Comparable Worth and the *Gunther* Case: The New Drive for Equal Pay

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The concept of comparable worth received attention from the Supreme Court for the first time in County of Washington v. Gunther. *Although the Court's decision has been characterized as "narrow," a careful reading raises serious doubt about that characterization. This Article examines the* Gunther *opinion and finds its implications to be more far reaching than previously assumed. It is, however, a separate question whether those implications, and comparable worth analysis in general, should be embraced by the federal courts. A concluding section of the Article focuses on prudential considerations that bear on this question.*

INTRODUCTION

In 1962, when Congress began to debate the Equal Pay Act,[1] women who worked full time earned only fifty-nine cents for each dollar earned by men.[2] Fifteen years later, the Department of Labor reported that women were still earning only fifty-nine percent as much as men, despite substantial efforts that had been made to enforce the Act.[3] This remarkable resistance to legislative reform has led observers to suggest that the earnings gap "is not primarily due to unequal pay for *equal* work"[4] — which was the focus of the Equal Pay Act — but is due instead "to the concentration of women in lower paying jobs which are *different* in content from men's jobs."[5] Thus, female clerical workers,

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[1] 29 U.S.C. § 206(d)(1)-(4) (1982).

[2] WOMEN'S BUREAU, OFFICE OF THE SECRETARY, U.S. DEP'T OF LABOR, THE EARNINGS GAP BETWEEN WOMEN AND MEN 6 Table 1 (1979).

[3] *See id.* The figures show a persistent earnings gap over a period of more than two decades.

[4] Newman & Vonhof, *"Separate But Equal" — Job Segregation and Pay Equity in the Wake of* Gunther, 1981 U. ILL. L. REV. 269, 270 (emphasis in original).

[5] *Id.* (emphasis in original).

such as secretaries and library assistants, have been paid less than co-workers like bus drivers and locksmiths, even when the various jobs received identical ratings in an objective evaluation conducted by their employer.[6]

In light of the limited effect of the Equal Pay Act, a number of writers have urged that Title VII of the 1964 Civil Rights Act[7] be interpreted to require equal compensation for comparable work as well as for equal work.[8] Under a comparable worth approach, employers would be obligated to base wage determinations on the "intrinsic" value of the work performed when single-gender jobs would otherwise be compensated unequally because of differences in job content. Given the extraordinary potential of this approach to unequal pay, it is not surprising that comparable worth has been called the "civil rights issue of the 1980's."[9]

County of Washington v. Gunther[10] was the Supreme Court's first foray into the area of pay equity outside the context of equal work. The Court held in the *Gunther* case that claims for intentional sex-based wage discrimination may be brought under the 1964 Civil Rights Act even though no co-worker of the opposite sex receives higher pay for equal work.[11] Justice Brennan's opinion for a five-to-four majority purported to reserve judgment on the broader question of comparable worth presented in cases involving wage differentials not attributable to intentional discrimination.[12] In a strongly worded dissent, Justice Rehnquist seized upon the limiting language of *Gunther* and attempted to put it to his own use. The *Gunther* case, he wrote, "will be treated

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[6] *See, e.g.*, Christensen v. Iowa, 563 F.2d 353 (8th Cir. 1977).

[7] 42 U.S.C. §§ 2000e-1 to -17 (1982). Title VII, like the Equal Pay Act, prohibits gender-based wage discrimination. *See infra* note 21.

[8] *See* Gasaway, *Comparable Worth: A Post-*Gunther *Overview*, 69 GEO. L.J. 1123 (1981); Newman & Vonhof, *supra* note 4, at 269; Note, *Equal Pay for Comparable Work*, 15 HARV. C.R.-C.L. L. REV. 475 (1980); Note, *Equal Pay, Comparable Work, and Job Evaluation*, 90 YALE L.J. 657 (1981). For a contrary view, see Nelson, Opton & Wilson, *Wage Discrimination and the "Comparable Worth" Theory in Perspective*, 13 U. MICH. J.L. REF. 231 (1980).

[9] Newman & Vonhof, *supra* note 4, at 322. The issue of comparable worth occupies much the same position today that the issue of corrective racial classification occupied a decade ago. *See* Vieira, *Racial Imbalance, Black Separatism and Permissible Classification by Race*, 67 MICH. L. REV. 1553 (1969); Note, *Preferential Minority Treatment as an Appropriate Remedy Under Section 703(j) of Title VII*, 42 TENN. L. REV. 397 (1975).

[10] 452 U.S. 161 (1981).

[11] *Id.* at 168.

[12] *Id.* at 166.

like a restricted railroad ticket, 'good for this day and train only.' "[13] The decision, he added even more emphatically, "is so narrowly written as to be virtually meaningless."[14]

Justice Rehnquist's dissent is clearly aimed at lower federal courts, and understandably so: lower courts will provide the battleground for the next round of comparable worth litigation. What is decided in the lower courts will, in turn, affect future decisions in the Supreme Court. It is important, therefore, to analyze the *Gunther* opinion closely, if Justice Rehnquist is not to be conceded an influence in the long run which he failed to command within the *Gunther* Court itself. Accordingly, this Article focuses on the meaning of the *Gunther* case and on its implications for comparable worth litigation. The Article begins with a full statement of the case, which lays the groundwork for examining Justice Rehnquist's claim that the decision is largely meaningless. The discussion explores the impact of *Gunther* on nonequal work cases involving either intentional or inadvertent discrimination and probes into a number of ambiguities in the Court's opinion. A concluding section of the Article addresses more general questions concerning the soundness of comparable worth theory and the viability of alternative remedies.

I. The *Gunther* Case: Facts and Opinions

In 1974 four female jail guards employed by Washington County, Oregon filed suit against their employer under Title VII of the 1964 Civil Rights Act, alleging illegal sex discrimination in their rates of compensation. The complaint asserted that the female guards received unequal pay for work substantially equal to that performed by male guards and, alternatively, that if the work was not equal, the disparity in pay was nevertheless due in part to intentional sex discrimination.[15] The latter claim was based on allegations that the county had evaluated the jobs in question and surveyed market rates, and had then adhered to the results of its evaluation in compensating male guards, but not in compensating females.[16] Despite the fact that the employer's own evaluation had found female guard positions to be worth ninety-five percent as much as male positions, the county proceeded to pay women guards

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[13] *Id.* at 183 (Rehnquist, J., dissenting).

[14] *Id.* at 183-84.

[15] Gunther v. County of Wash., 20 Fair Empl. Prac. Cas. (BNA) 788, 791 (Or. 1976), *rev'd in part*, 602 F.2d 882 (9th Cir. 1979), *aff'd*, 452 U.S. 161 (1981).

[16] *Gunther*, 452 U.S. at 165, 180-81.

only seventy percent as much as men.[17]

A federal district court found that male guards in Washington County supervised ten times as many prisoners as did female guards, who spent much of their time on clerical duties.[18] Accordingly, the court ruled that the two categories of jail guards were not substantially equal, and hence were not required to be similarly compensated under the principle of equal pay for equal work.[19] The court also denied recovery under Title VII on the alternative claim of intentional discrimination, finding that the Bennett Amendment — which exempts from Title VII coverage any sex-based wage differentials "authorized" by the Equal Pay Act[20] — precluded recovery when the equal work requirement of the Equal Pay Act had not been satisfied.[21] On review, the Court of Appeals for the Ninth Circuit affirmed the finding that the jobs in question were unequal, thereby foreclosing relief under the equal work formula; but it reversed the ruling which denied recovery for intentional discrimination.[22]

In the Supreme Court, the claim demanding equal pay for equal work was abandoned, and issue was joined on the alternative claim of intentional sex discrimination.[23] Justice Brennan, writing for a closely divided Court, rejected the argument that the Bennett Amendment confined wage discrimination actions under Title VII "to those that could

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[17] *Id.* at 180.

[18] *Gunther*, 20 Fair Empl. Prac. Cas. at 791.

[19] *Id.*

[20] 42 U.S.C. § 2000e-2(h) (1982).

[21] *Gunther*, 20 Fair Empl. Prac. Cas. at 791. Title VII makes it unlawful for an employer "to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's . . . sex." 42 U.S.C. § 2000e-2(a) (1982). However, the Bennett Amendment to Title VII exempts any wage "differentiation [which] is authorized by the provisions" of the Equal Pay Act. *Id.* § 2000e-2(h). The "authorization" for sex-based wage discrimination must therefore be extracted from the Equal Pay Act, which prohibits employers from discriminating:

> On the basis of sex by paying wages to employees . . . at a rate less than the rate at which he pays wages to employees of the opposite sex . . . for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, 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.

29 U.S.C. § 206(d)(1) (1982).

[22] 623 F.2d 1303 (9th Cir. 1979), *aff'd*, 452 U.S. 161 (1981).

[23] *Gunther*, 452 U.S. at 165-66.

also be brought under the Equal Pay Act,"[24] an argument which would have precluded "claims not arising from 'equal work.' "[25] Since the Bennett Amendment insulates wage disparities authorized by the Equal Pay Act,[26] the Court began by examining the restrictions in the Act which could be said to "authorize" discrimination. Three relevant restrictions were found: (1) the Equal Pay Act is limited to a smaller class of employers than is Title VII; (2) the Act applies only to cases involving equal work; and (3) the Equal Pay Act contains affirmative defenses that exempt wage differentials attributable to seniority, merit, productivity, or any factor other than sex.[27] The Court held that only the third group of restrictions — the four affirmative defenses — had been incorporated into Title VII by the Bennett Amendment.[28]

In reaching this conclusion, the majority relied on the language of the Bennett Amendment and on the underlying policy of Title VII. The Court said that the term "authorized," which the Bennett Amendment used to protect certain wage differentials, "denotes affirmative enabling action"[29] rather than merely an absence of regulation. In answering the question of what wage practices had been affirmatively authorized, Justice Brennan wrote:

> The Equal Pay Act is divided into two parts: a definition of the violation, followed by four affirmative defenses. The first part can hardly be said to "authorize" anything at all: it is purely prohibitory. The second part, however, in essence "authorizes" employers to differentiate in pay on the basis of seniority, merit, quantity or quality of production, or any other factor other than sex, even though such differentiation might otherwise violate the Act. It is to these provisions, therefore, that the Bennett Amendment must refer.[30]

This interpretation of the Bennett Amendment, limiting its reach to incorporate only the four affirmative defenses, did not render the amendment superfluous in the Court's view: "with respect to the first three defenses, the Bennett Amendment has the effect of guaranteeing . . . a consistent interpretation of like provisions"[31] in Title VII and the Equal Pay Act. Even more significant, the fourth affirmative defense could have notable substantive effects. In an important passage,

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[24] *Id.* at 168.
[25] *Id.*
[26] *See supra* note 21.
[27] *Gunther*, 452 U.S. at 167-68.
[28] *Id.* at 171.
[29] *Id.* at 169.
[30] *Id.*
[31] *Id.* at 170.

