Equal Work, Comparable Worth and Disparate Treatment: An Argument for Narrowly Construing *County of Washington v. Gunther*

Paul N. Cox
Equal Work, Comparable Worth and Disparate Treatment: An Argument for Narrowly Construing County of Washington v. Gunther

Paul N. Cox*

The Equal Pay Act of 1963 prohibits, prima facie, the unequal payment of compensation to employees on the basis of sex "for equal work on jobs the performance of which requires equal skill, effort, and responsibility." There are four statutory affirmative defenses to that prima facie prohibition: unequal payment made pursuant to a seniority system, a merit system, a system which measures earnings by quantity or quality of production and a "differential based on any other factor other than sex." In enacting the Equal Pay Act, Congress considered and rejected a proposal which would have imposed liability for unequal payment on the basis of sex for work of comparable character on jobs requiring comparable skills.

* Associate Professor of Law, Valparaiso University. B.S., 1971, Utah State University; J.D., 1974, University of Utah; LL.M., 1980, University of Virginia.

3. The Kennedy administration proposed bills which prohibited sex discrimination in compensation "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." H.R. 8898, 87th Cong., 1st Sess. (1962); H.R. 10266, 87th Cong., 2d Sess. (1962) in Hearings Before the Select Subcommittee of Labor on the House Committee on Education and Labor on H.R. 8898, 10266, 87th Cong., 2d Sess. 2-10 (1962). Neither bill contained an exception similar to the fourth "affirmative defense" in the enacted Equal Pay Act — an omission which would have been more susceptible than the enacted version to a disparate impact interpretation.

The bill eventually reported out of committee also contained a comparable worth standard but was amended on the floor of the House by substituting an equal work standard. 108 CONG. REC. 14767-69 (1962). The bill was, however, not reported out of conference committee.

A bill containing the equal work standard was introduced and eventually enacted as the Equal Pay Act in 1963. See infra note 147. The legislative history of the Equal Pay Act is reviewed at length in County of Washington v. Gunther, 452 U.S. 161, 184-88 (1981) (Rehn-
Title VII of the Civil Rights Act of 1964, by contrast, renders it unlawful for an employer "to discriminate against any individual with respect to his compensation . . . because of such individual's . . . sex . . . ." The obvious distinction between the Equal Pay Act prohibition and the Title VII prohibition is that the equal work standard is applicable only to the Equal Pay Act. Liability might therefore potentially be imposed on the basis of a comparison of work and skills in jobs which would be treated as entailing unequal work for Equal Pay Act purposes. There is, however, a second potential distinction between the Equal Pay Act and Title VII. Compensation claims brought under Title VII are potentially subject to analysis both under the disparate treatment and the disparate impact theories of discrimination. Although the Equal Pay Act precludes employer reliance upon labor market compensation rates where the equal work element of the prohibition is satisfied and may therefore be characterized as prohibiting employer


5. Alternative potential meanings of comparable worth or value theory are discussed infra notes 115-44 and accompanying text.


reliance upon a gender neutral rule or criterion in that relatively narrow circumstance, the fact that employer reliance on "any other factor other than sex" is an affirmative defense implies that only a disparate treatment prohibition otherwise governs Equal Pay Act claims.

The potential for conflict between the Equal Pay Act and Title VII is addressed by Section 703(h) of Title VII in language constituting what is commonly termed the "Bennett Amendment":

It shall not be an unlawful employment practice under [Title VII] for an employer to differentiate upon the basis of sex in determining the amount of wages or compensation paid or to be paid to employees... if such differentiation is authorized by the provisions of [the Equal Pay Act].

Prior to the Supreme Court's decision in County of Washington v. Gunther, the Equal Pay Act's equal work standard and Title VII's Bennett Amendment presented the primary legal obstacles to the so-called "comparable worth" theory of compensation discrimination. The equal work standard precludes reliance upon comparisons of the worth of unequal work performed by males and females and the Bennett Amendment was generally viewed as mandating incorporation of the equal work standard into Title VII. In Gunther, the Supreme Court rejected the latter interpretation of the Bennett Amendment by holding that only the Equal Pay Act's four affirmative defenses were incorporated into Title VII by the amendment. The Court therefore concluded that a compensation discrimination claim may be established under Title VII by "direct evidence" that a plaintiff's wages "were depressed because of in-
tentional sex discrimination."^{16}

Because the Court declined to identify the scope or meaning of "direct evidence" and distinguished comparable worth theory from proof by "direct evidence" while apparently reserving the comparable worth question,^{16} Gunther raises and leaves unanswered a number of important and difficult issues regarding the character of the compensation claims assertable under Title VII and the nature of the evidence admissible in proof of such claims.^{17} This article explores some of these issues by arguing in favor of a narrow interpretation of Gunther which leaves the Equal Pay Act's equal work standard substantially intact in all but a narrow range of cases. The thesis of the article is that, although the Supreme Court's interpretation of the Bennett Amendment may be legitimately viewed as a judicial abrogation of a clear legislative command,^{18} that command may yet survive Gunther if the policy underlying the command is both emphasized and utilized as a basis for interpreting the majority opinion in Gunther.

I. THE EQUAL PAY ACT

A. The Equal Work Standard and the Origins of the Gunther Decision

In typical Equal Pay Act cases, jobs predominantly or exclusively staffed by women are compared with jobs predominantly or exclusively staffed by men. There is typically a core of identical tasks or duties common to both jobs, but an employer will cite ad-

15. 452 U.S. at 166.
16. Id. at 166 n.6.
18. In the spirit of full disclosure, I note that I am in general agreement with Justice Rehnquist's dissent in Gunther. It is indeed a pity that the Justice fully expended the critique from Orwell in United Steelworkers v. Weber, 443 U.S. 193, 219-20 (1979) (Rehnquist, J., dissenting). This is not to suggest that I think Justice Rehnquist incapable of the manipulation evident in the majority opinions in both Gunther and Weber. See Neuborne, Observations on Weber, 54 N.Y.U.L. Rev. 546, 554 & n.29 (1979). It is, however, to suggest that Justice Rehnquist was in these instances in my view correct in his characterization of the majority's methodology. See Cox, The Question of "Voluntary" Racial Employment Quotas and Some Thoughts on Judicial Role, 23 Ariz. L. Rev. 87, 175-78 (1981).
ditional tasks or duties or distinct working conditions identified with one of the jobs (normally the job performed by men) as rendering the jobs unequal.\textsuperscript{19} Judicial analysis proceeds by attempting to characterize the additional or distinct aspects of the male job as significant or insignificant within the rubric of the equal skill, effort, responsibilities and working conditions standard.\textsuperscript{20}

A number of cases have relied, however, upon inconsistencies and self-contradictions in an employer's compensation scheme to conclude that jobs are unequal.\textsuperscript{21} Two examples illustrate this reliance. In \textit{Shultz v. American Can Co.},\textsuperscript{22} male night shift operators of manufacturing machines did work equivalent, as a matter of core duties, to female day shift operators of the same machines. However, male operators were required to load the machines with paper on the night shift, a task which varied in difficulty and duration of required time with the particular machine to which the employee was assigned. Female day shift operators were not assigned the additional paper loading task. The court concluded that the additional duty was not significant and that the jobs were therefore substantially equal. One of the grounds cited for that conclusion was that "[a]ll night shift operators receive the same rate of pay whether they spend a few minutes or thirty-three minutes per shift in the handling and loading function, whether the rolls of paper weigh fifty or fifteen hundred pounds, whether the rolls are loaded manually or mechanically. . . ."\textsuperscript{23}

In \textit{Shultz v. Wheaton Glass},\textsuperscript{24} the employer claimed that the work of a "female selector-packer" was not equal to the work of a "male selector-packer" because the male was required to be available to do the work of a "snap-up boy." Male selector-packers were paid at a rate of $2.35 an hour, female selector-packers at a rate of $2.14 an hour, and "snap-up boys" at a rate of $2.16 an hour. The court rejected a contention that the additional "snap-up boy" duties assigned male selector-packers rendered the latter work unequal to the work of female selector-packers on two grounds. First,

\begin{itemize}
\item \textsuperscript{19} See, e.g., \textit{Usery v. Columbia University}, 568 F.2d 953 (2d Cir. 1977); \textit{Brennan v. Prince William Hospital Corp.}, 503 F.2d 282 (4th Cir. 1974); \textit{Hodgson v. Fairmont Supply Co.}, 454 F.2d 490 (4th Cir. 1971).
\item \textsuperscript{20} 29 U.S.C. § 206(d) (1976). See cases cited \textit{supra} note 19.
\item \textsuperscript{22} 424 F.2d 356 (8th Cir. 1970).
\item \textsuperscript{23} \textit{Id.} at 361.
\item \textsuperscript{24} 421 F.2d 259 (3d Cir.), \textit{cert. denied}, 398 U.S. 905 (1970).
\end{itemize}
there was no finding that all male selector-packers did "snap-up boy" work and no finding of average or individual time spent on such work.\textsuperscript{25} Second, 

\begin{quote}
[e]ven if there had been [such findings], there would still be lacking an adequate basis for the differential in wages paid. . . . For there would be no rational explanation why men who at times perform work paying two cents per hour more than their female counterparts should for that reason receive 21 1/2 cents per hour more than females for the work they do in common.\textsuperscript{26}
\end{quote}

There are three possible explanations for this judicial emphasis upon internal contradictions in the employer's compensation system in evaluations of the equal work issue. First, it has been suggested that such an emphasis states a "least different" principle—a female job is to be compared to the male job involving duties "least different" from those entailed in the female job.\textsuperscript{27} In American Can a female day shift operator's work was arguably compared to the male night shift operator's work which involved the least time and effort in loading paper. In Wheaton Glass, a female selector-packer's work was compared to the male selector-packer's work presumed to involve the least "snap-up boy" duties.

Second, the cases may be explained on the ground that, because the employer did not itself value the additional duty in a manner consistent with a contention that it rendered the male and female jobs unequal, the court will assume that the extra duty is insignificant.\textsuperscript{28} In American Can, the employer failed to differently value the paper loading duty in a manner consistent with the contention that it was rewarding extra effort. In Wheaton Glass, the employer valued "snap-up" boy work at a mere two cents an hour more than female selector-packer work.

Third, the cases may be explained on the ground that employer inconsistencies indicated that the additional duty involved in the male work in issue was a pretext for compensation based on gender; since the extra duty was not valued in a manner consistent with payment for performing that extra duty, the employer was motivated by gender in making the compensation decision. The Wheaton Glass court is quite specific in suggesting such a rationale:

\begin{quote}
[T]hese disparities in rates of pay under which snap-up boys . . . receive a
\end{quote}

\begin{flushright}
\textsuperscript{25} 421 F.2d at 263. \\
\textsuperscript{26} Id. \\
\textsuperscript{27} Sullivan, Zimmer & Richards, supra note 10, at 614-16. \\
\textsuperscript{28} See id. at 617.
\end{flushright}
higher rate than female selector-packers while male selector-packers receive a much higher rate because they are available to do some of the work of snap-up boys, take on an even more discriminatory aspect when viewed in light of their history.29

On its face, the third explanation postulates a *non sequitur*—because the employer was motivated by gender, male and female work is equal. If the equal work standard is to be given effect as an independent and essential element of the Equal Pay Act prohibition, it must clearly authorize pay differentials founded on gender where work is unequal.30 And to the extent that a judicial finding of gender motivation is used as a basis for evaluating the equality of work, the equal work standard disappears as an element of the Equal Pay Act.

There is, however, a rationale for the third explanation which would render consideration of gender motivation in deciding an equal work issue legitimate. It is apparent that a congressional goal was to prohibit by the Equal Pay Act disparate gender treatment with respect to compensation.31 It is equally apparent that Congress sought by the equal work requirement to avoid the complexities inherent in attempting to adjudicate claims for comparable compensation for comparable work.32 Congress compromised the goal of precluding disparate treatment because it wished to preclude government regulation of work and pay valuation decisions.33

29. 421 F.2d at 264.

30. *See* IUE v. Westinghouse Electric Corp., 631 F.2d 1094, 1100 (3d Cir. 1980), *cert. denied*, 452 U.S. 967 (1981); Gunther v. County of Washington, 623 F.2d 1303, 1313 n.9 (9th Cir. 1979), aff’d, 452 U.S. 161 (1981). It is however possible that liability may be established under the Equal Pay Act by means of a hypothetical. If it can be established that a hypothetical male would have been paid at a higher rate for work currently performed by females, there is arguably unequal pay for equal work. *See* Bourque v. Powell Elec. Mfg. Co., 617 F.2d 61 (5th Cir. 1980); Di Salvo v. Chamber of Commerce, 568 F.2d 593 (8th Cir. 1978); Peltier v. City of Fargo, 533 F.2d 374 (8th Cir. 1976).

31. *See infra* notes 144-53 and accompanying text.


It therefore risked, and in effect “authorized,”34 disparate treatment where work is “unequal.” Comparable work comparisons were viewed as undesirable, however, primarily because they would require a judicial or administrative analysis of jobs and a judicial or administrative creation of standards for measuring comparability.35 A case such as Wheaton Glass does not present that difficulty. The inference of a gender component in the compensation decision was there derived from evidence of the employer’s actions, not from an effort at independently evaluating the comparability of male and female selector-packer work and the comparable value of that work.36

On these premises, it may be argued that the policy function performed by the equal work requirement—avoidance of independent judicial inquiry into the comparability of work and comparability of compensation—is not threatened in a case in which a court may rely upon evidence of the employer’s actual behavior to generate an inference of disparate treatment. In such a case, the congressional decision to compromise the goal of precluding disparate treatment by limiting the scope of independent judicial inquiry into issues of valuation is not threatened.37

B. The “Any Other Factor Other Than Sex” Defense: The Meaning of Disparate Treatment

One element of a prima facie case of an Equal Pay Act violation is that unequal payment occurs “on the basis of sex.”38 That element is satisfied wherever any male and any female receiving unequal compensation may be discovered.39 A male executive vice president may be compared for this purpose with a female file clerk. If it is determined that the male and female employees whose compensation is compared are engaged in “equal work,” the employer may establish an affirmative defense, one of which is that the compensation differential was based on “any other factor other than sex.”40

35. See infra notes 144-53 and accompanying text.
36. See SULLIVAN, ZIMMER & RICHARDS, supra note 10, at 617.
37. See infra notes 181-86 and accompanying text for further development of this argument in the Title VII context.
The "any other factor other than sex" defense appears to state a disparate treatment standard. Disparate treatment as a concept is illicitly motivated action; in the present context, action motivated by gender. Disparate impact, by contrast, is action motivated by reasons independent of, e.g., gender which has an effect on one gender group different in quality or quantity than its effect on another gender group. If, for example, an employer decides to compensate a category of workers (e.g., "executives") predominantly composed of males at a rate higher than a second category of workers (e.g., "secretaries") because the employer believes that the first category performs work requiring greater skill and responsibility, or believes that the return it receives from the work of the first category of workers is greater than the second, that decision is motivated by a reason independent of gender (the employer's valuation of the work performed) and has a disparate impact by gender; males as a group are compensated at a higher rate than females as a group. If the employer instead compensates the second category of workers at a lower rate because that category is predominantly composed of females, the employer is motivated by gender and therefore engaged in disparate treatment. The primary policy justification for imposing liability only in cases of disparate treatment is the preservation of the gender neutral interests furthered by employer actions undertaken for gender neutral reasons—including the controversial value of noninterference by government with employer discretion. The policies furthered by imposing liability in cases of disparate impact include prophylaxis (a prohibition of disparate impact captures otherwise undiscoverable disparate treatment) and the shifting of the burden of historical societal discrimination from the race or gender groups adversely affected by that discrimination to employers in the form of the costs imposed by precluding employer pursuit of interests fur-

(1974).


42. See supra note 6.

43. See supra note 7.

44. See infra notes 144-53 and accompanying text. But see SULLIVAN, ZIMMER & RICHARDS, supra note 10, at 625 (arguing that impact standard should be applicable).
thered by gender neutral actions.\textsuperscript{45}

Disparate treatment may be conceptually viewed in causal terms. There is disparate gender treatment if gender status caused a challenged employer's decision or action.\textsuperscript{46} There are, however, three distinct causal scenarios raising disparate treatment issues: gender as a necessary and independent cause of an act; a legitimate business reason as a dependent (on gender) cause of an act; and a legitimate business reason as a pretextual cause of an act in fact caused by gender.\textsuperscript{47} These distinctions may be illustrated by three cases.

Although the so-called "mixed motive" discharge\textsuperscript{48} provides the clearest example of an illicit employer reason as one of two or more independent causes of an act, similar mixed motive problems may arise under the Equal Pay Act. American Can Co.\textsuperscript{49} may be viewed as an example. Assume that the employer in that case was motivated both by gender and by a desire to compensate employees working the night shift for extra (paper loading) duties performed on the night shift. The employer's failure to differentiate between the difficulty and time spent in loading different machines was evidence that the latter of these reasons was pretextual, but that failure is explicable in terms of administrative convenience. If the administrative convenience explanation is believed, the employer was motivated by two independent reasons for its additional compensation, and the inquiry for disparate treatment purposes was which of those two independent reasons—the legitimate reason or the il-

\textsuperscript{45} See infra notes 101-15 and accompanying text.


\textsuperscript{48} See, e.g., Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977) (discharge for unconstitutional reasons); NLRB v. Wright Line, Inc., 662 F.2d 899 (1st Cir. 1981) (discharge for reasons rendered illicit by Labor Act). The mixed motive discharge problem arises where an employee's discharge was motivated both by an illicit reason (e.g., the employee's exercise of First Amendment rights) and by a licit reason (e.g., the employee's poor work performance). The question is whether an employer is liable if motivated in part by an illicit reason or is liable only where the illicit reason plays a controlling or necessary role in the discharge decision.

\textsuperscript{49} Shultz v. American Can Co., 424 F.2d 356 (8th Cir. 1970).
licit reason—"caused" the additional compensation. That inquiry is difficult because it is apparent that both reasons caused the compensation. In a case in which an employer's decision may have only a dichotomous outcome (e.g., a hiring case or a discharge case) the disparate treatment issue is whether the illicit reason was a "but for" cause. A compensation differential is potentially divisible into components attributable to differences in productivity and components attributable to gender. The difficult question is whether there is a means of determining the gender based and non-gender based components of the differential without thereby imposing government standards for compensation in contravention of the policies underlying the equal work element of the Equal Pay Act.

A legitimate business reason as a dependent (on gender) cause scenario is illustrated by *City of Los Angeles Department of*


To the extent, however, that the decision in issue produces a continuous rather than dichotomous outcome, it may be possible to separate gender caused from non-gender caused components of the outcome. See infra note 152.


52. This difficulty arises under the Equal Pay Act in the context of the question of remedy. See EEOC v. Whitin Mach. Works, 635 F.2d 1095 (4th Cir. 1980); Brennan v. Victoria Bank & Trust Co., 493 F.2d 896 (5th Cir. 1974). Following Gunther, it may arise with respect to the question of liability. Cf. EEOC v. Whitin Mach. Works, 635 F.2d 1095, 1100 (4th Cir. 1980) (Winter, J., concurring and dissenting) (factors other than sex argument is appropriate to the issue of E.P.A. liability, not to remedy); Id. at 1101 (Widener, J., concurring and dissenting).
Water & Power v. Manhart. In Manhart, the employer required its female employees to make larger contributions to a pension fund than similarly situated male employees. The employer had a legitimate business reason for that requirement. Because females as a group live longer than males as a group, larger female contributions were required to ensure both adequate funding for longer periods of female retirement and the fiscal integrity of the plan. This business reason for the larger female contribution was, however, dependent upon a conceptually antecedent gender reason for the contribution. Thus, the employer could not claim that projected longevity caused the additional contribution increment where the projection of longevity was itself dependent upon gender.

The relationship between the dependent cause scenario and the pretext scenario is illustrated by Hodgson v. Robert Hall Clothes, Inc. In Robert Hall, the employer operated a men’s apparel department exclusively staffed with male employees and a women’s apparel department exclusively staffed with female employees. These employees were found to be engaged in equal work, but were paid at unequal rates. The employer defended an Equal Pay Act claim on the theory that the men’s department produced a greater profit and this greater profit was a “factor other than sex.” The plaintiff’s counterarguments were that the greater profit generated by the men’s department was attributable to the employer’s merchandising practices rather than to the effort of the male employees and that the employer paid male employees a uniformly higher rate than female employees without regard to differences in individual productivity. The court accepted the employer’s argument, finding that “any other factor other than sex” means any other

54. Id. at 712-13. Manhart suggests that a disparate treatment prohibition is applicable whether or not the employer’s reason for its use of gender may be characterized as in some sense prejudiced; arguably legitimate reasons for the use of gender are prohibited. A rationale for justifying that conclusion is that decision makers — including courts deciding application of prohibition questions — cannot be trusted to differentiate between good and bad forms of race or gender based decision. See Cox, Book Review, 15 VAL. U.L. REV. 637, 648-59 (1981).
factor. 57

Two points of importance to the meaning of disparate treatment may be made concerning *Robert Hall*. The plaintiff's first counter-argument was clearly wrong and the court was clearly wrong. The plaintiff's first counterargument was that the profitability of the men's department was a function of merchandising methodology rather than labor productivity. Such an argument is appropriately made within the conceptual framework of disparate treatment theory if it is characterized as a claim that the employer's rationale for the compensation differential at issue in *Robert Hall* was pretextual. The argument went beyond pretext however. It was that "any other factor other than sex" means only any other factor relevant to the labor component of production. The difficulty with the argument is that it would prohibit employer reliance upon gender neutral factors (in *Robert Hall*, profitability, if profitability is assumed to be neither pretextual nor dependent on gender) having a disparate impact on gender groups, where not justified by considerations of labor productivity. Such a prohibition is not a prohibition of disparate treatment, it is a prohibition of undesirable consequences not justified by a "business necessity."

