unable to

²⁰⁰ Additionally, Madden sees all-male unions as instrumental in blocking female opportunities. Unions with monopoly power may encourage sex-defined jobs. They cannot allow lower wages to be paid to women than to their members in the same job because the employer might hire women instead of union members. But if women are barred from unionized jobs, and assigned to separate occupations, the union can negotiate high wages for members and disproportionately lower wages for the women. The same analysis, of course, applies to white unions and black jobs. Madden suggests union discrimination has the added advantage of providing psychic income to workers who would rather not associate with the excluded group. See Madden, *supra* note 196, at 149-50.

²⁰¹ Probably the most important governmental enforcement of sex roles in the workplace has been state protective legislation. See notes 13-17 and accompanying text *supra*. See also Madden, *supra* note 196, at 159. These laws, Madden says, have not only been instrumental in prescribing working conditions and opportunities for women, but have been the means to enforce discrimination and maintain collective monopsony power inexpensively. Employers who might otherwise be tempted to hire females in male jobs, thereby profiting from their lower price at the expense of the other employees, are prevented from doing so. Thus, every employer can make the monopsonist's profit which depends on the depressed wages of one employee group. See also L. THURLOW, *POVERTY AND DISCRIMINATION* (1969) (race discrimination is related to apartheid and segregation laws).

²⁰² See text accompanying notes 160-61 *supra*.

work during the "peak performance" years from 25 to 35.²⁰³ This economic incentive to distinguish the work force by sex can reinforce faulty perceptions described above so that the employer will not hire women for the "lifetime jobs" because of a belief that they are not attached to the labor market. The structure of the job and benefit plans are thus tailored to the stereotyped expectations. This, in turn, makes the stereotypes self-fulfilling prophecies. By treating women who become pregnant as if they have quit, thus forcing them to resign or to take mandatory leaves without disability coverage, sick leave, or retention of seniority, the employer until recently could insure that most women would conform.²⁰⁴

e. Segregation and the Theories of Non-Competing Groups. In 1874, John Elliot Cairnes modified classical economic analysis to incorporate the concept of non-competing groups.²⁰⁵ He suggested that when workers were segregated into different job categories on a basis such as race, sex, or class, the wages within the group would be equalized by the competitive labor market forces, but have no effect on other groups. Since it is assumed that there is no mobility from one occupational classification to another, an excess of labor in one category, though it will drive down the price in that group, cannot directly affect the wage in another occupation. This theory was applied to explain women's low wages and segregated jobs during the British suffragette movement and the World War I work push.²⁰⁶ The present day intellectual descendants of the theory of non-competing groups include the dual labor market theory and the occupational crowding theory.²⁰⁷

Institutional economists pointed out that the classical bargain for labor on a single open market was a gross oversimplification of modern industrial relations practices which operate within a dual labor market.²⁰⁸ The primary market tends to be associated with larger, better established firms and industries, the secondary

²⁰³ "Peak performance" years are those between the ages of 25 and 35. See Madden, *supra* note 196, at 163.

²⁰⁴ See *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977). Madden points to the one place where the parallel between blacks and women fails, viz., the unique relationship of men and women in the family relationship which, Madden suggests, allows men to influence women's choices of occupations in a way that has no analogy in white/minority relations. See Act of October 31, 1978, Pub. L. No. 95-555, 92 Stat. 2076 (1978) (amending Title VII of the Civil Rights Act of 1964 to include pregnancy and childbirth within the prohibition against sex discrimination).

²⁰⁵ J. CAIRNES, *SOME LEADING PRINCIPLES OF POLITICAL ECONOMY NEWLY EXPOUNDED* (1874). See also Oaxaca, *supra* note 189, at 16.

²⁰⁶ Fawcett, *Equal Pay for Equal Work*, 28 *ECON. J.* 1 (1918).

²⁰⁷ Oaxaca, *supra* note 189, at 17.

²⁰⁸ INTERNAL LABOR MARKETS, *supra* note 61, at 178.

market with smaller, more marginal firms and industries. Jobs in the primary sector are more likely to be unionized than are those in the secondary sector.

Jobs in the primary market are characterized by high wages, good working conditions, employment stability, chances of advancement, equity, and due process in the administration of work rules. By contrast, jobs in the secondary market tend to have the opposite characteristics: low wages and fringe benefits, poor working conditions, high labor turnover, little chance of advancement, and often arbitrary and personalized supervision. Disadvantaged workers are confined to the secondary market because of residence, poor skills and work habits, or discrimination. Employment in the secondary sector itself encourages and reinforces bad work patterns, decreasing any possibility of upward mobility. Wages are depressed in part because workers are plentiful, they require little or no training, and are not costly to replace.²⁰⁹ There are few and weak interconnections between the primary and secondary markets.²¹⁰

In the primary market, jobs tend to be designed and clustered so that on-the-job training proceeds up a job ladder.²¹¹ Promotions are given mainly to insiders and wage rates are structured in relation to each other rather than to the community. Since the internal promotion, transfer, and training sequences, and their related wages, are insulated from the operation of the general labor market, it has been argued that each constitutes a separate internal labor market.²¹²

In the secondary market there are three kinds of employment situations.²¹³ Some secondary employment is completely unstructured, and operates in a manner akin to that postulated by the competitive model; these include employment such as dish-

²⁰⁹ *Id.* at 169-77.

²¹⁰ Primary employers can, however, convert primary into secondary employment through devices such as sub-contracting and temporary employment, thus transferring the costs of economic instability to temporary jobs. *Id.* at 173.

²¹¹ The primary and secondary labor markets separated because job-specific and firm-specific skills required on-the-job training. The employer and employee share the cost of this specific training because they both have an interest in employment stability. Work rules, grievance procedures, and seniority systems are developed to further this mutual interest by keeping turnover through voluntary quits and layoffs low. But the combination of training costs and discharge restrictions increases the need for careful selection, so recruiting, screening, and hiring costs go up. This increases incentives to make hiring decisions on the basis of race or sex stereotypes. *See generally* Arrow, *supra* note 191; Phelps, *supra* note 191. These race and sex assumptions become self-supporting since most of the white males hired will be able to do the job, but the employer will never know whether the people who did not apply or were not hired might not have done as well or better.

²¹² INTERNAL LABOR MARKETS, *supra* note 61, at 167-69.

²¹³ *Id.* at 167.

washing and domestic work. Some jobs lie in labor markets which possess formal internal structures, but tend to have many entry points, short promotion ladders, and generally low paying, unpleasant work. Typical of such jobs are blue-collar jobs in foundries, sewing and other jobs in the apparel industries, and menial work in hospitals. Finally, sometimes secondary market jobs which have few, if any, promotion or transfer rights are attached to internal labor markets. In manufacturing, for instance, there may be one department composed of such secondary jobs such as a labor department with less stringent entry requirements.²¹⁴

7. *The Crowding Theory*—The theory of non-competing groups has been applied to modern race and sex job segregation. Women and minorities who are shut out of the better jobs reserved for white males are therefore crowded into the few remaining jobs. The supply for these jobs increases and this tends to depress the wage rate for entry level jobs.²¹⁵ Men who take jobs normally categorized as women's jobs will be paid the same wage as the women. However, if a woman or black gets a traditional white man's job, she or he may not be paid the same wages as the men because of fewer opportunities to change jobs. Assuming that low paying jobs denote low productivity jobs, these women or blacks in traditional jobs receive their marginal productivity and, in economists' terms at least, are not being exploited. However, since their wages are depressed because of the artificially increased labor supply, it has been maintained that even in economic terms this constitutes discrimination and thus, what looks like occupational discrimination is also wage discrimination in disguise.

Economists are now satisfied that discrimination infects the process of setting wages, particularly where jobs are segregated. This conclusion makes untenable the classic notion that the wage structure is the result of the free play of supply and demand. Whatever else may be involved, discrimination is a significant factor in wage differentials between men and women and blacks and whites. This conclusion is crucial in our legal analysis of the

²¹⁴ The laboring department at the Duke power plant is an example. See *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). In paper mills, jobs in the work yard which historically were considered as black jobs provide another example. See *Local 189, United Paper-makers & Paperworkers v. United States*, 416 F.2d 980 (5th Cir. 1969), cert. denied, 397 U.S. 919 (1970).

²¹⁵ See Bergmann, *The Effect on White Incomes of Discrimination in Employment*, 79 J. POLITICAL ECON. 294 (1971). See also TO SECURE THESE RIGHTS, supra note 46, at 57; Bergmann, *Occupational Segregation, Wages and Profits When Employers Discriminate by Race or Sex*, 1 EASTERN ECON. J. 103 (1974); Bergmann & Adelman, *The 1973 Report of the President's Council of Economics Advisors: The Economic Role of Women*, 63 AMER. ECON. REV. 508 (1973).

impact of Title VII on the wage setting process.²¹⁶ The economists, however, have not been specific in assessing the *extent* to which discrimination has infected the wage rate structure. The following section outlines the views of several economists who have addressed this question.

8. *Economic Analyses of the Extent of Wage Rate Discrimination*—In the last decade a number of economists estimated the extent to which income differences between whites and blacks and men and women are due to discrimination. These studies have used varying methods and different data which make comparisons difficult, but most of the studies conclude that between one-third and one-half of the earnings differential is due to discrimination because it is not explainable by other factors.²¹⁷ Many of the studies, however, defined discrimination to include only actions motivated by ill will. Discrimination identified by a showing of adverse effect on minorities and women is excluded from these analyses, which view it as “premarket” discrimination. Hence, the conclusions reached may be understated because the analyst had not considered the “adverse effect” of the employers’ practices to constitute discrimination. On the other hand, since unexplained wage differences are attributed to discrimination, the omission of legitimate variables such as skill, effort, and responsibility might result in overstatement of the effect of discrimination. These studies tended to focus on “pure” wage discrimination, a denial of equal pay for equal work as defined by job title, or “occupational discrimination,” meaning job segregation and lack of upward mobility. The studies rarely examined the interaction of wage discrimination and restrictions on upward mobility together, which has been the focus of Part I of this article.

These studies confirm that there is a significant relationship between job segregation and wage discrimination against the minorities and women holding the segregated jobs. The extent of that discrimination is a subject of debate among the economists.²¹⁸

²¹⁶ See Part II *infra*.

²¹⁷ But see *Furnco Constr. Corp. v. Waters*, 438 U.S. 567 (1978), in which the Court held that the making of a prima facie case of discrimination in violation of Title VII was not an ultimate finding of fact.

²¹⁸ Three excellent surveys of the economic literature have appeared recently. See note 189 *supra*. One, by Professors Kahne and Kohen, concluded that, while the job of synthesizing the findings remains to be done, “the sole consistent result of the melange of empirical studies surveyed is that sex discrimination in the form of unequal pay for equal work is of little, if any, quantitative significance.” However, while the studies also reach a consensus that occupational differentiation is an important source of the observed male-female earnings disparity, it is not clear to what extent the differentiation is pro-

In another study, both race and sex discrimination studies were reviewed and their data and results correlated so that they could be compared.²¹⁹ It concludes that much of the difference between the studies is explainable because of different notions of what are legitimate productivity characteristics. One's choice of variables, in fact, can eliminate discrimination completely.²²⁰

In the development of remedies, the economists' judgment as to the range of discrimination may be useful to assist a court in framing a remedy, subject to the cautionary note on the reliability of the data suggested above. Furthermore, as will be explained in more detail in Part II, no mechanical application of any percentage figure as a basis for establishing the extent of discrimination in a particular case would be appropriate. At the most, the economists' views might provide a useful starting point in the shaping of a remedy which will be based on the facts before the court, not abstract economic considerations.

The conclusion to be drawn from the totality of the evidence discussed above conforms to a common sense understanding of the way in which discrimination works and to a review of the facts concerning patterns of discrimination which have been developed in cases decided under Title VII. It is not only that the jobs into

duced by labor market discrimination (for example, in promotions) or by sex role discrimination (for example, in the home and schools). Kahne & Kohen, *supra* note 11, at 1261.

²¹⁹ Oaxaca, *supra* note 189, at 27-29.

²²⁰*Id.* at 24-25. In general, the more characteristics controlled for, the smaller the "unexplained" difference, and hence the smaller the role that discrimination is allowed to play in accounting for wage differentials. For example, controlling for occupational affiliation will often significantly lower the estimated effects of discrimination. The effects of minority concentration in low-paying occupations are subsumed under productivity differences by this method. Consequently, occupational discrimination would be ignored. Presumably, the researcher regards occupational differences as nondiscriminatory, voluntary labor-supply responses, or else the objective is the estimation of pure wage discrimination. Professor Oaxaca's findings and conclusions follow:

[O]n average males earn 67 percent in excess of female wages. On average, 50 percentage points of the average gross differential cannot be explained by the sex differences in the selected personal characteristics. If we estimate the MDC [Marginal Discrimination Coefficient] to be around 0.50, females on average should have earned wages 50 percent higher than their actual wages. Accordingly, discrimination would account for 75 percent of the original 67 percent gross wage differential. On average, whites earn wages 55 percent in excess of the wages of blacks. Of this 55 percent wage gap, 33 percentage points cannot be explained by race differences in personal characteristics. Since blacks should have received wages at least a third larger than their actual wages, direct labor market discrimination is estimated to account for about 60 percent of the original 55 percent white/black differential.

Id. at 25.

The following table, compiled by Oaxaca, gives a picture of labor market discrimination as viewed by various economists:

which women and minorities have been traditionally segregated are lower paying jobs, but it is that they are lower paying, in part at least, because they are the jobs which have been reserved for minorities and women. The social, historical, and economic studies have demonstrated the high degree of likelihood that the

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TABLE 1
Estimates of Wage Differentials by Sex and Race

Source	Sample	Gross Differential ^a	Unexplained Differential ^b	Unexplained Differential ÷ Gross Differential
<i>Male/Female</i>				
Blinder [10]	White workers over age 25. 1967.	0.57	0.58 ^c	1.02
Cohen [12]	Nonprofessional workers aged 22-64 who worked 35+ hours per week. 1969.	0.74	0.54 ^d	0.73
Fuchs [16]	Nonfarm employed workers. 1959.	0.67	0.57 ^e	0.85
Malkiel & Malkiel [20]	Professional workers in a single firm. 1971.	0.53	0.24 ^f	0.45
Oaxaca [22, 23]	White urban workers. 1967.	0.54	0.40 ^g	0.74
Oaxaca [24]	White, year-round, full-time urban workers. 1960.	0.79	0.56 ^h	0.71
	1970.	0.85	0.63 ^h	0.74
<i>White/Black</i>				
Blinder [10]	Male workers over age 25. 1967.	0.66	0.43 ^c	0.65
Oaxaca (unpublished results)	Male urban workers. 1967.	0.36	0.22 ^g	0.61
	Male year-round, full-time urban workers. 1960.	0.66	0.37 ^h	0.56
	1970.	0.53	0.29 ^h	0.55

^a The gross differential is calculated as the male (white) /female (black) wage ratio minus one.

^b The unexplained differential is calculated as the estimated female (black) wage in the absence of discrimination/actual female (black) wage ratio minus one.

^c Control variables: age, geographic region, parental income, father's education, place of birth/place grew up, number of siblings, labor market conditions, geographic mobility, seasonal employment.

^d Annual hours of work, fringe benefits, absenteeism, seniority, education, unionization.

^e Race, schooling, age, city size, marital status, class of work, length of trip to work.

^f Schooling, experience, degree held, publications, marital status, field of study, absenteeism.

^g Schooling, potential experience, health, part-time employment, migration, marital status, number of children for females, size of urban area, geographic region.

^h Same as in fn. g minus health.

jobs of minorities and women are considered to be of lesser worth because they are female or minority jobs, and the analysis of both job evaluation and the general method of setting wages has established how this value judgment is applied in the setting of wages.

PART II

Part II will examine the application of Title VII and the EPA to wage discrimination which results from job segregation in the manner which has been established in Part I. First, the issue of whether the facts outlined in Part I establish a violation of Title VII will be examined, beginning with the standards necessary to establish a *prima facie* case. Second, various defenses which may be asserted by employers will be explored, including the application of the "Bennett Amendment"²²¹ by which Congress related Title VII to the EPA. Finally, problems of formulating appropriate remedies will be analyzed.