Justice Brennan wrote:

> Incorporation of the fourth affirmative defense could have significant consequences for Title VII litigation. Title VII's prohibition of discriminatory employment practices was intended to be broadly inclusive, proscribing "not only overt discrimination but also practices that are fair in form, but discriminatory in operation." . . . The fourth affirmative defense of the Equal Pay Act, however, was designed differently, to confine the application of the Act to wage differentials attributable to sex discrimination.[32]

Finally, the legislative history of the Bennett Amendment, while "not unambiguous,"[33] was found to be "broadly consistent"[34] with the Court's reading of the Act and not supportive of an alternative reading.

The Court also relied heavily on the "remedial purposes of Title VII and the Equal Pay Act."[35] Under the interpretation of the Bennett Amendment advanced by the county, claims for sex-based wage discrimination could be brought under Title VII only if they satisfied the equal work requirement of the Equal Pay Act. This would mean that employers were free to use even "a transparently sex-based system for wage determination."[36] It would also mean that no protection could be given against employers who were not covered by the Equal Pay Act, even though they were clearly within the reach of Title VII. Justice Brennan argued that "Congress surely did not intend the Bennett Amendment to insulate such blatantly discriminatory practices from judicial redress under Title VII"[37] and that the Court must "avoid interpretations of Title VII that would deprive victims of discrimination of a remedy, without clear congressional mandate."[38]

The Court found it unnecessary to reach broader theories of comparable worth "under which plaintiffs might claim increased compensation on the basis of a comparison of the intrinsic worth or difficulty of their job with that of other jobs in the same organization or community."[39] Since the employer in *Gunther* had allegedly deviated from its own job evaluation, the case did not "require a court to make its own subjective assessment of the value of the male and female guard jobs, or to attempt by statistical technique or other method to quantify the effect

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[32] *Id.* (citations omitted).
[33] *Id.* at 168.
[34] *Id.* at 176.
[35] *Id.* at 178.
[36] *Id.* at 179.
[37] *Id.*
[38] *Id.* at 178.
[39] *Id.* at 166.

of sex discrimination on the wage rates."[40] Thus, the *Gunther* case did not decide "the precise contours of lawsuits challenging sex discrimination in compensation under Title VII."[41]

Justice Rehnquist, writing in dissent for himself and three other members of the Court, argued that "the most plausible interpretation of the [Bennett] Amendment is that it incorporates the substantive standard of the Equal Pay Act — the equal pay for equal work standard — into Title VII."[42] He would, however, reach the same result even in the absence of the Bennett Amendment. The legislative history of the Equal Pay Act made it clear that Congress had deliberately rejected a comparable work standard, which was strongly advocated by the Kennedy administration, and had substituted a requirement of equal work in order to limit the reach of the statute.[43] Furthermore, there was no explicit evidence that Congress decided to repeal the provisions of the Equal Pay Act when it enacted Title VII a year later: "The attenuated history of the sex amendment to Title VII makes it difficult to believe that Congress thereby intended to wholly abandon the carefully crafted equal work standard of the Equal Pay Act."[44] Justice Rehnquist, therefore, invoked "the doctrine of *in pari materia*, namely, that '[w]here there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.' "[45] He concluded that the only redeeming feature of the majority opinion was "its narrow holding"[46] which, he said, would render the *Gunther* case "virtually meaningless."[47] Thus, the saving virtue of *Gunther* in Rehnquist's view was that the decision would have no effect. It is, of course, the capacity of even a dissenting voice on the Court to generate self-fulfilling prophesies which, together with the inherent importance of comparable worth, makes a careful examination of *Gunther* essential.

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[40] *Id.* at 181.

[41] *Id.*

[42] *Id.* at 192 (Rehnquist, J., dissenting).

[43] Williams & McDowell, *The Legal Framework*, in COMPARABLE WORTH: ISSUES AND ALTERNATIVES 197, 212-21 (E. Livernash ed. 1980).

[44] *Gunther*, 452 U.S. at 190 n.4 (Rehnquist, J., dissenting).

[45] *Id.* at 189.

[46] *Id.* at 203.

[47] *Id.* at 183-84.

II. Implications of *Gunther*: Is the Decision Meaningless?

Despite Justice Rehnquist's protestations to the contrary, there are strong reasons to believe that the real source of concern for the *Gunther* dissenters was the potential breadth of the decision rather than its supposed narrowness. No doubt *Gunther*, like other cases of first impression,[48] leaves in its wake a number of unanswered questions.[49] That, however, is a mark of the elasticity of the Court's opinion, not a demonstration of its rigidity.

Close analysis suggests that the *Gunther* case, far from being "meaningless," is important in at least three respects: (1) in eliminating the equal work requirement from application to cases arising under Title VII; (2) in establishing viable ways to set forth a cause of action for wage discrimination; and (3) in reshaping the role of job evaluations in the administration of prevailing wage policies. Beyond these points, the *Gunther* case raises the prospect that even broader and more far-reaching approaches to sex-based wage discrimination might be approved in the future.

A. The Equal Work Requirement

When federal equal pay legislation was introduced in 1962, it contained a provision requiring equal wages for men and women doing "work of comparable character."[50] Congress carefully debated that provision and eventually rejected it in favor of a narrower substitute which limited wage claims for sex discrimination to cases involving equal work.[51] Yet, the doctrinal centerpiece of the *Gunther* opinion is the approval of a remedy for sex-based wage discrimination where jobs do *not* involve equal work. The Court achieved that result by reading Title VII of the Civil Rights Act to reject the equal work requirement, de-

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[48] *E.g.*, Baker v. Carr, 369 U.S. 186 (1962) (challenge on equal protection grounds to state apportionment of legislative seats).

[49] *See infra* text accompanying notes 122-49.

[50] H.R. 8898, 87th Cong., 1st Sess. (1962). The bill provided:

> No employer . . . shall discriminate . . . between employees on the basis of sex by paying wages to any employee at a rate less than the rate at which he pays wages to any employee of the opposite sex for work of comparable character on jobs the performance of which requires comparable skills, except where such payment is made pursuant to a seniority or merit increase system which does not discriminate on the basis of sex.

[51] 29 U.S.C. § 206(d)(1) (1982) ("No employer . . . shall discriminate . . . between employees on the basis of sex by paying wages to employees . . . at a [lesser rate than paid to] employees of the opposite sex . . . for equal work . . . ."); *see also infra* note 64.

spite the lack of evidence that Congress had intended to undo in 1964 the restrictions which the same Congress had insistently carved into the Equal Pay Act in 1963.[52] This judicial *tour de force* may support the observation that *Gunther* rests on an "unshakable belief"[53] that "there simply must be a remedy for wage discrimination beyond that provided in the Equal Pay Act."[54] But criticism of the Court's statutory construction does not justify the conclusion that *Gunther* is "virtually meaningless." On the contrary, courts rarely engage a confrontation with Congress for the purpose of achieving meaningless results, and certainly that was not the purpose in *Gunther*. Indeed, the decision to provide a remedy for unequal pay even where jobs are different in content can fairly be characterized not as a "meaningless" event, but as an extraordinary development. The Court managed thereby to eliminate in a single stroke the "major legal obstacle which stood in the way of pursuing wage disparity claims."[55] After twenty years of litigation, relatively few wage differentials remain vulnerable to attack under an equal work formula. But if jobs with different content may be scrutinized for wage discrimination, large areas of sex-segregated employment will be open to review. Even more important for the long term, the elimination of the equal work requirement carries major implications for comparable worth analysis.

Of course, the *Gunther* case did not explicitly embrace a comparable worth theory of recovery. Nevertheless, the immediate effect of *Gunther* will almost certainly be to permit the use of comparable worth evidence in at least two categories of cases. First, it should be noted that *Gunther* permitted a wage discrimination claim to be predicated on a job evaluation in which unequal jobs were compared.[56] This is precisely the type of comparison of unequal work that is at the heart of comparable worth analysis.[57] To be sure, the job comparison in *Gunther* was undertaken by the employer, and so the Court emphasized that it was not required "to make its own subjective assessment of the value of the male and female . . . jobs."[58] But employers surely will not continue routinely to concede the validity of the job evaluations they commission. If an employer challenges the validity of a job study, as some indeed

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[52] The legislative history is traced in Williams & McDowell, *supra* note 43.

[53] *Gunther*, 452 U.S. at 182 (Rehnquist, J., dissenting).

[54] *Id.*

[55] Newman & Vonhof, *supra* note 4, at 283 n.71.

[56] *See infra* note 62; *supra* text accompanying notes 19 & 40.

[57] *See infra* text accompanying notes 168-70.

[58] *Gunther*, 452 U.S. at 181.

have already done,[59] courts must either pass on the merits of the challenge or make presumptions regarding the validity of employer-sponsored surveys. A rebuttable presumption, however, would not forestall judicial involvement, and a conclusive presumption would not be supportable. On the other hand, a decision to pass on the merits of the employer's challenge, albeit under a narrow scope of review, will necessarily implicate courts in a "subjective assessment" of job evaluation processes and, ultimately, of job worth.[60]

Second, even when employer job evaluations are not at issue, courts may be obliged to receive comparable worth evidence in order to measure the extent of the injury caused by intentional discrimination. When a salary differential is attributable entirely to intentional sex discrimination, the obvious remedy is to equalize the salaries. However, the *Gunther* case authorized judicial relief even when only *part of the differential* can be attributed to intentional discrimination.[61] In the latter situation, courts cannot hope to determine what portion of a wage disparity is caused by discrimination unless they make or review an assessment of job worth through evaluation techniques or market surveys. It will not suffice to rely on employer evaluations, as the *Gunther* case did,[62] since the necessary evaluations may not exist and may be challenged if they do exist. Thus, while *Gunther* itself did not involve comparable worth analysis, the cause of action which it recognized will almost certainly require courts to engage in such an analysis in future cases.

Of course, the *Gunther* case did not address the broad question of whether comparable worth evidence by itself could establish a cause of action with no other showing of gender discrimination. But *Gunther* carries significant implications for that issue too. The statutory impediment to comparable worth recovery was that the Equal Pay Act ap-

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[59] *See infra* note 72.

[60] A decision to restrict the scope of review, like reliance on a rebuttable presumption that job evaluation results are valid, would reduce, but not eliminate, the occasions for judicial intervention.

[61] The rejection of the claim of equal work in *Gunther* meant that some of the difference in pay might be attributable to differences in the nature of the work. In stating their alternative claim, the plaintiffs therefore alleged only that "part of the pay differential was attributable to intentional sex discrimination." *Gunther*, 452 U.S. at 164.