The court's conclusion that the "any other factor other than sex" defense was established in *Robert Hall* was plainly wrong for two reasons. First, the court was wrong on a pretext theory because the employer's failure to differentiate on the basis of individual productivity obviated any claim that the compensation differential was an incentive for productivity. If the differential was granted independently of an incentive motivation, the sole remaining motivation (other than an illicit reliance on market rates 58) was generosity—an incredible proposition on the assumption that the employer was a rational profit maximizer. In short, the employer's gender neutral reason for the compensation differential was not credible; it was a "pretext" for a gender motivation. 59

---

57. 473 F.2d at 594.
58. Recall that equality of work was assumed in *Robert Hall*.
59. *See* Hodgson v. Behrens Drug Co., 475 F.2d 1041 (5th Cir. 1973). The distinction between disparate impact theory and a pretext theory of disparate treatment is that the former relies merely on the disparate effect of an employer action and the latter relies on a finding that a neutral criterion was used to further an illicit motive. Unfortunately, this distinction is not always observed in the commentary. Compare Newman & Vonhoff, supra note 8, at 190 (reliance on "head of household" as a criterion for calculating compensation is neutral factor having disparate impact) with Larson, supra note 11, at § 31.25 ("head of household" criterion should be attackable under the Equal Pay Act only under a disparate treatment conception).
The court was wrong, however, for another reason. Although the job segregation evident in Robert Hall was arguably defensible under Title VII on a bona fide occupational qualification (BFOQ) theory,60 there is no BFOQ defense under the Equal Pay Act. The employer’s stated reason for the compensation differential—departmental profitability—was dependent upon gender for the same reasons that a longevity projection was dependent upon gender in Manhart. Membership in the employee group to which the facially gender neutral reason was applied by the employer was a function of gender status in the sense that gender determined membership in that group.

This last point is crucial to the present analysis of the meaning of disparate treatment. The argument is that a legitimate employer reason for a compensation differential falls within a disparate gender treatment prohibition if that reason is itself dependent upon a current employment practice caused by gender.61 Robert Hall should, for purposes of illustration of that argument, be distinguished, however, from a case in which there is both gender based job segregation and a merit or incentive compensation plan. If such a plan is applicable on equal terms to both female and male job classifications, there is clearly no disparate treatment in compensation, for incentive compensation is independent of job classification. If such a plan is applicable only to the male classification, compensation paid under the plan is for productivity itself dependent upon gender.62 The employer cannot in the second of these hypotheticals claim that productivity is a factor other than sex where the opportunity to satisfy the productivity standard for compensation is itself a function of sex.63

60. 42 U.S.C. § 2003-2(e) (1976). Gender may be used as a decision criterion if gender is a bona fide occupational qualification. However, this exception to the disparate treatment prohibition has been narrowly construed. See Diaz v. Pan American World Airways, Inc., 442 F.2d 385 (5th Cir.), cert. denied, 404 U.S. 950 (1971); Weeks v. Southern Bell Tel. & Tel. Co., 408 F.2d 228 (5th Cir. 1969).
61. See 1 A. Larson, supra note 11, at § 31.25.
“Sex plus” discrimination entails treatment of individuals differently on the basis of a neutral criterion and gender where neither the neutral criterion standing alone nor gender standing alone would result in that different treatment. Such a form of discrimination is disparate treatment because the explicit or implicit rule underlying the employer’s action cannot be applied without reference to gender. See City of Los Angeles Dep’t. of Water & Power v. Manhart, 435 U.S. 702, 712-13 (1978).
63. Cf. EEOC v. Whitin Mach. Works, 635 F.2d 1095, 1101 (4th Cir. 1980) (Widener, J., concurring and dissenting) (factor other than sex which is independent of source of dis-
C. **The Labor Market as a Gender Based Consideration**

There is one and only one instance in which the "any other factor other than sex" defense may not be established by proof of employer reliance on a gender neutral criterion. Reliance on labor market rates is not a factor other than sex where work is equal. There are two possible rationales for this result. First, reliance on the market is reliance on sex and, therefore, disparate treatment; or, second, Congress intended in the stated circumstance to preclude reliance on the market even though such reliance does not constitute disparate treatment. The latter of these rationales is the more persuasive.

1. **Reliance on the Market As Disparate Treatment**

The argument favoring a conclusion that reliance on compensation levels established by the labor market is reliance on gender is that the labor market is distorted by gender. Traditional and pervasive notions concerning gender role operate to channel most women into a narrow spectrum of jobs thought appropriate to women and operate to channel most men into a broader spectrum of jobs thought appropriate to men. Because many women compete for a limited supply of "female jobs" and very few women compete for a larger supply of "male jobs," the normal operation of the laws of supply and demand artificially depress compensation levels for "female jobs" and artificially inflate compensation levels for "male jobs." Moreover, the internalization of socially imposed gender

parate treatment and is responsible for compensation differential cannot be basis for Equal Pay Act liability). *But cf.* Armstrong v. Index Journal Co., 647 F.2d 441, 446 (4th Cir. 1981) (back pay award calculated from base salary for male job restricted to males even though experience criterion for compensation calculation was dependent upon job assignment). The case coming closest to adopting this theory is Hodgson v. Behrens Drug Co., 475 F.2d 1041 (5th Cir.) (compensation not based on factor other than sex for Equal Pay Act purposes where male work paid such compensation not open to females), *cert denied sub nom.* Behrens Drug Co. v. Brennan, 414 U.S. 822 (1973). *See also* Armstrong v. Index Journal Co., 647 F.2d 441 (4th Cir. 1981) (relying on a Title VII job segregation theory for attacking a compensation differential).

role definitions causes women (or family units) to make human capital investment decisions consistent with such role definitions. The consequence of such investment decisions is lack of qualification for jobs historically viewed as male jobs, and, therefore, a distortion in the labor supply for such male jobs.

Let it be assumed that this argument accurately describes the state of the market. Notice what the argument does and does not contend. Although it is possible to argue that market distortions are in part the product of current hiring and job assignment discrimination on the part of employers, such discrimination is unlawful under Title VII. To conclude that current hiring and job assignment discrimination significantly distorts the labor market is therefore to conclude that current employer violations of Title VII are pervasive — an unproven possibility at most. And even if that possibility is assumed, such discrimination is subject to a direct Title VII attack which avoids the acceptance and approval of hiring and assignment discrimination implicit in an argument that the market effects of unlawful job segregation should be challenged as unlawful.

The distorted labor market argument does not, therefore, rely primarily upon current employer hiring and job assignment discrimination. It relies instead upon the propositions that current

65. The human capital theory, originally developed by Gary Becker and Jacob Mincer, postulates that individual earnings are related to past investment decisions on the part of that individual - investment, e.g., in education, training, and experience. See generally G. BECKER, HUMAN CAPITAL - A THEORETICAL AND EMPIRICAL ANALYSIS WITH SPECIAL REFERENCE TO EDUCATION, (2d ed. 1975); Mincer, Investment in Human Capital and Personal Income Distribution, 66 J. POL. ECON. 281 (1958).

66. See generally Mincer & Polachek, supra note 64. It is of course recognized by human capital theorists that there are a number of complex and interrelated investment variables and that such variables will not explain all components of a differential. Residual components may at least in part be attributable to disparate treatment, although such disparate treatment generally occurs in job assignment. See, e.g., Chiplin, An Evaluation of Sex Discrimination: Some Problems and a Suggested Reorientation in Women in the Labor Market 246(C. Lloyd, E. Andrews & L. Gilroy eds. 1979); Malkiel & Malkiel, Male-Female Pay Differentials in Professional Employment, 63 AM. ECON. REV. 693 (1974). Notice that considerations such as continuity of employment, if used by an employer to assume that women as a group will be only transient employees (rather than as a factual characteristic of individual employees) constitute gender based grounds for decision rendering the employer's use of such considerations disparate treatment. See General Electric Co. and Westinghouse Electric Corp., 28 War Labor Rep. 666, 686 (1945).

67. See Blumrosen, Wage Discrimination, supra note 8, at 445-54; Newman & Vonhoff, supra note 8, at 312-13.

68. See WOMEN, WORK AND WAGES, supra note 17, at 65.
market conditions are influenced by the residue of past and non-remedial job segregation decisions on the part of employers, by the internalization of limited gender role definitions by women who continue to compete for a narrow spectrum of jobs consistent with those definitions and by division of labor and human capital investment decisions made by the family units in which women are or have been members. In short, the proposition that the market is synonymous with gender as a reason for employer decision rests primarily on non-remedial historical phenomena and a current self-selection phenomenon.

The market argument is, then, a form of dependent cause argument. An employer’s legitimate business reason (expenditure for labor not in excess of the price at which labor is currently available) is dependent upon an antecedent series of decisions themselves caused by gender (historical job segregation decisions of employers and current job selection and human capital investment decisions by women).

The flaw in the argument is that the antecedent series of decisions which “cause” current market rates are not the employer’s decisions — they are phenomena external to the employer. It is of course true that a similar characterization may be made of antecedent gender causes of dependent legitimate business reasons in contexts clearly amounting to disparate treatment. The fact that women outlive men was an antecedent gender reason independent of any employer decision in City of Los Angeles Department of Water & Power v. Manhart. There is, however, a distinction of importance between the antecedent gender cause at issue in Manhart and the antecedent gender causes of current market rates. Longevity is correlated with gender — females as a group outlive males as a group. In Manhart, the employer incorporated that accurate generalization concerning the longevity of men and women as groups into a decision making process concerning individual men and women. It treated individual men and women differently on the basis of group differences between men and women by

69. Such historical discrimination on the part of employers is arguably not remediable because it occurred prior to the enactment of Title VII. See infra notes 253-66 and accompanying text.

70. See Mincer & Polachek, supra note 64. As Mincer and Polachek point out, the significance of such decision making is a matter of one’s definition of discrimination; “if division of labor in the family is equated with discrimination, all of the [wage] gap is by definition a symptom of discrimination.” Id. at 104.


72. 435 U.S. 702 (1978), supra notes 53-54 and accompanying text.
utilizing gender status as a proxy for longevity. By contrast, an employer who incorporates current market rates for different jobs into its compensation decisions does not thereby treat individual men and women differently on the basis of gender group status or characteristics. Market rates for jobs are job specific, not gender specific. To illustrate, a female civil engineer will receive from an employer who relies upon market rates for civil engineers a compensation level equivalent to the compensation paid a similarly situated male civil engineer. An employer who incorporates market rates does not utilize gender status as a proxy for a legitimate business interest independent of gender; rather, it uses a gender neutral criterion (the market) correlated with gender status as a proxy for a legitimate business interest (minimum possible cost) independent of gender.73

The difficulty with equating current market rates with gender is, then, that such an argument relies upon a market phenomenon correlated with gender status to contend that reliance on the market is reliance upon gender. The essence of disparate treatment is employer decision about an individual for group status reasons. The gender cause of the employer’s action must take the form of a motivation for that action. The correlation between gender and market rates for particular jobs is not a cause of a compensation rate for a particular employee amounting to a motivation for that rate unless the employer utilizes the market as a pretext for paying at a rate it would not pay absent the gender status of that employee. The market argument is, then, a disparate impact argument. If reliance on the market is to be prohibited, it must be for the same reasons that employer reliance on intelligence tests as a criterion for hiring is generally prohibited under Title VII.74 The disparate effect of such tests on protected racial groups is the product of a correlation (itself attributable to historical discrimination) between group status and success under such tests.

2. Congressional Intent and Reliance on the Market

The second, and more persuasive reason that reliance on the market where work is found to be equal may not be characterized as reliance upon a factor other than sex is that Congress intended that the market be equated with sex in such circumstances. The

73. See Larsen, supra note 11, at §§ 7-82 to 7-84.
reason for such a congressional characterization is not difficult to discover. Despite the prior conclusion here that reliance on the market is not generally reliance on gender and, therefore, that such a reliance does not establish the illicit motive prohibited by a disparate treatment prohibition, such a reliance where jobs are equal is the functional equivalent of disparate treatment.

Reliance on the market in equal work circumstances is functionally disparate treatment for three reasons. First, if the work performed by men and women is substantially equal but the market pays at differential rates dependent upon gender, those rates are not merely job specific, they are gender specific. The market phenomenon at work in such circumstances is not merely a distortion of labor supply, it is a gender specific distortion in which the market is giving effect to tastes for discrimination independently of any job specific supply phenomenon attributable to self-selection or historical job segregation. Where an employer hires men and women for substantially equal jobs but pays women at a lower rate, it is at least a fair inference that the employer has taken advantage of an economic power obtained by a tacit agreement among employers (an agreement inferred by parallel behavior and a bias hypothesis) not to compete for female labor. The employer has chosen to refuse to deal with female workers except on conditions inapplicable to males, and the employer is in a position to behave in this manner because other employers have tacitly agreed to a similar "boycott." Indeed, it is difficult to see how the employer could apply a distinct market rate compensation criterion in equal work circumstances without determining the gender of employees and without, therefore, taking sex explicitly into account. Second, reliance on the market in such circumstances is functionally

---

75. See Corning Glass Works v. Brennan, 417 U.S. 188, 205 (1974) ("The differential arose simply because men would not work at the low rates paid women inspectors, and it reflected a job market in which Corning could pay women less than men for the same work").

Notice that this proposition assumes equivalent qualifications as between male and female applicants for employment or employees and assumes equivalent or nearly equivalent job tasks, responsibilities, etc. Such equivalencies suggest disparate treatment because employers are in effect engaging in a concerted refusal to deal (or at least, a refusal to deal except conditionally) with females. Cf. Pittman v. Hattiesburg Municipal Separate Sch. Dist., 644 F.2d 1071, 1074 (5th Cir. 1981) (market rate may not be used if market pays different rates for black printer and white printer). Where such equivalencies are not present, it is possible to positulate a similar concerted refusal to deal, but it is not possible, absent employer admissions, to establish such a refusal in the litigation process without relying upon a judicially imposed standard of valuation for "comparable" work in place of the market mechanism.
equivalent to disparate treatment because the credibility of claimed reliance is suspect. Where jobs are equal but men and women are paid at different rates for performing those jobs, a market reliance claim may be viewed as pretextual — the claim is incredible. Even if it is assumed that compensation differentials in an equal work scenario are the product of supply distortions, the employer's conduct may be characterized either as irrational (it employs men when it could employ women at a lower rate) or as engaging in disparate treatment (it employs men at a higher rate than the rate at which it could employ women either because it is compelled to do so by government regulation or because it is satisfying a "taste" for male employees).

Even if it is assumed that an employer is not, in any of the above senses, motivated by gender in paying differential rates in equal work circumstances, Congress may be viewed as having sought to circumvent the market by means of employing a disparate impact standard in such circumstances. The unfairness of unequal pay for equal work warranted prohibition of market reliance despite the absence of illicit motivation. On this premise, the cor-

---

76. The operation of labor markets is complex. See N. Chamberlain & D. Cullen, The Labor Sector 322 (1971) (internal labor markets); Hildebrand, The Market System in Comparable Worth, supra note 17, at 88-94. It is nevertheless often possible for an employer to establish a market rate for particular work. Lemons v. City & County of Denver, 620 F.2d 228 (10th Cir. 1980) (wage surveys) cert. denied, 449 U.S. 888 (1981); Christensen v. State of Iowa, 563 F.2d 353 (8th Cir. 1977) (employer could not obtain employees willing to work at rate established by internal job evaluation for male dominated job). To the extent, however, that an employer establishes different (male and female) market rates for substantially equal work, its claim that it pays according to market rates is a claim that the market distinguishes between male and female workers performing substantially equal functions. What such a claim appears to mean in fact is that more women are willing to do the work than men and men must therefore be paid a premium to do the work. The difficulty with such a claim is that is does not rely on an established market rate for particular work so much as it relies on the employer's bargaining power - the power to refuse to deal except on the condition of lower compensation - under circumstances in which it would make sense to exercise that power against males. If males demand a premium and females are willing to forego that premium, why does the employer not hire more females? See Corning Glass Works v. Brennan, 417 U.S. 188, 205 (1974) (state law precluded hiring women for night shift and employer took advantage of lower market rate); Hodgson v. Brookhaven Gen. Hosp., 436 F.2d 719, 726 (5th Cir. 1970) (employer cannot use bargaining power in equal work circumstances). In equal work circumstances, it is at best difficult to distinguish the employer's actions with respect to gender from the market's decisions with respect to work.

relation between gender and current market conditions was thought of sufficient import to warrant an irrebuttable presumption of illicit motive in equal work circumstances.\textsuperscript{76}

Notice, however, that the equal work standard defines the boundaries of that presumption. Absent equal work, the question of "any other factor other than sex" does not arise. It does not arise because Congress inserted the equal work standard for the purpose of precluding judicial inquiry into issues of discriminatory compensation except in cases satisfying that standard.\textsuperscript{77} Preclusion was mandated for the reason that Congress feared the complexity and uncertainty of inquiry into the question of the relative worth of work and therefore wished to retain the market as a legitimate mechanism for establishing compensation rates as an operating alternative to that regulatory inquiry. The equal work standard authorizes reliance on the market in the sense that it precludes a judicial substitution of a valuation scheme formulated independently of the market in all circumstances other than equal work circumstances. And in that single circumstance, the statutory scheme precludes judicial reliance on any valuation scheme other than the scheme utilized by the employer in establishing the compensation rate for males engaged in equal work.\textsuperscript{80}

\section*{II. COMPARABLE WORTH AND EQUAL WORK}

\textbf{A. Alternative Meanings of Comparable Worth}

In general, comparable worth theory would compel equal compensation for unequal (dissimilar) work of equal value to an employer and would compel compensation for unequal work of unequal value at rates proportionate to value. The essence of comparable worth theory is that differences between distinct and unequal jobs are not a legitimate reason for compensation differential unless those differences affect the value of the work performed in those jobs. The primary difficulty faced by the theory is defining the meaning of value. The neoclassical economic measure of value, in which compensation rates are established by the market, is rejected by the theory because differences in the market rate for la-

\textsuperscript{78} This explanation of the congressional design comes closest to a pure disparate impact understanding of the prohibition upon market reliance in equal work circumstances. It is "unfairness" —a notion of impropriety founded upon premises about propriety independent of the premise that gender based decision is improper—which is the basis for the prohibition. \textit{See infra} note 90.

\textsuperscript{79} \textit{See infra} notes 144-49 and accompanying text.

bor for different work reflect the distortions correlated with gender earlier discussed here. The theory must therefore postulate a means of ascribing value to work independent of the operation of the forces of supply and demand. On the basis of the hypothesis that compensation paid for work predominantly performed by males is not affected by gender, that compensation is an available benchmark for identifying the compensation which would be paid female workers absent distortion. But what is needed, in addition, is a means of assessing the relative value of work performed predominantly by females — a means of comparing the relative value of work once some benchmark is established.

On neoclassical economic premises, an employer’s demand for labor is a function of the marginal productivity of labor; the value of labor is therefore potentially the marginal revenue product of la-

81. See supra notes 74-79 and accompanying text. The neoclassical version of the operation of the labor market assumes both unlimited information and free competition. See infra note 83. Institutional theories deny both assumptions. In particular, institutional theories in the present context argue that internal labor markets (selection and promotion from within a firm), segmentation of labor markets into non-competing groups, collective bargaining, and geographical and information bars to mobility often replace or significantly affect supply and demand. See, e.g., Women, Work and Wages, supra note 17, at 45-68; Bergman, Occupational Segregation, supra note 64; Gordon & Morton, A Low Mobility Model of Wage Discrimination—With Special Reference to Sex Differentials, 7 J. Econ. Theory 241 (1974); Sobel, Human Capital and Institutional Theories of the Labor Market: Rivals or Complement? 16 J. Econ. Issues 255 (1982).

The tainted market hypothesis supplies a reason for concluding that job segregation is in fact due to “discrimination.” See id. at 44-68; Blumrosen, Wage Discrimination, supra note 8, at 445-54; Bergman, Occupational Segregation, supra note 64; Oaxaca, Sex Discrimination in Wages in Discrimination in Labor Markets at 147-51 (A. Ashenfelter & A. Rees eds. 1973). The difficulty with that reasoning is that the tainted market hypothesis is a theory about wage differentials, not an established fact upon which a court formulating liability policies within the framework of legislation may reliably depend. Although it is of course open to Congress to treat the theory as a “legislative fact” and to act upon that fact, a court working within the framework of existing legislation (particularly where Congress in the Equal Pay Act expressly rejected radical solutions to the problem of pay equity) lacks both the information and the capacity to contemplate and accommodate the economic implications of the remedies implied by the theory. See Nelson et al., supra note 33, at 290-97; Hildebrand, The Market System in Comparable Worth, supra note 17, at 102-06.