A. Liability Under Title VII

1. *The Theory*—Title VII makes it unlawful for an employer to discriminate with respect to "compensation, terms, conditions, or privileges of employment" or to "limit, segregate, or classify" 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 em-

²²¹ 42 U.S.C. § 2000e—2(h) (1976). This subsection refers to the Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1963).

ployee," because of race, color, religion, sex, or national origin.²²² Thus, discrimination with respect to compensation is prohibited by the statute in exactly the same manner as other forms of discrimination.²²³

A case of discrimination may be made out either by establishing disparate treatment of two groups or by a showing that seemingly neutral employment practices have a disparate impact.²²⁴ Under

²²² 42 U.S.C. § 2000e—2(a) (1964). In a series of cases starting with *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), the Supreme Court has established that the statute is to be broadly construed to effectuate the strong congressional purpose to eradicate discrimination "in whatever form." *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 763 (1976). In *Griggs*, the Court was faced with the question of whether an employer was prohibited by Title VII from requiring a high school education or the passing of a standardized general intelligence test as a condition of employment in or transfer to jobs when a) neither standard was shown to be significantly related to successful job performance, b) both requirements operated to disqualify blacks at a substantially higher rate than white applicants and, c) the jobs in question formerly had been filled only by white employees as part of a long-standing practice of giving preference to whites. 401 U.S. at 425-26. In the landmark decision, the Court ruled that if an employment practice which *operates* to exclude blacks cannot be shown to be related to job performance, the practice is prohibited by Title VII. *Id.* at 431. The decision is notable for its liberal interpretation of Title VII. The Court construed Title VII as directed not only at employers' motivation in their employment practices, but also at the consequences of those practices, stating that "good intent or absence of discriminatory intent does not redeem employment procedures or testing mechanisms that operate as 'built-in headwinds' for minority groups and are unrelated to measuring job capability." *Id.* at 432. See also *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702 (1978); *Nashville Gas Co. v. Satty*, 434 U.S. 136 (1977); *Dothard v. Rawlinson*, 433 U.S. 321 (1977); *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975) (the central statutory purposes of Title VII are: "eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." *Id.* at 421. The Court stated that Title VII is "[a] complex legislative design directed at a historic evil of national proportions." *Id.* at 416; *Alexander v. Gardiner-Denver Co.*, 415 U.S. 36, 44 (1974); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 801 (1973) ("[i]t is abundantly clear that Title VII tolerates no racial discrimination, subtle or otherwise."); *Phillips v. Martin Marietta Corp.*, 400 U.S. 542 (1971).

²²³ *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978). See also *United States v. South Carolina*, 445 F. Supp. 1094 (D.S.C. 1977), *aff'd sub nom.* *National Educ. Ass'n v. South Carolina*, 434 U.S. 1026 (1978).

²²⁴ *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 355 n.15 (1977). See generally B. SCHLEI & P. GROSSMAN, *EMPLOYMENT DISCRIMINATION LAW 1-25 & 65-181* (1976); Blumrosen, *Strangers in Paradise: Griggs v. Duke Power Co. and the Concept of Employment Discrimination*, 71 MICH. L. REV. 59, 66-71 (1972).

Cases that have applied the disparate treatment concept to compensation differentials include: *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702 (1978); *James v. Stockham Valves & Fittings Co.*, 559 F.2d 310 (5th Cir. 1977); *Homemakers, Inc., of Los Angeles v. Division of Indus. Welfare*, 509 F.2d 20 (9th Cir. 1974), *cert. denied*, 423 U.S. 1063 (1976); *Hays v. Potlatch Forests, Inc.*, 465 F.2d 1081 (8th Cir. 1972); and *Quarles v. Philip Morris, Inc.*, 279 F. Supp. 505, 509-10 (E.D. Va. 1968). *Cf. Wade v. Mississippi Coop. Extension Serv.*, 528 F.2d 508 (5th Cir. 1976) (disparate treatment concept applied to employment and promotion practices); *Strain v. Philpott*, 331 F. Supp. 836, 842 (M.D. Ala. 1971) (disparate treatment concept applied to employment and promotion practices and provision of services); *United States v. Medical Soc'y of S.C.*, 298 F. Supp. 145, 150-51 (D.S.C. 1969) (disparate treatment concept applied to hiring and promotion practices and admission and treatment of patients). The most obvious form of disparate wage treatment is the kind of dual wage structure maintained at one time by GM. See text accompanying note 108 *supra*.

The disparate impact test has been applied to claims of discriminatory compensation. See, e.g., *United States v. South Carolina*, 445 F. Supp. 1094, 1104-09, 1116 (D.S.C. 1977),

Title VII, the burden is on the plaintiff to make a prima facie case on either disparate treatment or disparate impact grounds.²²⁵ This burden is the same in all Title VII cases whether they involve discrimination based on race, national origin, or sex.²²⁶ While the employer may have defenses which are applicable only to sex discrimination cases, that fact does not alter the nature of the prima facie case.²²⁷ The thesis outlined in Part I of this paper is that where jobs have been segregated the wages of the jobs to which minorities and women have been assigned have probably been depressed in light of the low status of the holders of the jobs. The establishment of present or past job segregation thus should create an inference of wage discrimination sufficient to constitute a prima facie case. Part I established that the ordinary process of establishing wages allows stereotypes and prejudices to operate in the valuation of segregated jobs, while the community wage rate reflects aggregate stereotyped judgments as to the value of "men's" versus "women's" work, and of "white" versus "black" work.

Thus, when the job evaluation-community wage system is used to set wages in jobs which are sex- or race-segregated, discrimination has more probably than not been a negative influence on the value of those jobs. The lower wage rate determination follows directly from the fact that the jobs in question are substantially segregated by race or sex. To make a prima facie case of wage rate discrimination, then, a plaintiff should have to show only that the job has been and/or is presently identified as a minority or female job.

Such a showing would demonstrate that a depressed wage was one of the adverse effects of job segregation prohibited by section 703(a)(2). The demonstration of such a discriminatory wage rate would also establish a violation of section 703(a)(1).²²⁸ No showing of discriminatory purpose is required under a disparate impact theory with respect to either sections 703(a)(1) or (a)(2); likewise, although such a showing is "critical" under a disparate treatment

aff'd sub nom. National Educ. Ass'n v. South Carolina, 434 U.S. 1026 (1978). Cf. Russell v. American Tobacco Co., 374 F. Supp. 286, 294-95 (M.D.N.C. 1973), *aff'd in relevant part and modified in part*, 528 F.2d 357 (4th Cir. 1975), *cert. denied*, 425 U.S. 935 (1976) (disparate impact test applied to company disability benefit plan); EEOC Decision No. 72-2066, [1973] EEOC DECISIONS (CCH) ¶6367, 4 FEP CASES (BNA) 1063 (1972) (disparate impact test applied to overtime and premium pay policy); EEOC Decision No. 70-110, [1973] EEOC DECISIONS (CCH) ¶6062, 2 FEP CASES (BNA) 225 (1969) (disparate impact test applied to overtime policy).

²²⁵ See *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977); *Franks v. Bowman Transp. Co.*, 424 U.S. 747, 772 (1976); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-03 (1973); *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971).

²²⁶ Compare *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (race), with *Dothard v. Rawlinson Co.*, 433 U.S. 321 (1977) (sex).

²²⁷ See *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977).

²²⁸ See note 1 *supra*, for the text of both sections.

theory, such motive can, in some situations, be inferred from differences in treatment.²²⁹ However, in a non-class action individual case charging discrimination in compensation based only on a theory of disparate treatment, the plaintiff would have to show that the depressed wage was racially or sexually motivated.²³⁰ Thus, the establishment of job segregation is the crucial fact which makes the prima facie case of wage rate discrimination under both subsections of 703(a).

2. *Establishing Job Segregation*—Under this theory, total job segregation would provide the clearest illustration of a situation where the wage structure was probably influenced by the same discriminatory factors which produced the segregation. “Pure” job segregation, however, is not necessary for the application of the theory. Rather, the touchstone of wage rate discrimination analysis is the perception which employers and employees have of the sexual or racial character of the job. If a job which has been historically segregated is still understood to be a “woman’s job” or a “black job,” the wage rate will reflect that fact, even though some members of the majority group have that job.²³¹

Today, the strict segregation of jobs by race or sex which was common before the passage of the Civil Rights Act has begun to break down.²³² Where the breakdown is complete, whatever wage rate discrimination previously existed will ultimately dissipate and the job will come to be valued without regard to the race or sex factor. However, in the transition period, not only are many jobs still substantially segregated, but the time lag in wage rate revision means that for most of those jobs the wage structure still reflects the depressed rate which was associated with its segregated character. There may come a time, however, when sufficient numbers of the majority have taken previously segregated jobs so that the jobs have lost their identity as minority or female and the inference of discrimination is no longer justified.

No single statistic identifies the conditions under which prior job segregation should no longer give rise to an inference of wage rate discrimination. However, the experience of the courts in the

²²⁹ *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977). See also *Furnco Constr. Co. v. Waters*, 438 U.S. 567, 581-83 (1978) (Marshall, J., concurring in part and dissenting in part); *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971) (“[C]ongress directed the thrust of the Act to the consequences of employment practices, not simply the motivation.”). On motive in Title VII cases, see generally Blumrosen, *Strangers No More: All Workers Are Entitled to “Just Cause” Protection Under Title VII*, 2 INDUS. REL. L.J. 519 (1978). For a discussion of proof of intent in disparate treatment cases, see B. SCHLEI & P. GROSSMAN, *supra* note 224, at 1153-54 (1976).

²³⁰ *Id.*

²³¹ See notes 113-14 and accompanying text *supra*.

²³² See text accompanying notes 42-43 *supra*. See also *TO FORM A MORE PERFECT UNION*, *supra* note 42, at 58-60; *JOBS FOR AMERICANS*, *supra* note 3, at 151-52. *But see SOCIAL INDICATORS*, *supra* note 17, at 39-47.

use of statistics to establish a prima facie case of discrimination under Title VII may provide some guidance. The ultimate consideration is whether the situation disclosed by the statistics is sufficiently likely to have resulted from illegal action to require the defendant to justify its action on a non-discriminatory, business-related ground.²³³

Where historically segregated jobs are partially integrated, it is likely that previously established discriminatory wage rates are continuing in effect if the wages of the segregated jobs have not changed relative to other jobs. This is particularly likely to be the case so long as approximately 70 to 80% of the occupants of the job continue to be minorities or women.

A practical guide or "rule of thumb" will be useful in this area, as it is in connection with the determination of "adverse impact" under the federal government's Uniform Guidelines on Employee Selection Procedures — 1978.²³⁴ In the Uniform Guidelines, the government takes the position that it will find "adverse impact" when the selection rate for the disfavored group is less than 80% of the selection rate for the most favored group. The Women's Bureau of the Department of Labor has utilized the figure of 70% female job occupancy as their basis for identification of segregated jobs.²³⁵ This figure was also used in a comparable worth study done for the State of Washington.²³⁶ While a prima facie

²³³ See *Hazelwood School Dist. v. United States*, 433 U.S. 229, 305-14 (1977); *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 339 n.20, 356-62 (1977).

²³⁴ UGESP § 4D. Under § 4D,

[a] selection rate for any race, sex, or ethnic group which is less than four-fifths (4/5) (or eighty percent) of the rate for the group with the highest rate will generally be regarded by federal enforcement agencies as evidence of adverse impact, while a greater than four-fifths rate will generally not be regarded by federal enforcement agencies as evidence of adverse impact.

The "selection rate" is "[T]he proportion of applicants or candidates who are hired, promoted or otherwise selected." 43 Fed. Reg. 38,308 (1978) (to be codified in 29 CFR Part 1607, § 16R).

²³⁵ See Waldman & McEaddy, *supra* note 33, at 10-11.

²³⁶ See N. WILLIS, STATE OF WASHINGTON COMPARABLE WORTH STUDY (1974). See also N. WILLIS, COMPARABLE WORTH STUDY: PHASE II (1976), which was a study done in connection with the State of Washington's Civil Service Commission that examined job classifications deemed either male- or female-dominated. Any job was considered "dominated" by one sex if more than 70% of its workers were members of one sex. The study concluded that "women's jobs" tended to be paid at a lower rate than "men's jobs" by about 20%. Concerning the same study, see H. Remick, "Comparable Worth: Equal Pay for Equal Worth" (paper presented at Annual Meeting of the American Association for Affirmative Action, 1977); G. Taber & H. Remick, *Beyond Equal Pay for Equal Worth: Comparable Worth in the State of Washington* (unpublished paper presented at the Conference on Equal Pay and Equal Opportunity Policy for Women in Europe, Canada, and the United States, at Wellesley College, May 1978).

Except where the actual numbers are so small that percentages are meaningless or misleading, any job that is 70% or more female or minority should be considered segregated. Even when the absolute numbers are small, however, a historical pattern can identify a job as a minority or female job.

case of wage rate discrimination could consist simply of proof of segregated jobs and the wage rate of those jobs, a plaintiff may offer additional evidence to strengthen the inference that job segregation influenced the wage rate.

Such evidence might show that the job in question is segregated not only by the defendant employer but by other employers in the same labor market. Testimony that these jobs are viewed as "women's jobs" or "black jobs," or that they were so viewed at some relevant point in history, could be presented by experts on labor market practices, such as a director of a state employment agency, or a director of a job-supplying organization such as the Urban League. Evidence of formal segregation of jobs at the time of the establishment of the wage pattern would strengthen the inference that the wage structure was itself influenced by the segregation. The relationships between the wage rates of different jobs may have been established during the time when race or sex discrimination was open and lawful.

Even though no showing of motive is required in a Title VII case based on disparate impact,²³⁷ evidence of past deliberate discrimination, past overt maintenance of dual wage structures with lower female or minority rates, or past intentional job segregation on the part of the employer or the relevant employment community may suggest that the overall pattern of discrimination influenced the present day setting of wages as well as other aspects of the employment relationship. The plaintiff may also be able to show specific pay practices that constitute disparate treatment or that have a disparate impact. The most obvious of these is paying less to women or minorities than to men or whites for the same job.²³⁸ Disparate treatment in the job evaluation process could

²³⁷ The pertinent language of Title VII provides:

(a) 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 natural origin;

42 U.S.C. § 2000e—2 (1976). The cases make clear that proof of motive is not required under the disparate impact theory. *See International Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977); *Griggs v. Duke Power Co.*, 401 U.S. 424, 430-32 (1971).

²³⁸ For example, see the orderly-nurses aide cases under the EPA cited in *Brennan v. Owensboro-Daviess County Hosp.*, 523 F.2d 1013, 1029-30 (6th Cir. 1975), in which the hospitals' policies of paying higher wages to orderlies than to nurses aides were struck down. *See also B. SCHLEI & P. GROSSMAN, supra* note 224, at 382-83.

Both Title VII and the EPA prohibit unequal pay for equal work because of sex. The EPA does not cover race. Because of the confusion over the relationship between the two acts, *see* note 257 *infra*, however, plaintiffs may wish to avoid combining a Title VII claim with an equal pay claim. Any suggestion that specific jobs should be compared is likely to lead the judge to focus on EPA requirements, not on a Title VII segregated job-discriminatory compensation claim.

also be shown: that the employer applied one rule, policy, or practice to men's jobs and another to women's jobs (for example, an education increment might be given to men who finish high school, but a lower one, or none at all, to women); that the employer determined women's pay by a woman's standard, and men's pay by a man's standard; that the employer set pay rates for jobs predominantly employing blacks by reference only to other "black" jobs while white pay rates are similarly keyed to each other. It may also show evidence of the disparate impact of neutral practices, for instance, that choice of factors or the operation of an evaluation plan results in an increased evaluation of the worth of jobs held by majority males.