[62] *Gunther* was based more directly on the employer's departure from the results of its own job evaluation. However, that departure is legally significant only if it was unjustified, and the justification for it is inextricably linked to the validity of the job evaluation.

peared to permit wage distinctions that are objectionable only on comparable worth grounds, and the Bennett Amendment excluded from Title VII coverage any wage differentials "authorized" by the Equal Pay Act.[63] However, the *Gunther* case refused to read the word "authorized" in the Bennett Amendment to include actions that are merely permitted rather than affirmatively protected. Instead, the Court held that the authorization of wage disparities in Title VII incorporates only the four affirmative defenses of the Equal Pay Act. Yet, it was the equal work requirement, not the four defenses, that operated to preclude comparable worth analysis under the Equal Pay Act;[64] and that requirement is precisely what *Gunther* found to be inapplicable to Title VII.[65] In short, the Equal Pay Act rejected comparable worth claims in favor of a demand for equal work, but under *Gunther* only the four affirmative defenses of the Equal Pay Act are included in Title VII; and those defenses do not address the issue of comparable worth.[66] If Title VII incorporates only the four affirmative defenses and not the rejection of comparable worth evidence which is implicit in the equal work requirement, it will be difficult to find a basis for denying comparable worth recoveries under Title VII. Perhaps for this reason, the

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[63] *See supra* notes 42-43 and accompanying text.

[64] When equal pay legislation was introduced in Congress in 1962, it was addressed to "work of comparable character." *See supra* note 50. Because of objections to the language of comparability, an amendment was passed to limit the bill to claims "for equal work." Opponents of the amendment agreed that "comparable" was the key word in the bill and argued that its deletion "could spell defeat for the bill's purpose." 108 CONG. REC. 14,768 (1962). Thus, both sides acknowledged that the adoption of the equal work amendment shifted the focus of the legislation from comparable work to equal work. *Id.* at 14,767-68. Although the conference committee failed to report a bill in 1962, similar legislation was introduced a year later, H.R. 3861, 88th Cong., 1st Sess. (1963), which retained the equal work requirement and which culminated in the Equal Pay Act.

[65] *Gunther*, 452 U.S. at 171.

[66] Arguably, *Gunther*'s interpretation of the fourth affirmative defense might make the latter provision relevant to comparable worth analysis. *See infra* text accompanying notes 115-17. However, that defense was added to the Equal Pay Act after the equal work requirement had already been adopted. *See* H.R. 3861, 88th Cong., 1st Sess. (1963), which retained the equal work requirement, designed to foreclose comparable worth analysis, but did not yet contain the fourth affirmative defense. Since the equal work requirement already precluded comparable worth analysis under the Equal Pay Act, the adoption of the fourth affirmative defense must have had some other mission. *See supra* note 64. Conversely, if the equal work requirement had been rejected in favor of the original language of "comparable work," it is clear that the statute would have authorized comparable worth analysis, notwithstanding the addition of the fourth affirmative defense.

Gunther case conspicuously declined to endorse the circuit court's view that "evidence of comparable work . . . will not alone be sufficient to establish a prima facie case."[67]

B. Intentional Discrimination

Even when the *Gunther* case is viewed apart from its broader implications, it is clearly the Court's most important wage discrimination decision to date. *Gunther* explicitly authorizes judicial relief upon a showing of "intentional" gender-based wage discrimination.[68] It is widely acknowledged that one way to prove intentional discrimination is through evidence that an employer has deviated from its own job evaluation plan.[69] What generally has been overlooked is that courts have recognized a number of other ways to prove discriminatory intent. A proper assessment of *Gunther*'s potential impact obviously requires an examination of all of the means available for proving intentional discrimination.

American Federation of State, County, & Municipal Employees v. Washington[70] illustrates the use of employer job evaluations to prove discriminatory intent. In 1974 the state of Washington commissioned a study of 121 government positions which resulted in a finding of "an approximate 20% disparity in salaries between predominately male and predominately female job classifications with the same number of job evaluation points."[71] However, state officials declined to take corrective action, in part because it would be "costly and disruptive of traditional pay relationships."[72] Shortly after the decision in the *Gunther* case, suit was filed in a federal district court, which ruled that Title VII of the 1964 Civil Rights Act had been violated by Washington's failure to compensate "predominately female job employees in accordance with their evaluated worth, as determined by the State."[73]

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[67] Gunther v. County of Wash., 623 F.2d 1303, 1321 (9th Cir. 1979), *aff'd*, 452 U.S. 161 (1981).

[68] *Gunther*, 452 U.S. at 180.

[69] *See, e.g.*, Newman & Vonhof, *supra* note 4, at 288; Note, *Women, Wages and Title VII: The Significance of* County of Washington v. Gunther, 43 U. PITT. L. REV. 467, 485-86 (1982).

[70] 578 F. Supp. 846 (W.D. Wash. 1983).

[71] *Id.* at 864.

[72] D. TREIMAN, JOB EVALUATION: AN ANALYTIC REVIEW 29 (1979) (Interim Report to the Equal Employment Opportunity Commission). Governor Dixy Lee Ray cancelled a budget request for funds to begin implementing the state's job evaluation, saying among other things that she questioned the methodology of the evaluation. *Id.*

[73] *AFSCME*, 578 F. Supp. at 865. The court also found that the state's wage system

The use of employer deviations from job evaluation results could have broad application since large numbers of employers have utilized various job evaluation schemes.[74] Nevertheless, several factors may operate to limit reliance on employer job evaluations to establish a violation of Title VII. First, many employers have commissioned job evaluations, not for the purpose of instituting a more equitable wage system, but in order to justify existing wage practices.[75] In these circumstances, the employer is unlikely to have deviated from the results of the evaluation, and the results are unlikely to have great credibility in any event. Second, employers often use different job evaluation plans for different categories of employment, a practice that may be encouraged by the *Gunther* case.[76] When different plans are used for each family of jobs, a direct comparison of the relative value of dissimilar jobs may be precluded. Finally, *Gunther*'s support for judicial relief against employer deviation from job evaluation results is itself somewhat limited. The *Gunther* case involved both a job evaluation and a market wage survey, each of which was allegedly incompatible with the employer's wage practice. It is not clear whether an employer would be liable under Title VII if the evaluation and market surveys were mutually inconsistent and the employer adhered to the latter.[77]

The opportunity for employers to manipulate the job evaluation process might justify some concern for the future of *Gunther* if no other means were available to prove gender discrimination. But a departure from employer job evaluations is not the only way to establish a cause of action under the opinion in the *Gunther* case. The authorization for judicial relief under *Gunther* runs in general terms to cases of intentional sex-based wage discrimination. The task for courts and commentators is to determine what types of evidence will support a finding of discriminatory intent.

Pre-*Gunther* cases provide substantial guidance on the question of what constitutes intentional wage discrimination. Those cases show that intentional discrimination may be inferred in a wide variety of circumstances. Thus, federal courts have found intentional wage discrimina-

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had a disparate impact on women, and it viewed the litigation as involving "the implementation of a comparable worth compensation system." However, the opinion stressed that the case "is more accurately characterized" as one of failure to pay in accordance with evaluated worth which, it said, was remarkably analogous to *Gunther*. *Id.*

[74] D. TREIMAN, *supra* note 72, at 49-50.

[75] *Id.* at 7.

[76] *See infra* text accompanying notes 118-21.

[77] The validity of the "market defense" in Title VII litigation remains a matter of conjecture. *See infra* text accompanying notes 133-49.

tion upon proof of: (1) Employer use of a wage system that incorporates past gender-based discrimination; (2) wage differentials arising out of discriminatory hiring or promotion policies; (3) unexplained statistical disparities in compensation; or (4) comparability of jobs having unjustified differentials in salary.

1. Incorporation of Past Discrimination

A good example of an intentional discrimination case involving the incorporation of past discriminatory wage policies is provided by *International Union of Electrical, Radio & Machine Workers v. Westinghouse.*[78] The plaintiffs in *International Union of Electrical, Radio & Machine Workers* claimed that their employer's wage structure was derived from a discriminatory system, instituted some forty years earlier, which segregated female jobs and relegated them to lower wages than were paid "for male jobs which had received the same point rating."[79] Following the passage of the Equal Pay Act and the 1964 Civil Rights Act, the employer adopted a new wage system which eliminated sexual designations, but which allegedly embodied the discriminatory policies of the prior system. The court held that these facts, if proved, would be sufficient to state a claim for intentional discrimination.[80] Under the holding in *International Union of Electrical, Radio & Machine Workers*, evidence that an employer has enforced a wage system that incorporates past gender-based discrimination may establish a violation of Title VII.

This is not to suggest that all wage systems which perpetuate the effects of past discrimination are unlawful. In *United Air Lines v. Evans*[81] the Supreme Court held that a seniority system which carries forward the effects of a prior discriminatory act is permissible, absent proof of a "present" violation of Title VII. Assuming the applicability of *Evans* to matters other than seniority,[82] claims based solely on the residual effects of past discrimination may be foreclosed. However, insofar as the *Gunther* case requires proof of intentional discrimination, a

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[78] 631 F.2d 1094 (3d Cir. 1980), *cert. denied*, 452 U.S. 967 (1981).

[79] *Id.* at 1097.

[80] *Id.* at 1097, 1107.

[81] 431 U.S. 553 (1977).

[82] Seniority systems like the one in *Evans* are specially protected under § 703(h) of Title VII, which provides that "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 . . . system. . . ." 42 U.S.C. § 2000e-2(h) (1982).

Title VII wage claim could not be based solely on discriminatory effects in any event. And a case which, like *International Union of Electrical, Radio & Machine Workers*, involves a new act incorporating prior discrimination might fairly be deemed a "present" violation of Title VII within the meaning of the *Evans* rule.[83] Accordingly, the *Evans* case need not prevent litigants from using the incorporation of past discrimination to satisfy the requirements of *Gunther*.

2. Discriminatory Hiring or Promotion

Federal courts also have provided relief against wage inequities arising out of discriminatory hiring or advancement policies. Gender-based decisions to deny a promotion[84] or job reclassification[85] will give rise to a Title VII action for wage discrimination. Furthermore, the same logic would seem to apply to employer discrimination in making initial job assignments, and at least one court has already so ruled.[86] Because men and women are frequently assigned, especially in industrial settings, to sex-segregated jobs for which they did not specifically apply, commentators have viewed initial job assignments as a major source for wage discrimination claims in the future.[87]

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[83] In International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977), the Court specifically acknowledged that if a labor union had no nonwhite members because of prior discriminatory practices, a facially neutral policy limiting new membership to blood relatives of existing members would be unlawful. *Id.* at 349 n.32. Some courts have gone even further than *Teamsters* and *International Union of Elec., Radio & Mach. Workers*, 631 F.2d at 1094. *See* Neeley v. Metropolitan Atlanta Rapid Transit Auth., 24 Fair Empl. Prac. Cas. (BNA) 1610 (N.D. Ga. 1980) (unlawful to require special permission for salary increases exceeding 10% because the effect of past wage discrimination would be perpetuated). Of course, the decisions are not uniform since it is sometimes difficult to determine whether an employer's action constitutes a "present" violation, as required by *Evans*. *Compare* Farris v. Board of Educ., 576 F.2d 765 (8th Cir. 1978) (recovery barred because mandatory maternity leave policy implemented before application of Title VII to school boards and no effect on plaintiff since that time) *with* Jenkins v. Home Ins. Co., 635 F.2d 310 (4th Cir. 1980) (continuing violation found when employer continued to engage in series of separate but unrelated acts throughout woman's employment).