In this connection, cf. Milkovich, The Emerging Debate, in Comparable Worth, supra note 17, at 42-46 (questioning measurements of the wage gap in part on the basis that such measurements adopt a “macro” approach which fails to account for what occurs in individual firms). Note that the existence of a wage gap relies upon differences in average earnings between males and females within relatively broadly defined occupational groups, it does not rely upon differences in rates of pay within the same or substantially similar jobs within a single firm. See Women, Work and Wages, supra note 17 at 13-43.

82. See, e.g. Women, Work & Wages, supra note 17, at 87-88; Blumrosen, Wage Discrimination, supra note 8, at 496.
The difficulty with that possibility is that the marginal revenue of labor in complex organizations is not practicably measurable. There are two possible substitutes for direct measurement of productivity. The first, identifiable with human capital theory, is that the characteristics of workers (e.g., worker investments in education, job training, and years of work experience), may be used as proxies for estimating the productivity of those workers.

An employer's demand for labor where capital input (technology, land, etc.) is held constant is determined by the additional product output (marginal product) an additional employee (or additional hours of labor) will generate. The value or worth of an employee to the employer is the revenue an employee’s marginal product will bring to the firm (marginal revenue product or marginal product multiplied by market price of the product).

Given the law of diminishing returns, adding employees will at some point actually diminish output. Marginal product will at first rise and later decline as labor is added. Total product output will increase until marginal product becomes negative. Total product output then declines.

If labor is free, the employer will hire up to the point at which marginal product is zero. Under conditions of perfect competition, the employer will stop hiring at the point at which the market determined wage rate for an additional employee exceeds that employee’s marginal revenue product, and all employees actually hired will therefore be compensated at a rate not in excess of the marginal revenue product of the last employee hired. Excess marginal product (the higher marginal product generated by employees hired earlier) becomes a payment to capital services (depreciation, interest and profit). See A. Rees, The Economics of Work and Pay 53-67 (1979); P. Samuelson, Economics 541-44, 546 (10th ed. 1976).

Note that the marginal product theory is a theory of the demand for labor (or other inputs of production) rather than a theory of wages; wages are the product of the interaction of demand and supply. Rees at 54. Moreover, as an explanation of compensation it has been subjected to attack on the theory that institutional phenomena rather than the laws of supply and demand control compensation levels and disparities. See generally A. Tolles, Origins of Modern Wage Theories 51-66, 188-97 (1964); Women, Work and Wages, supra note 17, at 44-68; Darity, The Human Capital Approach To Black-White Earnings Inequality: Some Unsettled Questions, 17 J. Human Resources 72 (1980). However, if for present purposes the capital contribution to output is held constant and the market or artificially imposed wage rate (cost of labor input) is ignored, the value of an employee’s labor is arguably the marginal revenue product (or some average of that product) of an identifiable category of workers minus arbitrarily determined (determined independently of market prices for labor) payment for capital services and raw materials. See Nelson, et al., supra note 33, at 257.

Although human capital investment may be viewed as a determinant of supply, it is possible to estimate the value of work to an employer by utilizing variables identifiable with human capital investment (e.g., education, training and experience variables) as proxies for productivity. Nelson, et al., supra note 33, at 258. On human capital assumptions, the market pays workers for their marginal products and workers with the highest investment in human capital obtain jobs generating higher marginal product. See Darity, supra note 82, at 79; Sobel, supra note 81, at 256-58. On such premises, wage differentials between men and women may be explained, utilizing the statistical technique of multiple regression, in terms of differences in human capital investment: education, experience, training, continuity of participation in the work force, etc. See e.g. Corcoran, Work Experience, Labor Force Withdrawals, and Women's Wages: Empirical Results Using the 1976 Panel of Income Dynamics, in Women in the Labor Market, supra note 66 at 216; Malkiel & Malkiel,
second, identifiable with the managerial science of formal job evaluation, is that the characteristics of work (e.g., the skill, effort, responsibility and working conditions elements of the Equal Pay Act's equal work standard), may be identified and rated for the purpose of comparing the value of distinct work. Further, these characteristics may provide the means for relating the compensation to be paid jobs for which there is no identifiable market rate to jobs for which there is such a rate.

86. See Nelson et al., supra note 33, at 257-60 (raising and rejecting this possibility). Job evaluation systems may be viewed as establishing a means of measuring "worth" by establishing proxy criteria (e.g. skill and effort required by a particular job) for worth and productivity. See note 87 infra. Cf. R. Tolles, supra note 83, at 88 (advocates of scientific management proposed incentive systems based on studies of job tasks which would establish wages consistent with marginal worth). Job evaluation nevertheless appears to define value by focusing upon the nature of job tasks and requirements rather than in terms of productivity as such.

87. Job evaluation systems utilize market rates for "benchmark" jobs for which there is a current market rate, current compensation rates or a priori estimates of value as the definition of value or worth. See Women, Work and Wages, supra note 17, at 71-82; D. Trieman, Job Evaluation: An Analytic View 2-7 (1979) (interim report to EEOC); Schwab, Job Evaluation and Pay Setting: Concepts and Practices in Comparable Worth, supra note 17, at 68; Hildebrand, The Market System, in Comparable Worth, supra note 17, at
The primary difficulty generated by use of either of the foregoing substitutes for the impracticable direct measurement of productivity is that the employer subjected to either standard may not in fact have based its compensation decisions upon the worker characteristics assumed by the human capital theorist or the evaluative judgments utilized by the formal job evaluator. The employer may have relied instead upon its perception of or experience with the market, upon its informal evaluation of the worth of distinct work or upon its guesses about potential and current productivity.\textsuperscript{88}

This difficulty is of course not surprising. Pristine versions of comparable worth theory seek quite candidly to substitute an imposed valuation system for the system used in fact by the employer.\textsuperscript{89} But the difficulty does suggest something essential to the nature of the legal doctrine implicit in all versions of comparable worth theory; that is, the theory is less concerned with identifying what the employer did in fact than with what employers should do. Human capital theory, originally postulated as a theory in explanation of an economic phenomenon, is potentially a normative theory. Workers should be compensated in proportion to their investments.\textsuperscript{90} Job evaluation, often used for the purpose of discovering

\textsuperscript{88-93.} They then seek to relate other jobs to such measure of value by identifying and rating, elements of such different jobs (e.g. skill, effort and working conditions) in relation to identified and rated elements of, e.g., benchmark jobs. In short, the focus is upon the relative character of jobs. Alternatively, a human capital approach utilizes characteristics of workers (e.g., experience and education) as proxies for productivity. See supra note 85. The focus is therefore upon the characteristics of workers rather than the characteristics of work. Both approaches may be viewed as efforts to make concrete the supposition that compensation reflects productivity, but the distinct focus employed by the approaches can be expected to produce distinct estimates of appropriate compensation levels.


\textsuperscript{89.} See infra notes 117-23 and accompanying text.

\textsuperscript{90.} Both approaches are subject to manipulation. In the case of job evaluation, the subjectivity of evaluation requires judgments about which elements of work should be compensated and the relative weight to be assigned to each element. Such judgments cannot be objectively made in the absence of an agreement on some starting point for valuation (such as the market). See \textit{Women, Work and Wages}, supra note 17, at 82. In the case of human capital theory, there is a danger that the use of a productivity proxy, thought of merely as an explanatory variable, will assume a normative aspect. For example, implicit in the use of “years of education” as an explanatory proxy for productivity in a regression analysis is the judgment that all years of education (whether in the form of secretarial school or medical school) are interchangeable. Differences in the “return” on “investment” in years of educa-
and making explicit an employer's ad hoc and informal compensation policy,91 is potentially an instrument for effecting a normative theory. Workers should be compensated at rates commensurate with the formally evaluated character of their work.

Comparable worth theory might seek to utilize the characteristics of workers or the characteristics of work as a means of assessing relative value within either the disparate treatment or the disparate impact doctrines. The question asked by disparate treatment doctrine in this context is whether gender motivated the compensation decision.92 Gender may be said to have motivated the compensation decision if the employer compensated work predominantly performed by females at a lower rate than work predominantly performed by males because the former was predominantly performed by females.93 The human capital or job evaluation techniques for assessing relative value arguably aid in answering the disparate treatment question if a component of a compensation differential between segregated jobs cannot be explained by differences in the human capital characteristics of workers or differences in the evaluated worth of the segregated jobs.94 The disparate gender effect of the employer's compensation decisions generates an inference of disparate treatment to the extent that such an effect cannot be attributed to the legitimate considerations postulated by the techniques.95

91. See TRIEMAN, supra note 87, at 4; WOMEN, WORK & WAGES, supra note 17, at 72.
95. Although disparate consequences raise an inference of illicit motive, Hazelwood School Dist. v. United States, 433 U.S. 299 (1977), such consequences must be of a character which permits an inference that motive explains the consequences. See International Bhd. of Teamsters v. United States, 431 U.S. 324, 358, 358 n.44 (1977); Texas Dept. Community Affairs v. Burdine, 450 U.S. 248, 253-56 (1981). The mere fact of job segregation does not, given the multitude of potential reasons for that segregation, eliminate the most common
The questions asked by disparate impact doctrine are whether a gender neutral employment criterion generates a disparate adverse effect on female workers and whether that effect may be justified by "business necessity." Compensation criteria may be characterized as having a disparate effect if female workers within a firm are, on average, compensated at a lower rate than male workers within that firm. Such a differential is arguably justified by business necessity if based upon considerations judicially approved as furthering legitimate business interests.

In theory, disparate treatment and disparate impact are distinct doctrines. As the doctrines have been stated above, they appear indistinct. Under both, a disparity in compensation not explained by the human capital characteristics of workers or the formally evaluated characteristics of jobs (or by a combination of these considerations) is unlawful discrimination. There are two reasons for this apparent absence of distinction. First, the policy function of the disparate impact doctrine is both in the present context and generally, incoherent. Second, comparable worth theory is inherently a variation on a disparate impact theme, even where it purports to prohibit only illicitly motivated employer compensation decisions.

1. The Policy Functions of Disparate Impact Doctrine

The primary theoretical distinction between the disparate treatment and disparate impact doctrines is that illicit employer motive is crucial under the former doctrine and immaterial under the latter doctrine. Liability is imposed under disparate impact doctrine for inadequately justified disparities in the effect of an employment criterion upon protected race or gender groups, nondiscriminatory reasons for disparities in compensation. 431 U.S. at 358.

96. See, e.g., Smith v. Olin Chemical Corp., 555 F.2d 1283, 1286 (5th Cir. 1977).
regardless of the motivation for adopting the criterion. Although an employer who adopts a gender neutral criterion which will have a disparate adverse effect on female workers may be said to have intended that effect in the sense that the effect was a natural and probable consequence of the use of the criterion, the employer's motive for adopting the criterion may have been (and most probably was) the perceived business interest furthered by the criterion. Because disparate treatment doctrine requires an illicit motive, an employer's use of a gender neutral criterion would have to be shown to be pretextual. More specifically, it must be demonstrated that the employer used the criterion because of rather than despite its effect on female workers to establish liability for disparate treatment. Disparate impact doctrine would, in theory, impose liability if the criterion could not be shown to be sufficiently necessary to furthering the employer's business interests.

The threat of exposure to disparate impact doctrine in effect compels employers to weigh the interests of the gender group which may be adversely affected by a business decision against the business gains anticipated. To the extent that the business necessity defense is more difficult to establish (to the extent that the necessity rather than the mere reasonableness of a business practice must be shown), courts applying the theory are engaged in a similar balancing process. The disparate effect on the protected group is weighed against the economic costs of foregoing a challenged practice. Implicit in such a weighing process is a policy of

ensuring equality of results for groups. On the hypothesis that historical discrimination, both in the sense of overt discrimination and of misallocations of societal resources, is responsible for disparities in the group consequences of current employer actions, the burden of that discrimination is shifted by the doctrine from the group to the employer. On the hypothesis that the objective of equality should be defined as equal achievement for groups, the doctrine effects that objective by precluding practices which generate unequal results for groups.

There is, however, another and potentially inconsistent policy underlying the disparate impact doctrine. Although the foreseeability or inevitability of disparate impact does not establish illicit motive, it is possible to infer that illicit motive is at least one possible explanation of the employer's use of a practice having such an impact. The viability of that inference is, of course, dependent upon whether probable alternative explanations have been eliminated. Moreover, the credibility of an employer's assertion that a gender neutral business practice having a disparate gender impact furthers some business interest is subject to question if the interest is poorly served by the practice. If the business necessity defense requires an employer to establish that its practice is reasonably related to the interest it asserts as the reason for the practice, the defense is a means of assessing the credibility of that assertion. Consequently, the potentially inconsistent policy underlying the disparate impact doctrine is that it provides a means of reaching a disparate treatment issue. It merely takes account of the difficulties inherent in discovering motive in the litigation process by allocating a greater risk of judicial error to employers in the form of a burden of justification - a burden satisfied by meeting more or less rigidly defined judicial standards for employment


practices.\textsuperscript{111}

If this prophylactic policy is assumed as the basis for impact doctrine, both the impact doctrine and the disparate treatment doctrine seek to preclude illicitly motivated employer conduct. The distinction between the doctrines is that disparate impact liability is overinclusive and disparate treatment liability is underinclusive.\textsuperscript{112} While disparate impact doctrine forces employers to adhere to governmentally defined standards of appropriate employment practices because deviation from those standards risks disparate treatment, required adherence is nevertheless an obligation broader than that of refraining from race or gender motivated action. Disparate treatment doctrine forces the plaintiff to establish that an employer's action was illicitly motivated because imposing the burden of justification on the employer would constitute government intrusion into legitimate business discretion. However, imposing the burden of proof on plaintiffs to establish illicit motive in each case nevertheless risks non-discovery of disparate treatment in many cases.

If the sole question underlying a choice between disparate impact and disparate treatment doctrines was the question of over or underinclusive prohibition, the choice would be merely a matter of judgment, based principally on the decisionmaker's relative distaste for judicial intrusion into business practice or the risk of permitting disparate treatment to continue. There is, however, another question underlying that choice. The first policy basis for the disparate impact doctrine postulated here, equal achievement for groups, is as plausible an explanation for the doctrine as an overinclusive prohibition of disparate treatment explanation. The two explanations are equally plausible because they run together and the distinction between them is a matter of degree (largely degree of the employer's burden of justification).\textsuperscript{113} Disparate impact doc-


\textsuperscript{112} Compare Texas Dept. Community Affairs v. Burdine, 450 U.S. 248 (1981) (employer need only produce evidence of a legitimate non-discriminatory reason for its actions to rebut a prima facie case); Furnco Constr. Co. v. Waters, 438 U.S. 567 (1978) (employer need only articulate a non-discriminatory reason for its action; it need not adopt criteria which will have the least adverse effect on minorities) with Dothard v. Rawlinson, 433 U.S. 321 (1977) (employer must use less burdensome alternative criterion to satisfy business necessity defense); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975) (employer must satisfy rigid requirement of EEOC guidelines on selection procedures to establish job relatedness of employment examination).

trine is incoherent because the courts have failed to make explicit which policy objective takes precedence and to therefore provide a guideline by which judgments concerning this matter of degree may be made. The second question underlying the choice is therefore whether the policy of equal achievement, implicit, in degree, in the choice of an impact doctrine, is an acceptable policy in the context in which the choice is to be made; here, in the context of compensation.

2. Comparable Worth Theory As Disparate Impact Doctrine

It cannot be said that there is a single identifiable legal theory of "comparable worth." Rather, there are distinct theories which share common themes. As the comparable worth label implies, one such common theme is that compensation is to be based upon the relative value of distinct and unequal work. A second common theme is that compensation rates established by the market for work predominantly performed by female workers are tainted by discrimination. There are three identifiable theories for implementing these themes in the legal process. It is the thesis here

(Burger, C.J., dissenting).

114. The 5-4 split on the Supreme Court in Connecticut v. Teal, 102 S. Ct. 2525 (1982) suggests that there are rather substantial differences of opinion on the Court about the function of disparate impact doctrine. Moreover, the Court's recent efforts to enforce a strict and disciplined interpretation of disparate treatment doctrine, Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981), appear superfluous if the scope of operation of disparate impact doctrine is not confined. The instant an employer articulates a nondiscriminatory reason for its actions in a disparate treatment case, it subjects that reason (if the reason has a disparate impact on protected groups) to disparate impact attack.


116. It is possible to identify other arguments as comparable worth arguments which are outside the scope of the present discussion because they entail calls to action independent of theories of legal liability. The most promising of such theories is that economic power, e.g., the power of unions in the collective bargaining process, can and should be used to force employers to adopt standards for making compensation decisions which will not result in disparate gender impact. Cf. Newman & Vonhoff, supra note 8, at 318-19 (advocating litigation by unions but also arguing that unions may avoid exposure to litigation by seeking changes through collective bargaining); id. at 321-22 (recounting successful bargaining and strike efforts on part of A.F.S.C.M.E. against the city of San Jose, California); A. Wood, A Theory of Pay 223-39 (1978) (advocating a more sophisticated but essentially similar approach of forcing employer-employee negotiation over "relatives"—normative beliefs about relative fairness of pay). Upon the assumptions that such efforts are directed to remedying differentials without reliance upon gender as a remedial device, they would not raise the questions presented by United Steelworkers v. Weber, 443 U.S. 193 (1979). There are also potential means of employing economic power to achieve comparable worth ends independently of collective bargaining. See NAACP v. Claiborne Hardware Co., 102 S. Ct. 3409 (1982).
that each such theory is, in operation, a disparate impact theory.

a. Government Evaluation of the Comparable Worth of Unequal Work

The most obvious comparable worth theory is the notion that the government should regulate employee compensation by requiring equal pay for work of equal value and pay proportionate to the relative values of work of unequal value. A direct means of regulation would simply mandate formal job evaluation in compliance with government standards for such evaluation.\textsuperscript{117} A potential indirect means of accomplishing the same end by judicial lawmaking following Gunther is simply to borrow the proof scheme of disparate impact doctrine in which the disparate effects of neutral employment criteria must be justified by "business necessity." In the present context, employer reliance upon different market rates for unequal work or upon informal job evaluation is reliance upon neutral criteria having a disparate effect.\textsuperscript{118} That effect must be justified by reference to some judicially imposed standard of appropriate employment practice, e.g., formal job evaluation or a combination of job evaluation and differences, as between male and female workers, in average human capital investment.\textsuperscript{119} There

\textsuperscript{117} This means was proposed to and rejected by the congress which enacted the Equal Pay Act. See supra note 2. For proposals to impose formal job evaluation on employers, see Gasaway, Comparable Worth: A Post-Gunther Overview, 69 Geo. L.J. 1123, 1155-59 (1981); Note, Equal Pay, Comparable Work and Job Evaluation, 90 Yale L.J. 657, 674-80 (1981).

\textsuperscript{118} Such reliance adversely affects female workers as they disproportionately staff lower paying jobs. See Women, Work and Wages, supra note 17, at 24-41; Blumrosen, Wage Discrimination, supra note 8, at 460-61; Newman & Vonhoff, supra note 8, at 289-91.

Such a mandate was apparently the plaintiff's theory in Lemons v. City & County of Denver, 620 F.2d 228 (10th Cir.), cert. denied, 449 U.S. 888 (1980). There plaintiff nurses sought to force the defendant city to abandon a system in which nurse compensation was determined by reference to the private sector market rate for nurses and to compare instead city nurses' compensation with the market determined rate for other (male-dominated) professions. In effect, then, the plaintiff's theory sought to substitute a male-dominated professional's market rate criterion for the city's "nurse market rate" criterion as an appropriate measure of the relative contribution of nursing jobs to the city.

\textsuperscript{119} For reliance upon job evaluation and multiple regression as a basis for inferring a discrimination component, see Women, Work and Wages, supra note 17, at 82-89. For reliance upon productivity proxies (worker characteristics, e.g. years of education) and multiple regression as a basis for inferring a discrimination component, see, e.g., id. at 17-24; Oaxaca, supra note 81. Multiple regression as a statistical tool for identifying disparate treatment is more fully explored at text and notes 199-246 infra.

Although each approach is framed in terms of contentions that existing devices are tainted by discrimination or are so subjective as to risk discrimination, neither relies upon proof in individual cases that an employer has used gender as a reason for its compensation
is a clear precedent for such judicial lawmaking. Employment tests (and perhaps other employee selection criteria as well) which generate disparate selection rates by race or gender must be shown to be job related within the meaning of the rather strict standards of the industrial psychologists.\textsuperscript{120}

The rationales for either direct or indirect regulation of compensation are presumably the rationales for the disparate impact doctrine. An overinclusive prohibition is necessary if disparate treatment is to be detected and eradicated,\textsuperscript{121} and substantial disparities in the compensation paid male and female workers as groups are to be eliminated.\textsuperscript{122} The arguments against regulation, on the other hand, are arguments against the disparate impact doctrine. Overinclusive regulation abrogates both business discretion and the market mechanism, and the claim that compensation differentials between male and female workers as groups are inequitable erroneously assumes that equal results as between gender groups is a legitimate governmental objective.\textsuperscript{123}

A theory of direct or indirect regulation of compensation is, however, merely the most obvious and candid means of adopting a disparate impact approach. Less obvious and less candid comparable worth theories are equally disparate impact theories.

\textit{b. Presumed Discrimination}

It has been argued that illegal compensation discrimination should be presumed from "job segregation."\textsuperscript{124} Job segregation, decisions. Both approaches therefore adopt what is in effect a disparate impact theory. Employer reliance upon facially gender neutral criteria for decision is to be precluded on the ground that the observed effect of such reliance is a difference in average earnings between males and females as groups. \textit{See Women, Work and Wages, supra} note 17, at 13-43, 71-82.