The foregoing elements would establish a prima facie case in accordance with usual Title VII standards as applied to actions based on a "disparate impact" theory. In such a case, the plaintiff may establish a prima facie case by identifying the practice which is being challenged, and demonstrating that it impacts more heavily on minorities or women than on white males. Thus, in *Griggs v. Duke Power Co.*, the practice of requiring a high school diploma and the passing of standardized aptitude tests was held illegal on the basis of evidence that 34% of whites but only 12% of blacks in the relevant labor force had completed high school, and that in one EEOC case, 58% of whites but only 6% of blacks had passed the tests.²³⁹ In *Dothard v. Rawlinson*, height and weight requirements were held discriminatory on evidence that they excluded less than 1% of men but 41% of women.²⁴⁰ In neither case was the employer able to justify the practice on grounds of business necessity.²⁴¹

At least one court has held that when jobs have been shown to

A job may be segregated even though men and women both perform essentially the same work but with different titles and pay. Since a court will look through titles to job content under the EPA, 29 U.S.C. § 206(d) (1976), a job may be found to be "substantially the same" so that it meets the narrow EPA test for equal work. Since, however, the work force is sex segregated by titles, the disparate impact expected from segregated jobs would still be likely. See *Laffey v. Northwest Airlines, Inc.*, 567 F.2d 429 (D.C. Cir. 1976). If the jobs are indeed the same or substantially identical, and men are being paid more, it is probably easier to file an equal pay claim. There is also a possibility of double damages under the EPA, unlike under Title VII. See 29 U.S.C. § 216(b) (1976). More often, however, the work in segregated jobs is not sufficiently like any other to qualify under the EPA test for equal work, which is quite narrow, and so the only remedy - if there is to be one at all - for historically segregated jobs must be found in Title VII.

²³⁹ 401 U.S. 424, 430 n.6 (1971).

²⁴⁰ 433 U.S. 321, 329-30 (1977).

²⁴¹ In *Dothard v. Rawlinson*, 433 U.S. 321 (1977), the Court did recognize a limited defense based on the bona fide occupational qualification exemption of § 703(e) of Title VII (42 U.S.C. § 2000e-2(e) (1976)), holding that the state could exclude women from "contact positions" in a situation in which sex offenders were mixed with other offenders in an atmosphere which had been characterized as a "jungle" by a federal district court. *Id.* at 334-37.

be segregated, no showing of economic harm is necessary in order for the plaintiff to make out a prima facie case.²⁴² The Fifth Circuit has stated:

[A] Title VII plaintiff does not have to show economic loss to prove discrimination The key for this case is whether there was past discrimination Going further and requiring plaintiffs to prove that past assignment practices produced lower pay checks is contrary to law and precedent. . . . Title VII contains neither requirement nor implication that economic harm must be shown before a class can be found to have made out a prima facie case of racially discriminatory job assignment. Indeed, the statutory prohibitions of the enactment are explicitly broader than economic harm.²⁴³

The Eighth Circuit has held that “[s]tatistics which show segregated departments and job classifications establish a violation of Title VII.”²⁴⁴ Thus, when the existence of segregated jobs has been shown, statistically or otherwise, there is a prima facie violation of Title VII.

In addition, courts have recognized in Title VII cases that employer decisions made on the basis of subjective considerations provide opportunities for discriminatory considerations to operate. When, as in *Rowe v. General Motors*,²⁴⁵ the cumulative ef-

²⁴² *Swint v. Pullman-Standard*, 539 F.2d 77, 89-93 (5th Cir. 1976).

²⁴³ *Id.* at 89-90. The Fifth Circuit has not been uniform in its treatment of Title VII cases involving segregated jobs. In *James v. Stockham Valves & Fittings Co.*, 559 F.2d 310 (5th Cir. 1977), the court compared the treatment of black workers, who had been confined to lower paying, more distasteful jobs, to those of white employees who had been assigned better jobs, and had no difficulty concluding that the black workers were victims of illegal discrimination. However, in *EEOC v. Delta Airlines, Inc.*, 578 F.2d 115 (5th Cir. 1978) (per curiam), in analyzing a situation in which the airline had assigned women only to the stewardess classification and then adopted a no-married stewardess rule, the court did not compare the treatment of the stewardesses to that of the flight personnel, which would have been consistent with the analysis used in *James*. Rather, the court held that, because only women were employed in the stewardess category, the no-married rule did not constitute a violation of Title VII because there were no male stewards who were treated differently. *Cf. Sprogis v. United Air Lines, Inc.*, 444 F.2d 1194 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971) (no-married rule not applied to any other category of airline personnel). The court stated:

Congress intended to strike at the entire spectrum of disparate treatment between men and women resulting from sex stereotypes. Section 703(a)(1) subjects to scrutiny and eliminates such irrational impediments to job opportunities and enjoyment which have plagued women in the past. The effect of the statute is not to be diluted because discrimination adversely affects only a portion of the protected class. . . or through the unequal application of a seemingly neutral company policy.

Id. at 1198 (citations omitted).

²⁴⁴ *Reed v. Arlington Hotel Co.*, 476 F.2d 721, 723 (8th Cir. 1973).

²⁴⁵ 457 F.2d 348 (5th Cir. 1972). *Rowe* makes clear the suspect nature of subjective judgments; when such decisions made by members of the majority have adverse effects

fect of a series of such decisions is to favor whites or males at the expense of minorities or women, the courts will draw the inference that discriminatory considerations were involved in those decisions. As Part I of this article established, the process of job evaluation contains many points at which the subjective judgment of employer representatives is crucial in determining the relative valuation of jobs held by minorities or women as compared to the valuation of jobs held by whites or males. Here, as in *Rowe*, the extent of subjective procedures in setting wages provides a ready mechanism for discrimination.

Under these cases, the range of subjective judgments which culminate in the establishment of lowered wage rates for segregated jobs justifies the inference that discriminatory considerations were involved. This inference is not conclusive, but is sufficient to require the employer to demonstrate that the relative rates were established without consideration of discriminatory factors.

Pay discrimination and job segregation are thus so linked that both must be dealt with together. A whole complex of adverse effects flow from job segregation. One of these is undervaluation of those segregated jobs. Where jobs are segregated, it is likely that the pay rate is influenced by the black or female character attributed to the job. Therefore, evidence of segregated jobs justifies an inference of discrimination in compensation. Previously, segregation was viewed as a violation of section 703(a)(2) and wage discrimination was viewed, separately, as a violation of section 703(a)(1). It is now clear that the sections are addressed to different aspects of the same underlying phenomena: the discriminatory radiations from job segregation encompass not only restrictions on job opportunities but a depressed wage for the jobs which the disfavored groups were allowed to hold.

B. A Critical Analysis of the Wage Discrimination Theory

This section will examine challenges to the theory that wage rate discrimination is sufficiently linked to job segregation to warrant the inference that the segregation influenced the wage rate in a discriminatory manner. These challenges will include: (a) that the claim is too theoretical and that it is unfair to apply it to an employer in the absence of any specific evidence that the rates for its previously segregated jobs are undervalued, (b) that the jobs actually reflect the value of the work, not the characteristics of

upon members of the minority, those decisions should be subject to judicial scrutiny. See generally B. SCHLEI & P. GROSSMAN, *supra* note 224, at 166-81.

²⁴⁶ 42 U.S.C. § 2000e-2(h) (1964).

the people who perform them, and (c) that the Bennett Amendment²⁴⁶ to Title VII precludes the use of the foregoing analysis and requires that the plaintiff show that the jobs require equal work in order to prevail in a sex/wage discrimination case.

1. *Plaintiff Must Prove What the Rate Would Have Been in the Absence of Segregation*—Employer representatives will argue that the thesis that wage discrimination may be inferred from job segregation is too abstract a proposition to justify a finding of liability under Title VII. To avoid this abstract quality, they may argue, the plaintiff should be required to show as part of the prima facie case that the value of the segregated jobs would be higher in the absence of segregation. The plaintiff would have to show the “true” (intrinsic) value, or the non-discriminatory value, of the segregated jobs before a court would be justified in concluding that the wage was discriminatorily depressed. While Title VII litigation ought not to turn on an unproven socio-economic assumption, this assumption is not unproven. Not only is there probative force in the studies described in Part I, but both common sense and precedent suggest that the analysis is true, and that the market forces which contribute to the setting of wage rates of segregated jobs are themselves infected with discrimination.

Congresses that have dealt with these matters were aware that long standing beliefs, customs, and assumptions had consigned a substantial group of Americans to low paying, segregated jobs and that the interaction of segregation and low pay affected both personal and national interests. The legislative histories of the EPA, Title VII, and the 1972 amendments reflect a realization of the need to improve the socio-economic status of minorities and women, a status measured by the extent of job segregation and earnings differentials.²⁴⁷ The interconnection between discrimi-

²⁴⁷ H.R. REP. NO. 914, 88th Cong., 1st Sess., pt. 2 (1963), reprinted in LEGISLATIVE HISTORY, *supra* note 5, at 2148-49; S. REP. NO. 176, 88th Cong., 1st Sess. (1963), reprinted in HOUSE COMM. ON EDUCATION AND LABOR, 88TH CONG., 1ST SESS., LEGISLATIVE HISTORY OF THE EQUAL PAY ACT OF 1963 36-41 (Comm. Print 1963); *Equal Pay Act of 1963: Hearings on S. 882 and S. 910 Before the Senate Subcomm. on Labor of the Comm. on Labor and Public Welfare*, 88th Cong., 1st Sess. 18-21 (1963) (statement by Assistant Secretary of Labor Esther Peterson); *id.* at 9-11 & 16 (statements by Secretary of Labor W. Willard Wirtz); S. REP. NO. 92-415, 92nd Cong., 1st Sess. (1971), reprinted in HISTORY OF EEO, *supra* note 5, at 415-17; H.R. REP. NO. 92-238, 92d Cong., 1st Sess. (1971), reprinted in HISTORY OF EEO, *supra* note 5, at 64-65; 117 CONG. REC. 32094-95 (1971) (remarks of Representative Fauntroy); 118 CONG. REC. 590 (1972) (remarks of Senator Humphrey); 118 CONG. REC. 564 (1972) (testimony of EEOC chair William H. Brown III cited by Senator Saxbe); 118 CONG. REC. 580 (1972) (remarks of Senator Javits). See generally Berg, *Equal Employment Opportunity Under the Civil Rights Act of 1964*, 31 BROOKLYN L. REV. 62 (1964); Gitt & Gelb, *Beyond the Equal Pay Act: Expanding Wage Differential Protections Under Title VII*, 8 LOY. CHI. L.J. 723 (1977); Margolin, *Equal Pay and Equal Opportunity for Women*, 19 N.Y.U. LAB. CONF. 297 (1967); Ross & McDermott, *The Equal Pay Act of 1963: A Decade of Enforcement*, 16 B.C. INDUS. & COM. L. REV. 1 (1974); Vaas, *Title VII: Legislative History*, 7 B.C. INDUS. & COM. L. REV. 431 (1966).

nation, attitudes toward identifiable groups, job segregation, and economic deprivation examined by economists, sociologists, and industrial relations analysts was the premise underlying the adoption of the three acts.

The Supreme Court has recognized that Congress intended to address situations in which stereotypes produce job segregation or a depressed wage. In deciding a Title VII case, the Court has stated:

Before the Civil Rights Act of 1964 was enacted, an employer could fashion his personnel policies on the basis of assumptions about the differences between men and women, whether or not the assumptions were valid.

It is now well recognized that employment decisions cannot be predicted on mere "stereotyped" impressions about the characteristics of males or 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*.²⁴⁸

In a recent decision, *United Steelworkers of America v. Weber*,²⁴⁹ the Court affirmed the right of an employer to undertake affirmative action programs where there have been traditionally segregated job categories. Mr. Justice Blackmun, concurring, wrote:

[T]he Court considers a job category to be "traditionally segregated" when there has been a societal history of purposeful exclusion of blacks from the job category, resulting in a persistent disparity between the proportion of

²⁴⁸ *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 (1978) (footnote omitted and emphasis added). See also *Corning Glass Works v. Brennan*, 417 U.S. 188 (1974). In construing the EPA, the Court stated that Congress had adopted the Act because of concern about the effect of women's depressed wages. *Id.* at 206. In *Corning*, although men and women did the same work, the jobs had been segregated, with women working only during the day and men only at night. Originally, a state protective law had prevented women from working at night. Men were paid more for their night work; this differential continued after passage of the EPA. Pointing out that the stereotyped belief that women are not worth as much as men persists even in the most obvious case — when they do exactly the same work — the Court said:

Congress' purpose in enacting the Equal Pay Act was to remedy what was perceived to be a serious and endemic problem of employment discrimination in private industry — the fact that the wage structure of "many segments of American industry has been based on an ancient but outmoded belief that a man, because of his role in society, should be paid more than a woman even though his duties are the same."

417 U.S. at 195, quoting S. REP. NO. 176, 88th Cong., 1st Sess. 1 (1963).

²⁴⁹ ____ U.S. ____, 99 S.Ct. 2721 (1979).

blacks in the labor force and the proportion of blacks among those who hold jobs within the category.²⁵⁰

The belief that the true value of a job should be part of the plaintiff's case argues that the plaintiff must show damages as part of the prima facie case.²⁵¹ But the Supreme Court has indicated that, in Title VII cases, it is proper to establish liability separately and prior to consideration of questions of remedy.²⁵²

The Court, mindful that a prima facie case does not determine whether the plaintiff will prevail but only requires employers and others to justify their practices, has imposed burdens of proof which permit judicial scrutiny of practices and procedures where a likelihood of discrimination exists.²⁵³ Thus, where a plaintiff has established that jobs have been segregated in the past or present, that jobs are identified as female or minority jobs, that a wage rate structure exists for the segregated jobs which is low in the employer's overall structure, or that a job is traditionally reserved for minorities or women throughout the labor force, the inference that segregation influenced the pay rate is sufficient to require the employer to present evidence as to how the wages were set.²⁵⁴

The burden of proof properly shifts at this point because the employer has unique access to, possession of, and control over this evidence. Discovery by the plaintiff may well be inadequate because the plaintiff will not know where to seek the evidence. In Title VII matters, the Court has emphasized that one important element in determining whether there is a prima facie case, and whether the burden of proof should shift to the defendant, is the possession by the defendant of knowledge of facts on which the decision should turn.²⁵⁵

2. The Argument That the Market Rate Reflects the Value of a Job—The second argument of employers against the thesis that a court may infer wage discrimination from job segregation is that there is no reasonable method by which value can be fairly determined except by reference to the job market. Therefore, even if race or sex discrimination is among the factors influencing wage rates, there is no alternative for the market rate except to engage in wholesale judicial supervision of every wage structure in the

²⁵⁰ *Id.* at 2732 (footnote omitted).

²⁵¹ Courts have also recognized that subjective judgments incorporate societal prejudices, and are therefore suspect and subject to close judicial scrutiny. *See, e.g.,* *Rowe v. General Motors Corp.*, 457 F.2d 348 (5th Cir. 1972).

²⁵² *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 342 n.24, 360 (1977).

²⁵³ *Id.* at 360.

²⁵⁴ *Id.*

²⁵⁵ *Id.* at 359 n.45.

country—a result Congress did not intend. When the same Congress passed the EPA in 1963, the year before it passed Title VII, it limited the EPA coverage to cases involving claims of equal work to avoid the prospect of judicial supervision of all wage rates. The equal work requirement provides some assurance that there is an easily identifiable instance of wage rate discrimination to serve as a basis for legal intervention. Except where there is a high probability that discrimination is taking place, Congress did not intend to interfere with market forces. This concept of limited interference with the market forces was implicitly grafted onto Title VII by the Bennett Amendment. While the scope of the Bennett Amendment is unclear, it is argued that Congress did not change its mind within one year as to the extent to which it wished to regulate wage practices.

Furthermore, the argument runs, placing the Equal Employment Opportunity Commission²⁵⁶ and, ultimately, district judges in the position of setting wage rates in every employment situation covered by Title VII must give great concern. The courts lack the resources and the expertise to review wage structures, and there are no standards on which courts can rely. Judicial supervision would create conflict within each work place and would displace collective bargaining, where unions exist, as the prime process for establishing wages.