[84] Fitzgerald v. Sirloin Stockade, 624 F.2d 945 (10th Cir. 1980).

[85] Orahood v. Board of Trustees, 645 F.2d 651 (8th Cir. 1981).

[86] Taylor v. Charley Bros. Co., 25 Fair Empl. Prac. Cas. (BNA) 602 (W.D. Pa. 1981).

[87] *See* Blumrosen, *Wage Discrimination, Job Segregation, and Title VII of the Civil Rights Act of 1964*, 12 U. MICH. J.L. REF. 397 (1979); Newman & Vonhof, *supra* note 4. Of course, a discriminatory denial of job opportunities gives rise to an independent cause of action under Title VII even when there has been no wage discrimination. Title VII thus makes employers liable both for wage discrimination and for discrimina-

3. Statistical Disparities in Compensation

More difficult questions are raised when courts are asked to infer a discriminatory intent from statistical data showing gender-related differences in compensation. The difficulty, of course, is that factors other than sex discrimination could account for part or all of the wage differential. Nevertheless, some courts have suggested that discriminatory intent may be inferred from statistical evidence showing that female jobs are compensated at lower rates than male jobs.[88] And even if statistical data alone did not suffice, such data could establish a prima facie case when combined with other circumstantial evidence of discriminatory intent. It is possible, for instance, that employees will submit their own job evaluation studies to employers and use the results, if not implemented, as evidence of the employer's intent. Judicial reliance on such evidence would be consistent with *Gunther*'s emphasis on the use of job evaluation data.[89] Admittedly, a determination of the validity of job studies would signal a larger judicial role than *Gunther* acknowledged, but not a larger one than *Gunther* requires when employer job evaluations are challenged.

4. Discrimination in Comparable Jobs

A number of courts have considered the comparability of male and female jobs in determining whether wage differentials are the result of a discriminatory intent. For example, *Taylor v. Charley Brothers*[90] found a violation of Title VII upon proof that jobs held by women, although not equal to those held by men, were worth ninety percent as much and were compensated at a lesser rate. Another court said that "Title VII may properly be invoked in situations of discrimination involving inadequate compensation where the plaintiff's work is comparable (but not substantially equal) work. . . ."[91] And *Briggs v. City of Madison*[92] reached the same conclusion in a post-*Gunther* controversy. The *Briggs* case ruled that a prima facie violation of Title VII can be established by proof that women occupying sex-segregated jobs are paid less than men for work requiring "similar" skills and having compara-

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tion in hiring or promotion.

[88] Wilkins v. University of Houston, 654 F.2d 388 (5th Cir. 1981), *vacated*, 459 U.S. 809, *cert. denied*, 459 U.S. 822 (1982); Heagney v. University of Wash., 642 F.2d 1157 (9th Cir. 1981).

[89] *See infra* text accompanying notes 115-18.

[90] 25 Fair Empl. Prac. Cas. (BNA) 602 (W.D. Pa. 1981).

[91] Orahood v. Board of Trustees, 645 F.2d 651, 655 (8th Cir. 1981).

[92] 536 F. Supp. 435 (W.D. Wis. 1982).

ble value to the employer.[93] Of course, such evidence will not always be sufficient to prove discriminatory intent since some employers may successfully rebut the plaintiffs' prima facie case.[94] But the insufficiency of evidence in particular cases does not negate the general principle of *Briggs*, which is that *Gunther*'s requirement of discriminatory intent can be satisfied by evidence of comparable worth.

The pre-*Gunther* cases in the foregoing areas are instructive. The cases, though framed as claims for intentional discrimination, reveal a striking measure of acceptance of the legal doctrines that would be invoked in early comparable worth litigation.[95] Lower courts were prepared, before the Supreme Court's ruling in *Gunther*, to infer a discriminatory intent from statistical data or from a comparison of similar jobs. Moreover, even in cases not ostensibly based on job comparison, it has sometimes been necessary to receive comparable worth evidence in order to determine liability under an alternative theory.[96] The immediate question raised by *Gunther* is not whether the opinion will be broadened, as many commentators have asked,[97] but whether its forerunners in the lower courts will be narrowed. The lower court cases

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[93] *Id.* at 445.

[94] In Lemons v. City & County of Denver, 620 F.2d 228 (10th Cir.), *cert. denied*, 449 U.S. 888 (1980), and Christensen v. Iowa, 563 F.2d 353 (8th Cir. 1977), employers were found to have acted in good faith to conform their wage scales for predominantly female jobs to the prevailing market rates. For a discussion of the "market defense," see *infra* text accompanying notes 133-38. It should also be noted that the *Lemons* and *Christensen* cases did not involve comparisons of similar jobs. However, some courts have declined to compare jobs even though they are similar. *See, e.g.*, Power v. Barry County, 539 F. Supp. 721 (W.D. Mich. 1982).

[95] As previously noted, there has been considerable judicial reluctance to compare highly dissimilar tasks, such as typing and carpentry. *See* Christensen v. Iowa, 563 F.2d 353 (8th Cir. 1977). However, an orderly development of comparable worth theory, like that of any other complex legal doctrine, would necessarily require that similar situations be addressed before dissimilar ones. Early comparable worth litigation could not be expected, therefore, to focus on job comparisons like those in the *Christensen* and *Lemons* cases. Of course, even with respect to similar jobs, lower court decisions have not been altogether uniform. *Compare* Power v. Barry County, 539 F. Supp. 721 (W.D. Mich. 1982) (matrons in county prison system could not recover under comparable worth theory) *with* Taylor v. Charley Bros. Co., 25 Fair Empl. Prac. Cas. (BNA) 602 (W.D. Pa. 1981) (Title VII violated when female receivers, order selectors, and pick-up persons were paid less than male receivers, order selectors, and truck loaders doing "substantially" the same work).

[96] *See* International Union of Elec., Radio & Mach. Workers v. Westinghouse, 631 F.2d 1094, 1108-09 (3d Cir. 1980) (Van Dusen, J., dissenting), *cert. denied*, 452 U.S. 967 (1981).

[97] *E.g.*, Powers & Cooper, *Validity of Comparable Worth Left Open by* Gunther, Legal Times of Wash., June 15, 1981, at 15.

show that *Gunther*'s authorization for judicial relief against intentional gender-based discrimination is already broad enough to reach a good deal of pay inequity in the marketplace.[98] However, if the *Gunther* case — or the *Gunther* dissent — prompts a significant retrenchment, it is possible that Title VII safeguards against intentional wage discrimination will be made as restrictive as some observers have suggested.

But it would be ironic if the Supreme Court's ruling in *Gunther*, which was designed to expand protection against gender discrimination, became an instrument for reducing the protection that was previously available. Moreover, the *Gunther* opinion did not suggest that a decision had been made to reject lower court developments. Rather, the limits on the reach of *Gunther* have been inferred from silence or from what *Gunther* chose not to decide. It should be apparent, however, that silence is not tantamount to a repudiation of earlier decisions.

Perhaps it is not surprising that *Gunther*'s recognition of a cause of action based on discriminatory intent would be viewed as narrow since other cases have redressed even discriminatory effects.[99] Yet, it should be remembered that Title VII originally was conceived as a remedy for intentional discrimination,[100] and neither the supporters of the legislation nor its opponents believed that the legislation was narrow in scope. The reach of such a remedy would be narrow only if courts refused to infer intent from reasonably available evidence. In short, the narrowness of a cause of action for intentional discrimination depends largely upon the range of evidence from which discriminatory intent may be inferred.[101]

Justice Rehnquist was well aware of the potential reach of claims for intentional discrimination, and he sought to limit *Gunther* to cases involving "direct" evidence of discriminatory intent.[102] Since employers rarely admit their discriminatory design, and usually do not create records to document the illegality of their conduct, a demand for direct evidence would typically be impossible to meet.

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[98] *See supra* text accompanying notes 78-93.

[99] *E.g.*, Dothard v. Rawlinson, 433 U.S. 321 (1977).

[100] It was not until Griggs v. Duke Power Co., 401 U.S. 424 (1971), was decided that the discriminatory impact theory assumed a prominent role in Title VII litigation.

[101] In school segregation cases courts have often discovered a segregative intent upon scrutinizing numerous pieces of evidence, including patterns of school board decisions, the availability of alternative courses of action, and the reasonableness of the explanations given for the policies pursued. *E.g.*, Columbus Bd. of Ed. v. Penick, 443 U.S. 449 (1979) (considering the choice of attendance zone boundaries, school construction sites, assignment of faculty, and the use of optional and discontiguous attendance areas).

[102] *Gunther*, 452 U.S. at 204 (Rehnquist, J., dissenting).

But the pre-*Gunther* cases show that courts have not required a discriminatory intent to be proved by direct evidence. Indeed, virtually all of the prior cases have involved judicial inferences of illicit intent based on circumstantial evidence.[103] Furthermore, these decisions are fully consistent with the Supreme Court's own practice of permitting discriminatory intent to be established by objective or circumstantial evidence.[104] Finally, the *Gunther* case itself, though allegedly involving direct evidence of discriminatory intent, clearly indicated that a Title VII violation could be established through circumstantial evidence. The Court noted that under the employer's view "a transparently sex-biased system for wage determination"[105] would be shielded from legal attack, and it said that "Congress surely did not intend . . . to insulate such blatantly discriminatory practices from judicial redress under Title VII."[106] By carefully providing an example of a Title VII action that would be proven circumstantially, the Court appeared to signal its approval of judicial intervention in cases involving persuasive, though not direct, evidence of discriminatory intent.[107]

Unlike a demand for direct evidence, an intent requirement need not destroy the effectiveness of Title VII. As noted above, that requirement has been satisfied in numerous cases in the lower courts. Only if Justice

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[103] *E.g.*, Wilkins v. University of Houston, 654 F.2d 388 (5th Cir. 1981), *vacated*, 459 U.S. 809, *cert denied*, 459 U.S. 822 (1982); Orahood v. Board of Trustees, 645 F.2d 651 (8th Cir. 1981).

[104] In Gomillion v. Lightfoot, 364 U.S. 339 (1960), for instance, the Court had no difficulty discerning a discriminatory intent from facts showing that a city's boundaries had been changed from the shape of a rectangle to a 28-sided figure which effectively removed several hundred blacks, but no whites, from the town's voting rolls. More recently, Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 266 (1977), said that a determination as to whether governmental action is motivated by a discriminatory purpose "demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." The opinion then enumerated several kinds of circumstantial or indirect evidence that would be relevant in determining whether an actor harbored a discriminatory intent. Although *Arlington Heights* and *Gomillion* were fourteenth amendment cases, circumstantial evidence also has been deemed sufficient in disputes arising under Title VII. *See* Hazelwood School Dist. v. United States, 433 U.S. 299, 307-08 (1977) ("Where gross statistical disparities can be shown, they alone may in a proper case constitute prima facie proof of a pattern or practice of discrimination.").