\textsuperscript{121} \textit{See} Women, Work and Wages, \textit{supra} note 17, at 77-78 (existing formal job evaluation systems are too subjective and therefore permit covert discrimination).

\textsuperscript{122} \textit{See} Women, Work and Wages, \textit{supra} note 17, at 41-42 (evidence of existing pay inequity); Blumrosen, \textit{Wage Discrimination, supra} note 8, 460-61 (wage disparities indicate "discrimination" where discrimination is defined broadly to apparently mean, somewhat circularly, wage disparities between jobs segregated \textit{de facto}).

\textsuperscript{123} \textit{See Nelson et al., supra} note 33, at 383-85.


The primary advocate of a presumption analysis is Professor Ruth Blumrosen: "wage discrimination" should be presumed from "job segregation" and the burden should therefore
under this theory, means de facto job segregation so that the mere fact that some jobs are staffed predominantly by males and some jobs are staffed predominantly by females warrants a presumption that a compensation differential between the jobs is illicit.\textsuperscript{128} Although an employer may rebut this presumption by establishing that the differential is attributable to "legitimate considerations," neither reliance on the "tainted" market rate nor reliance upon inevitably subjective employer sponsored job evaluation is a legitimate consideration.\textsuperscript{128} The chief proponent of this presumption theory, Professor Ruth Blumrosen, contends that the theory is not a comparable worth theory because it does not rely upon government evaluation of relative worth.\textsuperscript{129} Such a government evaluation occurs only at a remedy stage under her proposal; liability is a function of de facto segregation and of the risks of discrimination inherent in employer reliance upon the market or upon subjective evaluation.\textsuperscript{129}

Two points should be noted concerning the Blumrosen thesis.

fall on the employer to prove that a wage differential between jobs "segregated" by gender was based on legitimate factors other than sex. Blumrosen, Wage Discrimination, \textit{supra} note 8, at 441-57, 459, 468. Blumrosen denies that such an analysis is a "comparable worth" analysis because it does not rely upon any attempt at measuring, by government imposed standards, the "worth" of comparable jobs. Blumrosen, \textit{Wage Discrimination and Job Segregation: The Survival of a Theory}, 14 U. Mich. J.L. Rev. 1 (1980). Indeed Blumrosen attacks job evaluation systems as subjective and as therefore themselves tainted by gender prejudice. Blumrosen, supra note 8, at 428-41.

125. \textit{See} Blumrosen, \textit{Wage Discrimination}, \textit{supra} note 8, at 457-65. Although Blumrosen characterizes job segregation as establishing a prima facie case, \textit{id.} at 468, "segregation" is not defined in Blumrosen's theory as intentional segregation by employers on the basis of gender. That is only one of a number of possible explanations of job segregation. \textit{See id.} at 462; Nelson, \textit{et al.}, supra note 33, at 253-64. Moreover, Blumrosen would apparently require a business necessity defense where a plaintiff proceeds on an impact theory, Blumrosen, \textit{Wage Discrimination}, \textit{supra} note 8, at 463, 465, 490, a notion inconsistent with any requirement that intentional job segregation be established.

The difficulties with the Blumrosen thesis lie in her use of the terms "discrimination" and "segregation". "Discrimination" is a hypothesis derived from the inference Blumrosen wishes to make from "segregation," and "segregation" means the presence of jobs in an employment system some of which are disproportionately staffed by males and some of which are disproportionately staffed by females. "Segregation" does not, in the Blumrosen analysis, mean proven job assignment motivated by gender. As a consequence of these understandings of the terms discrimination and segregation, it is not clear whether Blumrosen is advocating a disparate treatment theory or a disparate impact theory. \textit{See} Nelson, \textit{et al.}, \textit{supra} note 33, at 237, 283, 284. Compare Blumrosen, \textit{Wage Discrimination}, \textit{supra} note 8, at 460 (job segregation established prima facie case of disparate treatment) with Blumrosen, \textit{Survival of a Theory}, \textit{supra} note 124, at 1 (depressed wage rate is an "effect" of job segregation within the meaning of Griggs v. Duke Power Co., 401 U.S. 424 (1971)).

128. \textit{Id.}
First, the claim that the theory is not a comparable worth theory is disingenuous. The supposed distinction between liability and remedy is spurious where liability is presumed from de facto segregation and the employer is precluded from relying on the chief mechanisms for establishing compensation. In essence, a disparate impact theory. Second, the theory is, in essence, a disparate impact theory. In form, the theory may be characterized as relying upon an inference of illicit motive arising from a disparity in consequences. It may be inferred that a compensation differential between segregated jobs arises because the jobs are segregated. That inference is, however, extremely weak. There are many and obvious alternative and facially gender neutral explanations for such a differential, including distinct market rates for dissimilar work, differences in average human capital investment of the workers engaged in dissimilar work, and differences in the formally or informally valued worth of dissimilar work. Nor can the theory’s reliance upon job segregation be said

129. Professor Blumrosen argues that her theory—a theory which presumes discrimination from de facto job segregation—does not entail a problem of comparison because any comparison judiciously undertaken under that theory occurs at a remedy stage rather than liability stage of adjudication. Blumrosen, Survival of a Theory, supra note 124, at 3-4. It is true that a theory which presumes wage discrimination from de facto job segregation is distinguishable in form from a theory which grounds liability upon an employer’s failure to comply with an externally mandated standard of valuation. It is, however, not distinguishable in substance for two reasons. First, to the extent that the presumption is rebuttable by proof of employer “justification,” an external standard of justification is, in operative effect, an externally imposed standard of valuation. See id. at 6-7 (employer should have burden of establishing “legitimate” reasons independent of sex for a differential once segregation is shown). If all that need be shown in rebuttal is a gender neutral basis for decision, such an externally imposed standard amounts in theory to a disparate treatment prohibition despite an allocation of the burden of proof (presumably a burden of persuasion) to the employer. In that event, Blumrosen is quite right in distinguishing her theory from “comparable worth” theory. It is, however, not at all apparent that the “legitimacy” of the employer’s reasons asserted in rebuttal is to be measured by reference to a disparate treatment standard. Blumrosen’s repeated references to impact theory and her refusal to permit employer reliance on either market rates or employer developed (and facially gender neutral) evaluation systems suggest that in fact an externally imposed “objective” standard of valuation is mandated by her theory. See id. at 2, 4, 7.

Second, shifting the external standard problem from a liability to a remedy stage of judicial proceedings, id. at 4, does not establish that no externally developed standard of value is imposed where liability is presumed from de facto segregation. The presumption, particularly where the presumption is made difficult to rebut, makes the distinction between an issue of liability and an issue of remedy a matter merely of labels.

130. See Blumrosen, Survival of a Theory, supra note 124, at 1.

131. See Nelson et al., supra note 33, at 244-64. The difficulty with an argument that reliance upon the market or upon internal evaluation in “job segregation” circumstances should be treated as reliance on gender is that the factual predicates for such a treatment are missing. Pregnancy is legitimately treated as synonymous with gender because it is a biological fact that only females are capable of becoming pregnant. General Electric Co. v.
to warrant a legitimate inference of disparate treatment. The job segregation relied upon is not job segregation shown in individual cases to be the product of gender based job assignments. It is, rather, de facto job segregation which is as explicable by reference to differences in job application and human capital investment decisions of male and female workers as to conduct on the part of employers. 132

Moreover, Professor Blumrosen’s rejection both of formal and informal job evaluation and of market rates as legitimate employer defenses renders her theory a disparate impact theory. The market is rejected on a taint hypothesis, but, as was previously argued here, that hypothesis relies as much upon the notion that past societal discrimination has affected the decisions of female workers as it does upon the unproven notion that there are frequent occurrences of job assignment discrimination by employers. 133 The presumption theory, therefore, rejects the market because of its disparate effect, not because employer reliance on the market constitutes illicit motivation. Job evaluation is rejected by Professor Blumrosen not because gender is shown in a particular case to have been included in the evaluation, but because the subjective character of even formal job evaluation risks disparate treat-

Gilbert, 429 U.S. 125, 162 (1976) (Stevens, J., dissenting). A longevity criterion is legitimately treated as synonymous with a gender criterion where there has been a factual finding that longevity was calculated by reference to gender. See City of Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. 702, 712-13 (1978). Reliance upon the market is not factually reliance on gender unless it can be established that the market relies upon gender. There is a theory that gender has tainted the market, but that theory relies largely on the propositions that historical (and non-remediable) discrimination in hiring and self-selection by females both in making human capital investment decisions and in making job choices has distorted supply and demand. See Blumrosen, Wage Discrimination, supra note 8, at 445-54. To the extent that the theory relies on current hiring and assignment discrimination on the part of employers, discrimination prohibited by Title VII, the extent to which such discrimination, in fact, affects labor market rates is uncertain.

Whether historical conditions and female self-selection should be viewed as sufficient to warrant the conclusion that the market is synonymous with gender is a policy judgment which must take into account the fact that such a judgment would result in a radical reordering of the American economy. See Nelson, et al., supra note 33, at 288-97. That policy judgment is best addressed by Congress. Cf. Meltzer, The Weber Case: The Judicial Abrogation of the Anti Discrimination Standard in Employment, 47 U. Chi. L. Rev. 423, 457-59 (1980) (making a similar argument favoring reference to Congress with respect to “voluntary” affirmative action). A conclusion that reliance on job evaluation should be treated as reliance on gender rests on a similarly speculative factual foundation. It is the “risk” of disparate treatment inherent in subjective judgment rather than the occurrence of disparate treatment which is the ground for the conclusion. See Blumrosen, Wage Discrimination, supra note 8, at 434-41.

132. Nelson et al., supra note 33, at 239.
133. See supra notes 64-74 and accompanying text.
The presumption theory, therefore, rejects job evaluation from a perceived need for an overinclusive prohibition which will catch in its net otherwise undetected disparate treatment. In short, the primary and gender neutral grounds for rebutting the inference of discrimination presumed from de facto segregation are rejected either because they are outweighed by the adverse consequences of their use or because the possibility of undetected employer manipulation is thought to be too great. These reasons for rejection are also central to disparate impact doctrine.

Adoption of the presumption theory would have consequences equally congruous with disparate impact doctrine. The proposed remedy for discrimination presumed from de facto job segregation is an increased compensation rate paid for jobs predominantly

134. See Blumrosen, Wage Discrimination, supra note 8, at 434-41. Upon the assumption that both the market and internal job evaluation systems are gender neutral, those systems have a disparate impact upon jobs disproportionately staffed by women because they operate to perpetuate past (and often non-remediable) hiring discrimination and because female self-selection in making human capital investment decisions and job selection decisions operates to depress wage rates in such jobs. The employer "rebuttal" contemplated by Professor Blumrosen becomes, in effect, a business necessity defense. The employer's compensation decision must be shown to be "job related" in the sense that it is based upon differences in the worth or productivity of different jobs. See Griggs v. Duke Power Co., 401 U.S. 424 (1971). Compare Nelson, et al., supra note 33 at 280 (Blumrosen's presumptions in effect irrebuttable) with Blumrosen, Survival of a Theory, supra note 124, at 6 (presumption is not irrebuttable).

The disparate impact interpretation of the Blumrosen thesis explains the primary points of difference between Blumrosen's own view of her theory in Survival of a Theory and the Nelson, Opton and Wilson critique of that theory. Nelson, et al. complain that there is no available means by which to determine what, if any, portion of a compensation differential is attributable to gender. Nelson, et al., supra note 33, at 253-60. Blumrosen argues that such an issue is a matter of calculating a remedy. Blumrosen, Survival of a Theory, supra note 124, at 4-5. The former complaint assumes that disparate treatment is the appropriate conceptual scheme for analysis. The issue is what, if any, part of a compensation differential is attributable to gender. Because that question cannot be answered except by reference to a disparate impact methodology (the methodology of imposing government standards on employer decision-making in place of an inquiry into motivation) it is, for Nelson, Opton and Wilson, an improper inquiry. The Blumrosen response assumes that disparate impact is the appropriate scheme for analysis because it assumes liability from effect without reference to whether any component of a differential is attributable to gender. The gender component is presumed from disparate staffing patterns in combination with employer reliance on presumptively tainted compensation criteria. See Briggs v. City of Madison, 536 F. Supp. 435, 445 (W.D. Wis. 1982). The effect of accepting such a presumption is to encourage employers to equalize compensation without reference to their perceptions of productivity. (A rebuttal burden, whether or not Blumrosen's presumption is irrebuttable, entails substantial expense). The presumption therefore accomplishes at least one of the potential objectives underly- ing the disparate impact model; i.e., equal attainment for groups. See generally Fiss, supra note 108. Blumrosen's theory is on these premises a comparable worth theory. Government policy regarding the appropriate distribution of societal resources is substituted for employer decisions regarding comparative productivity of different jobs.
staffed by females. The new rate is to be set as a percentage of the rate paid for jobs predominantly staffed by males and presumably one justified by "legitimate" considerations, i.e., those approved by a court.\textsuperscript{135} In short, female workers as a group are to be granted a right to an increased share of the compensation currently enjoyed by male workers as a group on the ground that female workers are presently receiving an inadequate share of the compensation pie.

c. \textit{Disparate Impact in Disparate Treatment Clothing: The Viability of An Inference of Illicit Motive From Proof of an Unexplained Differential}

As previously indicated here,\textsuperscript{136} a plaintiff might seek to utilize job evaluation or human capital productivity proxies within the framework of a disparate treatment theory. If it can be established (for example, by means of a job evaluation analysis or by means of an analysis of productivity or by means of a combination of these analyses) that a compensation differential between unequal male and female jobs within a single firm has both a value component\textsuperscript{137} and an unexplained component\textsuperscript{138} an inference of disparate treatment arises. The unexplained component is potentially attributable to gender. There are two difficulties with this argument. The first is that the inference of disparate treatment is dependent upon the reliability of the technique used to predict the value component of the differential. It therefore suffers from defects in the reliability of the technique and from the absence of an uncontroversial understanding of value. The second difficulty is that the unexplained component of the differential is potentially attributable to considerations distinct from illicit motive and not accounted for in the analysis of the characteristics of work and productivity of

\textsuperscript{135} See Blumrosen, \textit{Wage Discrimination}, supra note 8, at 420-21, 460-65.

\textsuperscript{136} See supra notes 94-95 and accompanying text.

\textsuperscript{137} By value component, I mean that the differential is explained, in part, by a difference in either the value of the employee's work or the economic value of the contribution made by the employee to the employer. Notice that, to the extent that the employer has not based its compensation criteria explicitly on some measure of the value of work or economic contribution, the value component is in fact a component measured by externally imposed standards of value.

\textsuperscript{138} By unexplained component, I mean that portion of a differential not attributable to the difference in value predicted by the technique (scheme for measuring value of work or economic contribution of workers) used. For example, differences in return on human capital investment between male and female workers where investment has been held constant is an unexplained differential. See \textit{Women, Work \& Wages}, supra note 17, at 18-19, 40-43; see infra notes 230 and 233.
workers.\textsuperscript{139}

To the extent that the technique employed fails to account for all explicit or implicit causes of actual compensation rates, it will attribute the influence of such missing and gender neutral variables to illicit motivation.\textsuperscript{140} To the extent that any technique not voluntarily adopted by an employer is judicially imposed for purposes of identifying a gender component of a wage differential, the definition of value underlying the technique is in degree imposed on the employer. The unexplained component of the differential is unexplained only in the sense that the valuation assumptions of the human capital or job evaluation technique utilized do not explain the component. This difficulty would be obviated merely by permitting employer rebuttal once the inference derived from the unexplained component arises were it not for a more fundamental version of the difficulty. Unless the employer has itself conducted a job evaluation or human capital productivity study and has chosen to pay an "unexplained" component of the differential,\textsuperscript{141} it is not more probable than not that the unexplained differential represents illicit motive. Absent that circumstance, it is as probable that the unexplained component of the differential represents the employer's bad guess concerning value, a guess which is "bad" only in the sense that it failed to conform to the assumptions of the plaintiff's job evaluation or productivity study.

If employer rebuttal is not permitted, judicial reliance upon unexplained components of a compensation differential to infer disparate treatment would impose a disparate impact theory. Such a reliance imposes a disparate impact theory because it finds unlawful a disparate effect of the employer's actions not explained by the gender neutral considerations proposed by a plaintiff and implicitly approved by a court as legitimate measures of differences in the value of work. Employer rebuttal (in the form of a proposal that additional gender neutral considerations explain the component of a differential unexplained by the plaintiff's analysis) might be precluded either because such additional considerations are thought to risk disparate treatment or because employer reliance on such additional considerations is thought unwarranted by the


\textsuperscript{140} See, e.g., WOMEN, WORK & WAGES, supra note 17, at 19; Milkovich, supra note 81, at 40-42; Chipkin, supra note 66, at 254-58.

employer's business interests. Such judicial reasoning is central to disparate impact doctrine, as well.

These difficulties are in degree eliminated where the statistical procedure relied upon by this version of comparable worth theory, multiple regression, includes as an explanatory variable, the gender status of employees. In that event, judicial reliance is placed on the influence on compensation attributed by the procedure to gender rather than upon the inference of illicit motive arising from a gross unexplained component of a differential. But even this step potentially imposes a disparate impact theory. To the extent, for example, that gender neutral considerations correlated with gender (job differences are correlated with gender where jobs are segregated de facto) are omitted from such an analysis, the procedure will attribute the influence on compensation of the omitted consideration to the gender status variable. This and other difficulties with post-Gunther reliance upon multiple regression as a means of detecting

142. The addition of a dummy variable for gender to a regression equation permits an estimation of the average compensation difference between gender groups where gender neutral influences on compensation selected by the researcher are held constant. See Fisher, Multiple Regression in Legal Proceedings, 80 COLUM. L. REV. 702, 722-24 (1980). Omission of a variable which influences compensation will bias that estimate if the omitted variable is correlated with gender. BALDUS & COLE, supra note 51, at 273. Moreover, the imperfect character of the gender neutral variables selected by the researcher as measures of productivity or merit (years of education as an explanatory variable may be only imperfectly related both to true productivity and to the employer's good faith guess regarding productivity) will result in a similar bias. See COMPARABLE WORTH, supra note 17 at 183-92; Finkelstein, The Judicial Reception of Multiple Regression Studies in Race and Sex Discrimination Cases, 80 COLUM. L. REV. 737, 747-49 (1980).

To the extent that an employer may be required to disprove discrimination by establishing both that omitted variables reduce or eliminate an estimate of an average compensation difference between gender groups and that the omitted variables are reasonable or necessary considerations in making compensation decisions, a form of business necessity defense is imposed on the employer. For example, WOMEN, WORK & WAGES, supra note 17, at 85-86, 85 n.8 advocates use of "percent female" as an independent variable in a regression equation used to derive factor weights for job evaluation, but further contends that employers should have the burden both of rebutting the "percent female" influence on compensation estimated by the equation and of establishing that alternative factors not accounted for as independent variables in the equation are reflected in the residual and should have been considered.

To the extent that an employer has specified its criteria for decision and to the extent that the criteria selected are quantifiable, it is of course possible to measure whether the employer has applied the criteria consistently as between male and female employees. It is however often the case that employers have not specified their criteria for making compensation decisions. Rather, they make guesses regarding the productivity or estimated productivity of employees. See, Gwartney, et al., supra note 88, at 657 n.68, 658. Cf. WOMEN, WORK & WAGES, supra note 17, at 72 (employers often use job evaluation to identify or "capture" current wage policy); Roberts, Statistical Biases, supra note 88, at 180-90.
disparate treatment are explored at a later point in this article.\textsuperscript{143} It is important for present purposes to recognize, however, that reliance either upon an unexplained component of a differential or upon a regression analysis which omits gender neutral considerations correlated with gender risks a legal prohibition distinct in scope and character from a prohibition of disparate treatment.

B. The Policy Basis For the Equal Work Standard and its Relationship To Comparable Worth As A Theory

The equal work standard of the Equal Pay Act is inexplicable from the normative premises of a disparate treatment prohibition. Although unequal pay for equal work raises a strong inference of disparate treatment, the equal work standard permits explicit gender based decision whenever jobs are unequal.\textsuperscript{144} The equal work standard must therefore be explained in terms of competing values which are independent of the logic of a disparate treatment prohibition.

The legislative history of the Equal Pay Act discloses three such independent and competing values. First, the analytical tools necessary for an independent evaluation of issues of comparative compensation were thought to be unavailable. Employer use of the tools available was authorized by Congress within the rubric of the equal work standard as a means of permitting maximum flexibility to employers, but it was made clear that government was not to impose job evaluation except as a means of determining the equivalency, rather than comparability, of work.\textsuperscript{145} Second, Congress wished to preclude judicial and administrative intrusion into the exercise of business discretion. Although Congress clearly wished as well to preclude disparate treatment,\textsuperscript{146} the inadequacy of analytic tools for making compensation comparisons rendered it impossible to confine government inquiry on the basis of such tools to disparate treatment issues. It therefore adopted the equal work standard for the explicit purpose of limiting the discretion of en-

\textsuperscript{143} See infra text accompanying notes 197-246.