This line of argument has commended itself to the courts which have reviewed claims of wage discrimination that were outside the EPA.²⁵⁷ The first issue in evaluating the argument is whether

²⁵⁶ The Equal Employment Opportunity Commission was established pursuant to Title VII to administer and implement its provisions. As of July 1, 1979, the EEOC also has jurisdiction over EPA. Reorganization Plan No. 1 of 1978, 43 Fed. Reg. 19,807 (1978) and Executive Order 12067, 43 Fed. Reg. 28,967 (1978).

²⁵⁷ None of the cases which have dealt with the issue of whether Title VII is restricted by the equal work requirements of the EPA have dealt with the theory of liability discussed in the text. Many of the cases which express a requirement that a Title VII plaintiff prove equal work rely on the decision in *Ammons v. Zia*, 448 F.2d 117 (10th Cir. 1971). *Ammons*, however, was a case in which the plaintiff's theory was that she had to prove equal work in order to recover under Title VII. Therefore, the court was never faced with the necessity for deciding whether equal work was a necessary part of plaintiff's case. In a number of other cases, the plaintiff assumed it was necessary to prove equal work and either succeeded in bearing that burden, *see, e.g.*, *Laffey v. Northwest Airlines*, 567 F.2d 429 (D.C. Cir. 1976); *Di Salvo v. Chamber of Commerce of Greater Kansas City*, 416 F.Supp. 844 (W.D. Mo. 1976), *aff'd*, 568 F.2d 593 (8th Cir. 1977), or failed, *see, e.g.*, *Calage v. University of Tenn.*, 544 F.2d 297 (6th Cir. 1976); *Orr v. Frank R. MacNeill & Son, Inc.*, 511 F.2d 166 (5th Cir.), *cert. denied*, 423 U.S. 865 (1975); *Wetzel v. Liberty Mut. Ins. Co.*, 449 F. Supp. 397 (W.D. Pa. 1978); *Molthan v. Temple Univ.*, 442 F. Supp. 448 (E.D. Pa. 1977); *Keyes v. Lenoir Rhyne College*, 15 FEP Cas. (BNA) 914 (W.D.N.C. 1976), *aff'd*, 552 F.2d 579 (4th Cir.), *cert. denied*, 434 U.S. 904 (1977). Most of these cases that failed to show equal work were brought as individual actions, not as class actions alleging discrimination against a group identified by sex or race.

Beginning with *Ammons*, many of the cases have adopted the following line of argu-

Congress by Title VII intended to intrude on market forces beyond the situations covered by the EPA. The courts have considered this question primarily in the context of claims based on sex, rather than race. The existence of the EPA and the Bennett Amendment has in these situations encouraged courts to put a

ment. First, Title VII and the EPA must be read *in pari materia*. Quoting from *Shultz v. Wheaton Glass Co.*, 421 F.2d 259 (3d Cir.), *cert. denied*, 398 U.S. 905 (1970), for the proposition that the statutes should be construed in harmony, *Ammons* said that "to establish a case of discrimination under Title VII, one must prove a differential in pay based on sex for performing 'equal work.'" *Wheaton Glass*, the source of the *in pari materia* doctrine, however, drew the opposite conclusion, holding that Title VII was not restricted by the EPA. *Id.* at 266.

The second line of reasoning concludes that the Bennett Amendment requires that Title VII be construed in harmony with the EPA. See *Orr v. Frank R. MacNeill & Son, Inc.*, 511 F.2d 166, 170-71 (5th Cir.), *cert. denied*, 423 U.S. 865 (1975); *Molthan v. Temple Univ.*, 411 F. Supp. 448, 454 (E.D.Pa. 1977). The court in *Molthan* not only cites *Ammons* and *Orr*, but holds that the Bennett Amendment requires that a Title VII claim fail if it does not amount to a violation of the EPA since only claims that do not "run afoul of" that Act, *i.e.*, are not prohibited by the Act, are "authorized." *Id.* at 455. The court in *International Union of Elec., Radio, & Mach. Workers v. Westinghouse Corp.*, 17 FEP CAS. (BNA) 16 (N.D.W.Va. 1977), relied on the congressional intent as evidenced by the change in EPA language from "comparable" to "equal" to argue that the Bennett Amendment underscored the desire of Congress to apply the equal work standard to Title VII cases. The cases that have followed this line of conclusions test whether the plaintiffs have made a *prima facie* case by comparing the jobs according to EPA standards. The inadequacy of this analysis is discussed in the text accompanying notes 311-13 *infra*.

For a recent case which was decided on the theory that the Bennett Amendment did not incorporate the EPA's equal work formula into Title VII, but rather incorporated the EPA's four affirmative defenses but not its equal work standard into Title VII, see *Gunther v. County of Washington*, 600 F.2d ____ (9th Cir. 1979), 48 U.S.L.W. 2175 (Aug. 16, 1979). *Gunther* involved a claim by prison matrons that they were denied equal pay for equal work with male guards. The matrons contended that even if their jobs were not substantially equal to those of the male guards, they should be allowed to prove that some of the wage discrepancy was due to sex discrimination. The court rejected this contention, holding that the record showed that greater amounts of clerical work and a different prisoner/guard ratio made the position of male guard qualitatively different from the position of matron.

The third line of reasoning is summed up by Judge Bright's pithy comment in *Christensen v. Iowa*, 563 F.2d 353 (8th Cir. 1977), that

We find nothing in the text and history of Title VII suggesting that Congress intended to abrogate the laws of supply and demand or other economic principles that determine wage rates for various kinds of work. We do not interpret Title VII as requiring an employer to ignore the market in setting wage rates for genuinely different work classifications.

Id. at 356. The court, without comment, approved the lower court's finding that plaintiffs made no showing that the work "is substantially equal." See also *Lemons v. Denver*, 17 FEP CAS. (BNA) 906 (D.C. Colo. 1978) (transcript of oral opinion); *Chrapliwy v. Uniroyal, Inc.*, 71 F.R.D. 461 (N.D. Ind. 1976).

Some cases suggest that a statistical proof of pay differentials may establish a Title VII violation. These have tended to be cases alleging systemic discrimination against a group, usually brought as a class action. See, *e.g.*, *Kyriazi v. Western Elec. Co.*, 461 F. Supp. 894 (D.C.N.J. 1978), in which the court found a Title VII sex discrimination violation where the plaintiffs gave statistical proof of segregated jobs and discrimination in compensation, and proved individual bias and company policy that encouraged assignments on the basis of sex. Other cases which suggested the possibility of establishing discriminatory compensation against women as a group, but held that the plaintiff had not produced the requisite proof, include *Keyes v. Lenoir Rhyne College*, 552 F.2d 579 (4th Cir.), *cert. denied*, 434 U.S. 904 (1977); *Preseisen v. Swarthmore College*, 442 F. Supp. 593 (E.D. Pa. 1977); and *Calage v. University of Tenn.*, 400 F. Supp. 32 (D.C. Tenn. 1975), *aff'd*, 544 F.2d 297 (6th Cir. 1976).

gloss on Title VII that might not have been considered if the claims had first arisen in the context of racial discrimination.²⁵⁸ However, the Supreme Court has established that Title VII must be construed and applied in the same way to all kinds of discrimination²⁵⁹ and has answered affirmatively the question of whether Congress intended to interfere with the market or employer's wage setting process under Title VII. In a *sex* discrimination case, the Court specifically addressed the question by using a *racial* precedent: "[A] statute that was designed to make race irrelevant in the employment market . . . could not reasonably be construed to permit a take-home-pay differential based on a racial classification."²⁶⁰

Title VII applies to all employment practices which "adversely affect" employment opportunities and which "deprive or tend to deprive" persons of such opportunities.²⁶¹ The Court has made clear that employment opportunities may not be denied on the basis of stereotyped thinking about race or sex. Stereotyped thinking may affect the wage setting process in precisely this way where the jobs are segregated, as it can affect the basic decision to employ and to assign a person to a segregated job. For example, in one case, *Phillips v. Martin Marietta Corp.*,²⁶² an employer's rule against hiring women with pre-school children came under attack. No such rule was applicable to men. The Court criticized the rule on the grounds that the employer was treating women with pre-school age children differently from men with pre-school age children. If, instead of not hiring them at all, the employer in *Phillips* had decided to pay women with pre-school age children a lower rate of pay than men because of a perceived risk of greater absenteeism, the logic of the *Phillips* decision would require a finding that the lower rate of pay was as discriminatory as the decision not to hire. Such disparate treatment in compensation was in fact the basis of the *Manhart* decision.²⁶³

The fact is that Title VII has significantly interfered with the operation of the labor market. It has upset recruitment proce-

²⁵⁸ Courts have generally been more willing to find discrimination and to grant relief in those cases where wage differentials followed race-based distinctions than in those cases where wage differentials followed sex-based distinctions. *Cf. Lemons v. Denver*, 17 FEP CAS. (BNA) 906 (D.C. Colo. 1978) (transcript of oral opinion) (sex-based distinctions); *Quarles v. Philip Morris, Inc.*, 279 F. Supp. 505 (E.D. Va. 1978) (race-based distinctions).

²⁵⁹ See *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702 (1978).

²⁶⁰ *Id.* at 709.

²⁶¹ Title VII of the Civil Rights Act of 1964 was aimed at all forms of discrimination. See S. REP. NO. 867, 88th Cong., 2d Sess. 10 (1964).

²⁶² 400 U.S. 542 (1971).

²⁶³ *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702 (1978).

dures which were time-honored, such as "word of mouth" recruiting;²⁶⁴ it has struck down employment selection procedures such as pre-employment tests which were viewed as essential to the operation of industry;²⁶⁵ it has required changes in seniority systems which were the fruit of national policy favoring the collective bargaining process;²⁶⁶ and it has required psychological adjustments by millions of workers and thousands of employers who have had to abandon the application of their beliefs concerning the place of minorities and women. It has worked a major revision in our industrial relations systems. Furthermore, this heavy impact on traditional ways of doing business was known to the Congress which in 1972 expanded Title VII and strengthened the EEOC.²⁶⁷ Thus, the suggestion that Title VII was not intended to interfere with the operation of the wage setting process is without foundation. This conclusion applies with equal force to both race and sex discrimination. While there is no detailed legislative history behind the introduction of prohibitions of sex discrimination into Title VII, Title VII was generally understood to be a wholesale attack on all forms of discrimination.²⁶⁸ Furthermore, Congress rejected an amendment which would have sharply restricted its application to sex discrimination cases.²⁶⁹

²⁶⁴ See generally Blumrosen, *The Duty of Fair Recruitment Under the Civil Rights Act of 1964*, 22 RUTGERS L. REV. 465 (1978). See also *Parham v. Southwestern Bell Tel. Co.*, 433 F.2d 421 (8th Cir. 1970), in which the court found that the employer made a good faith effort to recruit black employees after a Title VII suit was commenced.

²⁶⁵ See, e.g., *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

²⁶⁶ See text following note 183 *supra*.

²⁶⁷ Prior to the adoption of the 1972 amendments, the Senate Committee stated:

In 1964, employment discrimination tended to be viewed as a series of isolated and distinguishable events, for the most part due to ill-will on the part of some identifiable individual or organization. . . . Employment discrimination as viewed today is a far more complex and pervasive phenomenon. Experts familiar with the subject now generally describe the problem in terms of "systems" and "effects" rather than simply intentional wrongs, and the literature on the subject is replete with discussions of, for example, the mechanics of seniority and lines of progression, perpetuation of the present effect of pre-act discriminatory practices through various institutional devices, and testing and validation requirements.

S. REP. NO. 92-415, 92d Cong., 1st Sess. 5 (1971).

²⁶⁸ The amendment adding prohibitions of sex discrimination to Title VII was proposed by Representative Smith of Virginia. His maneuver may well have been intended to frustrate either passage or the subsequent enforcement of Title VII, rather than to further the interests of women.

However, in proposing the addition of prohibitions of sex discriminations to Title VII, Representative Smith reasoned: "I think we all recognize and it is indisputable fact that all throughout industry women are discriminated against in that just generally speaking they do not get as high compensation for their work as do the majority sex." 110 CONG. REC. 2577 (1964).

²⁶⁹ The day following the addition of prohibitions relating to sex discrimination to the House bill, Representative Griffin (R.-Mich.) introduced an amendment which would have recognized women's role as a secondary labor force, and would have put Congress'

The initial administrative interpretations of Title VII by the EEOC were hesitant about the reach of the sex discrimination provision,²⁷⁰ and this hesitancy was reflected in lower court decisions such as *Phillips v. Martin Marietta Corp.*²⁷¹ There, the court characterized an employer rule denying employment to women with pre-school children as involving not sex discrimination, but "sex plus" another factor, the presence of pre-school children, which factor precluded a finding of a violation. This analysis in effect required that sex be the sole cause of the discrimination in order for a claim to be actionable under Title VII. No such limitation was intended with respect to race discrimination cases²⁷² or to Title VII cases generally.²⁷³ The Supreme Court, in reversing the lower court's decision, refused a narrow reading of the sex provision, and required that the same Title VII analysis be applied to women as to minorities. The sweep of this requirement of even application of Title VII was demonstrated in *Dothard v. Rawlinson*,²⁷⁴ where the Court applied the adverse effect test of *Griggs*²⁷⁵ to standards which had exclusionary effects on women. Thus, there is no warrant in the statute as adopted or interpreted to suggest today that the sex discrimination provisions, because of their origin, should be treated more narrowly than the provisions prohibiting race or other forms of discrimination.²⁷⁶ This broad sweep of the sex discrimination provisions

imprimatur on that economic role. The Griffin amendment provided that no unlawful employment charge "claiming discrimination on the basis of sex shall be considered unless the person filing such charge . . . signs a statement under oath certifying that the spouse, if any, of such person is then unemployed and was unemployed when the alleged unlawful employment practice occurred." 110 CONG. REC. 2728 (1964). The amendment was overwhelmingly defeated by 96 to 15 in a division vote.

²⁷⁰ See Hernandez, *supra* note 24.

²⁷¹ 400 U.S. 542 (1971).

²⁷² See, e.g., *King v. Laborers Int'l Union, Local 818*, 443 F.2d 273 (6th Cir. 1971), in which the court reasoned that where the aggrieved party can show that discrimination on the basis of race was, in part, a causal factor in a discharge or a refusal to hire, the aggrieved party is entitled to damages.

²⁷³ Three days after adoption of the Bennett Amendment, the Senate rejected a proposed amendment by Senator McClellan (D.-Ark.) which would have made it illegal to discriminate against an individual solely because of his race, color, religion, sex, or national origin. The amendment was rejected by a roll call vote of 39 for, 50 against. 110 CONG. REC. 13837-38 (1964).

In an early case involving sex discrimination, the Seventh Circuit explained, "[t]he scope of Section 703(a)(1) is not confined to explicit discrimination based 'solely' on sex." *Sprogis v. United Airlines, Inc.*, 444 F.2d 1194, 1198 (7th Cir.), *cert. denied*, 404 U.S. 991 (1971).

²⁷⁴ 433 U.S. 321 (1977).

²⁷⁵ *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

²⁷⁶ When the Supreme Court did interpret the sex provision narrowly (see, e.g., *Gilbert v. General Elec. Co.*, 429 U.S. 125 (1976)), Congress immediately corrected that interpretation by passing the 1979 amendment to Title VII, known as the "Pregnancy bill," which specifies that the definition of sex discrimination shall include discrimination on account of pregnancy or child bearing. See Act of October 31, 1978, Pub. L. No. 95-555, 92 Stat.

was reaffirmed by Congress in 1972, when it reviewed and adopted mainly procedural amendments to Title VII.²⁷⁷ Thus, "intrusion" into the market is no more a factor in wage cases than in other cases.