[105] *Gunther*, 452 U.S. at 179.

[106] *Id.*

[107] The striking fact is that there is no modern precedent in the field of civil rights for requiring persuasive, though indirect, evidence of purposeful discrimination to be ignored. It is inconceivable that evidence like that in the *Gomillion* case would be insufficient under Title VII because it is "indirect."

Rehnquist's dissent controls the application of *Gunther* is such a requirement likely to be fatal. If, instead, litigants are permitted to prove discriminatory intent through reasonably available evidence, as pre-*Gunther* cases suggest and as the Supreme Court has repeatedly allowed in other civil rights areas,[108] there is no reason to believe that Title VII wage litigation will be ineffectual.

C. Beyond Intentional Discrimination: Job Evaluations and Discriminatory Effects

The authorization for judicial relief against intentional wage discrimination leaves open the question whether employment practices that are neutral in design but discriminatory in their effect on wages will give rise to a cause of action under Title VII. In *Griggs v. Duke Power Co.*,[109] the Supreme Court held that facially neutral employment classifications which operate disproportionately to exclude a racial class are impermissible under Title VII unless shown to be "job-related." The *Gunther* case did not in any way modify *Griggs*' holding that employment practices having discriminatory effects may violate Title VII. However, the *Gunther* opinion raises a serious question as to whether *Griggs* will apply to cases of gender-based wage discrimination.

In discussing the incorporation of the fourth affirmative defense into Title VII, the *Gunther* case said:

> Title VII's prohibition of discriminatory employment practices was intended to be broadly inclusive, proscribing "not only overt discrimination but also practices that are fair in form, but discriminatory in operation." *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971). The structure of Title VII litigation, including presumptions, burdens of proof, and defenses, has been designed to reflect this approach. The fourth affirmative defense of the Equal Pay Act, however, was designed differently, to confine the application of the Act to wage differentials attributable to sex discrimination.[110]

Thus, the *Gunther* opinion explicitly referred to the *Griggs* case and carefully distinguished it from cases involving gender-based wage discrimination.

Justice Brennan's reference to the *Griggs* case was skillfully drawn to suggest, but not decide, that discriminatory effects are insufficient to establish a violation of the ban against sex-based wage discrimination. In stating that the fourth affirmative defense "was designed differ-

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[108] *See supra* note 104.

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

[110] *Gunther*, 452 U.S. at 170.

ently,"[111] the Court studiously refrained from saying whether the differences relate only to the "structure" of the litigation, which was the immediate subject of discussion, or also to substantive matters such as the definition of the cause of action. Similarly, the opinion stated that the fourth affirmative defense confines judicial relief to cases involving "wage differentials attributable to sex discrimination"[112] but did not say that the act of sex discrimination must be intentional. Since it would have been a simple matter to declare a discriminatory intent to be necessary rather than sufficient, one is entitled to be skeptical of the assumption that this issue has been fully resolved.[113]

But even assuming that discriminatory effects alone are generally not actionable in cases of gender-based wage discrimination, employers may still be liable under a *Griggs* analysis in a substantial number of cases. The predicate for distinguishing the *Griggs* case in *Gunther* was that the fourth affirmative defense authorizes wage differentials based on any "factor other than sex."[114] The *Gunther* opinion noted that "earlier versions of the Equal Pay bill were amended to define equal work and to add the fourth affirmative defense because of a concern that bona fide job evaluation systems used by American businesses would otherwise be disrupted."[115] The desire to protect bona fide job evaluation systems was thus found to be at the heart of the fourth affirmative defense. This legislative purpose suggests that "a bona fide job evaluation system . . . may well be a defense to a comparable worth claim, assuming that the . . . system supports the difference in pay between a man's job and a woman's job."[116] On the other hand, if pay differentials

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[111] *Id.*

[112] *Id.*

[113] One writer has argued that a requirement of discriminatory intent "insures that employers will not be called on to rectify all conditions, historical or otherwise, that have led to depressed wages for women." Note, *Women, Wages and Title VII: The Significance of* County of Washington v. Gunther, 43 U. PITT. L. REV. 467, 499 (1982). But it is not apparent why this concern should be any greater in the context of sex-based wage discrimination than it was in the context of the *Griggs* case. Furthermore, employers would be protected under the *Griggs* rule if they could show a business necessity for practices having discriminatory effects. Finally, employers may well have profited from "depressed wages," whether or not they were responsible for the conditions that caused them.

[114] *Gunther*, 452 U.S. at 170 (quoting remarks of Rep. Griffin, *reprinted in* 159 CONG. REC. 9203 (1963)).

[115] *Id.* at 170-71 n.11 (citing analysis of legislative history of Equal Pay Act in Corning Glass Works v. Brennan, 417 U.S. 188, 199-201 (1974)).

[116] B. Nelson, Remarks at the Fourth Annual Conference, Employment Discrimination Law Update in Washington, D.C. (Aug. 13, 1981).

are not supported by a job evaluation system, there is no apparent reason for applying the fourth affirmative defense under the rationale in *Gunther*.[117] Yet, it was that defense which provided the basis for *Gunther*'s suggestion that the disparate impact theory of *Griggs* was inapplicable to cases of gender-based wage discrimination. In the absence of a fourth affirmative defense, it is not clear that the *Griggs* theory, which is generally applicable to Title VII actions, would not also apply to Title VII suits for wage discrimination. In short, the viability of the fourth affirmative defense, and hence the applicability of *Griggs*, may depend on the adoption of a bona fide job evaluation system.

The *Gunther* Court was fully cognizant of the vital role that was being shaped for job evaluations in cases of gender-based wage discrimination. In discussing the effect of the fourth affirmative defense, Justice Brennan said that courts "are not permitted to 'substitute their judgment for the judgment of the employer . . . *who [has] established and employed a bona fide rating system*,' so long as it does not discriminate on the basis of sex."[118] The negative implication is that courts may be free "to substitute their judgment for the judgment of an employer" who has not established a bona fide job rating system or whose system discriminates on the basis of sex. Furthermore, *Gunther* could not have overlooked the fact that, without some inducement for the use of job evaluations, the decision to expose employers to liability for noncompliance with evaluation results would discourage employers from utilizing job evaluations in the manner contemplated by the Equal Pay Act and protected in Title VII by the Bennett Amendment.

Of course, if bona fide job evaluations take on the crucial quality implied in *Gunther*, a determination will have to be made as to what constitutes a "bona fide" system. In light of the purpose of the fourth affirmative defense to protect the use of job evaluations, it is unlikely that courts will assume an intrusive role in this area. But even allowing for proper deference to employers, courts need not accept as bona fide a job evaluation system which was deliberately designed to preserve the status quo rather than to reassess it.[119] Nor is it clear that a system

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[117] Of course, evidence of gender discrimination would be required even in the absence of the fourth affirmative defense, since Title VII on its face is addressed to sex discrimination. But to the extent that the fourth affirmative defense has any independent "significant consequences," *Gunther*, 452 U.S. at 170, it may be inapplicable, absent employer job evaluations.

[118] *Id.* at 171 (emphasis added) (quoting remarks by Rep. Goodell, *reprinted in* 109 CONG. REC. 9209 (1963)).

[119] *See supra* note 75 and accompanying text.

devised to preclude a fair assessment of the relative value of different families of jobs[120] would be deemed bona fide. Arguably, judicial oversight of the job evaluation process, although limited, should be structured to encourage the adoption of systems that will facilitate rather than impede the drive for pay equity.[121] However, single-family job evaluations were prevalent when the Equal Pay Act was passed, and Congress made no suggestion that such evaluations should be discouraged. Given this historical background, courts will be reluctant to require company-wide job evaluations, although they may admit such evaluations into evidence when presented by an employee.

III. Lingering Ambiguities: Market Defense and Burden of Proof

Although the *Gunther* case clearly opens new ground in wage discrimination litigation, the opinion leaves some important questions unanswered. One of the ambiguities in *Gunther* has already been discussed. As noted above,[122] the *Gunther* case implies, but does not decide, that proof of a discriminatory intent is essential in cases of gender-based wage discrimination, at least when pay differentials are supported by bona fide job evaluations. It is uncertain, therefore, whether an employer will be liable for wage practices that are discriminatory in effect but not in design.

The *Gunther* case also leaves open the question of how the burden of proof will be allocated in cases of alleged sex-based wage discrimination. The general rule for Title VII litigation was set forth in *Texas Department of Community Affairs v. Burdine*:

> The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with

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[120] *See supra* text accompanying note 76. Even critics of comparable worth analysis concede the feasibility of multi-family job evaluations. See Livernash, *An Overview*, in Comparable Worth: Issues and Alternatives 3, 13 (E. Livernash ed. 1980), which states that "having worked with a single system that applied to all employees of the State of New Hampshire, this author recognizes that an adequate fit can be achieved by applying a single system to a wide variety of blue and white collar employees."

[121] Without such encouragement, employers may attempt to frustrate the process of comparing various jobs. See B. Schlei & P. Grossman, Employment Discrimination Law 481 (2d ed. 1983), which advises that "in light of the risks posed by *Gunther*, employers should not use [job evaluation] systems companywide. Different systems should be used for different job families, so that no direct comparison in the system is possible."

[122] *See supra* text accompanying notes 110-13.

> the plaintiff. . . . Establishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee. If the trier of fact believes the plaintiff's evidence, and if the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case.
>
> The burden that shifts to the defendant, therefore, is to rebut the presumption of discrimination by producing evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason.[123]

Thus, the defendant in conventional Title VII litigation has the burden of producing admissible evidence, but not the burden of persuasion.

However, in *Corning Glass Works v. Brennan*[124] the Court said:

> [O]nce the Secretary has carried his burden of showing that the employer pays workers of one sex more than workers of the opposite sex for equal work, the burden shifts to the employer to show that the differential is justified under one of the [Equal Pay] Act's four exceptions. . . . [T]his view is consistent with the general rule that the application of an exemption under the Fair Labor Standards Act is a matter of affirmative defense on which the employer has the burden of proof.[125]

In so stating, the Court appeared to cast on employers who defend cases under the Equal Pay Act the burden of proving the four defenses, rather than merely the burden of production. Since the *Gunther* case has now interpreted the Bennett Amendment to incorporate the four affirmative defenses into Title VII, it is possible that *Burdine* will not apply to Title VII wage discrimination claims.[126]

Ironically, this would mean that employers, who were intended to be protected by the Bennett Amendment,[127] could stand in a more vulnerable position with the Amendment in force than they would without it. In virtually all cases of alleged gender discrimination, employers will argue that their actions were predicated on legitimate considerations rather than on sex. This defense would generally be available even without the Bennett Amendment, since Title VII prohibits discrimination only when it is based on sex or on some other regulated classification.[128] In the absence of the Bennett Amendment, the burden of proving that such action was based on sex would rest on the plaintiff since, according to *Burdine*, "the burden of persuasion 'never shifts.' "[129] But

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[123] 450 U.S. 248, 253-54 (1981) (citations omitted).