\textsuperscript{146} Even advocates of the application of disparate impact theory under the Equal Pay Act concede that the congressional understanding of the discriminatory evil targeted by the Act was disparate treatment. See Sullivan, Zimmer & Richards supra note 10, at 624. But see id. at 618.
forcement agencies.\textsuperscript{147} Third, Congress sought to preclude judicial circumvention of the market and of industrial practice unrelated to the practice of gender motivated decision because it viewed the adjudication process as an inadequate means for making the judgments which would be required by abrogation of the market and of industry practice.\textsuperscript{148}

In sum, then, Congress explicitly rejected comparable worth proposals because it both doubted the viability of comparable worth as a manageable construct and wished to preclude government intrusion into private compensation decisions except where such an intrusion could be undertaken for the purpose of discovering and prohibiting disparate treatment and could be narrowly confined to that purpose. Indeed, these considerations were viewed as of sufficient importance to cause Congress to compromise the objective of prohibiting disparate treatment and to therefore risk the occurrence of disparate treatment by enacting the equal work standard.

Despite this recitation of the purposes underlying the equal work standard and the importance of that standard to the Congress which enacted the Equal Pay Act, it is not apparent that all potential theories of compensation discrimination which fail to assume as a premise the equality of work, give rise to the evils Congress sought to avoid by the equal work standard. It is of course apparent that Congress intended the equal work standard as a prophylactic. The regulatory evils at which the standard was targeted were not to be risked in litigation under the Equal Pay Act.\textsuperscript{149} It is


\textsuperscript{148} [The intent is to provide] a maximum area for interplay of intangible factors that justify a measurement which does not have to be given a point-by-point evaluation. In this concept, we want the private enterprise system, employer and employees and a union, if there is a union, and the employer and employees if there is not a union, to have a maximum degree of discretion in working out the evaluation of the employee's work and how much he should pay for it.


\textsuperscript{149} See 109 CONG. REC. 9196 (Rep. Frelinghuysen); 109 CONG. REC. 9208 (Rep. Goodell); Id. at 9209.
nevertheless possible to postulate claims of disparate gender treatment in compensation decisions which would not be objectionable from the policy premises underlying the equal work standard.

It is possible to postulate such claims because the policy premises underlying the equal work standard are premises concerning the character of the evidence which might be used to establish disparate treatment. Comparisons of worth or value as a means of proof were rejected by Congress because such a means risked over-inclusive prohibition. Comparison threatened to substitute government developed standards of compensation for a narrow prohibition of disparate treatment. That threat was a risk inherent in comparisons of value or worth because, although such comparisons may generate an inference of disparate treatment, reliance upon them as a means of approximating a disparate treatment prohibition too easily becomes in the litigation process a substitution of government judgment for business judgment.

It should be apparent that each of the versions of comparable worth theory postulated here suffers from the evidentiary evils targeted by the equal work standard. To the extent that any such theory proposes a substitution of any job evaluation or productivity analysis for an employer's existing decisionmaking process, it constitutes precisely the regulatory evil targeted by the equal work standard. To the extent that any such theory proposes that discrimination be presumed from reliance upon the market or upon the assumed occurrence of disparate treatment in hiring or assignment decisions, it indirectly contravenes the policies underlying the equal work standard by proposing what is, in effect, a disparate impact theory and by necessitating government imposed compensation standards as a remedial device. Reliance upon unexplained components of a compensation differential discovered by means of independent job evaluation or human capital valuation similarly risks imposition of a disparate impact prohibition.

A disparate impact theory is inconsistent with the policies underlying the equal work standard because it is, by definition, a theory precluding unjustified use of gender neutral criteria for decision and because justification requires reference to an externally imposed standard for assessing justification. Any presumption of

150. Note, again, that such a substitution could occur either by means of a directly mandated adherence to an externally developed standard for the determination of compensation or by means of the subterfuge of imposing a justificatory burden on an employer to be met by reference to an externally imposed standard.

151. See, e.g., Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); Griggs v. Duke
discrimination in compensation necessitating an adjustment to compensation rates as a remedy for that discrimination requires reference to a judicially imposed standard, an arbitrarily imposed standard, for measuring an appropriate level of comparative compensation.  

Assume, however, the paradigm case of an instance in which evidence of comparability and, therefore, an externally imposed standard of comparison, need not be considered to reach a disparate treatment finding. The employer admits that it would compensate at a higher rate if a job predominantly staffed by females was predominantly staffed by males. The Equal Pay Act's prophylactic

---

152. It has been held that back pay as a remedy for an Equal Pay Act violation is to be calculated by determining the sum a plaintiff (female) would have received "but for" the employer's reliance on gender rather than by determining the difference between the plaintiff's compensation and the compensation paid males holding substantially equal jobs. EEOC v. Whitin Machine Works, 635 F.2d 1095 (4th Cir. 1980); Brennan v. Victoria Bank & Trust Co., 493 F.2d 896 (5th Cir. 1974). Such a holding is, at least facially, internally inconsistent. The finding of liability assumes that a factor other than sex (e.g., experience) is not the basis for a compensation differential, but that same factor (e.g., experience) may be used to discount the plaintiff's recovery where the plaintiff lacks the factor or possesses the factor in lesser degree than a male doing equal work (e.g., the plaintiff has less experience than the male). If the court concludes that a factor "other than sex" was the basis for the differential, a conclusion implicit in the proposition that such a factor should govern the remedy issue, there should be no liability. EEOC v. Whitin Machine Works, 635 F.2d 1095, 1101 (4th Cir. 1980) (Widener, J., concurring and dissenting). If the court concludes that the differential was based on sex (the defendant failed to establish an affirmative defense), a remedy which takes into account a "factor other than sex" amounts to an imposition of a comparable worth standard. Consequently, the employer's compensation system is restructured to reflect the court's view of an appropriate valuation of that factor. See id. at 1100 (Winter, J., concurring and dissenting).

A solution to this dilemma is, of course, the theory that a component of the differential is attributable to gender (that component being sufficient to preclude a successful affirmative defense) and a second component of the differential is attributable to a gender-neutral factor (e.g., experience). Compensation is a continuous outcome, unlike a hiring decision involving a dichotomous outcome. See D. BALDUS & J. COLE, supra note 51, at 12. It is therefore arguably subject to analysis distinct from the "but for" causation test applicable to a hiring decision. While portions of a continuous outcome are at least arguably attributable to independent causes, it is not possible to divide a dichotomous outcome into components.

The difficulty with this solution to the dilemma is that the court has no basis for measuring the components of a differential absent proof of an employer's actual use of a gender neutral criterion and proof of that criterion's actual influence on compensation. If, however, the actual influence of an experience variable upon a compensation variable is determinable from evidence of the employer's actual reliance upon experience in establishing male compensation, it is presumably possible to utilize such evidence to calculate a hypothetical experience component of the male-female differential and to make a back pay award on the basis of that hypothesis. See Finkelstein, supra note 142, at 751-53; Note, Multiple Regression Analysis: A Statistical Approach to Assessing and Correcting Salary Inequity, 1982 U. ILL. L. REV. 449.
equal work standard might well preclude a remedy in such a case absent substantially equal jobs staffed by males in the employer’s “establishment.” But preclusion in such a case would be a function of the prophylactic character of the equal work requirement rather than the policies underlying that requirement, and a finding of disparate treatment may be made without reference to an externally imposed standard of value. The question, indeed the question raised by Gunther, is whether the Bennett Amendment to Title VII requires a prophylactic result under Title VII.

III. GUNThER: A PROPOSED INTERPRETATION

A. The Decision: The Court Giveth and The Court Taketh Away

In County of Washington v. Gunther, a county jail employed women as guards in the female section of the jail and men as guards in the male section of the jail. The male guards were paid higher wages than the female guards, but female guard work was found not substantially equal to male guard work. The differential was nevertheless attacked under Title VII on the theory that a portion of the differential was attributable to intentional gender discrimination. The question presented was therefore whether the Bennett Amendment precluded the Title VII claim.

The majority opinion in Gunther narrowly construed the Bennett Amendment by concluding that it incorporated only the Equal Pay Act’s four affirmative defenses into Title VII. The principal effect of this interpretation is to eliminate the Equal Pay Act’s equal work standard as an element of a compensation discrimination claim brought under Title VII. As Justice Rehnquist argued in dissent, this interpretation abrogates the congressional rationale for the Bennett Amendment. The Congress which enacted Title VII sought to avoid by the amendment the repeal of the statutory policies it had adopted a year earlier; principally, the equal work standard.

153. Compare County of Washington v. Gunther, 452 U.S. 161, 179 n.19 (1981) (adherence to the equal work standard under Title VII “would leave remediless all victims of discrimination who hold jobs never held by men”) with id. at 201 (Rehnquist, J., dissenting) (overt discrimination is subject to attack under the Equal Pay Act through proof that a male once holding a plaintiff female’s job was compensated at a higher rate or through an employer concession that he would pay more if a “female” job was occupied by a male).


155. Id. at 168.

156. 452 U.S. at 193 (Rehnquist, J., dissenting). The majority’s response to this point,
The fact remains, however, that Gunther is now the law. The present question is Gunther’s meaning, and that question is, as an initial matter, informed by a rationale which seeks to legitimate the Court’s decision on the basis of a premise that the Court’s task in Gunther was statutory interpretation. Such a rationale is suggested by the earlier discussion here of the policy bases for Equal Pay Act’s equal work standard. That standard was characterized as prophylactic for Equal Pay Act purposes. Its function was to preclude any judicial or administrative attempt at inquiry into issues of comparative value in the guise of disparate treatment theory. Title VII is, however, a different statute. It is true that Title VII’s prohibition of gender discrimination was largely a congressional afterthought not extensively considered by a Congress concerned primarily with racial discrimination. It is equally true that the Bennett Amendment sought to incorporate Equal Pay Act policy into Title VII for purposes of the later statute’s prohibition of gender discrimination in compensation. But the general policy underlying Title VII’s prohibition of gender discrimination, a policy at least inferentially similar to the policy underlying Title VII’s prohibition of racial discrimination, was much broader than the policy which underlay the Equal Pay Act. Disparate treatment was viewed for Title VII purposes as an unmitigated evil to be eliminated.

On these premises, Gunther may be viewed as a judicial attempt at reconciling Title VII’s underlying broader view of the evil to be eradicated with the policy limitations which concerned the Congress which enacted the Equal Pay Act and the Congress which sought to preserve those limitations in Title VII. Gunther is appropriately characterized as a legitimate exercise in statutory construction to the extent that its reconciliation preserves the substance of the Equal Pay Act policies Congress sought to preserve by means of the Bennett Amendment.

That the Gunther Court sought such a reconciliation is sug-

that no senator mentioned the equal work standard in the debate on the Bennett Amendment, assumes its conclusion. Id. at 174 n.13. The inquiry, because senatorial statements were not explicit, was what was meant by the Amendment’s incorporation of the Equal Pay Act.

157. See supra notes 144-48 and accompanying text.
gested by its insistence that the sole issue before it was a claim of “intentional discrimination” to be established by “direct evidence.” The reconciliation itself took the form, however, of the rationale the Court employed in countering an employer argument regarding the Court’s narrow construction of the scope of the Bennett Amendment. The employer argued that an interpretation incorporating only the Equal Pay Act defenses would render the Bennett Amendment superfluous because those defenses are also defenses to Title VII’s prohibitions. The Court’s response to this argument was as follows:

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 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. Equal Pay Act litigation, therefore, has been structured to permit employers to defend against charges of discrimination where their pay differentials are based on a bona fide use of ‘other factors other than sex.’ Under the Equal Pay Act, the courts and administrative agencies are not permitted ‘to substitute their judgment for the judgment of the employer . . . who [has] established and employed a bona fide job rating system,’ so long as it does not discriminate on the basis of sex.

The Court’s reference to Griggs v. Duke Power Co. and its argument that the Equal Pay Act’s fourth affirmative defense, “any other factor other than sex,” was designed to preclude substitution of judicial judgment for business judgment and was a clear rejection of disparate impact theory as an available alternative for litigating claims of gender based discrimination in compensation. It

160. 452 U.S. at 166.
is, moreover, a rejection not subject to circumvention by means of an argument that an issue of disparate impact was not before the Court in Gunther. It may be legitimately argued that the Court's references to the intentional discrimination claim at issue in Gunther and to the plaintiff's anticipated use of "direct evidence" merely reserved the question of comparable worth theory for the future. But the Court's rationale for its claim that the Equal Pay Act's fourth affirmative defense makes a difference for Title VII purposes is the central thread in its interpretation of the Bennett Amendment. Any future approval of disparate impact theory for purposes of attacking compensation decisions necessarily severs that thread and renders Gunther an instance of judicial repeal of an express legislative command. Such an approval would read the Bennett Amendment out of the statute.

On the assumption, then, that Gunther permits Title VII attacks on gender related compensation decisions only by means of disparate treatment theory, the Court's abrogation of the equal work standard was only a partial abrogation. Although abrogation of that standard opened the door to comparable worth theory, an insistence on disparate treatment very nearly closes that door. And both the opening and closing may be said to operate as the legitimate reconciliation earlier postulated here. To the extent that a disciplined application of a disparate treatment theory precludes the forms of judicial inquiry the Equal Pay Act Congress sought to preclude by means of an equal work standard, the substance of the congressional policy expressed by that standard is preserved. At the same time, the broader view of the prohibition of discrimination implicit in Title VII, is given effect. It is true that when Congress enacted the Equal Pay Act it sought a prophylactic standard and that Gunther defeats prophylaxis, but whether that defeat will result in the evils Congress sought to preclude by prophylaxis is dependent upon the discipline with which post-Gunther judicial decisions adhere to disparate treatment as governing conception.

164. See Newman & Vonhoff, supra note 8, at 282.
165. See supra notes 156-58 and accompanying text.
166. This broader view was discussed in Gunther as follows: "In practical terms, [the employer's argument] means that a woman who is discriminatorily underpaid could obtain no relief—no matter how egregious the discrimination might be—unless her employer also employed a man in an equal job in the same establishment, at a higher rate of pay." 452 U.S. at 178.
B. Post-Gunther Application of Disparate Treatment As Governing Conception

At its base, a disparate treatment prohibition is a prohibition of employer action motivated by an illicit basis for decision; in the present context, by gender. It is not a prohibition merely of unwarranted, undesirable, or immoral intent or purpose, but of gender caused decision.167 There may be justifications for the use of gender as a basis for decision, but these justifications take the form of defenses to the application of the prohibition;168 they do not alter the character of the concept underlying the prohibition. It is at the same time apparent that a disparate treatment prohibition is not a prohibition of consequences or even of foreseeable, probable, or inevitable consequences. Illicit motive is not a legal construct synonymous with intent as it is understood, for example, in the law of tort.169

The difficulty presented by disparate treatment as a concept is that the limitations of the adjudicatory process require, in the absence of an employer admission, that a plaintiff be permitted to establish disparate treatment by inference.170 The consequences of employer actions themselves give rise to inferences about the motive for such actions. An employer decision which results in signifi-

168. See 42 U.S.C. § 2000e-2(h) (1976) (bona fide occupational qualification). Courts have on occasion sought to define gender based classifications as gender neutral classifications. See, e.g. General Electric Co. v. Gilbert, 429 U.S. 125 (1976) (exclusion of pregnant persons from employment benefits not disparate treatment); De Santis v. Pacific Telephone & Telegraph Co., 608 F.2d 327 (9th Cir. 1979) (discrimination on the basis of sexual preference is not gender discrimination). It is nevertheless apparent that such cases in fact do entail disparate gender treatment. See Bundy v. Jackson, 641 F.2d 934 (D.C. Cir. 1981); Barnes v. Costle, 561 F.2d 983 (D.C. Cir. 1977). Judicial decisions in such contexts are explicable on the grounds either that competing social values outweigh the usual prohibition of disparate treatment (e.g. social taboos regarding homosexuality outweigh the application of the prohibition in cases in which an employer decides on the basis of an employee's sexual preference) or that a court is operating upon an equal achievement (equality of result) premise rather than an equal treatment (prohibition of disparate treatment) premise. With respect to the latter point, See General Electric Co. v. Gilbert, 429 U.S. 125 (1976) (no prohibited discrimination where women as a group receive benefits equal to those received by men as a group); Connecticut v. Teal, 457 U.S. 440, 456-64 (1982) (Powell, J., dissenting) (there is no disparate impact liability where a racial minority is proportionately represented in a workforce). But see Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. 702 (1978) (gender caused decision is prohibited as disparate treatment even where consequence of ignoring gender in making employment decisions will be unequal benefits for males and females as groups).
170. See supra notes 94-95 and accompanying text.
cantly lower compensation for female employees than for male employees gives rise to an inference that the decision was gender based. Reliance upon inference results, however, in merely an approximation of the disparate treatment concept; absent express or admitted gender based compensation standards, there is always a risk that disparate treatment will be found where it did not in fact occur.

A reliance upon consequences as evidence of illicit motive presents the clearest example of such a risk. An uncritical reliance on consequences risks a prohibition of consequences even where the judicial effort is to prohibit illicit motive.\textsuperscript{171} A disparate impact theory may be viewed as the full realization of such a risk. Such a theory prohibits disparate consequences unless those consequences are justified by "business necessity." "Necessity" entails the substitution of judicial judgment for employer judgment concerning the need for or desirability of grounds for employer decision independent of gender.\textsuperscript{172}

The risk run by the \textit{Gunther} decision's substitution of disparate treatment for equal work as the means by which the congressional policies underlying the equal work standard and the Bennett Amendment are satisfied is the risk that the limitations of the adjudicative process will permit an approximation of the disparate treatment concept which substitutes judicial judgment for employer judgment untainted by gender considerations. If the "any other factor other than sex" defense incorporated by the Court's interpretation of the Bennett Amendment is an affirmative defense for Title VII purposes, that risk is exacerbated.\textsuperscript{173} What follows are analyses of each of six postulated schemes of proof of post-\textit{Gunther} compensation discrimination claims which seek to assess that risk and to therefore suggest which modes of proof are consistent with the proposed rationale for \textit{Gunther}.


\textsuperscript{172} Compare Rowe v. General Motors Corp., 457 F.2d 348 (5th Cir. 1972) (subjective evaluations for promotion found unlawful under disparate impact theory due to risk of disparate treatment) with Nath v. General Electric Co., 438 F. Supp. 213 (E.D. Pa. 1977) (subjective evaluations for professional employees upheld because evaluation is necessarily and inevitably subjective), aff'd, 594 F.2d 855 (3d Cir. 1979).

\textsuperscript{173} See infra notes 272-83 and accompanying text.
1. Independent Evaluative Evidence of the Relative Value of Work

It was earlier argued here that judicial reliance upon a plaintiff's job evaluation or productivity analysis or upon any similar means of determining the relative worth of work for the purpose of measuring employer adherence to such a determination of relative worth is inherently the imposition of a disparate impact standard. Such a reliance is, by definition, the substitution of a standard independent of the basis for decision in fact utilized by the employer.\(^{174}\) It is nevertheless the case that such evidence may in some circumstances give rise to a legitimate inference of illicit motive. If distinct job classifications appear to entail similar but unequal work (as measured by the job evaluation factors stated in the Equal Pay Act's equal work standard) and if those classifications are segregated, de facto, by gender, a substantial compensation differential between the classifications might be inferred, for purposes of a prima facie case, to be a consequence of an employer decision to compensate the female classification at a lower rate because it is staffed predominantly by females.\(^{176}\) The plaintiff's independent evidence of comparative value in such circumstances purports to assess only the credibility of the employer's existing basis for making compensation decisions, and may, therefore, be said to be consistent with a disparate treatment theory.\(^{176}\)

There is, in the use of such evidence, nevertheless a substantial risk of imposing a disparate impact theory. The credibility assessment is made on the assumption that the definition of value or worth assumed by the assessment tool is the appropriate understanding of desirable or necessary business practice. It is therefore crucial both that independent evidence of comparable value be probative of disparate treatment in the circumstance of the particular case and that the employer be permitted to rebut the infer-

\(^{174}\) See supra notes 117-23 and accompanying text.

\(^{175}\) See Briggs v. City of Madison, 536 F. Supp. 435, 445-46 (W.D. Wis. 1982). In Briggs, the district court concluded that a showing of disparities in compensation between job classifications segregated de facto by gender establishes a prima facie case of disparate treatment where the classifications, although unequal, are so similar, in terms of job evaluation factors, that they support an inference that the employer compensated the classification predominately staffed by females at a lower rate because it was predominantly staffed by females. In effect, Briggs interprets Gunther as relaxing the equal work standard and rendering it a similar work standard.

ence of illicit motive generated by such evidence by establishing a credible gender neutral reason for the differential independent of the valuation premises of the evaluative evidence employed by the plaintiff.

Two examples may illustrate these points. An attempt by a plaintiff to utilize a full scale job evaluation to establish the relative value of dissimilar work (rather than the similarity of unequal work) is inconsistent with a disparate treatment theory because such evidence does not suggest illicit motive. It suggests, instead, that the employer has acted with respect to compensation in a manner inconsistent with the presuppositions of the plaintiff's job evaluation. Absent evidence of employer practice consistent with those presuppositions, judicial reliance upon such evidence is, in operation, a judicial insistence upon employer adoption of the presuppositions. With respect to the question of employer rebuttal, a judicial refusal to credit an employer's claimed reliance upon some reason, e.g., the market, independent of job evaluation as the cause of a compensation differential is, in operation, an insistence that the sole legitimate business reason for the differential is job evaluation.