The second facet of the argument described above is more complex. It is that by adopting the Bennett Amendment, Congress intended to disrupt market forces which influence wages only in narrowly defined circumstances regardless of the impact of Title VII on other employment practices. The Bennett Amendment states:

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice

2076 (1978) (amending Title VII of the Civil Rights Act of 1964 to include pregnancy and childbirth within the prohibition against sex discrimination); Conference Report, H.R. REP. NO. 95-1786, 95th Cong., 2d Sess. (1978).

²⁷⁷ The House Report on the amendment stated:

The Equal Employment Opportunity Commission has progressively involved itself in the problems posed by sex discrimination, but its efforts here, as in the area of racial discrimination, have been ineffective due directly to its inability to enforce its findings.

In recent years, the courts have done much to create a body of law clearly disapproving of sex discrimination in employment. Despite the efforts of the courts and the Commission, discrimination against women continues to be widespread, and is regarded by many as either morally or physiologically justifiable.

This Committee believes that women's rights are not judicial diversions. Discrimination against women is no less serious than other forms of prohibited employment practices and is to be accorded the same degree of social concern given to any type of unlawful discrimination.

H.R. REP. NO. 92-238, 92d Cong., 1st Sess. (1971), *reprinted in* HISTORY OF EEO, *supra* note 5, at 64-65. *See also* S. REP. NO. 92-415, 92d Cong., 1st Sess. *reprinted in* HISTORY OF EEO, *supra* note 5, at 416-17. Furthermore, the Section-by-Section Analysis of H.R. 1746, The Equal Employment Opportunity Act of 1972, stated: "In any area where the new law does not address itself, or in any areas where a specific contrary intention is not indicated, it was assumed that the present case law as developed by the courts would continue to govern the applicability and construction of Title VII." 118 CONG. REC. 7166 (1972).

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 29.²⁷⁸

Arguments based on the Bennett Amendment have succeeded in many cases²⁷⁹ and at least one race case.²⁸⁰ In essence, the arguments interpret 1963 and 1964 actions by Congress as reflecting a desire to permit the continued operation of market forces in setting wages except where prohibited by the EPA. Thus, the scope of Title VII in wage discrimination cases is restricted to the scope of the EPA. This argument turns the EPA, which was intended as a sword against a certain form of discrimination, into a shield for other forms of wage discrimination. Its validity can best be assessed by examining the text and history of the Bennett Amendment.

3. *The Argument That the Bennett Amendment Restricts Title VII to the Scope of the EPA*—This argument is based on two assumptions: first, that Congress carefully drafted the EPA so that it would apply only to a narrow set of circumstances, and second, that the Bennett Amendment carried forward this concept of narrow coverage into Title VII. The first point has considerable validity. The EPA has been considered to be narrower than the bills which had been introduced on the subject over a twenty-year period. As proposed, the bill would have required equal pay for "comparable work."²⁸¹ However, Congress adopted the equal pay requirement for "equal work." While at least one proponent of the Act thought that the shift from "comparable" to "equal" was a broadening of the Act, many believed it was more restrictive.²⁸² The Act incorporated four exceptions, under which an

²⁷⁸ 42 U.S.C. § 2000e—2(h) (1964).

²⁷⁹ See cases discussed in note 257 *supra*.

²⁸⁰ *Patterson v. Western Dev. Laboratories Div.*, 13 FEP CAS. (BNA) 772 (N.D. Cal. 1976).

²⁸¹ See HOUSE COMM. ON EDUCATION AND LABOR, 88TH CONG., 1ST SESS., LEGISLATIVE HISTORY OF THE EQUAL PAY ACT OF 1963 (Comm. Print 1963). See also Shultz v. Wheaton Glass Co., 421 F.2d 259 (3d Cir.), *cert. denied*, 398 U.S. 905 (1970); *International Union of Elec., Radio, and Mach. Workers v. Westinghouse Corp.* 17 FEP CAS., (BNA) 16 (N.D.W. Va. 1977); Gitt & Gelb, *supra* note 247, at 736-42.

²⁸² The language "comparable work" evidently originated with the National War Labor Board (see text accompanying note 107 *supra*). Under the "comparable work" standard, the Board had approved some male-female wage differentials, even for the same jobs. Moreover, it had moved against Westinghouse and GE for paying women's jobs too little under its more general mandate to correct inequities rather than under the banner of "comparable work." Thus, some legislators were skeptical of the term "comparable" and thought "equal" stronger, broader, and less likely to be nibbled away by an un-

employer could pay unequal pay for equal work. These included situations where such differences were based on a seniority system or a merit system, systems which measured earnings by quantity or quality of production, and those where the differential was based on "any other factor other than sex."²⁸³ The EPA was also made a part of the Fair Labor Standards Act,²⁸⁴ which did not cover all workers who were within the reach of congressional power.

Perhaps more importantly, Congress took pains to harmonize the new statutory requirement of "equal pay for equal work" with the existing job evaluation process used by industry.²⁸⁵ This process involved the assessment of equal work by examining the skill, effort, responsibility, and working conditions under which it is performed. These terms of art from the job evaluation industry were inserted into the bill, which had initially included only the concept of skill as the basis for establishing job equality. Thus, as adopted, the EPA required a showing of equal skill, effort, responsibility, and working conditions, rather than only of equal skill. This arguably was a narrowing of the proposed bill.

As a matter of *initial* interpretation of the Act, however, these "limitations" might have been far less restrictive of the scope of the Act than the interpretations which the administrators and the lower courts have adopted. Job evaluation practice, which was incorporated into the EPA, permits the cumulation of point values for the four areas of skill, effort, responsibility, and working conditions in order to identify total point values as a basis for compar-

friendly judiciary. See remarks of Representative St. George, 109 CONG. REC. 9197-98 (1963). Compare Representative Goodell's understanding of the scope of the Act, at 109 CONG. REC. 9197 (1963), with Senator McNamara's understanding, at 109 CONG. REC. 9219 (1963).

²⁸³ The Equal Pay Act provides, in part:

No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided*, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

29 U.S.C. § 206(d) (1976).

²⁸⁴ 29 U.S.C. §§ 201-19 (1976) [hereinafter cited as FLSA]. The EPA was enacted as § 206(d) of FLSA, and was amended by Pub. L. No. 92-318, 86 Stat. 235, effective July 1, 1972, which extended the coverage of EPA (but not the rest of the FLSA) to "bona fide executive, administrative, or professional" employees.

²⁸⁵ See *Corning Glass Works v. Brennan*, 417 U.S. 188 (1974).

ing jobs to determine compensation. Jobs which have different levels of skill, effort, and responsibility would be considered equal for compensation purposes if the total point values for the four elements were the same.²⁸⁶ Under job evaluation practice, it is not the "job" which must be the same, but rather the evaluation totals. In short, job evaluation practice permits a comparison of jobs which involve *different* work. By contrast, both the administrators' interpretation of the EPA and the interpretation of that Act by most courts in the period *subsequent* to the adoption of Title VII have adopted a narrower interpretation of the statute by requiring that the work be the same, *i.e.*, that the skill levels, effort levels, responsibility levels, and working conditions *each* be the same in the jobs being compared and, moreover, that the jobs "look alike." A cumulative total similarity in evaluation points, which might suffice under a job evaluation system, will not suffice under this interpretation of the EPA.²⁸⁷

In the early months of 1964 when Title VII was under consideration, it was not clear that such a narrow interpretation would result. If the administrators and the courts had adopted the broader interpretation used in the job evaluation industry, the sweep of the EPA would have been much greater than it has become, and consequently, the limiting effect of the Bennett Amendment would have been less. Thus, the narrowness of the EPA may be due to administrative interpretation rather than to congressional intent. Therefore, even if the Bennett Amendment is viewed as a restriction on Title VII, the scope of that restriction need not be coextensive with the scope of the EPA as initially interpreted by the Department of Labor. Nevertheless, it is clear that the EPA was not the broad attack on all forms of discrimination that Congress was to adopt the following year in the Civil Rights Act. It was a narrower legislative response to one particular aspect of discrimination in employment. Regardless of congressional intent concerning the scope of the EPA, however, the adoption of the Bennett Amendment did not mean that Title VII was to be restricted to its scope.

The prohibition on sex discrimination was added to Title VII without extensive debate. An amendment which would have viated the addition of sex to Title VII was defeated.²⁸⁸ Thereafter

²⁸⁶ See generally Part I and NAS REPORT, *supra* note 85. See also *Corning Glass Works v. Brennan*, 417 U.S. 188 (1974).

²⁸⁷ See 29 CFR § 800.121 (1978). A case that required work to be substantially equal was *Shultz v. Wheaton Glass Co.*, 421 F.2d 259 (3d Cir. 1970). Courts, however, vary on how equal "substantially equal" is. See, *e.g.*, *Angelo v. Bacharach Instrument Co.*, 555 F.2d 1164 (3d Cir. 1977). See also B. SCHLEI & P. GROSSMAN, *supra* note 224, at Ch. 13.

²⁸⁸ See note 269 *supra*.

debate on Title VII did not single out sex discrimination for special consideration until the following exchange between Senators Dirksen and Clark occurred:

Objection. The sex antidiscrimination provisions of the bill duplicate the coverage of the Equal Pay Act of 1963. But more than this, they extend far beyond the scope and coverage of the Equal Pay Act. They do not include the limitations in that act with respect to equal work on jobs requiring equal skills in the same establishments, and thus, cut across different jobs.

Answer. The Equal Pay Act is part of the wage hour law, with different coverage and with numerous exemptions unlike Title VII. Furthermore, under Title VII, jobs can no longer be classified as to sex, except where there is a rational basis for discrimination on the ground of bona fide occupational qualification. The standards in the Equal Pay Act for determining discrimination as to wages, of course, are applicable to the comparable situation under Title VII.²⁸⁹

There thus was a recognition that the EPA did not cover most segregated jobs. There was also a clear understanding that after passage of Title VII, segregated jobs would not be legal, unless sex was a bona fide occupational qualification for the job. Moreover, even those jobs that could legally be segregated could not, according to the language of section 703(a)(2), be segregated in such a way that employment opportunities or status would be denied or adversely affected as a consequence of the segregation, unless the factor that makes sex a bona fide occupational qualification also requires those adverse effects.²⁹⁰

Two months later, Senator Bennett offered a "technical correction" to Title VII which became the Bennett Amendment.²⁹¹ In a cryptic debate, three senators focused on different considerations. Senator Bennett was concerned that the provisions of the

²⁸⁹ 110 CONG. REC. 7217 (1964). Senator Clark here distinguished between Title VII, which covers segregated jobs, and EPA, which does not, before he recognized an area of overlap. The definition of that overlap is left ambiguous. Compare Senator Dirksen's questions here with his comment after the final reading of the Bennett Amendment, 110 CONG. REC. 13647 (1964) (quoted at note 329 *infra*).

²⁹⁰ 42 U.S.C. §§ 2000e2—(a)(2), —(e). See EEOC Guidelines on Discrimination, 29 CFR §§ 1604.2(a), 1604.3(a) (1978).

²⁹¹ 110 CONG. REC. 13647 (1964). The text of the amendment read:

It shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 6 (d) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 206(d)).

EPA not be "nullified." It is not clear whether he was referring to the scope of the Act, which had not yet been interpreted, or to the Act's four exceptions. Senator Dirksen, a key figure in the Title VII debate, was concerned with the problem of the different coverages of the Fair Labor Standards Act.²⁹² Senator Humphrey, in a later colloquy with Senator Randolph, interpreted the amendment to permit differences in treatment on sex grounds under pension and benefit plans, a matter different from the considerations which Dirksen and Bennett expressed.²⁹³

²⁹² The text of the debate follows:

Mr. BENNETT. Mr President, after many years of yearning by members of the fair sex in this country, and after very careful study by the appropriate committees of Congress, last year Congress passed the so-called Equal Pay Act, which became effective only yesterday.

By this time, programs have been established for the effective administration of this act. Now, when the civil rights bill is under consideration, in which the word "sex" has been inserted in many places, I do not believe sufficient attention may have been paid to possible conflicts between the wholesale insertion of the word "sex" in the bill and in the Equal Pay Act.

The purpose of my amendment is to provide that in the event of conflicts, the provisions of the Equal Pay Act shall not be nullified.

I understand that the leadership in charge of the bill have agreed to the amendment as a proper technical correction of the bill. If they will confirm that understand [*sic*], I shall ask that the amendment be voted on without asking for the yeas and nays.

Mr. HUMPHREY. The amendment of the Senator from Utah is helpful. I believe it is needed. I thank him for his thoughtfulness. The amendment is fully acceptable.

Mr. DIRKSEN. Mr. President, I yield myself 1 minute.

We were aware of the conflict that might develop, because the Equal Pay Act was an amendment to the Fair Labor Standards Act. The Fair Labor Standards Act carries out certain exceptions.

All that the pending amendment does is recognize those exceptions, that are carried in the basic act.

Therefore, this amendment is necessary, in the interest of clarification.

Id.

²⁹³ The text of the colloquy follows:

Mr. RANDOLPH. Mr. President, I wish to ask of the Senator from Minnesota [Mr. HUMPHREY], who is the effective manager of the pending bill, a clarifying question on the provisions of Title VII.

I have in mind that the social security system, in certain respects, treats men and women differently. For example, widows' benefits are paid automatically; but a widower qualifies only if he is disabled or if he was actually supported by his deceased wife. Also, the wife of a retired employee entitled to social security received an additional old age benefit; but the husband of such an employee does not. These differences in treatment as I recall, are of long standing.

Am I correct, I ask the Senator from Minnesota, in assuming that similar differences of treatment in industrial benefit plans, including earlier retirement options for women, may continue in operation under this bill, if it becomes law?

Mr. HUMPHREY. Yes. That point was made unmistakably clear earlier today by the adoption of the Bennett amendment; so there can be no doubt about it.

Mr. RANDOLPH. I am grateful for the reply.

110 CONG. REC. 13663-64 (1964).

This colloquy was referred to by the Court in *General Elec. Co. v Gilbert*, 429 U.S. 125 144 (1976) to support giving weight to the Wage and Hours Administrator's interpreta-

Whatever the concerns of the senators, it does not appear that they believed that the amendment carved out an exception to section 703(a), making sex discrimination in compensation lawful unless it was also prohibited by the EPA. If Congress had intended this it would be reasonable to expect that it would have drafted specific statutory language and that there would be a legislative history making clear to members of Congress who would vote on the amendment that such a drastic cutback was contemplated. There are no such indicia of congressional intent. In fact, there is significant evidence to the contrary.²⁹⁴

First, far from making a record of an intention to limit substantively Title VII and to undercut women's protections, Senator Bennett characterized his amendment and the leadership accepted it as a "technical correction." Since Senator Bennett introduced the amendment by reminding the Senate of how long women had worked and waited for the equal pay protections, his amendment should be interpreted as preserving the protections afforded women in the EPA, not as restricting women's rights under Title VII.²⁹⁵

Second, it is unlikely that the women who so strongly and eloquently spoke in favor of including sex in Title VII would have remained silent if they had understood that the substantive reach of that amendment would be limited to the EPA, which they had already suggested did not go far enough.²⁹⁶

Third, after debate, Congress had rejected attempts to restrict the reach of the sex provision, and had rebutted efforts to restrict the reach of the entire statute to situations where the discrimination was based "solely" on the prohibited classifications.²⁹⁷

Fourth, when Congress considered extending the bona fide occupational qualification exception to race and sex, the language of

tions of the EPA in a Title VII case. *But see* Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702 (1978), in which the Court rejected the argument based on this dialogue:

His statement cannot, however, fairly be made the sole guide to interpreting the Equal Pay Act, which had been adopted a year earlier; and it is the 1963 statute, with its exceptions, on which the Department ultimately relies. We conclude that Senator Humphrey's isolated comment on the Senate floor cannot change the effect of the plain language of the statute itself.

Id. at 714.

²⁹⁴ The most that can be said from the legislative history is that there seems to have been an abundance of uncertainty. This is reinforced by a colloquy between Senators Clark and Bennett a year later, in which it is clear only that they still could not agree on what had been meant. 111 CONG. REC. 18261-63 (1965).