[124] 417 U.S. 188 (1974).

[125] *Id.* at 196-97 (footnotes omitted).

[126] Briggs v. City of Madison, 536 F. Supp. 435 (W.D. Wis. 1982).

[127] *See supra* note 21.

[128] *Id.*

[129] 450 U.S. at 253 (citing 9 J. WIGMORE, EVIDENCE § 2489 (3d ed. 1940)).

all of these claims of nongender justification are now embraced by the fourth affirmative defense, which protects pay differentials based on any "factor other than sex."[130] If the *Corning Glass* rule requires a defendant in these circumstances to prove defenses falling within the scope of the fourth affirmative defense, employers will face a heavier burden of justification than they would have confronted in the absence of the Bennett Amendment. The *Gunther* Court gave no hint of recognizing this ironic twist;[131] but ultimately the Court appeared to preserve its options on the allocation of the burden of proof by stating that "we do not decide in this case how sex-based wage discrimination litigation under Title VII should be structured to accommodate the fourth affirmative defense of the Equal Pay Act."[132]

Perhaps the most important of the lingering ambiguities in the *Gunther* case concerns the "market defense." The issue, briefly stated, is whether an employer's adherence to the prevailing market pay scale is a defense to a wage discrimination claim under Title VII. The question may arise in the context of either intentional or unintentional discrimination.

Analysis of the problem may begin with the pre-*Gunther* case law. *Christensen v. Iowa*[133] offers a good example. A state university in *Christensen* had evaluated nonprofessional jobs and determined that female clerical employees should be classified in the same labor grade as physical plant employees, most of whom were male. However, the university made an upward adjustment in the salaries of physical plant employees "[b]ecause the local job market paid higher wages for physical plant jobs."[134] The federal Court of Appeals for the Eighth Circuit declined to "interpret Title VII as requiring an employer to ignore the market in setting wage rates for genuinely different work classifications."[135] It ruled that the wage differential resulting from adjustment to the market pay scale was permissible under Title VII because it was not shown to have "rested upon sex discrimination"[136] rather than on

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[130] *See supra* note 21.

[131] To the extent that the fourth affirmative defense has any independent "significant consequences," such as protecting the use of job evaluations, employers may derive some special benefit from the Bennett Amendment. *See supra* text accompanying notes 115-18. Where new defenses are created, a reallocation of the burden of proof may be warranted.

[132] *Gunther*, 452 U.S. at 171.

[133] 563 F.2d 353 (8th Cir. 1977).

[134] *Id.* at 354.

[135] *Id.* at 356.

[136] *Id.* at 355.

some "legitimate reason."[137] In effect, the court found that wage disparities resulting from employer use of market rates were based on a "factor other than sex," as stated in the fourth affirmative defense.[138]

However, in the wake of the *Gunther* decision, a number of commentators have argued that the incorporation of the four affirmative defenses into Title VII requires that each of those defenses be interpreted the same way in Title VII actions as in cases arising under the Equal Pay Act.[139] And *Corning Glass Works v. Brennan*[140] has been repeatedly cited for the proposition that the market defense is unavailable in cases under the Equal Pay Act.[141] Commentators have concluded that after *Gunther* and *Corning Glass* wage disparities caused by employer adjustment to market rates cannot be viewed as based on any "factor other than sex" under Title VII and the incorporated fourth affirmative defense.[142]

Because of its pivotal role in the market defense controversy, the *Corning Glass* case deserves close examination. The employer in that case was found to have violated the Equal Pay Act "by paying a higher base wage to male night shift inspectors than it paid to female inspectors performing the same tasks on the day shift, where the higher wage was paid in addition to a separate night shift differential paid to all employees for night work."[143] The difference in base wages apparently arose at a time when state law prohibited the employment of women at night, and men, who were recruited for transfer from the day shift, demanded higher wages than were paid to female day shift inspectors even though the employer then paid no general premium for nighttime work. The Court said:

> The [pay] differential arose simply because men would not work at the low rates paid women inspectors, and it reflected the 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

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[137] *Id.*

[138] *Accord* Lemons v. City & County of Denver, 620 F.2d 228 (10th Cir.), *cert. denied*, 449 U.S. 888 (1980).

[139] *See* Newman & Vonhof, *supra* note 4, at 288 n.93; Reynard, *Proving Title VII Sex-Based Wage Discrimination After* County of Washington v. Gunther, 4 CARDOZO L. REV. 281, 317 (1983).

[140] 417 U.S. 188 (1974).

[141] *E.g.*, Comment, *Sex-Based Wage Discrimination Claims After* County of Washington v. Gunther, 81 COLUM. L. REV. 1333, 1346 (1981).

[142] Reynard, *supra* note 139, at 317; Note, *Equal Pay, Comparable Work, and Job Evaluation*, 90 YALE L.J. 657, 672 (1981).

[143] 417 U.S. 188, 190 (1974).

> matter of economics, but its differential nevertheless became illegal once Congress enacted into law the principle of equal pay for equal work.[144]

The *Corning Glass* case clearly rejected excuses grounded in waiver, but contrary to popular assumptions,[145] it did not rule on the validity of the market defense. The employer, in fact, did not rely on any evidence of market rates in defending its alleged violations of the Equal Pay Act. Corning simply showed that it had a supply of female workers who were willing to work for less than men.[146] This is not an attempt to establish a market defense; it is merely a demonstration of the need for statutory protection. Indeed, it is difficult to see how a market defense could be raised in a case under the Equal Pay Act. When men and women receive unequal pay for the same work, their employer will necessarily be paying members of one sex more or less than the market rate, unless the market itself is discriminating. If the employer is paying some of its employees more or less than the market rate, it cannot defend its action on a market basis. If, instead, the employer shows that unequal pay conforms to market rates because the market itself is discriminating, the defense will fare no better since a violation of the law by some employers obviously cannot justify similar violations by others.[147] It is possible to raise a market defense in a comparable worth case, because in that situation nondiscriminatory factors could account for unequal earnings of men and women.[148] But unequal earnings cannot be attributed to nondiscriminatory factors when men and women perform the same work and, as in *Corning Glass*, none of the affirmative defenses is applicable. In these circumstances the assertion of a market defense would be untenable, and no such assertion was made in *Corning Glass*.

Since *Corning Glass* made no decision regarding the availability of a

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[144] *Id.* at 205.

[145] *E.g.*, Comment, *Sex-Based Wage Discrimination Claims After* County of Washington v. Gunther, 81 COLUM. L. REV. 1333 (1981).

[146] *See Corning*, 417 U.S. at 205.

[147] The willingness of employees to tolerate a departure from equal pay provisions cannot be a defense any more than would the willingness of employees to work for less than the minimum wage. Hence, it is irrelevant that women may be prepared to work for unequal pay. Horner v. Mary Inst., 613 F.2d 706 (8th Cir. 1980); Brennan v. Victoria Bank & Trust Co., 493 F.2d 896 (5th Cir. 1974). Of course, some employers are not covered by the antidiscrimination provisions of Title VII but, except in rare instances, the number of exempt employers will be far too few for them to dominate market rates. It is not surprising, therefore, that no case has been found in which a Title VII employer asserted a defense based on compliance with a market scale controlled by employers who were exempt from Title VII.

[148] *See infra* text accompanying notes 159-63.

market defense under the Equal Pay Act, the case cannot be made a predicate for applying the supposed standard of the Equal Pay Act to assertions of a market defense under Title VII. Perhaps because it recognized that neither *Corning Glass* nor any other case sheds much light on the issue of the market defense, the *Gunther* Court ultimately reserved judgment on the issue. The Court cited the *Christensen* case in the course of explaining that it was unnecessary to determine whether a prima facie case of sex discrimination had been stated in *Gunther*.[149] The implication of this cryptic reference is that the questions raised by *Christensen*, like the issues of unintentional discrimination and burden of proof, have been left for future disposition.

It is hardly surprising that *Gunther* would withhold judgment on these difficult questions. Even the allocation of the burden of proof, which is the least complicated of the issues, required no fewer than four Supreme Court opinions for resolution in conventional Title VII cases.[150] Nor does the suspension of judgment on these issues imply that *Gunther* will be narrowly construed. It is standard operating procedure in cases of first impression to leave the outer limits of emerging doctrine undefined.[151] This lack of early definition gives no indication of what the outer limits will eventually be. Thus, the ambiguities in *Gunther* remain wholly unresolved, notwithstanding Justice Rehnquist's effort to limit the case to its facts, but the *Gunther* decision will be an important force in wage discrimination litigation regardless of how those ambiguities are finally unraveled.

IV. Prudential Considerations

The discussion above has focused on the impact of *Gunther* and of related cases on comparable worth analysis. However, issues of such high magnitude as those raised by comparable worth are not likely to be decided on the basis of precedent alone. The remainder of this Article will therefore address some of the policy considerations that might affect the ultimate disposition of the issue of pay equity. The discussion proceeds from the view that arguments for and against comparable worth must be assessed evenhandedly since, as Justice Harlan has cautioned, "lack of candor in meeting a difficult issue . . . goes far to de-

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[149] *Gunther*, 452 U.S. at 166 n.8.

[150] Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981); Board of Trustees v. Sweeney, 439 U.S. 24 (1978); Furnco Constr. Corp. v. Waters, 438 U.S. 567 (1978); McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

[151] *See, e.g.*, Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (affirmative action); New York Times Co. v Sullivan, 376 U.S. 254 (1964) (defamation).

stroy [analytical] effectiveness."[152] A balanced analysis requires that three questions be squarely faced: first, how job worth is to be measured; second, what costs a comparable worth approach would entail; and third, whether an alternative to comparable worth can effectively achieve the same objectives.

A. Measuring Job Worth

Although doubts have occasionally been expressed about the very existence of sex-based wage discrimination,[153] there is little reason to assume that salaries for comparable work are never influenced by gender. *American Federation of State, County & Municipal Employees v. Washington*[154] has already provided some concrete evidence of discrimination against comparable work. More important, cases under the Equal Pay Act demonstrate that women have been subjected to wage discrimination even when their work is identical to that performed by men.[155] And cases arising under Title VII show that employers have also discriminated against women in hiring and promotion.[156] These patterns of discrimination in other contexts do not inspire confidence in the notion that wage rates for comparable work can be assumed to be nondiscriminatory.