Even within the restrictions suggested by these examples, reliance upon independent job evaluations or upon a relaxed treatment, under Title VII, of the Equal Pay Act's job evaluation factors for establishing the similarity rather than equality, of work entails substantial risks of deviation from the policies underlying the equal work standard. Any difference in jobs is, facially, a gender neutral reason for a compensation differential. The reason that a substantial differential between similar jobs gives rise to an inference of disparate treatment is that the differential does not appear warranted by the differences between jobs, an appearance which is strongest in the case of equal work under the Equal Pay

177. This conclusion follows even if it is assumed that a post-Gunther prima facie case is established simply by proof of compensation disparities and that an employer has the burden of persuasion as well as production in establishing the "any other factor other than sex" defense. In that circumstance, the plaintiff's use of independent job evaluation evidence or of other independent evaluative evidence of worth is presumably an attempt at rebutting the employer's asserted gender neutral reasons for a differential; but the rebuttal is not responsive to the employer's reasons in any case in which the employer did not rely upon the evaluation conducted by the plaintiff. The plaintiff's "rebuttal" is in effect an argument that its evaluation is preferable to the defendant's because it has a lesser impact.

178. Cf. Corning Glass Works v. Brennan, 417 U.S. 188, 204 (1974) (although night shift is not a working condition for purposes of equal work standard, it is, if bona fide, a factor other than sex).
Act's equal work standard. The strength of that inference in a case in which a court analyzes a compensation differential between similar and unequal jobs is a function of the court's willingness to question the credibility of the employer's claim to good faith assessment of the importance of the differences between those jobs. That willingness should be informed by a recognition that it is often dealing with an employer's guess regarding the importance of differences. It is not the court's task under a disparate treatment theory to determine whether a differential is warranted by its view of the importance of differences. Rather, it is the court's task to determine whether a differential apparently unwarranted by the importance of differences justifies even a tentative inference that the differential was motivated by gender.

Similar conclusions follow if the claim made is that the job evaluation system in fact utilized by an employer is discriminatory. An evaluation system which relies upon subjective judgment may and often does have a disparate impact on females. Jobs predominantly staffed by females are often compensated at a lower rate than jobs predominantly staffed by males as a consequence of the evaluations made by the system. Such an impact may be attributable to the subjective character of the judgment made under job evaluation systems and may be attributable to presuppositions concerning the meaning of value inherent in such systems. Any subjective system entails a risk of illicit motive. For example, formal job evaluation values job characteristics of industrial jobs of the character traditionally staffed by men at a higher level than job characteristics of service jobs of the character traditionally staffed by women. Although the disparate effect of the use of such a job evaluation system may be viewed as admissible evidence of the pretextual character of the use of such a system, invalidation of the system on the ground that it has such an effect is clearly the substitution of an independent standard of valuation (fairness) for the standard adopted by the employer. Assessment of the job evaluation system in fact adopted by the employer in terms of that system's overvaluation of, e.g., industrial job characteristics and undervaluation of, e.g., service job characteristics is equally such a substitution. The purpose of such an assessment is measurement of the necessity or desirability of the facially gender neutral standard in fact adopted by the employer in terms of an external valuation

179. See supra note 131.  
180. See TRIEMAN, supra note 87, at 1332-33.
standard, the undesirability of disparate impact, adopted by a court. Both such forms of judicial inquiry constitute precisely what Congress sought to avoid by the equal work standard and both such forms of inquiry should therefore be avoided under a disparate treatment understanding of Gunther.

2. Employer Failure to Comply With the Mandates of a Standard Adopted by the Employer

In Gunther, the “direct evidence” of intentional discrimination relied upon by the plaintiff was that the employer’s evaluation system determined that female correctional officers should be paid 95% as much as male correctional officers but the employer in fact paid female officers 70% as much as males. That disparity, if unexplained by considerations independent of gender, clearly raises an inference of illicit motive. It is moreover an inference upon which a court may rely without impairing the congressional policies underlying the Equal Pay Act’s equal work standard. The employer’s standard for evaluating value, not an externally imposed standard for that determination, is the basis for judicial decision.

There are, however, important distinctions which should be made in relying upon an employer’s failure to adhere to its own standard for establishing compensation. It is, for example, possible that the employer will adhere to its job evaluation determination by compensating employees assigned a job predominantly staffed by females at the rate determined by the employer’s evaluation system, but will pay employees assigned jobs predominantly staffed by males at a rate higher than that determined by the system. One explanation of such a discrepancy is that it is a gender based decision. Another explanation is that the employer paid a higher rate for the latter category of jobs by relying on the market; the employer could not find a sufficient number of qualified employees at the rate predicted by its system to staff available positions. If the market explanation of the discrepancy is believed, liability in spite of that explanation is liability imposed for reasons of disparate impact. It is, moreover, liability imposed on the basis of an external standard of desirability or necessity. Employer reliance upon the market is undesirable where its internal system

181. 452 U.S. at 180.
182. See Christensen v. Iowa, 563 F.2d 353 (8th Cir. 1977).
183. See id. at 356.
predicts other than the market rate for labor.

Gunther presents a more difficult problem if an employer in a Gunther factual situation claims reliance on the market. The employer is then claiming that a reduction from the rate mandated by its internal system is justified by the availability of female labor at a lower rate. There is in such a case, however, no difference in principle. This is so because an employer's job evaluation system is often adopted as an adjunct to a compensation system which relies primarily on market rates for labor; the market rate is a primary basis for employer decision and job evaluation is a means of approximating that basis for jobs with no readily ascertainable market rate.¹⁸⁴ Unless an employer acts inconsistently with the underlying reasons for its use of job evaluation, an inference of disparate treatment is not warranted. If the employer failed to investigate the market rate for jobs predominantly staff by males, or compensated such male positions at the rate predicted by its evaluation system despite a different market rate for such jobs, a disparate treatment finding may be warranted. The mere fact of reliance on a lower market rate for significantly different jobs staffed predominantly by females should not, however, constitute a violation within the meaning of the disparate treatment model unless reliance on a lower market rate may legitimately be characterized as functionally equivalent to disparate treatment.

As noted here earlier, a functional equivalence characterization was mandated by Congress for Equal Pay Act purposes where work is substantially equal.¹⁸⁵ That characterization is however not possible in circumstances in which work is not substantially equal without breaching the congressional policy underlying the equal work standard of the Equal Pay Act. It is not possible because a judicial conclusion precluding employer reliance upon lower market rates for work which is predominantly performed by females and which is not equal to work predominantly performed by males necessitates the substitution of judicial standards of compensation for employer decision precluded by that congressional policy. To ban employer reliance upon the market rate for a job where that market rate cannot be shown to be gender rather than job specific in its valuations is to impose on employers the effects of both self-selection on the part of female workers and past discrimination on the part of society writ large. Such an allocation is of course pre-

¹⁸⁴. See supra notes 86-87 and accompanying text.
¹⁸⁵. See supra notes 75-80 and accompanying text.
cisely what a disparate impact standard effects, but disparate treatment theory attempts no such shifting of burdens.

3. Internal Inconsistencies in the Operation of the Employer's Compensation System and Intentional Job Segregation

As was pointed out here earlier, some Equal Pay Act cases rely upon internal inconsistencies in the application of the compensation principles the employer purported to utilize in analyzing equal work issues. Such inconsistencies are evidence of gender based decision making. Inconsistent application of a facially gender neutral criterion for decisions having disparate gender consequences suggests that the criterion is used as a pretext for disparate treatment. If, as in *Shultz v. Wheaton Glass*, an employer purports to compensate on the basis of estimates of the relative productivity of different jobs, but appears to have violated the internal logic of those estimates by compensating work predominantly performed by women at a rate inconsistent with that internal logic, an inference of disparate treatment is warranted. Judicial reliance upon such evidence is consistent with the policies underlying the equal work standard because it is reliance upon the employer's actual behavior and upon the employer's stated premises for that behavior rather than reliance upon an external and problematic standard of valuation.

It was further argued earlier that disparate treatment in job assignment decisions is a basis for concluding that a difference in compensation between a job to which access for females is currently precluded and a job to which access for males is currently permitted itself constitutes disparate treatment where the compensation differential is a function of the employer's evaluation of the value of the jobs or reliance upon the market rate for labor for those jobs. For Equal Pay Act purposes, this theory of disparate treatment would be operable only where the jobs in issue entailed "equal work." If the jobs entail equal work, however, the possible fact that there is a Title VII BFOQ defense to the job segregation should not preclude an Equal Pay Act remedy, as there is no BFOQ defense under the Equal Pay Act. For purposes of Title VII, there is a BFOQ defense to disparate gender treatment, but that defense is applicable by its terms only to hiring and assignment

186. See supra notes 29-37 and accompanying text.
188. See supra notes 59-63 and accompanying text.
In short, the theory would be available under Title VII to attack a compensation differential related to disparate treatment in hiring and job assignment decisions even where there is a BFOQ defense available to that disparate treatment.

In form, the disparate treatment alleged by the foregoing theory is "sex plus" discrimination. The employment decision in issue, here the compensation decision, is founded both upon gender and upon some criterion independent of gender. Gunther was itself such a case. Females were excluded from positions as male correctional officers (purportedly on the basis on a bona fide occupational qualification) and male correctional officers were paid at a rate purportedly determined by the value of the male correctional counselor's work, either as determined by the market, or as determined by the employer's internal valuation system. The compensation decision was on these premises based upon considerations independent of gender, but those considerations are not separable from the job. The employer either relied upon a gender neutral evaluation of the value of the job or on the market rate for labor for that job. Because access to the job was dependent upon gender, the compensation paid male correctional counselors was "sex plus" compensation. The evaluated or market determined value of the work "plus" gender based access to that work determined who would and who would not receive the compensation paid for the work.

Four points should be made about this theory. First, the availability of the theory to any given potential plaintiff should be dependent upon the continued presence, at the time of any challenged compensation payment, of an employer rule or policy which

189. See 42 U.S.C. § 2000e-2(e) (1976). It is possible to argue that the theory would so compromise the policy underlying the BFOQ defense that the defense should be assertable. In a sense, the "sex plus" theory, when applied to a compensation claim, remedies job assignment discrimination despite the immunity of that discrimination from exposure to liability in instances in which the BFOQ defense is applicable. Note, however, that the BFOQ defense is so narrow that impairment of the statutory policy underlying it is unlikely. See Dothard v. Rawlinson, 433 U.S. 321 (1977).

190. 452 U.S. at 164-65.

191. In Taylor v. Charley Bros., 25 FEP Cases 602 (W.D. Pa. 1981), the court appears to have relied at least in part upon such a sex plus theory, although relying primarily upon a pattern or practice of intentional job segregation by gender in finding discrimination in compensation. Its theory is distinguishable from that advocated in the above text. The argument in the text is that an express gender component (job segregation) of a compensation differential is a ground for liability. The Charley Bros. argument was that an intent to compensate workers in a particular job classification at a lower rate because the job classification is predominantly staffed by females may be inferred from intentional discrimination in job assignments. Id.
reserves a job exclusively for males. Although it may be argued that there is a gender component to any compensation payment made to a female worker who was at any time in the past excluded from a higher paying position for reasons of gender, reliance upon the current compensation effects of past hiring or assignment discrimination appears precluded by the policy of repose underlying Title VII's relatively short filing periods. The source of the gender component of challenged compensation is, under the theory postulated here, current and intentional job segregation, not past acts of hiring or job assignment discrimination.

Second, the theory would not be available if the form of job assignment discrimination is issue is disparate impact. There is, in that event, no gender component to the compensation available to support a disparate treatment theory.

Third, the proposed theory should be available to any female holding a job in the employer's workforce regardless of the similarity or lack of similarity between the job she holds and the job reserved exclusively for males so long as the plaintiff female attacks the differential between her compensation and the male job compensation on the ground that the differential is based upon differences in the jobs. Components of a compensation differential between a female employee's compensation and the compensation paid for a job reserved for males based on characteristics of the male job (e.g., greater skills or responsibilities or the greater profitability of the functions performed in the male job) are dependent

---


194. The theory therefore, also should be distinguished from Professor Blumrosen's theory that wage discrimination should be presumed from de facto job segregation. See supra note 124-35 and accompanying text. The present theory requires proof of disparate treatment in individual cases; it does not rely upon a presumption amounting in fact to a disparate impact theory.
upon gender if access to the male job is dependent upon gender. If a female worker lacks the gender neutral qualifications for the job reserved for males, gender is arguably not a "but-for" cause of the challenged differential. Access to the male job, and male job compensation, would have been denied for reasons independent of gender; but a female employee's interest or lack of interest in the male job is at least arguably immaterial to the question of compensation discrimination. Although intentionally discriminatory job segregation would be deterred by judicial acceptance of the proposed theory, it is not job segregation which is remedied by the theory; rather, it is the explicit gender basis for the compensation differential which is the target of the theory. Whether or not a fe-

195. Assume, for example, that an employer pays male guards at a rate higher than female guards because male guards perform duties requiring greater responsibilities and effort than the duties performed by female guards. Women are barred from jobs as "male" guards. See County of Washington v. Gunther, 452 U.S. 161 (1981). The elements of the male guards' work identified by the employer as the reason for its compensation decision are gender neutral. The opportunity to perform tasks involving that greater responsibility and effort is, however, foreclosed for women. The greater responsibility and effort criteria are themselves based explicitly on gender by virtue of intentional job segregation.

Notice that the discriminatory component of the male guard's wage cannot be separated from the gender neutral factors relied upon by the employer as justifying the compensation differential. All of the differential is attributable to gender because all of the legitimate factors which explain it are attributable to gender. The disparate treatment involved does not take the usual form; compensation for a female job at a lower rate because the job is staffed by female workers. Indeed, the employer might in the contemplated circumstances compensate at the lower rate even if "female" guard work was performed predominantly by males. Rather the disparate treatment involved takes the form of gender as a "cause" of a result. Cf. Cox, supra note 47, at 184 n.113 (distinguishing discrimination as cause and discrimination as disparate treatment for National Labor Relations Act purposes, but noting that disparate treatment has a different meaning under Title VII).

It may, of course, be argued that the form of compensation discrimination postulated is not compensation discrimination, but job assignment discrimination. It is true that female workers denied access to a "male job" may, in the absence of a BFOQ defense, recoup a compensation differential in the form of a back pay remedy for job assignment discrimination. It is also true that the rationale for concluding that a compensation differential is gender based where job assignment is gender based is a gender criterion for job assignment rather than for compensation. But a compensation differential is not, in circumstances in which the employer currently assigns employees on the basis of gender, a mere effect of an act of classification by gender; it is compensation by gender as well. Cf. City of Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. 702 (1978) (compensation differential founded upon projection of longevity, itself founded upon gender, is disparate treatment).

Although the differential at issue in Gunther may be said to have been based upon gender to the extent that women as a group were barred from access to those gender neutral aspects of the male guard job which explained a higher rate of compensation, no individual female was barred from such access for reasons of gender who would not have qualified for the male guard position for reasons independent of gender. Gender would not, in such an individual's case, constitute a necessary condition to the differential because gender neutral reasons for non-access would constitute sufficient conditions for the differential.
male employee would seek the male job if access by females was not precluded, the fact remains that the differential is based on the characteristics of the male job and access to the male job is based on gender. The differential is therefore equally based on gender.

Fourth, there is in this theory again no inconsistency with the policies underlying the equal work standard. The court relies on an express gender classification, not an externally imposed standard of desirability or necessity.

4. *Express Gender Classifications and Multiple Regression*

It should be apparent that any express gender classification and any classification, such as that at issue in *City of Los Angeles Department of Water and Power v. Manhart,* synonymous with gender which operates as a basis for compensation decision may be attacked under *Gunther* without impairing the congressional policies underlying the equal work standard. In such cases, a court relies upon the expressed conduct of the employer; it need not decide the disparate treatment issue on the basis of inference.

A potential means of identifying gender classifications which are not express is multiple regression. Regression is a statistical technique for estimating, quantitatively, the influence of factors (independent variables) thought to have affected the outcome (dependent variable) of some decision making process. In a

196. Self-selection is distinguishable from the question of qualification, supra note 195. If the employer controls the question of initial job assignment, self-selection is immaterial to the matter of access. If the employee has a least partial control over the question of job assignment, that control, assuming intentionally segregated jobs, cannot be exercised. The argument that the possibility of non-competition between groups (males and females, as a consequence of the socialization process do not compete for some jobs) must be accounted for, although generally persuasive, loses its force in the contemplated circumstance. Roberts, supra note 88, at 192-93.


198. On these grounds, the cases postulated in the Supreme Court's *Gunther* opinion entailing express disparate treatment are clearly within the scope of the interpretation of *Gunther* contemplated by the text. See 452 U.S. at 178-79.

compensation discrimination case, the dependent variable is compensation; the independent variables are the factors claimed to have been considered in establishing compensation or claimed to constitute accurate proxies for productivity on the assumption that compensation was established on the basis of productivity. Independent variables may, on human capital premises, constitute characteristics of workers (e.g., education and experience); may, on job evaluation premises, constitute characteristics of work (e.g., effort and responsibility); or may constitute both worker and job characteristics. A regression equation is estimated by obtaining data regarding the compensation of each of the employees to be studied and by compiling data regarding independent variable values (e.g., years of experience) for each such employee. The equation is the formula which best fits this data in describing the relationship between the explanatory variables and average compensation. It is expressed so as to indicate in monetary terms (a regression coefficient) the effect of each independent variable on average compensation, holding other independent variables constant. For example, a regression equation in which only years of experience and education were considered as explanatory variables might indicate that average compensation equals $10,000 plus $2000 (per year of job experience) plus $5000 (for college degree). The regression coefficient for the job experience variable is $2000. Holding all other considered factors constant, average compensation can be expected to increase $2000 for every year of job experience. Notice that the formula estimates the average effect on compensation of an extra year of experience; individual cases may vary.

200. Independent variables selected for a regression study might, on human capital premises, take the form of education, experience and continuity of employment proxies for productivity. See, e.g., Greenspan v. Automobile Club of Michigan, 495 F. Supp. 1021, 1061-65 (E.D. Mich. 1980); Mincer & Polachek, supra note 64; Malkiel & Malkiel, supra note 66. The independent variables selected may also, however, take the form, on job evaluation premises, of characteristics of jobs within a firm. See WOMEN, WORK AND WAGES, supra note 17, at 82-89. A regression study may include both job evaluation variables and human capital (productivity) variables. See Vuyanich v. Republic Nat'l Bank of Dallas, 505 F. Supp. 224, 284-87 (N.D. Tex. 1980).

201. See H. BLALOCK, SOCIAL STATISTICS 329 (1960); infra note 208. The legal question asked by a disparate treatment theory may be viewed as an issue of causation; did gender cause the compensation differential in issue? Judicial use of regression seeks to infer such causation from evidence, provided by a regression study, of a relationship between variables. With respect to the risks run in inferring causation from relationship, see H BLALOCK, SOCIAL STATISTICS 337-43 (1960); D. HUNTSBERGER, D. CROFT, P. BILLINGSLEY, STATISTICAL INFERENCE FOR MANAGEMENT AND ECONOMICS 453 (2d ed. 1980); Roberts, supra note 88, at 179.

In the regression study typically used in this context, gender (group status) is included as an independent variable. The measure of the influence of the gender variable (the regression coefficient for group status) predicted by a regression equation is, in effect, a measure of the average disparate impact on female employees of the employer's compensation system. Disparate treatment is inferred from disparate impact. Trout v. Hidalgo, involving alleged job assignment and promotion discrimination, illustrates these points.

The plaintiffs in Trout sought to establish discrimination in part on the basis of a regression analysis purporting to measure the influence of gender on compensation in the employer's workforce. On average, women earned between 82% and 84% of male salaries in that workforce. The regression analysis sought to account for these average disparities by examining level of education, years of service with the employer, years of other work experience, and gender as independent explanatory variables. Salary was treated as a dependent variable. By utilizing data regarding each independent variable for employees in the workforce, the regression analysis estimated an equation which assigned a measure of the influence, expressed in monetary terms, of each independent variable on the dependent salary variable. By using the equation, it was esti-

203. See BALDUS & COLE, supra note 51, at 245; Fisher, supra note 199, at 725; Roberts, supra note 88, at 184.

204. See BALDUS & COLE, supra note 51, at 242; Fisher, supra note 199, at 722. It is however, also possible to estimate separate equations for men and women and to compare regression coefficients for particular variables in the equations. Fisher, supra note 199, at 724. See infra note 230.

205. See BALDUS & COLE, supra note 51, at 245; see also supra text accompanying note 142.

206. See BALDUS & COLE, supra note 51, at 245. Disparate impact is a legitimate basis, if properly confined so as to be probative, for inferring disparate treatment. See Hazelwood School Dist. v. United States, 433 U.S. 299 (1977). It is, however, crucial that race or gender neutral influences which may explain race or gender disparities in the consequences of an employment practice be controlled. See id. at 309.