²⁹⁵ 110 CONG. REC. 13647 (1964) (quoted at note 292 *supra*).

²⁹⁶ See 110 CONG. REC. 2577-84 (1964), reprinted in LEGISLATIVE HISTORY, *supra* note 247, at 3213-32.

²⁹⁷ 110 CONG. REC. 2778 (1964) (amendment offered by Representative Dowdy was defeated).

the amendment and legislative history indicates that the exception was intended to be a narrow one. Even so, there was some exploration of its ramifications before provisions regarding sex were added, and considerable heated debate before the amendment adding race was defeated.²⁹⁸ This sharply contrasts with the total lack of attention given the Bennett Amendment; a strange contrast, indeed, if the Bennett Amendment had been understood to permit sex discrimination in compensation. Thus, any interpretation of the Bennett Amendment that restricts section 703(a) to the one factual situation covered by the EPA,²⁹⁹ is contrary to the broad congressional intent concerning Title VII, and to the leadership's acceptance of the amendment as a technical correction. This interpretation seems, however, to be what many courts have accepted.³⁰⁰

The language of the Bennett Amendment does little to clarify the legislative intent. The amendment states that wage differentials which are authorized by the EPA are not unlawful under Title VII. But the term "authorized" is ambiguous. There are three possible ways to construe the term in this context:

(1) All differences in wages and compensation which are not prohibited by the EPA are authorized by it, and therefore do not violate Title VII. Under this interpretation, a plaintiff claiming sex discrimination in compensation under Title VII would have to meet the EPA requirements that the work be equal and be performed in the same establishment.³⁰¹

(2) The EPA prohibits wage differentials where there is equal work but then lists four exceptions to this prohibition. Any jus-

²⁹⁸ 110 CONG. REC. 2550 (1964) (attempt by Representative Williams in the House); 110 CONG. REC. 13825 (1964) (Senator McClellan's approach in the Senate). See also Blumrosen, *supra* note 244, at 82-83.

²⁹⁹ The EPA requires that an employer not pay different rates for equal work. Equal work, as defined in the Act, requires that the work be performed in the same establishment, be on jobs which require performances equal in skill, effort, responsibility, and which are performed under similar working conditions. 29 U.S.C. § 206(d) (1976). Since there is no warrant in the EPA for treating any element as less important than any other, it is assumed that if the Bennett Amendment restricts Title VII to the equal work provisions of the EPA, the work would have to meet all of the EPA definitions, otherwise some rationale other than the language of the amendment must be present.

³⁰⁰ See cases cited in note 296 *supra*. Most of those decisions, however, pre-date the Supreme Court decisions which decided what constitutes discrimination in compensation under Title VII and the effect to be given the Bennett Amendment. See, e.g., *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702 (1978); *General Elec. Co. v. Gilbert*, 429 U.S. 125 (1976).

³⁰¹ Another way to reach this result would be to assume that the term "authorized" in the Bennett Amendment refers only to the four exceptions, as set out below in arguments (2) and (3), but then to conclude that since the exceptions were applicable in cases of equal work, Congress must have intended the exceptions to carry the restriction to equal work. This "tail wags the dog" argument would produce the same result as the first interpretation set forth above.

tification falling under one of the four exceptions is authorized by the Act and hence is not a violation of Title VII. Under this interpretation, a plaintiff with an equal pay claim could not avoid an EPA defense by bringing the action under Title VII.

(3) The four exceptions to the EPA are available not only in equal pay cases, but in any case of "wage or compensation" discrimination under Title VII. Under this interpretation, the plaintiff could make a normal Title VII *prima facie* case involving compensation although the work was not equal, and the defendant could then assert as a defense any of the four exceptions set out in the EPA.

The first interpretation above, that the term "authorized" refers to all differentials not prohibited by the EPA, involves an assumption that the power of the employer to set wages derives from Congress. Only then could a wage rate which is not prohibited by the Act be said to be authorized by Congress. But the basic premise of our constitutional system is to the contrary. Governmental authorization is not necessary in order to engage in the ordinary economic and social activities of life. The concept of our government as one of limited powers presupposes a freedom of action in the absence of governmental regulation rather than an ability to act only with permission or authorization from the government.

The more conventional meaning of the term "authorized" is the second interpretation, which encompasses activity that is within the four exceptions in the EPA itself.³⁰² Since such unequal pay would be illegal under the Act in the absence of these exceptions, it is appropriate to conclude that these unequal payments are, indeed, authorized by Congress.

The difficulty with the second interpretation is that it leaves open the possibility that an equal pay claim brought under Title VII might not be subject to the four exceptions, and therefore, that an employer's liability would depend upon which statute was invoked. This is the risk that Senator Bennett wished to avoid. For example, in 1964, the meaning of the term "bona fide seniority or merit system" under Title VII was not clearly understood and it was therefore possible that it would be given a narrower reading than the term "seniority system" under the EPA.³⁰³ In

³⁰² BLACK'S LAW DICTIONARY 122 (5th ed. 1979), defines "authorize" as: "To empower; to give a right or authority to act." In *Laffey v. Northwest Airlines, Inc.*, 567 F.2d 429 (D.C. Cir. 1976), where a cause of action was found under both the EPA and Title VII, the court stated: "Indeed, Title VII refers specifically to the Equal Pay Act and states that a sex-predicated wage differential is immune from attack under Title VII only if it comes within one of the four enumerated exceptions to the Equal Pay Act." *Id.* at 446.

³⁰³ See, e.g. 110 CONG. REC. 7218 (Senator Clark's response to Senator Dirksen's memorandum questioning some provisions of Title VII), reprinted in LEGISLATIVE HISTORY, *supra* note 247, at 3015.

such a case, an employer sued for unequal pay under Title VII might not have a defense that is available under the EPA. Since the Bennett Amendment was intended to avoid this, the second interpretation may be too narrow.

The third interpretation, that the term "authorized" encompasses the four exceptions to the EPA and makes them applicable to all Title VII claims, not only those which involve equal work, would avoid the risks of possible inconsistent interpretations of the EPA and Title VII and assure that, in the event a case involving unequal pay for equal work were brought under Title VII, the EPA defenses would be available.³⁰⁴ This interpretation is consistent with the use of the term "wages or compensation" in the Bennett Amendment to describe the type of cases in which the defenses would be available. Since the EPA applies only to "wages," the effect of the Bennett Amendment would be to extend those defenses to cases of "compensation," which are covered by Title VII but might be outside the EPA. For example, at one time, the EPA was interpreted not to cover "fringe benefits,"³⁰⁵ while Title VII was interpreted from the beginning to cover such benefits. Some fringe benefit programs are geared to wage rates. Without the broadening effect of the Bennett Amendment, it might have been possible to argue that an employer who had a "merit system" defense to an equal pay claim had violated Title VII with respect to fringe benefits if the term "merit systems" was differently construed in the two statutes. The use of the broader term "compensation" makes clear that Congress did not intend this result.

The Supreme Court opinions which have dealt with the relationship between the EPA and Title VII appear to have adopted this third interpretation and to have rejected the first and second interpretations *sub silentio*.

The first interpretation—that plaintiff cannot establish a case of compensation discrimination under Title VII without making a showing of equal work which would satisfy the EPA—was totally disregarded in the two sex wage discrimination cases which the Court has decided, *General Electric Co. v. Gilbert*³⁰⁶ and *Los Angeles Dep't of Water & Power v. Manhart*.³⁰⁷ In neither case was there any allegation or consideration of whether the female employees were doing equal work with the male employees, though it was probable that they were not. Yet, in both cases, the

³⁰⁴ The same conclusion is reached by Vaas, *supra* note 247, at 449.

³⁰⁵ Conversation with Wage and Hour Administrator in Washington, D.C. (July, 1965).

³⁰⁶ 429 U.S. 125 (1976).

³⁰⁷ 435 U.S. 702 (1978).

Court examined the question of whether the plaintiff had established a prima facie case of Title VII violation, without referring to any need to show that the work was equal. In both cases, the defendants addressed problems under the EPA, so that the interpretation of that Act was before the Court.

In *Manhart*, the Court held that the female plaintiffs had established a prima facie case under Title VII of differential compensation by showing that the employer withheld more from their pay than from that of male employees for pension payments. The question of whether the male and female employees did the same work was not considered. However, the Court held that the employer could assert one of the exceptions to the EPA as a defense to the Title VII action. The defense asserted by the employer was that the differential was based on longevity, a "factor other than sex." The Court allowed this defense but rejected it on the merits, holding that longevity itself was sexually based and could not, therefore, be a "factor other than sex."³⁰⁸

The Court thus allowed a defense under the fourth exception to the EPA to be raised against a Title VII claim which was not based on the EPA. This constituted a rejection of the second interpretation, that the EPA defenses are available only in EPA cases, and an adoption of the third position, that EPA defenses are available in any sex discrimination case involving wages or compensation under Title VII, even if the plaintiff's case-in-chief does not fall under the EPA.

This interpretation of the Bennett Amendment to incorporate defenses under the EPA into Title VII is also consistent with the treatment of the other provisions of the same section of Title VII in which the amendment appears.³⁰⁹ These provisions, dealing with the conditions under which a "bona fide seniority system" and "professionally developed ability tests" may be used have both been interpreted by the Supreme Court, which has treated them as affirmative defenses to be established by the employer.³¹⁰ It is reasonable to treat the Bennett Amendment similarly as an affirmative defense to be established by the employer.

This interpretation is also consistent with the general proposition that exceptions to social or remedial legislation are to be narrowly construed to avoid restricting achievement of the overall purpose of the statute.³¹¹ Thus, given alternative possible mean-

³⁰⁸ *Id.* at 712-13.

³⁰⁹ See 42 U.S.C. § 2000—2(h) (1976).

³¹⁰ See *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977) (seniority); *Albermarle Paper Co. v. Moody*, 422 U.S. 405 (1975) (testing); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) (testing).

³¹¹ See *Corning Glass Works v. Brennan*, 417 U.S. 188, 208 (1974).

ings of the term "authorized," its application to the defenses under the EPA rather than to the conduct prohibited by the EPA would have lesser restrictive impact on the remedial objectives of Title VII while preserving the vitality of the EPA defenses. However, this analysis implicitly rejects the contention that a plaintiff must establish as part of its *prima facie* case that the defendant did not pay equal pay for equal work. If the Bennett Amendment creates only affirmative defenses, then this contention is not part of the *prima facie* case, which may be made out without reference to the "equality" of the work.

The following conclusions may be drawn concerning the Bennett Amendment: (a) it recognizes as affirmative defenses under Title VII the exceptions in the EPA, but does not otherwise restrict Title VII wage discrimination claims; (b) since it creates defenses, the amendment does not address the nature of the *prima facie* case required of a plaintiff under Title VII, and lower court decisions to the contrary are in error;³¹² and (c) the fourth exception under the EPA ("any other factor other than sex") does not encompass factors which themselves are based in whole or in part on sex.³¹³ This exception would not be available in a case where it was established that the segregation of the jobs influenced and depressed the wages of those jobs, unless the employer demonstrates which factors other than sex actually influenced the wage rate.³¹⁴

There is one other argument concerning the Bennett Amendment which must be examined. It is that the Congress in 1963 comprehensively examined the problem of discrimination in wages against women and made a decision to legislate only with respect to the narrow area where discrimination could be easily identified, i.e., where the work was equal. This decision to legislate in a limited way in the complex area of wage setting was preserved, perhaps with inartful language, in the Bennett Amendment. Putting aside technicalities of the meaning of the term "authorized," the underlying objective of the amendment was to preserve the limited intrusion into the wage structure which had been

³¹² See, e.g., *Keyes v. Lenoir Rhyne College*, 552 F.2d 479 (4th Cir.), *cert. denied*, 434 U.S. 904 (1977); *Orr v. Frank R. MacNeill & Son, Inc.*, 511 F.2d 166 (5th Cir.), *cert. denied*, 423 U.S. 865 (1975); *Ammons v. Zia Co.*, 448 F.2d 117 (10th Cir. 1971). See also cases cited at note 296 *supra*, which have required plaintiff to show equal work as part of the *prima facie* case.

³¹³ *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702 (1978); *Corning Glass Works v. Brennan*, 417 U.S. 188 (1974).

³¹⁴ See *Di Salvo v. Chamber of Commerce of Greater Kansas City*, 416 F. Supp. 844, 853 (W.D. Mo. 1976), *aff'd*, 568 F.2d 493 (8th Cir. 1978), where the court held that even if differences in the jobs precluded a finding of equality, the grossly disproportionate salaries paid for the difference in duties is evidence of discrimination because of sex.

carefully crafted in 1963. The technical way in which this can be done is for the courts to require the plaintiff to bring herself within the ambit of the EPA before requiring her employer to justify its actions. This line of reasoning has been adopted by the courts that have faced the problem.³¹⁵

This argument is flawed in several ways. Title VII clearly is a broader statute than the EPA, and Senator Bennett's "technical correction" should not be construed as a major limitation on the later Act without a better foundation in legislative history or statutory language. Further, the location of the amendment as part of a section dealing with affirmative defenses, rather than in the exemption section,³¹⁶ confirms its limited role. The Court's interpretation of the amendment in *Manhart* is consistent with this limited view.³¹⁷ When Congress reviewed the administration of sex discrimination provisions of Title VII during the process of adopting the Equal Employment Opportunity Act of 1972,³¹⁸ it demonstrated an awareness of and concern for the problems of sex discrimination which are inconsistent with a broad interpretation of the Bennett Amendment. The seriousness with which Congress viewed the continuation of wage and job discrimination against women was underscored by both the House and Senate reports and speeches. The statistics showing a continued earnings gap, lopsided job segregation, and the persistence of the unemployment ratios for minorities and women were carefully considered.³¹⁹ These were characterized as "disappointing in terms of what minorities and women in this country have a right to expect,"³²⁰ and were the reasons behind the granting of enforcement power to the EEOC. In this context, the Senate report said:

While some have looked at the entire issue of women's rights as a frivolous divertissement, this Committee believes that discrimination against women is no less serious than other prohibited forms of discrimination, and that it is to be accorded the same degree of concern given to any type of similarly unlawful conduct. . . .³²¹

³¹⁵ 42 U.S.C. §§ 2000e—2000e—17 (1976).

³¹⁶ H.R. REP. NO. 914, 88th Cong., 1st Sess., pt. 2 (1963), reprinted in LEGISLATIVE HISTORY, *supra* note 5, at 2148-51. For a discussion of these statistics as they refer to minorities, see Blumrosen, *supra* note 7, at 681-82, and Tables, Appendix.

³¹⁷ H.R. REP. NO. 92-238, 92d Cong., 1st Sess. (1971), reprinted in HISTORY OF EEO, *supra* note 5, at 65.

³¹⁸ S. REP. NO. 92-415, 92d Cong., 1st Sess. (1971), reprinted in HISTORY OF EEO, *supra* note 5, at 416.

The House report found as follows:

Women are subject to economic deprivation as a class . . . [w]omen are placed in the less challenging, the less responsible and the less remunerative positions on the basis of their sex alone.

Such blatantly disparate treatment is particularly objectionable in view of the fact that Title VII has specifically prohibited sex discrimination since its enactment in 1964.³²²

Although both the House and the Senate discussed whether the EPA should be continued as a separate statute or absorbed into Title VII, no reference was made to the Bennett Amendment. The section-by-section analysis of the proposed changes which compared the 1964 Act with the proposed amendments does not note the Bennett Amendment although the other exceptions were quoted.³²³

For all its ambiguities, the Bennett Amendment represents congressional recognition of the real problem of the appropriate relationship between the EPA and Title VII, given the fact that their coverage of the same subject matter overlaps. If there had been no Bennett Amendment, the courts would still have had to work out the relationship, under the doctrine that statutes *in pari materia* should be construed so as to accomplish the overall legislative objectives set forth in both statutes. The treatment of the Bennett Amendment as authorizing recognition of EPA defenses in Title VII cases best accomplishes this objective. This was recognized early in *Shultz v. Wheaton Glass Co.*, in which the court said, "Since both statutes serve the same fundamental purpose against discrimination based on sex, the Equal Pay Act may not be construed in a manner which by virtue of section 703 (h) would undermine the Civil Rights Act."³²⁴

³²² H.R. REP. NO. 92-238, 92d Cong., 1st Sess. (1971), reprinted in HISTORY OF EEO, *supra* note 5, at 64.