But it is one thing generally to surmise the presence of discrimination against comparable work and something else to measure it in a particular case. Critics of comparable worth analysis have argued that the difficulty of measuring discrimination makes such analysis impracticable: "The basic idea of wage discrimination is that wages are disproportionate to the worth of work performed. Absent some way of establishing the 'worth' of jobs, wage discrimination loses all meaning."[157]

This criticism overstates the problem to some extent. It is not necessary to determine the "worth" of each job. Male-dominated jobs, after all, are as difficult to evaluate as any other job, but this does not prevent them from being well compensated. What is needed to achieve pay

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[152] Harlan, *What Part Does the Oral Argument Play in the Conduct of an Appeal?*, 41 CORNELL L.Q. 6, 9 (1955).

[153] Roberts, *Statistical Biases in the Measurement of Employment Discrimination*, in COMPARABLE WORTH: ISSUES AND ALTERNATIVES 173 (E. Livernash ed. 1980).

[154] 578 F. Supp. 846 (W.D. Wash. 1983).

[155] *E.g.*, Corning Glass Works v. Brennan, 417 U.S. 188 (1974).

[156] *E.g.*, Fitzgerald v. Sirloin Stockade, Inc., 624 F.2d 945 (10th Cir. 1980); Taylor v. Charley Bros. Co., 25 Fair Empl. Prac. Cas. (BNA) 602 (W.D. Pa. 1981).

[157] Nelson, Opton & Wilson, *supra* note 8, at 254.

equity is not necessarily a "way of establishing the 'worth' of jobs,"[158] but only some means of determining their *relative* worth.

Unfortunately, it is also difficult to ascertain the relative value of different jobs, especially if the jobs are dissimilar in content. When a woman is paid three-fifths as much as a man who is doing another job, it is possible that some, all or none of the wage differential is due to sex discrimination by the employer. Virtually all observers agree that "[t]he disparity between the average earnings of male and female workers results in part from education and career choices made by women, and so would exist to some degree even in the absence of discrimination by employers."[159] Women, more often than men, will "miss work in order to care for sick children"[160] or even "withdraw entirely from labor market activities" because of family responsibilities.[161] These employment patterns reduce the work experience and job tenure of women and thereby contribute significantly to their lower earnings.[162] In addition, differences in the socialization of males and females may influence vocational choices and investments in vocational training.[163] This differential treatment may reflect societal discrimination, but it can hardly be charged to a particular employer.

Of course, it does not follow that the earnings gap is due entirely to legitimate factors. The essential task is to determine how much of the wage disparity is caused by gender-based discrimination. Multiple regression analysis can help to ascertain the extent to which wage differentials are related to legitimate considerations.[164] But "economists have questioned whether the traditional . . . measures . . . have captured all of the productivity related factors that affect earnings."[165] Therefore, even if multiple regression analysis reveals that only a portion of the earnings gap has been explained by legitimate considerations, a question will arise as to whether the residual is a product of wage discrimi-

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[158] *Id.*

[159] Note, *Equal Pay, Comparable Work, and Job Evaluations*, 90 YALE L.J. 657, 659 (1981).

[160] *Hearings Before the United States Equal Employment Opportunity Commission on Job Segregation and Wage Discrimination*, 96th Cong., 2d Sess. 279 (1980) [hereafter *Hearings*].

[161] *Id.* at 277-78.

[162] *Id.*

[163] *See* Taub, *Keeping Women in Their Place: Stereotyping* Per Se *as a Form of Employment Discrimination*, 21 B.C.L. REV. 345, 350 (1980).

[164] *See* Fisher, *Multiple Regression in Legal Proceedings*, 80 COLUM. L. REV. 702, 721-25 (1980).

[165] *Hearings*, *supra* note 160, at 275.

nation, or of some unmeasured legitimate source, or of a combination of the two.

The difficulty of measurement in comparable worth analysis is compounded by the uncertain meaning of "worth." Some commentators define worth in terms of the skill, effort, and responsibility of a job.[166] Others define it in terms of the value of the work to an employer or to society at large.[167] Similar controversy surrounds the frame of reference for comparing various jobs. Most authorities propose a comparison of different jobs within a single organization.[168] However, some litigants have sought to compare their work with that performed for employers in "the general community."[169] Others have demanded wage adjustments, not only for comparable work, but also for jobs which are underpaid, though not comparable.[170] Finally, the difficulty of measurement is further compounded by the thorny question of which jobs should be compared. The work of a practical nurse in a modern medical facility, for instance, could be compared to that of a registered nurse, an orderly, a staff pharmacist, or a physician.[171] The outcome of comparable worth analysis can be critically affected by the decision as to which jobs should be compared, and yet little attention has been directed to this issue. Perhaps the problem could be solved by bringing all of the employees of the facility under the same wage plan so that each job could be compared to every other job. However, some organizations deliver services through nonemployees, and nurses can reasonably argue that their salaries should not depend on whether their employer does or does not hire its own staff of physicians. In fact, it is because of varied employment practices of this sort that some comparable worth advocates have urged that comparisons be made within a general community rather than within a single organization.[172] But if comparisons

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[166] *See, e.g.*, Note, County of Washington v. Gunther: *Sex-Based Wage Discrimination Extends Beyond the Equal Pay Act*, 16 LOY. L.A.L. REV. 151 (1983).

[167] McGuiness, *Foreward* to COMPARABLE WORTH: ISSUES AND ALTERNATIVES at iv (E. Livernash ed. 1980).

[168] *E.g.*, Taylor v. Charley Bros., 25 Fair Empl. Prac. Cas. (BNA) 602 (W.D. Pa. 1981).

[169] *Cf.* Lemons v. City & County of Denver, 620 F.2d 228 (10th Cir.) (nurses requested comparison with non-nursing positions), *cert. denied*, 449 U.S. 888 (1980).

[170] Taylor v. Charley Bros. Co., 25 Fair Empl. Prac. Cas. (BNA) 602 (W.D. Pa. 1981). The operative theory in these circumstances has been called "proportional comparability." B. SCHLEI & P. GROSSMAN, *supra* note 121, at 478 n.146.

[171] *See* Lemons v. City & County of Denver, 620 F.2d 228 (10th Cir.), *cert. denied*, 449 U.S. 888 (1980); Nelson, Opton & Wilson, *supra* note 8, at 289-90.

[172] *See* Lemons v. City & County of Denver, 620 F.2d 228 (10th Cir.), *cert. denied*, 449 U.S. 888 (1980). *But see* B. SCHLEI & P. GROSSMAN, *supra* note 121, at 478

can be made to any employees in the community, the problem of determining which jobs to compare will be aggravated and could become unmanageable.

However the various definitional issues are resolved, it is likely that comparable worth analysis will depend ultimately on traditional job evaluation techniques to measure job worth. Some experts, noting that evaluation systems do not measure worth, have expressed doubt that such techniques can be enlisted in the service of comparable worth.[173] One writer has explained that the function of evaluation systems is to relate jobs with unknown market value to other jobs whose compensation reflects market rates:

> As practiced, job evaluation identifies and differentially weights compensable factors to maximize the relationship between them and the wages for key jobs which are assumed to reflect the market. . . . The model (compensable factors and weights) emerging from this process is then applied to non-key jobs for purposes of establishing a wage hierarchy.[174]

Since the objective is to "develop pay hierarchies for jobs where market values are difficult to obtain, that is, for non-key jobs,"[175] evaluation techniques do not measure actual worth.

Acquiescence in this view of the job evaluation process need not preclude the use of evaluation techniques for comparable worth purposes. What is essential to comparable worth analysis, it should be recalled, is not a determination of actual worth but only an adequate measure of relative worth. If non-key jobs can be assigned a proper place in an employer's wage scale by comparing their compensable factors to those of key jobs, it may be possible to adopt a similar approach for female-intensive jobs. Just as non-key jobs are evaluated because their market worth is difficult to ascertain, so female-intensive jobs might be evaluated when their market rates are plausibly claimed to be infected by discriminatory ingredients. If the pay scale for predominately female work is evaluated in relation to key jobs, it may be possible to establish the relative value of that work and to compensate it accordingly.

But if job evaluation techniques are adaptable to comparable worth analysis, they are not necessarily adequate to the intended task. As previously noted, job evaluation schemes attempt to identify and weight

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n.146 (basing value to employers in general community "inconsistent with the basic scope of Title VII itself").

[173] *See* Schwab, *Job Evaluation and Pay Settings: Concepts and Practices*, in COMPARABLE WORTH: ISSUES AND ALTERNATIVES 49 (E. Livernash ed. 1980).

[174] *Id.* at 63.

[175] *Id.* at 76.

various compensable factors.[176] However, the judgments involved in selecting compensable factors and assigning weights to them are notoriously subjective. Some systems are said to "give undue weight to attributes that members of one sex are more likely to possess than the other."[177] And virtually all systems confer broad discretion on the persons conducting the evaluation.[178] Consequently, the task of identifying and weighting compensable factors, which is central to the job evaluation process, may incorporate individual or societal bias that makes these procedures less serviceable than comparable worth theorists have assumed. For these reasons, and because of the widespread use of single-family job evaluations, which hinder needed comparisons, a study conducted for the Equal Employment Opportunity Commission has cautioned that the use of job evaluation procedures for comparable worth purposes is "problematic."[179]

Unfortunately, if job evaluation systems do not provide an adequate neutral process, the problem of measuring relative worth will not be easily solved. Market wage surveys could be used to test job worth, but market rates, no less than job evaluations, are susceptible to discriminatory influences.[180] The upshot may be that no method exists which is adequate to the task of measuring relative job worth. Of course, comparable worth analysis does not create these deficiencies. Current practice already relies heavily on job evaluation techniques and market surveys, despite their potential for bias. But it is apparent that courts endorsing comparable worth would have to be prepared to work with tools that have been shown to have significant shortcomings.[181]

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[176] "The choice of factors, and the choice of how heavily to weigh each factor's contribution to the total score . . . are at the heart of the design of job evaluation systems." D. TREIMAN, *supra* note 72, at 6.

[177] Comment, *Equal Pay for Comparable Work*, 15 HARV. C.R.-C.L. L. REV. 475, 498 (1980).

[178] "For example, 'skill' may be measured by the amount of formal education necessary for the job, length of previous or current on-the-job training necessary to become fully competent, extent of trade knowledge, amount of judgment required in performing the job [or] manual skill required. . . ." D. TREIMAN, *supra* note 72, at 6-7.

[179] *Id.* at 48.

[180] Blumrosen, *supra* note 87, at 442-43.