208. Data regarding each independent variable for each employee may be conceived as producing, when plotted against the independent and dependent variables, a series of scatter points in multi-dimensional space. Regression seeks to estimate an equation which best explains these scatter points in terms of the variables. Specifically, regression seeks to find the equation which best explains the scatter points "in the sense that the sum of the squared deviations between predicted and actual [dependent variable] values is minimized." Fisher, supra note 199, at 707 (explaining bivariate regression). The equation so estimated assigns a measure of the average influence of each independent variable, a regression coefficient, on the dependent variable. For example, in Trout, the formula estimated that the
mated that the component of the salary differential attributable to the gender variable ranged between $2,200 and $3,500 for different years.\textsuperscript{209} The employer attacked the plaintiff's regression analysis on the grounds that, \textit{inter alia}, it failed to account for such independent variables as job level in the workforce\textsuperscript{210} and that the independent variables utilized by the study were imperfect proxies for the actual gender neutral considerations which influenced salary decisions. More specifically, the analysis utilized years of experience as a factor, but failed to take into account the character or type of such experience.\textsuperscript{211} The court rejected these attacks on the grounds that, \textit{inter alia}, the job level could not be considered because it may have been tainted by discrimination in promotion decisions and that the defendant had failed to introduce a regression analysis taking into account character of experience.\textsuperscript{212}

From the perspective of a disparate treatment theory of discrimination, \textit{Trout} suggests that the evidentiary use of multiple regres-

---

\textsuperscript{209} 517 F. Supp at 883-84.
\textsuperscript{210} Id.
\textsuperscript{211} Id.
\textsuperscript{212} Id. To the extent that promotion and job assignment discrimination constitute the gravamen of the plaintiff's theory, it may be legitimate to decline to include job and job level as independent variables because the resulting regression study will produce results which assume that job assignment and promotion were independent of gender. See James v. Stockham Valves & Fittings Co., 559 F.2d 310 (5th Cir. 1978). Ignoring such variables in a case alleging compensation discrimination is not warranted. See Vuyanich v. Republic Nat'l Bank of Dallas, 505 F. Supp. 224, 305 n.96 (N.D. Tex. 1980); See also infra notes 230-46 and accompanying text. Moreover, to the extent that a plaintiff seeks to use a regression study to establish that gender influenced compensation and to infer promotion discrimination from that influence, a court is in effect asked to assume a conclusion both in instances in which job and job level are included and where they are excluded. If the variables are omitted, the court is asked to infer promotion discrimination from a salary disparity attributed to gender where the attribution is itself based on an assumption, not established by independent evidence, that job assignment and promotion decisions were tainted by gender. If the variables are excluded and the regression shows no statistically significant gender component of a differential, the court may be asked by an employer to infer that there is no promotion or job assignment discrimination from a regression study which assumed those facts. The difficulties inherent in assuming conclusions in this context are illustrated by Valentino v. United States Postal Serv., 674 F.2d 56 (D.C. Cir. 1982). There, in a case involving allegations of promotion and job assignment discrimination, the court rejected a regression which sought to determine the influence of gender on salary but failed to control for dissimilar jobs in the workforce. \textit{Id.} at 70-71. The ground for that rejection was that job differences clearly influence salary. The court nevertheless criticized the district court for rejecting the regression study for failing to take into account job level on the ground that job level might be tainted by discrimination in promotion. \textit{Id.} at 71 n.26, 73 n.30. The court failed to explain why "type of job" might not be similarly tainted by discrimination in job assignment and why these "might be" possibilities should be assumed by the analysis.
sion presents two distinct problems for a court seeking to confine its inquiry to the conceptual boundaries of that theory — the problem of substitution and the problem of variable selection.

**a. The Problem of Implicit Government Regulation of Standards for Compensation**

The initial difficulty presented by multiple regression is that the independent variables selected as explanatory influences upon compensation may implicitly become imposed standards for compensation when accepted by a court as a ground for inferring disparate treatment. This difficulty is not present in the case in which an employer has adopted an explicit policy regarding compensation from which a court may derive the considerations an employer purported to utilize in making compensation decisions. To the extent that such considerations are quantifiable, they may be adopted as independent variables in a regression study designed, in effect, to measure the consistency with which the employer applied such considerations.

Many employers do not, however, make explicit the bases for their compensation decisions; rather, they make more or less accurate guesses about productivity and compensate accordingly. A regression study which seeks to determine whether these guesses were tainted by gender must select gender neutral independent variables which will serve as quantifiable proxies for productivity. In effect, the regression study substitutes the statistician's, and if judicially accepted, the court's quantifiable approximations of productivity for the employer's guesses about productivity. To

---

213. See Gwartney, supra note 88, at 657 n.68; Roberts, supra note 88, at 183-92.
214. See, e.g., Women, Work and Wages, supra note 17, at 17-43; see also supra note 200.
215. Notice that this process of substitution occurs both where the study utilizes job evaluation (characteristics of the job) variables and where the study utilizes human capital (characteristics of workers) variables. In the former case, the study in effect imposes job evaluation as the standard for compensation. In the latter case, the study imposes the suppositions of human capital theory as the standard for valuation. An example may make this imposition clearer. Women, Work and Wages, supra note 17, at 82 suggests use of job evaluation with the addition of a group status variable (percentage of incumbents in a job who are female) to the compensable characteristics of job variables used in job evaluations to estimate the weights to be assigned such characteristics. In a job evaluation not utilizing such a group status variable, multiple regression is used to predict appropriate weights from existing wages. The evaluation rationalizes an existing compensation system by determining the weight (in the form of the regression coefficient identified by the regression for each compensable characteristic) that system assigns the compensable job characteristics identified by the evaluation. The addition of a group status variable becomes a measure of “dis-
the extent that the independent variables explain portions of a differential, it may be inferred that the employer consciously or subconsciously considered that variable (or some factor related to the variable) and weighed it in the fashion suggested by the regression equation. But the fact remains that the plaintiff's regression equation specifies the plaintiff's view of considerations (independent variables) which are legitimate explanations of a compensation differential.

Although it is possible to contend that any such substitution contravenes the underlying policies of the Equal Pay Act's equal work standard, the difficulty of identifying disparate treatment in the litigation process may warrant reliance upon multiple regression if the risk of substitution can be minimized. In particular, three aspects of the substitution difficulty should be recognized by a court asked to rely upon regression. First, the proxy variables employed by a statistician are more or less accurate measures of true productivity. To the extent that they are imperfect measures of true productivity, their imperfections can be reflected in a regression study as "discrimination." Part of a compensation differential that is in fact attributable to true differences in productivity will be attributed by the regression study to gender.\footnote{216} This discrimination." \textit{Id.} at 84. The difficulty is that in fact the group status variable is potentially a measure of factors not included in the regression study as independent variables where omitted factors are correlated with group status. \textit{Id.} at 85 n.8. Thus, in effect, the use of the suggested technique identifies as discriminatory any influence not identified by the regression study as an independent variable. Because \textit{Women, Work and Wages} would impose on the employer the burden of identifying additional variables and of quantifying those variables, \textit{id.} at 85, and because that burden cannot, on comparable worth premises, be met with respect to differences in jobs as an independent variable, the suggestion operates as an imposed job evaluation system.

216. In technical terms, this phenomenon is labeled "underadjustment bias." See Finkelstein, \textit{supra} note 142, at 747-49; Roberts,\textit{supra} note 88, at 183-92. See also L. Horwitz \& L. Ferleger, \textit{Statistics for Social Change} 266-67 (1980) (discussing the "regression fallacy"); Birnbaum, \textit{Procedures for Detection of Salary Equity in Salary Equity, Detecting Sex Bias in Salaries among College and University Professors} 123-26 (T.Pezzullo & B. Brittinham eds. 1979). Underadjustment may occur where productivity proxies used in a regression analysis are imperfectly correlated with the employer's actual (and gender neutral) assessments of productivity. If productivity is correlated with gender, a regression equation predicted from such imperfect proxies will "underadjust" for the influence of productivity differences on compensation in the sense that it will attribute the influence of such differences to gender. See Birnbaum, at 126; Finkelstein, \textit{supra} note 142, at 747; Roberts, \textit{supra} note 88, at 186.

It is arguably true that what is important for disparate treatment purposes is determining the influence of considerations the employer can observe, Fisher, \textit{supra} note 199, at 725, and that imperfections in proxy variables are therefore of less concern where it can be inferred that the employer's assessment of productivity was founded on the proxy utilized by the statistician to explain the employers' compensation decisions. The difficult problem is in
culty is exacerbated from the perspective of disparate treatment theory because the relevant question for purposes of that theory is whether the employer's guess regarding productivity was tainted by gender, not whether the employer's guess deviated from true productivity. Not only is the productivity proxy used in the regression study an imperfect measure of true productivity, it is a proxy for the employer's guess regarding productivity.\textsuperscript{217} Even a perfect proxy for true productivity risks a finding of "discrimination" (in the sense of disparate treatment) where none occurred.

Second, selection of proxy variables is a process rife with implicit normative judgments regarding questions of both the meaning of value and the meaning of discrimination. At the most obvious level, the choice between proxies which emphasize the characteristics of workers or proxies which emphasize the characteristics of work implicitly entails normative judgments about the meaning of "worth" or of appropriate means of approximating productivity.\textsuperscript{218} At a more subtle level, the selection and definition of independent explanatory variables entails implicit normative judgments about appropriate anti-discrimination policy. For example, an experience variable defined in terms of years of work experience might be selected because there is data available for quantifying that variable. Use of that definition nevertheless ignores the possibility that the character of experience is also relevant to productivity. Even if it is assumed that data regarding character of experience is unavailable to the statistician in quantifiable form, a decision to utilize years of experience as an imperfect productivity proxy rests on an implicit normative judgment that male and female investments in equivalent years of experience should generate an equivalent return on that investment.\textsuperscript{219} The relevant question for disparate
treatment purposes is, of course, the employer's use of the experience factor. The absence of data regarding quality of experience (e.g., the absence of business records regarding quality of experience) at the time of litigation, may or may not indicate the presence or character of data regarding quality of experience available to the employer at the time of the compensation decision.

The third aspect of the substitution problem which should be of concern to a court is the question of burden and character of proof in specifying the explanatory variables to be used.\textsuperscript{220} If it is assumed that an employer has the burden of establishing that it did not engage in disparate treatment,\textsuperscript{221} the above objections to multiple regression might well take the form of an argument that an employer's defense founded on a regression study is an after the fact, and inaccurate, rationalization of its past behavior.\textsuperscript{222} If the burden is instead on the plaintiff to establish disparate treatment, the plaintiff's regression study is subject to the objection that it imperfectly captures the employer's actual behavior and therefore \textit{pro tanto} imposes a governmental compensation standard.\textsuperscript{223}

\begin{footnotes}
\item[220] With respect to the question of burden of persuasion, \textit{See infra} notes 242-59 and accompanying text.
\item[221] The employer would have such a burden, under Professor Blumrosen's proposal, upon proof of the existence of job segregation. Blumrosen, \textit{Wage Discrimination}, \textit{supra} note 8, at 457-65. The use of multiple regression on the assumption that job segregation establishes a prima facie case would therefore resemble an effort at identifying back pay for purposes of a remedy. \textit{See generally Note, Multiple Regression Analysis, supra} note 199. It is also possible that employers will have such a burden under the \textit{Gunther} opinion's rationale. \textit{See infra} notes 272-83 and accompanying text.
\item[222] \textit{See Women, Work and Wages, supra} note 8, at 85 (employer should have burden to show that additional variables should be included); Finkelstein, \textit{supra} note 142, at 744 (employer should have burden to show that additional data was available and actually used by employer in making decisions). For an example of a similar judicial argument, \textit{see James v. Stockholm Valves and Fittings Co.}, 559 F.2d 310, 332 (5th Cir. 1977), \textit{cert. denied}, 434 U.S. 1034 (1978) (employer may not include an education variable not in fact relied upon in making decisions).
\item[223] If it is assumed that a plaintiff must establish a prima facie case of discrimination in compensation and that an employer must then rebut such a case either by attacking the adequacy of the plaintiff's evidence (e.g., the plaintiff's regression failed to include relevant variables) or by affirmatively establishing a non-gender reason for a compensation differential (e.g., by introducing a regression study including variables claimed to explain the differential), a judicial insistence upon a perfect regression model for purposes of a prima facie case is unwarranted. \textit{See, e.g., Trout v. Hidalgo}, 517 F. Supp. 873, 882-84 (D.D.C. 1981); Vuyanich v. Republic Nat'l Bank of Dallas, 505 F. Supp. 224, 314 (N.D. Tex. 1980). On the other hand, the plaintiff's regression should meet some minimum level of credibility by including obviously relevant explanatory and gender neutral variables. \textit{See Valentino v.
The substitution problem is in either case a problem of the weight to be assigned an imperfect and potentially deceptive evidentiary tool. If the plaintiff must establish a prima facie case directed to the issue of disparate treatment, a regression analysis which includes plausibly relevant independent variables probative of that issue might suffice for the prima facie case. An employer’s rebuttal might take the form of a regression analysis specifying different or additional explanatory variables. The question is the evidentiary foundation an employer must lay for claiming that such different or additional variables explain the portion of a compensation differential attributed by the plaintiff’s analysis to gender.

To the extent that the employer’s bases for making compensation decisions have not been expressed in formal policies, the plaintiff’s regression will be founded upon explanatory variables she selects as proxies for the employer’s informal guesses regarding productivity. The employer’s rebuttal in such circumstances will be similarly grounded. If the employer is precluded from utilizing different or additional (and plausible) proxies in rebuttal absent proof of the actual use of such considerations, the consequence is a one-way street which artificially defines disparate treatment in terms of the compensation standards asserted by the plaintiff, and

United States Postal Serv., 674 F.2d 56, 70-71 (D.C. Cir. 1982); Wilkins v. Univ. of Houston, 654 F.2d 388, 402-07 (5th Cir. 1981).


225. But see infra notes 262-276 and accompanying text.


228. Cf. Valentino v. United States Postal Serv., 674 F.2d 56, 73 n.30 (D.C. Cir. 1982). “Absent clear, affirmative evidence that promotions were made in accordance with neutral, objective standards consistently applied, there is no assurance that level or rank is an appropriate explanatory variable, untainted by discrimination.” Id. Notice that this statement in effect precludes “subjective” standards and thereby imposes a disparate impact theory: subjectivism is rejected as a basis for decision due to the risk that it is tainted, not because it has been found to have been tainted. See Furnco Constr. Co. v. Waters, 438 U.S. 567 (1978) (rejecting such a view for disparate treatment purposes). Cf. Bartholet, Application of Title VII To Jobs In High Places, 95 Harv. L. Rev. 947, 973-78, 1006-08 (1982) (treating attacks on subjective employment practices as properly within impact theory).
accepted by the court, as appropriate bases for compensation.\textsuperscript{229}

b. The Problem of Variable Selection: Significant Differences in Jobs or Job Levels as Explanations of Compensation Differentials

Typically, regression studies of compensation differentials utilize a group status variable as one of the independent variables thought to influence a dependent compensation variable.\textsuperscript{230} The gender variable may explain components of the dependent salary variable not explained by the influence of gender neutral independent variables.\textsuperscript{231} The gender neutral variables used in a regression analysis are, as previously indicated, proxies for nonquantifiable gender neutral considerations.\textsuperscript{232}

\textsuperscript{229} See Lamphere v. Brown Univ., 685 F.2d 743, 750 n.2 (1st Cir. 1982) ("friendship", albeit an idiocyncratic reason for a differential, is nevertheless a legitimate factor other than sex). \textit{But see infra} note 239.


The regression formula estimated by such a study is a single equation. An alternative occasionally utilized is estimating separate equations for males and females without including a group status variable in either. See, e.g., Vuyanich v. Republic Nat'l Bank of Dallas, 505 F. Supp 224, 278 (N.D. Tex 1980); Finkelstein, \textit{supra} note 142, at 739-40 n.12; Fisher, \textit{supra} note 199, at 724; Baldus & Cole, \textit{supra} note 51, at 262. On human capital premises, the separate equations approach infers discrimination if males and females receive different rates of return on the productivity proxies (human capital investments they make), a determination made by comparing regression coefficients for each independent variable and viewing the difference between coefficients in the separate equations for any given variable as a measure of discrimination. \textit{Id.} A variation on this theme involves the calculation of separate equations and the substitution of average levels of female attainment for male levels of attainment for each independent variable in the male equation (male earnings function). The result is an estimate of the average earnings females could expect if they were receiving the same rate of return as males. The difference between that expected return and actual average compensation is a measure of discrimination. See, e.g., Women, Work and Wages, \textit{supra} note 17, at 42-43; Chiplin, \textit{supra} note 66, at 247-52; Haworth, Gwartney & Haworth, \textit{Earnings, Productivity, and Changes in Employment Discrimination During the 1960's}, 65 Am. Econ. Rev. 158, 161-63 (1975).

\textsuperscript{231} See Baldus & Cole, \textit{supra} note 51, at 242; Women, Work and Wages, \textit{supra} note 17, at 85 n.8. \textit{But see supra} note 230.

\textsuperscript{232} See \textit{supra} note 216 and accompanying text. On human capital theory premises, compensation is a function of investment, e.g., education, experience, or continuity of work experience. See \textit{supra} notes 66, 85. A regression study based upon such investment variables will presumably reflect accurately the employer's decision making process where the employer claims that it relied upon the independent variables used in the study. The difficulty is that there is often substantial disagreement between the parties to employment discrimination litigation over precisely which variables should be included in the study. See Finkelstein, \textit{supra} note 142, at 747, 753-54.

To the extent that a proxy variable for productivity (e.g. education) is badly correlated with the employer's actual estimate of productivity, the regression analysis may attribute components of a compensation differential to gender whereas in fact such components are attributable to differences in productivity. See \textit{id.} at 747-49; \textit{supra} note 216. With respect to
The difficulty with the use of such proxies in combination with a group status variable is that, to the extent that they fail to account for all gender neutral influences on compensation related to gender, the regression study will erroneously identify the omitted gender neutral influences as a gender influence.\footnote{If, for example, years of work experience influences compensation and is related to gender (males on average have more years of work experience than females), a regression analysis which fails to include years of work experience as an independent explanatory variable may at least partially attribute the influence on compensation of that omitted variable to the gender (group status) variable included in the study. A decision to omit such a gender-related variable is in effect a decision to treat the omitted variable as synonymous with gender, and is therefore tantamount to the decision in \textit{Griggs v. Duke}}\footnote{\textit{The Idiosyncratic Determiners of Salary Differences in \textit{Salary Equity},} supra note 216, at 145-53.}

233. A failure to include a relevant and gender-neutral variable (or gender tainted variable an attack on which is time barred) will attribute the influence of the omitted variable to the gender variable and therefore identify that influence as discrimination. See \textit{e.g.}, \textit{BALDUS \& COLE, supra} note 51, at 273-75; \textit{WOMEN, WORK AND WAGES, supra} note 17, at 85 n.8; \textit{Roberts, supra} note 88, at 254-58; \textit{Ramsey, supra} note 219, at 41-44. \textit{See generally G. WESOLOWSKY, MULTIPLE REGRESSION AND ANALYSIS OF VARIANCE} 49-56 (1976).

The reason for this phenomenon is that, if the omitted variable is correlated with gender (e.g. if years of education is omitted and women on average have fewer years of education), a portion of the influence attributed to gender will in fact be attributable to differences in education. The result is termed specification error or mispecification. \textit{See, e.g.}, \textit{BALDUS \& COLE, supra} note 55, at 273; \textit{Fisher, supra} note 199, at 708-09, 713-15; \textit{Ramsey, supra} note 219, at 41-44.

Note that the problem of variable omission occurs both in cases in which a single equation with a gender variable is used and in cases in which separate male and female equations are used. In the latter instance, the influence of an omitted variable is not reflected in a gender variable, but the assumptions upon which differences in rates of return on a human capital investment (independent variable) are inferred to reflect discrimination are violated. \textit{See Chiplin, supra} note 66, at 250-51, 254-58; \textit{Haworth, supra} note 230, at 163. If, for example, there is a disparity between the male and female rates of return on years of experience (as determined by separate equations estimating the influence of experience on compensation), that difference is not appropriately inferred to constitute discrimination if education also influences compensation and education is omitted as a variable. There may be differences in rates of return on experience at different educational levels which explain the disparity between male and female rates of return on experience (assuming that gender and education are correlated). \textit{See Malkiel \& Malkiel, supra} note 229, at 702-03 (addition of job level variable correlated with gender explains differential utilizing separate equations for men and women). \textit{Compare Vuyanich v. Republic Nat'l Bank of Dallas,} 505 F. Supp. 224, 278 (N.D. Tex. 1980) (use of separate equations to show disparate treatment of twins with respect to productivity factors) \textit{with id. at} 284, 286-87 (regression must include both personal productivity and job characteristics variables).
Power Co.\textsuperscript{234} to treat the use of race-neutral employment criteria correlated with race (that is, criteria having a disparate impact by race) as race-based employer conduct.

Job classifications, and job levels within classifications, are often segregated, de facto, by gender. Job differences and gender status are therefore related. If a regression study controls for differences in jobs by confining analysis to particular jobs or by treating job differences as independent variables (the employer's claim being that compensation was based on the employer's valuation of the job or the market rate of labor for that job),\textsuperscript{235} it is likely that there will be no significant residual for gender. The independent job variable (and other independent gender neutral variables) will fully explain the dependent (salary or wage) variable.\textsuperscript{236} To the extent that significant differences in segregated or partially segregated jobs are not accounted for, the regression study will attribute the influence of such job differences on compensation to the gender variable.\textsuperscript{237} Omitting job classification as an explanation of com-

\textsuperscript{234} 401 U.S. 424 (1971).

\textsuperscript{235} See Bloom & Killingsworth, supra note 199, at 323-26.