³²³ See LEGISLATIVE HISTORY, *supra* note 5, at 2046-49, 2067. In 1972, following the passage of the 1972 Equal Employment Opportunity Act, the EEOC published amended sex guidelines. See Sex Guidelines, 27 Fed. Reg. 6835 (1972) §§ 1604.1-10.

In the House, amendments were offered to consolidate all antidiscrimination legislation so as to afford a complainant a single cause of action and/or a single forum. Representative Green (R.-Ore.) objected that the women still needed all the protection they could get against wage exploitation, and that EPA added to that protection. See LEGISLATIVE HISTORY, *supra* note 5, at 286-87. Senator Hart responded by assuring that there was no intention to cut back women's rights. See Senator Hart's statement and Senator Williams' answer in HISTORY OF EEO, *supra* note 5, at 1075-76. These several statements are consistent only with the conclusion that Congress intended to support a broad interpretation of Title VII.

³²⁴ 421 F.2d 259, 266 (3d Cir.), cert. denied, 398 U.S. 905 (1970). *Wheaton Glass* first used the concept of *in pari materia* to broaden the interpretation of the EPA relying on the

4. *Reliance on Standard Job Evaluation Techniques or on the Market Rate*—Employers required to justify wage structures under Title VII will argue that in fact the jobs are worth what they are paid and that the differences are justified on economic grounds independent of considerations of discrimination. If an employer demonstrates that the wage structure in a facility where jobs are segregated has the same characteristics as the wage structure in a facility where jobs are integrated, this would negate the inference that the wages in the “black” or “womens” jobs were discriminatorily depressed. The employer would thereby demonstrate that the rates were set by factors unrelated to discrimination. If no such evidence is available, the employer will contend that it was simply paying the market rate and state that this is a nondiscriminatory basis or a “factor other than sex.” This argument will not prevail if the premise of this article, that, absent a showing to the contrary, the market rate reflects discriminatory factors where the jobs are segregated, is accepted.

In its first interpretation of the EPA, the Supreme Court faced precisely this issue: whether the market rate, economic conditions, or the depressed wage at which women were willing to work were “factors other than sex,” and therefore provided a defense to an EPA claim. In *Corning Glass Works v. Brennan*,³²⁵ the employer argued that its reliance on the market price of female labor was a “factor other than sex” that justified the differential involved in that case. But the Court rejected the contention, stating:

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

As the Second Circuit noted, Congress enacted the Equal Pay Act “[r]ecognizing the weaker bargaining position of many women and believing that discrimination in wage rates represented unfair employer exploitation of this source of cheap labor.” 474 F.2d, at 234. In response to evidence of the many families dependent on the income of working women, Congress included in the Act’s statement

broader scope of Title VII. It is ironic that it has been the authority relied on by every case that has restricted Title VII to the confines of EPA. See note 257 *supra*.

³²⁵ 417 U.S. 188 (1974).

of purpose a finding that "the existence . . . of wage differentials based on sex . . . depresses wages and living standards for employees necessary for their health and efficiency." Pub. L. 88-38, § 2(a)(1), 77 Stat. 56 (1963). And Congress declared it to be the policy of the Act to correct this condition. § 2(b) The whole purpose of the Act was to require that these depressed wages be raised, in part as a matter of simple justice to the employees themselves, but also as a matter of market economics, since Congress recognized as well that discrimination in wages on the basis of sex "constitutes an unfair method of competition." Pub. L. 88-38, *supra*, § 2(a)(5).

The Equal Pay Act is broadly remedial, and it should be construed and applied so as to fulfill the underlying purposes which Congress sought to achieve.³²⁶

Thus, the Court decided that under the EPA reliance on the "community wage structure" is no defense. The same principle should apply under Title VII, which is recognized as a broader statute than the EPA.³²⁷

Finally, the employer may contend that, even if there is adverse impact on wage rates as a consequence of job segregation, there is no practical method of identifying and eliminating it. The use of conventional job evaluation techniques, reliance on the community wage structure, and the market rate for wages is a "business necessity" within the meaning of Title VII, because there is simply no available alternative with a lesser adverse impact. Furthermore, the employer may argue that it is unreasonable to make illegal reliance on job evaluation procedures which Congress approved by specific amendments to the EPA in the course of its adoption.

The arguments are invalid. Congress intended to permit the use of only those job evaluation techniques which themselves did not contain discriminatory features. Congress did not give blanket approval to job evaluation procedures any more than to professionally developed tests or to seniority systems. The concept of discrimination in job evaluation procedures simply had not been developed at that time.

³²⁶ *Id.* at 206-08.

³²⁷ *But cf.* Christensen v. Iowa, 563 F.2d 353 (8th Cir. 1977) (holding that female plaintiffs failed to establish a *prima facie* case of illegal sex discrimination under the Civil Rights Act of 1964 even though the state university's practice was to pay clerical workers, who were exclusively female, less than the amount it paid physical plant workers, who were predominantly male, for jobs of equal value to the employer because of higher wages paid latter employees in labor market).

The question of alternative methods of establishing wages which would eliminate the adverse effect of the use of job evaluations or community wage structures is more serious. If a court could devise an appropriate remedy,³²⁸ employers could do so without awaiting court action. Any such alternative wage structure would require a review and evaluation of wage rates. Because of the plethora of court decisions restricting Title VII to the reach of the EPA, an employer has good reason at present to assume that its use of job evaluations or community wage structure is lawful under Title VII. But this fact suggests only that any remedy should be made prospective. The Supreme Court adopted this approach in *Manhart*, where prior inconsistent judicial and administrative precedents justified the employers' belief that Title VII was not applicable. Where there is a consistent line of authority in the lower courts insulating the wage structure, albeit erroneously, from Title VII, prospective but not retroactive relief is appropriate.

C. Remedies

1. *The General Principle*—Once the plaintiff has introduced evidence sufficient to create an inference that the wage structure for traditionally segregated jobs has been discriminatorily depressed, the employer must either rebut the inference of discrimination or justify the wage structure on grounds of business necessity. If the employer fails in this effort, the Supreme Court has stated that the plaintiff is entitled at that point to prospective relief in the form of an injunction or some other appropriate order.³²⁹

In addition to injunctive relief to assure that discrimination does not exist in the future, district courts are authorized to award back pay for the purpose of "making persons whole for injuries suffered through past discrimination."³³⁰ An injunction against discriminatorily depressed wage rates and a determination

³²⁸ See Section C. (Remedies) *infra*.

³²⁹ *International Bhd. of Teamsters v. United States*, 431 U.S. 324, 361 (1977). The Court stated that:

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

³³⁰ *Albemarle v. Moody*, 422 U.S. 405, 420 (1975).

of the amount of back pay due the victims of discrimination both involve calculating the extent to which the discrimination depressed the wage rate. Therefore, the court decisions that address the problem of establishing back pay are appropriate precedents in wage cases dealing with both issues.³³¹ The opinions which deal with the difficulty of establishing the amount of back pay are also apt in considering the difficulty in determining the amount by which wages were discriminatorily depressed for the purposes of injunctive relief.

During the first years of Title VII, remedies were developed for cases of discriminatory assignment to segregated jobs, primarily in cases involving the operation of seniority systems.³³² The opening of promotional opportunities and provision of back pay based on the denial of such opportunities were assumed to be sufficient remedies for the discriminatory assignment and resulting job segregation. In these cases the courts not only made no provision for wage discrimination in the segregated jobs, but some judges incorrectly assumed that the statute did not encompass such a remedy.³³³

A decade of experience with these remedies suggests that this assumption was oversimplified and that these remedies may not be adequate. Many economic, human, and legal circumstances have contributed to the inadequacy of these remedies. First, they depend upon the opening of vacancies in higher paying jobs. These vacancies may not be available when they are needed, or, in a static or declining employment situation, may never become available.³³⁴ Second, the number of vacancies in higher paying jobs will rarely equal the number of claimants, for there are usually fewer places as one moves toward the top of the job pyramid. Third, the underlying qualifications and interests of the victims of discrimination may have changed during years of working in segregated jobs. Whatever might have been the case at the time of their initial assignment, the workers may no longer be interested in, or perhaps qualified for, those jobs which they might have held but for the discrimination. Fourth, the Supreme Court decision in *Teamsters v. United States* sharply restricts the situations where

³³¹ The "two stage trial" outline in *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1976), in which liability is determined first and back pay is considered in a second stage proceeding, is appropriate to wage discrimination cases.

³³² See note 5 *supra*.

³³³ See, e.g., *Chrapliwy v. Uniroyal, Inc.*, 71 F.R.D. 461 (N.D. Ind. 1976).

³³⁴ See, e.g., *Patterson v. American Tobacco Co.*, 535 F.2d 257 (4th Cir.), *cert. denied*, 429 U.S. 920 (1976).

promotional opportunity remedies can be granted at all.³³⁵

The focus on promotional opportunities during the first decade under Title VII was based on the assumption that the wrong was a denial of promotions. Therefore, the courts and agencies did not address the issue of wage discrimination. Neither injunctions, nor opening jobs for future promotions, nor back pay awards premised on vacancies in and qualifications for the jobs from which victims of discrimination had been excluded, were intended to remedy wage discrimination. Each of these remedies leaves the victims of discriminatory assignments continually subject to the discriminatorily depressed rate until such time, if ever, as promotion is achieved. For many such victims, relief from wage discrimination will be the only effective remedy because of the legal or practical unavailability or inadequacy of the promotional remedy.

The Supreme Court has endorsed the need to concentrate on the injury in fashioning relief:

[W]here federally protected rights have been invaded, it has been the rule from the beginning that courts will be alert to adjust their remedies so as to grant the necessary relief. . . . Where racial discrimination is concerned, "the [district] court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future. . . . [W]here a legal injury is of an economic character, "the general rule is that when a wrong has been done, and the law gives a remedy, the compensation shall be equal to the injury. The latter is the standard by which the former is to be measured.³³⁶

2. *Where the Evidence Establishes the Extent of the Injury*—In some cases, the proof of the amount by which wages were depressed will be included in the plaintiff's case on the issue of liability. Proof of discrimination often points the way to the remedy.³³⁷ The following are examples:

(a) Proof offered under Title VII may have established a viola-

³³⁵ *International Bhd. of Teamsters v. United States*, 431 U.S. 324 (1977). However, *Teamsters* has no application to wage rates. In *Teamsters* the Court specifically reaffirmed the *Griggs* principle in all instances except where § 703(h) explicitly requires an intent to discriminate; i.e., though the *Griggs* principle is not applicable to seniority systems, it is applicable to discriminatory wage rates generally, and particularly to those that are effects of traditional job segregation.

³³⁶ *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417 (1975).

³³⁷ See Blumrosen & Blumrosen, *The Duty to Plan for Fair Employment Revisited: Work Sharing in Hard Times*, 28 RUTGERS L. REV. 1082, 1101 (1975).

tion of the EPA. In such a case, the remedy is to raise the lower wage to the rate of the higher wage. This is consonant with the remedy mandated by the EPA, and may be required under Title VII by the Bennett Amendment.³³⁸ The amount of the discrimination is the difference between the rate for the "woman's job" and the rate for the "man's job."

(b) Proof may establish that an employer in the past had maintained a dual wage structure but had then integrated wage rates into a single structure. In the unified wage structure differentials may persist which are traceable to the historical dual wage structure.³³⁹ It may be possible to show that the wage rates for female and minority jobs in comparison to the rates for the white and male jobs perpetuate the historical wage differential. Those differentials may, in fact, have been increased since the wage structure was integrated. Percentage increases, for example, would increase any original differentials, while raises in equal amounts would reduce them. Tracing the amount of increase and the way increases were handled after overtly sex- or race-based differentials were abolished may be possible. Where the amount of the gap can be traced to its ancestral roots, the remedy is to eliminate the differential by raising the depressed rate in accordance with the evidence.³⁴⁰

(c) Proof may show that an employer has used a job evaluation system that incorporates discriminatory features. One possible remedy would be to eliminate the discriminatory features and apply the reformed evaluation system to the segregated jobs. This

³³⁸ The EPA states: "Provided, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee." 29 U.S.C. § 206(d)(1) (1976).

In *Corning Glass Works v. Brennan*, 417 U.S. 188, 207 (1974), the Court explained:

The purpose of this proviso was to ensure that to remedy violations of the Act, "[t]he lower wage rate must be increased to the level of the higher." . . . Comments of individual legislators are all consistent with this view. Representative Dwyer remarked, for example, "The objective of equal pay legislation . . . is not to drag down men workers to the wage levels of women, but to raise women to the levels enjoyed by men in cases where discrimination is still practiced." Representative Griffin also thought it clear that "[t]he only way a violation could be remedied under the bill . . . is for the lower wages to be raised to the higher."

(citations omitted).

At least two courts have concluded that the requirement that the EPA and Title VII be read *in pari materia* means that the principle of the EPA proviso prohibits the lowering of wages where a violation of Title VII has been found. *Rosen v. Public Serv. Elec. & Gas Co.*, 477 F.2d 90 (3d Cir. 1973); *Hays v. Potlatch Forests, Inc.*, 465 F.2d 1081 (8th Cir. 1972).

³³⁹ See notes 115 & 201 and accompanying text *supra* (discussion of dual wage structures).

³⁴⁰ See J. ROBINSON, *supra* note 195, at 302 (discussion of situations where part of a wage differential is due to discrimination). See also Rathbone, *The Remuneration of Women's Services*, 27 *ECON. J.* 55 (1917).

may be difficult if the system has incorporated stereotyped thinking about women's jobs or black jobs. The Supreme Court has made it clear that "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."³⁴¹ Therefore, the reform of the job evaluation system would have to be supervised carefully.

(d) Proof may establish that the employer used different factors or different plans to establish the value of men's and women's jobs, or of black and white jobs. For instance, there may have been one plan to evaluate office and administrative work and another to evaluate production jobs.³⁴² One appropriate remedy would be to evaluate all the jobs on the same scale, so that the same standard would measure all jobs.³⁴³ Alternatively, if within each evaluation grouping the jobs had been fairly evaluated, so that the office and administrative jobs were in proper relationship to each other even though no comparison had been made of the relative worth of office and production jobs, it may be possible to relate the groupings as they are in the federal civil service system when various classifications are reduced to eighteen grades for pay purposes.³⁴⁴ Care must be taken, however, that the method chosen to correlate the worth of jobs does not depend on or incorporate the market rate or other known biases.

(e) Proof may establish that the employer made a partial use of the job evaluation process rather than using it to determine the wages of all the jobs for which wages were set. If the job evaluation system is utilized differently for male and white jobs from its utilization in female and minority jobs, the job evaluation system may provide a measure of the extent to which the employer's wages are discriminatory. For example, an employer may deny nurses a wage which a job evaluation system would produce because the market rate for nurses is lower than the rate which the evaluation system identified. In such a case, the difference between the market rate and the rate which the evaluation system produced would be evidence of the extent to which the market for the job which is generally considered a women's job is discriminatorily depressed. Similarly, after conducting a job evaluation, an employer may conclude that he must pay more for male/white jobs than for female/minority jobs even though they were

³⁴¹ *Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702 (1978).

³⁴² See text accompanying note 196 *supra*.

³⁴³ N. WILLIS, *supra* note 236. One purpose of the Willis study was to devise such a single scale. NAS REPORT, *supra* note 85 at 27-29.

³⁴⁴ See note 131 and accompanying text *supra*.

evaluated in the same way, because the market rate for the male and white jobs is higher.³⁴⁵ In such a case as well, the evaluation of the jobs as similar suggests the extent to which the female job rate is discriminatorily depressed.