[181] Some writers have suggested that the experience of the National War Labor Board from 1942 to 1945 provides a precedent for judicial enforcement of comparable worth analysis, Newman & Vonhof, *supra* note 4, at 302-03, since the Board called on employers to "equalize the . . . salary rates paid to females with the rates paid to males for comparable quality and quantity of work." NATIONAL WAR LABOR BD., TERMINATION REPORT 290 (1945). However, the War Labor Board functioned largely through "mediation and persuasion," Williams & McDowell, *supra* note 43, at

B. Costs of Comparable Worth Analysis

Even if the problem of measuring relative worth is satisfactorily resolved, serious questions will arise over the costs inherent in comparable worth analysis. The cost of raising the median pay of full-time female employees to that of males was estimated in 1978 to be 150 billion dollars a year,[182] and the figure, corrected for inflation, would now be considerably higher. Critics have said that "[t]he gravest consequences" to free competition and the balance of payments deficits "would inexorably flow from such a drastic imposition of liability upon employers."[183]

The addition of 150 billion dollars in wage expenditures would undoubtedly have a major impact on the American economy. But it is misleading to measure the cost of comparable worth analysis by the difference in median pay between men and women. As earlier noted, there are legitimate reasons for at least part of the earnings gap.[184] Estimates of the cost of implementing comparable worth must take account of all of the nondiscriminatory factors contributing to the earnings gap. An accurate cost estimate cannot be made, therefore, until the problem of measuring job worth has been confronted. Nevertheless, it seems fair to say that the cost will be quite high if gender-based wage discrimination is widespread. Indeed, the cost will be directly proportionate to the level of discrimination: only if the incidence of discrimination is low, will the cost of implementation be low.

The expenditure of substantial sums of money to redress wage discrimination could affect either the inflation rate or the rate of unemployment. Because the rule in pay equity cases has been that equalization of wages must be achieved by increasing depressed rates rather than by decreasing inflated ones,[185] all decisions favorable to a claimant

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206, rather than through adjudication; and because of the wartime emergency, "patriotic instincts predisposed [the parties] to accept the Board's decisions" much as they accepted the type of wage and price controls that have been resisted in peacetime. *Id.* at 206-07 (quoting NATIONAL WAR LABOR BD., TERMINATION REPORT (1945)). More fundamentally, the policy of the Board in disputes over comparable worth was to remand "the issue to the parties for further negotiations" or to order "the institution of a job evaluation to establish the worth of a job on the basis of content." NATIONAL WAR LABOR BD., TERMINATION REPORT 290, 294 (1945). The Board's practice thus offers no adjudicative methodology that is free of the deficiencies of job evaluation procedures.

[182] Smith, *The EEOC's Bold Foray Into Job Evaluation*, FORTUNE, Sept. 11, 1978, at 58-59.

[183] Nelson, Opton & Wilson, *supra* note 8, at 264 n.134.

[184] *See supra* notes 159-62 and accompanying text.

[185] *See* Hodgson v. Miller Brewing Co., 457 F.2d 221 (7th Cir. 1972); Dunlop v.

will result in greater cost to the employer. But cost increases which are unaccompanied by productivity increases will almost certainly generate higher prices for consumers. The extent of the impact on inflation is debatable. Although some writers have characterized the effect as "massive,"[186] the actual impact will be a function of the discriminatory component of the earnings gap. If discriminatory treatment does not make a "massive" contribution to the earnings gap, there is no reason to believe that the inflationary impact will be massive.

Acceptance of comparable worth doctrine could also affect the rate of unemployment in female-intensive industries.[187] If employer costs increase significantly, there is a risk that jobs may be discontinued or lost to foreign competition. Perhaps for this reason, the International Ladies Garment Workers Union has insisted, despite its substantial female membership, that the wages of its members must be based "on the value of the work in the marketplace and in the face of competition from overseas, where garment workers make 30 cents an hour."[188] Such comments underscore the fact that, while the costs of implementing comparable worth will be spread widely through society, they will not be spread equally; and in some cases women will bear a disproportionate share of the burden.

It should be remembered, however, that the risks of inflation and unemployment are inherent in any cost-enhancing regulation. Minimum wage laws and environmental controls engage those risks as surely as does comparable worth.[189] Moreover, employer costs have been flatly rejected as a justification for action that would otherwise violate Title VII.[190] Finally, a failure to attack the discriminatory component of the earnings gap would scarcely eliminate economic costs. The question is not whether to bear these costs, but how to distribute them. Inaction would simply mean that the costs would be borne, as they are now, by the victims of discriminatory treatment.

Difficult questions also are raised by the noneconomic costs attending

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Beliot College, 411 F. Supp. 398 (W.D. Wis. 1976).

[186] Nelson, Opton & Wilson, *supra* note 8, at 293.

[187] C. LINDSAY, EQUAL PAY FOR COMPARABLE WORK: AN ECONOMIC ANALYSIS OF A NEW ANTIDISCRIMINATION DOCTRINE 33 (1980).

[188] Address by S. Chaikin, President, ILGWU, at AFL-CIO Annual Convention, Washington, D.C. (Nov. 15-20, 1979), *quoted in The New Pay Push for Women*, BUS. WK., Dec. 17, 1979, at 69.

[189] Of course, the degree of risk will vary with the cost of the particular regulation.

[190] "[N]either Congress nor the court have recognized [a cost-justification] defense under Title VII." City of Los Angeles v. Manhart, 435 U.S. 702, 717 (1978) (footnote omitted).

the implementation of comparable worth. Career choices of both men and women could be affected by the adoption of comparable worth analysis.[191] In addition, a number of courts have expressed important institutional concerns about comparable worth doctrine. Judges worry that acceptance of the doctrine would lead to government displacement of private market forces, and perhaps even to a judicial reordering of the entire economy.[192] Although some of these expressions are hyperbolic, there is no doubt that comparable worth would have major implications for the collective bargaining process and for the economy in general. Furthermore, courts have no significant expertise in matters of wage determination;[193] in fact, they have been deliberately excluded from any role in regulating the content of collective bargaining agreements.[194] This does not necessarily mean that the task is judicially unmanageable. It is probably less difficult to determine the value of labor than to fix the compensation for lost lives or broken limbs. But personal injury cases arise sporadically and do not have the broad institutional implications of comparable worth. Thus, "the anxiety [is] not so much that the judgment" of courts will fail "as that perhaps it should."[195] The extraordinary potential of comparable worth, which is the great strength of the doctrine, is also the cause for great reservations. Fear of unknown terrain gives pause to both courts[196] and legislatures[197] when

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[191] Traditionally, market forces have helped to attract workers into fields that suffer labor shortages and to discourage entry into fields that are overcrowded. But if comparable worth requires wages to be based on job skills, *supra* note 166, the incentive to fill labor shortages could be reduced, and the "crowding" that already exists in some female-intensive industries could increase. C. LINDSAY, *supra* note 187, at 33.

[192] Power v. Barry County, 539 F. Supp. 721, 727 (W.D. Mich. 1982) (citing "inherent problems and other ramifications [of] making . . . a subjective evaluation of the intrinsic worth of different jobs"); Lemons v. City & County of Denver, 17 Fair Empl. Prac. Cas. (BNA) 906, 908 (D. Colo. 1978) (declining to "take over the restructuring of the economy of the United States"), *aff'd*, 620 F.2d 228 (10th Cir.), *cert. denied*, 449 U.S. 888 (1980).

[193] Because of the equal work requirement, judicial experience under the Equal Pay Act has not involved an evaluation of jobs except to the limited extent of determining that they require the same skill, effort and responsibility.

[194] H.K. Porter Co. v. NLRB, 397 U.S. 99 (1970).

[195] A. BICKEL, THE LEAST DANGEROUS BRANCH 184 (1962).

[196] The difficulty of estimating the economic cost of comparable worth creates predictable judicial unease. Lemons v. City & County of Denver, 17 Fair Empl. Prac. Cas. (BNA) 906, 908 (D. Colo. 1978), *aff'd*, 620 F.2d 228 (10th Cir.), *cert. denied*, 449 U.S. 888 (1980). In addition, commentators have noted that "the problem of formulating an objective job evaluation system presents an extremely burdensome and value-laden task for the judiciary." Recent Developments, *Comparable Worth*, 6 HARV. WOMEN'S L.J. 201, 206 (1983).

[197] Congressional ambivalence with the concept of pay equity is illustrated by the

they are asked to mandate a sharp turn from private decisionmaking to judicial intervention in the pricing mechanism.'

C. An Alternative to Comparable Worth

The costs of implementing comparable worth must be weighed against the prospect for finding an alternative solution to the problem of pay equity. Comparable worth analysis is not the only device available for redressing sex-based wage discrimination. Integration of jobs by gender would be at least as effective as comparable worth, and perhaps more effective. When jobs are integrated, wage discrimination can be attacked by simply enforcing the provisions of the Equal Pay Act. Unfortunately, job integration is not a viable solution in the near term. While increased access into male-dominated vocations may yield substantial integration in some fields, there is no reason to believe that female-intensive industries will soon be integrated by males. Indeed, the current low wage rates in those industries almost certainly will impede their integration. And it is no answer to women working for depressed wages to suggest that other jobs, which they cannot obtain, are integrated and are compensated on a nondiscriminatory basis.

Collective bargaining could also be used to attack sex-based wage discrimination. In some countries, labor unions have worked for a significant equalization of pay rates "in the belief that the existing wage range was too great and should be compressed."[198] That, however, has generally not been the policy of unions in the United States.[199] Even the enforcement of equal pay for equal work has been effected only by assuring men that their wages will not be reduced in the process of achieving equality.[200] It is unlikely, given this tradition and given the underrepresentation of women in union power structures,[201] that collective bargaining will eliminate the discriminatory component of the earnings gap.

Thus, the prospect for achieving pay equity through job integration

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Civil Service Reform Act of 1978. The Act states that "[e]qual pay should be provided for work of equal value with appropriate consideration of both national and local rates paid by employers in the private sector. . . ." 5 U.S.C. § 2301(b)(3) (1982). The call for "appropriate" consideration of market rates, without definition or elaboration, shows the caution with which Congress has continued to approach this subject.

[198] Ballace, *A Foreign Perspective*, in COMPARABLE WORTH: ISSUES AND ALTERNATIVES 139, 170 (E. Livernash ed. 1980).

[199] *See id.*

[200] *See supra* text accompanying note 185.

[201] *See* Gasaway, *supra* note 8, at 1167.

or collective bargaining is not yet a promising one. These are in fact the very mechanisms that have failed for more than two decades to alter the earnings gap in any significant way. Conceivably, the impetus for comparable worth analysis could encourage some change, but there is not much cause to be optimistic about an alternative solution to the problem in the near future.

CONCLUSION

The Equal Pay Act, which mandates equal pay for equal work, has not succeeded in substantially narrowing the gap in earnings between men and women. Advocates of pay equity have, therefore, begun to focus on the question whether differences in earnings are justified by differences in the content of predominantly female jobs. In the *Gunther* case, the Supreme Court for the first time addressed the proposition that Title VII of the 1964 Civil Rights Act can be read to require equal pay for comparable work as well as for equal work. Despite Justice Rehnquist's effort to convince lower courts that *Gunther* is largely meaningless, the decision promises to have an important impact on pay equity by (1) eliminating the equal work requirement in Title VII cases, (2) recognizing a cause of action for gender-based wage discrimination, and (3) reshaping the role of job evaluations in the administration of wage policies. Serious questions will continue to be raised concerning the cost of comparable worth and the difficulty of measuring job worth, but it should be recognized that no alternative solution to the problem of pay equity is likely to have much early success.