3. *Where the Extent of Injury Is Unclear*—There are cases in which job segregation and low wage rates attached to the segregated jobs can be established but in which the extent to which wage rates have been discriminatorily depressed cannot be as clearly established as in the situations discussed in the preceding section. This uncertainty, like uncertainty in back pay cases, may invoke competing legal principles. One principle is that where damages are uncertain the court will not order recovery because there is not a sufficient basis to justify a recovery. The countervailing principle is that once liability has been established there should be a remedy. Uncertainty as to the amount of the damage should not relieve the wrongdoer of responsibility. Damages are assessed on the most reasonable basis available, and the wrongdoer should bear the risk of error arising from the uncertainty.

The Supreme Court held in *Teamsters* that, once discrimination has been found, “[t]he force of that proof does not dissipate at the remedial stage of the trial.”³⁴⁶ This holding suggests that once liability has been determined the risk of uncertainty as to the extent of liability is on the defendant. This was the position of the Fifth Circuit in connection with uncertain back pay claims in *Johnson v. Goodyear Tire & Rubber Co.*:

The constant tendency of the court is to find some way in which damages can be awarded where a wrong has been done. Difficulty of ascertainment is no longer confused with right of recovery. . . . Of course, many equitable considerations will enter into any resolution of entitlement, but onerous and speculative limitations should not be utilized as a bar to the restoration process.³⁴⁷

This analysis is particularly relevant in an action seeking an increase in wages in the future.

If the premise that uncertainty will not bar relief is accepted, there still must be a rationale for determining the extent to which the discrimination affected the wage rates. The rationale must relate to the defendant’s wage structure, and may not be based sole-

³⁴⁵ Christensen v. Iowa, 563 F.2d 353 (8th Cir. 1977).

³⁴⁶ International Bhd. of Teamsters v. United States, 431 U.S. 324, 361 (1977).

³⁴⁷ Johnson v. Goodyear Tire & Rubber Co., 491 F.2d 1364-80 (5th Cir. 1974) (citations omitted) (quoting Story Parchment Co. v. Patterson Paper Co., 282 U.S. 555, 565-66 (1931)). See also Kyriazi v. Western Elec. Co., 461 F. Supp. 894 (D.N.J. 1978).

ly on considerations of wage discrimination in society in general. While those general considerations discussed in Part I are useful in assessing the extent of wage discrimination, the remedy must be rooted in the realities of the defendant's wage structure. Therefore, the formulation of the remedy should take as its starting point the wage rate which the employer pays for certain other jobs. These jobs are jobs which are not segregated, or are occupied by whites or males.

For example, an employer may have several entry level jobs, such as common laborer, that do not require any previous educational skill or training. Some of these jobs are open only to men and some only to women, or some only to blacks and others only to whites. Since at the time of their hiring all entry employees possess similar quantities and qualities of skill, with any learning to be acquired on the job, there is a presumption that at this time one employee is as valuable as another to the employer, disregarding the factors of race or sex.³⁴⁸

The pay for the unskilled, common labor white men's jobs is presumably either the lowest wage that an employer would pay white men, or the lowest wage for which white men would work. But women or minorities should not be paid less because of their sex or race. Therefore, their wages should be equalized to the white men's entry level pay even though the jobs to which they are assigned have different duties and might not qualify as sufficiently similar in content to be considered "equal" under the EPA. Obviously, if women's or minorities' jobs require higher qualifications but are paid less than the lowest paid white men's jobs, appropriate proportionate adjustments should be made. Other jobs related to those entry level jobs should then also be adjusted.³⁴⁹

The jobs whose pay rates should be used as the starting point in the remedial analysis are those which, on the facts of the case, are rationally related to the segregated jobs. For example, if light assemblers, all women, receive \$3.00 per hour while heavy assemblers, all men who work on the same product and in closely related areas, receive \$4.00 per hour, and there are no other non-segregated jobs more closely related to the segregated job, the starting point for the analysis of a discriminatory wage difference would be \$1.00 per hour. However, any mechanical conclusion

³⁴⁸ *Kyriazi v. Western Elec. Co.*, 461 F. Supp. 894, 906-11 (D.N.J. 1978).

³⁴⁹ For jobs that require previous training, the entry level for professional, technical, managerial, or skilled men's jobs might be a preferred measure for female and minority jobs in those general categories.

that the women's wages should be raised \$1.00 per hour would not be supportable. It is usually not clear that, but for discrimination, the "light job" would have been paid the same rate as the "heavy job." Thus, the starting point in the analysis is not its end. Optimally, the parties might negotiate a resolution within the framework of the \$1.00 per hour maximum. If, however, the parties insist on a judgment as to the amount of the wage raise required, the court should consider the following factors:

- (a) From 20% to 50% of the wage differential between men and women has been attributed to factors which cannot be justified on grounds unrelated to discrimination;³⁵⁰
- (b) The more nearly alike the work of the two jobs, even where they are not "equal" within the meaning of the EPA, the greater the likelihood that the non-discriminatory wage rate is close to the rate of the other job;
- (c) The less similar the two jobs chosen for comparison, the less likelihood there is that the rates would be similar;
- (d) Where the employer has typically given percentage increases, these increases exacerbated the monetary differences in wage rates in the past. This should be taken into account in fixing the appropriate increase.

These standards are not as firm as the formula for determining back pay liability under Title VII. Nevertheless, this approach is supported by several considerations. First, there is considerable room for judicial discretion in formulating damage remedies under Title VII even where the law appears to be more clearly articulated. Second, the sting of the wage increase is reduced to the extent that it is not retroactive. Third, the employer and the union (if there is one) may take additional steps in the future to deal with the need to adjust the pay rates. While the employer cannot reduce the rates on the jobs which are compared,³⁵¹ it may make other overall adjustments in its wage policy to absorb the additional costs or it may deal with them in some other way.

Once a judgment has been made with respect to the basic wage increase which must be given to those in "women's jobs" or "black jobs," there remains the task of applying the remedy to the various jobs. For example, the segregated jobs may have had a wage rate structure of their own. An employer may have keyed

³⁵⁰ See text accompanying notes 152-83 & 188-220 *supra*.

³⁵¹ See note 338 *supra*. See Act of October 31, 1978, Pub. L. No. 95-555, 92 Stat. 2076 (1978) (amending Title VII of the Civil Rights Act of 1964 to include pregnancy and childbirth within the prohibition against sex discrimination); House Conference Report, H.R. REP. 95-1786, 95th Cong., 2d Sess., reprinted in [1978] U.S. CODE CONG. & AD. NEWS 4765.

all men's jobs to other men's jobs, and all women's jobs to women's jobs. Within each group the relationships between jobs are established as a function of a certain number of points. Within this point system, the women's jobs group may have been slotted farther down the pay scale than the men's jobs group, but with the same point spread between jobs. Once the non-discriminatory entry level rate has been established, rates for the higher women's jobs may be calculated by reference to the point spread between each of the women's jobs.

These internal relationships may themselves sometimes be discriminatory. The point spreads for women's and men's jobs or for black and white jobs may not be the same, or they may not be the same throughout the wage hierarchy. This may occur if a man's job and a woman's job, *e.g.*, chief of security and supervising nurse at a large clinic, though different, are considered roughly equivalent by the employer. The principle of even pay steps would require that the two supervisors be paid the same salary. To avoid this result, the employer may restrict the top of the female or black rates by allotting fewer points between jobs at the top of the women's or the black pay lines than elsewhere in the wage structure. The remedy would be to apply the same standard to both male and female or black and white pay lines. Care must be taken in devising remedies to include revisions for all related jobs, so that the pay line is not inequitably squeezed from either the top or the bottom.

One possible consequence of remedying the discriminatory rate for the segregated jobs might be pressure from the union and/or the male employees to maintain the old relationships between the women's and the men's jobs. Since the evaluation of the job and the attendant pay and status are relative, maintaining the old relationships simply continues the prior discrimination at a higher level³⁵² and would not meet the demands of Title VII.

4. *Whites in Black Jobs; Men in Women's Jobs*—Where there are men or whites in predominantly women's or black jobs, should they also get raises if the victims of discrimination are given an increase? Traditionally segregated jobs are now being opened to formerly excluded groups. While women and minorities have begun to penetrate formerly all-white male sanctuaries, some men are becoming telephone operators, nurses, airline flight attendants, and even typists. The movement is slow and thus is unlikely to change the race and sex stereotypes

³⁵² *Corning Glass Works v. Brennan*, 417 U.S. 188 (1974).

rapidly.³⁵³ Employers would probably echo one commentator who noted that when whites or males were found in traditionally black or female jobs they probably were low productivity people.³⁵⁴ This cannot be true if, in fact, it is the *job* which has been undervalued because of attitudes toward the kinds of people with whom it is identified. Since the artificially depressed wage rate is attached to the job, anyone, without regard to personal characteristics, will be offered the discriminatory rate for that job. There might, therefore, be an expectation that if the jobs become increasingly integrated the perception of the jobs as women's or black would change, and the wage rate would go up. This, however, does not happen quickly.

Once blacks or women in predominately segregated traditional jobs get raises, the case for the few men or whites already in those jobs (at the women's or black rate) is clear. They, too, should receive the same remedial raise.

Two theories support this relief for men in traditionally women's jobs or whites in black jobs. If the men are doing the same work as the women who receive wage increases, they could establish a violation of the EPA.³⁵⁵ That Act requires that the lower wage be increased to match the higher one. Under Title VII, if the women or blacks are given a raise because they have been discriminated against on account of their sex or race, whereas men in the same jobs do not get such a raise, the men are deprived of a raise they would have gotten "but for" their sex. This constitutes a violation of Title VII.³⁵⁶

5. Totally Segregated Employment and the Wage Discrimination Problem—Where there is total segregation—where only minorities or women are employed—there will be no "benchmark" jobs filled by whites or men to use as a basis for analysis. Similarly, where jobs have extremely different requirements of professional credentials, it would be inappropriate to use the pay in one job as a basis for analysis of depressed rates in the other. Thus, in a "sewing shop" with an all-female work force, or a consulting firm with all-female clericals and all-male engineering consultants, a comparison of job rates within the same company would not assist in resolving the issue.

The thorough segregation of such jobs increases the likelihood that the rate of pay for the minority or women's jobs has been in-

³⁵³ Even the increase of 2% in the number of men in an occupation such as telephone operator leaves it 96% female. *Women and Poverty*, *supra* note 40, at 60 (1974).

³⁵⁴ Bergmann, *supra* note 215, at 298.

³⁵⁵ See text of EPA at note 3 *supra*.

³⁵⁶ *McDonald v. Santa Fe Trail Transp. Co.*, 427 U.S. 273, 278-81 (1976).

fluenced by race or sex. The relationship between totally segregated jobs and depressed wages has been carefully identified by a BLS study of male-female earnings differentials. For all establishments studied, males had 18% higher earnings than females in each of the ten occupations examined. For the same occupations, however, the male advantage declined to 11% in establishments which employed both men and women, and rose to 22% in establishments which were totally segregated.³⁵⁷

This study reinforces the conclusion that total segregation leads to a wage structure which has a greater adverse effect on women or minorities than does an integrated job situation. But the fact of total segregation requires that one look elsewhere for integrated "benchmark" jobs. Comparisons may be available in other firms in which the jobs at issue are integrated, or where there are the kind of benchmark jobs described above.³⁵⁸ If the jobs are definitely gender or race specific, however, the wages for similar jobs in other firms may reflect the same discriminatory influences.

There are many jobs, such as clerical work, which tend to be performed by females, for which there will not be any integrated employer whose wage structure can be used for comparative purposes. In such a situation, the court may consider such factors as the economic analysis which suggests that 20% to 50% of the national male-female, black-white wage gap cannot be explained except by discrimination.³⁵⁹ Such general statistics alone, however, are not a sufficient basis for a remedy. There must be some evidence bearing more closely on the employer's own wage structure.

An analysis of the State of Washington Comparable Worth Study discloses that job evaluation points were related to the community wage rates, but that the relationship was different for men's jobs and women's jobs.³⁶⁰ The extent of this difference is a measure of the extent to which the market rate discounts the value of women's jobs. The analysis concludes that the study demonstrated a pervasive 20% difference in pay standards based on sex throughout the state. If the relationship between the worth

³⁵⁷ Buckley, *Pay Differences Between Men and Women in the Same Job*, 94 MO. LAB. REV. 36 (1971).

³⁵⁸ See text accompanying note 377 *supra*. Such a comparison of the defendant's rate structure with the rate structure in other facilities characterized at least one early race case. See *International Chem. Workers Union v. Planters Mfg. Co.*, 259 F. Supp. 365 (N.D. Miss. 1966), *motion to dismiss denied*, 55 LAB. CAS. [CCH] 9046 (N.D. Miss. 1967). The suit was dismissed by consent after a conciliation agreement was executed which increased rates of pay of black employees by changing job classifications.

³⁵⁹ See note 220 *supra*.

³⁶⁰ See Remick, *supra* note 234.

of predominately or totally segregated jobs and the community wage can be so identified, the method may provide a foundation for similar studies elsewhere. While one study in a single state is probably not a sufficient base from which to predict whether the correlation was peculiar to that state or is more generally applicable, more research along these lines might provide the beginnings of a national comparison grid.

Comparable studies of key job rates in the labor markets which include totally segregated jobs may provide a more concrete basis for identification of differentials in particular cases. Such studies would provide a practical means for establishing the upper limit for any finding of wage rate discrimination in segregated jobs. The court could then take into account any other relevant factors in arriving at a judgment as to the extent of the sex-based wage discrimination.

PART III

CONCLUSION

The underlying forces which restrict opportunities of minorities and women to segregated jobs also assure that the wages of those jobs will reflect their low status. Thus, job segregation encompasses wage discrimination. Where such discrimination is established under Title VII, an appropriate remedy would include, *inter alia*, an injunction raising the pay of those in the segregated jobs sufficiently to dissipate the discriminatory factor in the wage rate. This article has explored some of the theoretical and practical problems involved in implementing these conclusions. None are insurmountable, and the judiciary which has solved many difficult problems under Title VII is clearly competent to handle them.

More, however, is needed. Guidelines issued by the EEOC in this area would serve to alert employers, unions, minorities, women, and the courts to this problem and to provide specific guidance on the solution to some of the problems discussed in this article. The Supreme Court has suggested that EEOC guidelines and interpretations which were made contemporaneously with the initial implementation of Title VII are entitled to more weight than those developed in later years.³⁶¹ It would be unfortunate if such an attitude were shown toward the theory of Title VII liabil-

³⁶¹ See *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 76 n.11 (1977); *General Elec. Co. v. Gilbert*, 429 U.S. 125, 142-45 (1976).

ity here outlined. It is only recently that the inadequacies of the remedy of opening promotional opportunities have become apparent under Title VII, and that concentrated attention has been given to the problem of the wages paid for segregated jobs.³⁶² The interpretation of Title VII should not be constricted by the perceptions existing at the time of its initial implementation, for our knowledge of discrimination was elementary and inadequate at that time.³⁶³ As our understanding unfolds, so too should our capacity to address those problems which come newly into focus.

³⁶² In *NLRB v. Seven-Up Bottling Co.*, 344 U.S. 344 (1952), the Court upheld the NLRB modification of its back pay remedy based on its experience in administering the National Labor Relations Act. Labor Act precedents are often highly influential under Title VII despite some differences in the administrative process under the two laws. *See, e.g.*, *Franks v. Bowman Transp. Co.*, 424 U.S. 747 (1967). While some of the problems posed by the differential in income distribution were identified in 1974, no solution was then proposed. *See* Blumrosen, *supra* note 319, at 696; Newport News Shipbuilding and Drydock Co., conciliation agreement in A. BLUMROSEN, *supra* note 3, at 367-77 (1970); Gitt & Gelb, *supra* note 247.

³⁶³ *See* H.R. REP. NO. 92-238, 92d Cong., 1st Sess. (1971) reprinted in HISTORY OF EEO, *supra* note 5, at 65; S. REP. NO. 92-415, 92d Cong., 1st Sess. (1971), reprinted in HISTORY OF EEO, *supra* note 5, at 416, on the need for the 1972 amendments to Title VII.