\textsuperscript{236} See Presseisen v. Swarthmore College, 442 F. Supp. 593, 612-13 (E.D. Pa. 1977), aff'd mem., 582 F.2d 1275 (3d Cir. 1978); WOMEN, WORK AND WAGES, supra note 17, at 24-25 n.9, 33, 33 n.19; Chiplin, supra note 66, at 254-58; Malkiel & Malkiel, supra note 66; COMPARABLE WORTH, supra note 17, at 192-93. Cf. Tuckman, Salary Differences Among University Faculty and Their Implications for the Future in SALARY EQUITY, supra note 216, at 31-32; (inclusion of field of study explains large portion of differential); Oaxaca, supra note 81 (large but incomplete portion of differential explained by human capital and other factors within relatively broadly defined occupational groups).

\textsuperscript{237} See Valentino v. United States Postal Serv., 674 F.2d 56, 70-71 (D.C. Cir. 1982); Wilkins v. Univ. of Houston, 654 F.2d 388, 402-07 (5th Cir., 1981); Presseisen v. Swarthmore College, 442 F. Supp. 593, 614-20 (E.D. Pa. 1977), aff'd mem., 582 F.2d 1275 (3d Cir. 1978); Vuyanich v. Republic Nat'l Bank of Dallas, 505 F. Supp. 224, 280-85 (N.D. Tex. 1980); Agarwal v. McKee & Co., 16 Empl. Prac. Dec. ¶ 8301 (N.D. Cal. 1977). From the point of view of human capital theory, inclusion of occupation, job or job level within a firm as an independent variable (or controlling for job or job level by restricting the sample studied) may erroneously treat a dependent variable as an independent variable. See Chiplin, supra note 66, at 255; Mincer, Comment in WOMEN IN THE LABOR MARKET, supra note 66, at 284-85. At least in the case of job level (or promotion to higher job levels), human capital theory would view advancement within a firm as a form of return on investment or as the mechanism by which return on investment is obtained. Cf. Stastny v. Southern Bell Tel. & Tel. Co., 458 F. Supp. 314, 324 n.3 (W.D. N.Car. 1978) (salary classification is not a productivity variable but a result of productivity factors).

From the point of view of a disparate treatment theory, however, neither job nor job level can safely be ignored as independent variables absent proof that an employer is currently engaged in disparate treatment in making job assignment or promotion decisions. It is possible to conclude either that the character of distinct jobs should not be a ground for an employer's compensation decision or that de facto job segregation warrants a legal rule precluding employer consideration of the job as a basis for compensation decisions, but neither conclusion can be derived from a disparate treatment theory. Both preclude employer con-
Compensation differentials is therefore again tantamount to treating job classification as a neutral criterion subject to a disparate impact prohibition, except in cases in which a current policy of disparate gender treatment in job assignment is established. The influence of job classification on compensation is treated by such an omission as if it was the influence of gender on compensation. It is of course quite possible, although not established simply by means of the hypothesis that it is possible that job differences variables will mask or cover up other independent variables, including gender. For example, a regression analysis which treats job differ-

238. See, e.g., James v. Stockham Valves & Fittings Co., 559 F.2d 310, 332 (5th Cir. 1977), cert denied, 434 U.S. 1034 (1978) (inclusion of a variable reflecting employer practice itself challenged as discriminatory is improper); Blumrosen, supra note 8, at 415-70 (wage differentials are linked to job segregation); Finkelstein, supra note 142, at 744 (criticizing court's refusal, in Agarwal v. McKee & Co. 16 Empl. Prac. Dec. ¶ 8301 (N.D. Cal. 1977) to accept a regression study which omitted job level because job assignment "may have been tainted by discrimination"); Finkelstein, supra note 142, at 742 (rank should be included as a variable only where employer proves that neutral and objective standards were applied in granting rank). Cf. Bloom & Killingsworth, supra note 199, at 328-30 (where analysis is restricted to a limited sample, e.g. a particular job category—and where selection bias taints access to that sample, salary discrimination within the sample may go undetected if omitted productivity factors which influence salary within the sample are correlated with omitted productivity factors which influence access to the sample).

The difficulty with this position is that it presumes discrimination by failing to take into account a relevant variable without proof that the variable was in fact tainted by disparate treatment. To omit a relevant variable because there is a risk, e.g., that the employer engaged in job assignment or promotion discrimination, (as distinguished from omission because it is established that the employer currently engages in such conduct) is effectively to impose a disparate impact model. The influence of the omitted variable will be characterized as "discrimination" because it will magnify the value of regression coefficient for the group status variable under circumstances in which it is not established that the omitted variable constitutes in fact a gender variable. The allocation of the burden of proof and the character of that burden following are crucial here. Even if it is assumed, however, that the employer has a burden of persuasion, that burden, under a disparate treatment theory, is to establish a credible gender neutral reason for a compensation decision. It is not a burden to establish use of a criterion free of risks of disparate treatment. See infra notes 262-76 and accompanying text.

It is the case that the use of independent variable in a regression study which are related to each other, a problem of multicollinearity, will bias the study's estimates of the influence of such variables on the dependent variable (compensation). See, e.g., BALDUS & COLE, supra note 51 at 273-76; Fisher, supra note 199, at 713; SALARY EQUITY, supra note 216, at 38-40. In the present context, it is of course known that there is both widespread job segregation by gender and substantial differentials in compensation by gender. There is, in short, a relationship between gender and jobs, job levels, occupational groups, etc. What is not known is the reason for that relationship. Although de facto job segregation is an observed
ferences as a gender neutral explanation of a compensation differential ignores the possibility of job assignment discrimination. This possibility is, however, precisely the possibility the policies underlying the equal work standard will not permit to be assumed by a court. To the extent that the job, and any other gender neutral cause claimed by an employer as an explanation of compensation, whether or not that variable is quantifiable, is ignored as an explanation of a differential discovered across jobs and replaced with proxy variables for productivity, the resulting regression study

fact, it is not necessarily the case that job segregation is the consequence of disparate treatment on the part of employers.

The cure for multicollinearity is omission of the variable creating the problem, but that omission generates mis specification. BALDUS & COLE supra note 51, at 275 n.3; SALARY EQUITY, supra note 216, at 39, 42. The choice between multicollinearity and mis specification is a choice to be made on policy grounds. See id. at 39-40. If mis specification is risked, a disparate impact standard is imposed. The omitted variable is not a consideration upon which the employer may rely because it is correlated with gender, not because it constitutes gender. See Chiplin, supra note 66, at 259. If multicollinearity is risked, a disparate treatment standard is imposed. The statistical significance of the influence of a gender variable on compensation will decline where an independent variable correlated with gender but gender neutral in character is included in the study. See BALDUS & COLE, supra note 51, at 275, 275 n.3; SALARY EQUITY, supra note 216, at 39, 40-44.

239. Gwartney, supra note 88, at 657 n.68, 658, argues that proxy variables for productivity should be utilized in regression studies whether or not those variables constitute a part of an employer's formal wage determination. The employer's informal guesses about employee productivity are to be quantified by the formal imposition of proxy variables. In part, this is an argument favoring a new definition of the job relatedness component of the business necessity defense to disparate impact theory. Compensation is job related if it can be explained by a statistically significant relationship with race or gender neutral proxy variables imposed by a court whether or not the employer relied in fact upon such race or gender neutral considerations. Id. My difficulty with the argument is that it substitutes an economic efficiency policy for fact finding. What the employer did in fact is less important than whether the consequences of the employer's actions are consistent with profit maximization. Cf. Flynn, The Misuse of Economic Analysis in Antitrust Litigation, 12 Sw. R. U. L. Rev. 335, 343 (1981) (criticizing use of the economic theory as substituting presuppositions of the theoretical model for fact finding).

For purposes of the present discussion, my specific difficulty with any use of proxy variables which are not at least close quantifiable approximations of what the employer did in fact is that such a use is inconsistent with the assumptions of a disparate treatment prohibition. Economic efficiency might well be characterized as an appropriate consideration for purposes of impact theory, for the business necessity defense, in effect, balances disparate consequences against efficiency concerns. But a disparate treatment prohibition is concerned with what occurred in fact as an expression of a policy precluding illicitly motivated employer decision; it is not a balancing test. To the extent that a regression analysis utilizes proxy variables which explain components of a differential, it may be inferred that the employer's guesses regarding productivity took those variables (or considerations related to the variables) into account. But the inference that any unexplained component of a differential is gender based is suspect precisely because the regression has only imperfectly approximated the employer's actual decision making process.

I would, however, propose an exception to this line of argument. If a plaintiff is permitted
has substituted the statistician's version of appropriate or potentially appropriate criteria for decision\textsuperscript{240} for the employer's criteria for decision.

\textsuperscript{240} See, \textit{e.g.}, EEOC v. Fed. Reserve Bank of Richmond, 698 F.2d 633, 656-58 (4th Cir. 1983); Heagney v. Univ. of Washington, 642 F.2d 1157,1164 (9th Cir. 1981); Roman v. ESB, Inc., 550 F.2d 1343, 1355 (4th Cir. 1976). To the extent that a regression study attributes a dependent (salary) variable to gender by ignoring a gender neutral independent variable, it imposes liability for reasons of consequences rather than for reasons of illicit motivation. It therefore imposes a disparate impact prohibition by treating a salary differential as, \textit{pro tarto}, an effect of the ignored variable. The effect of the ignored variable on the dependent salary variable will be reflected in the regression study's independent gender variable.

It is of course quite possible to ignore an independent job assignment variable where jobs are substantially different on the ground that the plaintiff has established that job assignment was discriminatory (on either a disparate impact or a disparate treatment theory). But, if that is the case, the regression study is in effect being used to calculate a back pay remedy for job assignment or promotion discrimination. On the assumption that the job assignment or promotion discrimination was properly and timely charged, the effect of that discrimination will be reflected in the regression coefficient for gender as an influence (or cause) of the dependent salary variable. If the assumption is instead that job assignment or promotion discrimination was not timely charged, ignoring job assignment as a variable in a regression study targeted at compensation discrimination, is in effect the imposition of a present effects of past discrimination theory; again a variation of a disparate impact theme. It is the imposition of a present effects theory because the study's regression coefficient for gender will reflect the influence of job assignment and, therefore, of past discrimination in job assignment; past discrimination is arguably not remediable by a direct attack on that discrimination because it is time barred. See Delaware State College v. Ricks, 449 U.S. 250 (1980); United Air Lines, Inc. v. Evans, 431 U.S. 553 (1977); Trabucco v. Delta Airlines, 590 F.2d 315 (6th Cir. 1979); Farris v. Bd. Educ. of St. Louis, 576 F.2d 765 (8th Cir. 1978); Masco v. United Air Lines, Inc., 574 F.2d 1127 (3d Cir. 1978). Note, however, that current employer policy segregating jobs by gender would render the resulting compensation differentials infected by disparate treatment. See supra notes 188-96 and accompanying text. In that event, a regression study which ignored job assignment might be useful as a measure of remedy.

The risk of an imposition of an impact prohibition would appear equally present under either of the two primary means of presenting a regression study. Under the first of these means, a single equation giving the average effect of independent variables (including a gender variable) upon a dependent compensation variable is given. To the extent that the gender variable, within the parameters of tests of statistical significance, influences compensation, discrimination may be inferred. Under the second approach, separate equations for males and females are calculated. Significant differences in the regression coefficients for productivity proxies for males and females may indicate that females are given less than males for the same qualifications. See Baldu & Cole, supra note 51, at 262-64; Finkelstein, supra note 142, at 739-40 n.12. Under the first approach, omission of a job assignment variable will be reflected in the gender variable. Under the second approach, omission will be reflected in the productivity proxy variables. Cf. \textit{id.} at 740 (inclusion of a marriage variable in separate male and female equations in Stastny v. Southern Bell Tel. & Tel. Co., 458 F. Supp. 314 (W.D. N.Car. 1978) can conceal discrimination); Haworth supra note 230, at 163 (reporting possibility of similar distortion).
It is fully permissible within the conceptual boundaries of a disparate treatment prohibition to question the credibility of an employer's claimed reliance upon some gender neutral criterion unrelated to productivity.\textsuperscript{241} And it is equally permissible within those boundaries to disregard an employer's claimed reliance upon a criterion (independent variable) itself tainted by disparate treatment.\textsuperscript{242} But a judicial decision to disregard the influence of a facially gender neutral criterion upon compensation is not warranted absent a factual finding founded upon proof in individual cases that an employer's reliance on such a criterion is pretextual or that the criterion is tainted by currently remediable disparate treatment.\textsuperscript{243} Absent proof that an employer currently and intentionally engages in disparate treatment in job assignments, such a decision assumes that job differences are, despite their gender neu-

\textsuperscript{241} See supra notes 55-63 and accompanying text (discussing pretextual disparate treatment).

\textsuperscript{242} A number of courts have expressed concern about the use of tainted variables, but have unfortunately done so in terms of the potential for taint rather than in terms of the actual presence of taint. See, e.g., Valentino v. United States Postal Serv., 674 F.2d 56, 72 n.30 (D.C. Cir. 1982); Segar v. Civiletti, 508 F. Supp. 690, 712 (D.D.C. 1981); Trout v. Hidalgo, 517 F. Supp. 873, 885 (D.D.C. 1981); Greenspan v. Auto. Club of Mich., 495 F. Supp. 1021, 1064 (E.D. Mich. 1980). The appropriate analysis from a disparate treatment perspective is to require proof of taint. See Valentino v. United States Postal Serv., 511 F. Supp. 917, 944-45 (D.D.C. 1981), aff'd on other grounds, 674 F.2d 56 (D.C. Cir. 1982). Cf. Pope v. City of Hickory, N.C., 679 F.2d 20, 22 (4th Cir. 1982) (disparate impact theory may be applied only to specific neutral procedures adapted by an employer); Pouncy v. Prudential Ins. Co. of Am., 678 F.2d 795, 798 (5th Cir. 1982) (same); Heagney v. Univ. of Washington, 642 F.2d 1157, 1163 (9th Cir. 1981) (disparate impact theory may not be applied to subjective decisional criteria). If it is assumed that the employer has the burden of proof regarding disparate treatment, it may legitimately be claimed that the employer must affirmatively establish the legitimacy of its proposed explanatory variables. But the standard under which legitimacy is then judged should not be proof of "objective standards". Valentino v. United States Postal Serv., 674 F.2d 56, 73 n.30 (D.C. Cir. 1982). Rather, the standard should be that the employer has asserted a "factor other than sex." Cf. Texas Dep't. Community Affairs v. Burdine, 450 U.S. 248 (1981) (question of imposition of burden of persuasion on employer treated as separated issue from question of what the employer must prove; court of appeals erred both in imposing burden of persuasion and in requiring proof that person hired was more qualified than plaintiff); Furnco Constr. Co. v. Waters, 438 U.S. 567 (1978) (employer must prove that it based decision on a legitimate consideration; it need not prove that it acted so as to employ the most minority employees it could consistent with its business interests).

trafal character, an insufficient justification for a compensation differential. And this conclusion is not altered by an assumption that the employer has the burden of persuasion on the issue of disparate treatment. In that event, it is the employer's burden to establish that it relied on a "factor other than sex"; it is not the employer's burden to establish that it relied upon "objective standards" or upon standards which are justified by "necessity." The possibility of promotion or assignment discrimination may be a possibility to be taken into account in assessing the credibility of an affirmative defense, but a requirement that an employer justify the gender neutral factor relied upon in asserting such a defense is effectively to impose a disparate impact theory in the guise of an allocation of a risk of non-persuasion.

It is, then, possible that regression can be an effective tool for identifying the influence of gender upon compensation, but the use of that tool must be tailored both to the legal issue (disparate treatment) sought to be informed by that tool and the legal policies governing the adjudication of that issue. Because significant differences in jobs must be accounted for by the regression tool if the policies underlying the equal work standard are to be enforced by means of a disparate treatment prohibition, the tool's potential usefulness under Gunther is extremely limited. Indeed, it is generally limited to those cases which could be brought under the Equal Pay Act - cases in which jobs are "substantially equal."

5. Perpetuation of Past Discrimination

In I.U.E. v. Westinghouse Electric Corporation, the plaintiffs alleged that the employer had, prior to 1965, both intentionally segregated jobs by gender and explicitly adopted wage rates for female jobs lower than wage rates for male jobs rated as equal under an internally adopted job evaluation system. In 1965, the employer eliminated its dual wage policy. The plaintiffs in Westinghouse alleged, however, that the employer perpetuated its former

244. See supra note 242. For examples of this difficulty, see Valentino v. United States Postal Serv. 674 F.2d 56, 73 n.30 (D.C. Cir. 1982) (requiring employer proof of "objective" standards in making promotion decision before job level may be included as an explanatory variable); Vuyanich v. Republic Nat'l Bank of Dallas, 505 F. Supp. 224, 313 (N.D. Tex. 1980) (employer failed to justify claim that omitted variables should have been included through proof of business necessity for such variables).

245. See supra note 241 and accompanying text.

246. See Nelson, supra note 33, at 260.


248. Id. at 1097. See Newman & Vonhoff, supra note 8, at 292-96.
policy by expanding the number of its pay grades and ranking jobs predominantly staffed by women at pay grades lower than pay grades assigned jobs predominantly staffed by men.\(^{249}\) Although the Third Circuit confined its opinion in \textit{Westinghouse} to the issue ultimately resolved by the Supreme Court in \textit{Gunther}, it characterized the plaintiffs’ theory as alleging “explicit discrimination in compensation.”\(^{250}\)

It should be apparent that the employer’s pre-1965 policy would be subject to attack within the scope of the narrow theory of liability advocated here if that policy had continued after the effective date of Title VII. The employer engaged in a policy of job segregation,\(^{251}\) a policy of acting inconsistently with an internally adopted evaluation plan\(^{252}\) and an explicitly stated policy of differential compensation founded on gender.\(^{253}\) It should also be apparent that, if the employer sought intentionally to perpetuate its pre-1965 policies through the pretextual use of a facially unisex schedule of pay grades, the post-1965 use of such a schedule would equally fall within the boundaries of the narrow theory of liability advocated here. The difficult question is that of an acceptable method of proof of such a pretextual use of the schedule.

Unfortunately, the Third Circuit’s opinion in \textit{Westinghouse} does not provide much guidance regarding the latter question. The plaintiffs in that case pointed to the facts that the employer adopted a unisex schedule of pay grades which “generally” placed jobs predominantly staffed by women at grades below jobs predominantly staffed by men, that the unisex schedule placed female jobs below male jobs which had been at corresponding grade levels prior to 1965, and that jobs in the employer’s plant in 1975 continued to be segregated, de facto, by gender.\(^{254}\) The dissent in \textit{Westinghouse}, relying upon the plaintiffs’ answers to interrogatories, characterized the plaintiffs’ proposed method of proof as the use of comparative work evidence; that is, evidence comparing the skills, effort, responsibilities and working conditions of predominantly male and predominantly female jobs in terms of the opinions of the plaintiffs’ expert.\(^{255}\) Changes in job content and com-

\(^{249}\) \(631\text{ F.2d at 1097-98.}\)
\(^{250}\) \(Id.\text{ at 1107.}\)
\(^{251}\) \(Id.\text{ at 1097. See supra notes 188-96 and accompanying text.}\)
\(^{252}\) \(631\text{ F.2d at 1097. See supra notes 181-86 and accompanying text.}\)
\(^{253}\) \(631\text{ F.2d at 1097-98. See supra notes 197-98 and accompanying text.}\)
\(^{254}\) \(631\text{ F.2d at 1097-98.}\)
\(^{255}\) \(631\text{ F.2d at 1109 & n.5 (Van Dusen, J., dissenting).}\)
pensation rates following the employer's 1965 adoption of a unisex pay grade schedule would arguably make such comparisons essential if the plaintiffs were to show a continuation of the employer's pre-1965 policies.256

Comparative worth evidence of the character contemplated by the Westinghouse dissent, evidence, in effect, constituting a job evaluation analysis developed by the plaintiff,257 might be proffered for one of two purposes. It might be proffered for the purpose of establishing the similarity of the employer's existing compensation system to its pre-1965 compensation system or it might be proffered for the purpose of establishing the fairness, on the value premises of the plaintiff's job evaluator, of the employer's existing system.258 The former purpose appears consistent with a theory that the employer's existing compensation system constitutes a current policy of disparate treatment in compensation. The latter purpose imposes a disparate impact theory.

There is of course a substantial risk that evidence proffered for the former purpose will be used by a court for the latter purpose, and that risk is exacerbated by the occasionally indistinct line between a pure perpetuation theory and a pretext theory.259 A pure perpetuation theory attacks a gender neutral employer practice as carrying forward into the present the effects of past instances of discrimination.260 A pretext theory attacks a facially gender neutral

---

256. See Newman & Vonhoff, supra note 8, at 295 n.116.
257. See 631 F.2d at 1109 n.5 (Van Dusen, J., dissenting).
258. See Newman & Vonhoff, supra note 8 at 295. Newman and Vonhoff speak both in terms of a continuation of the employer's pre-1965 policies and in terms of the perpetuation of "wage inequities", terminology which makes it at least unclear whether they have distinguished a disparate treatment theory from an unfairness theory.
259. See Newman & Vonhoff, supra note 8 at 323. Newman and Vonhoff, like Professor Blumrosen, would make evidence of job segregation sufficient for a prima facie case of discrimination. Unlike Blumrosen, they would apparently require proof of purposeful discrimination. Id. What is unclear is whether they would adopt a wage discrimination theory to attack the present compensation effects of past instances of purposeful employer job segregation. See Id.

It is of course apparent that whether the plaintiff is relying merely upon the present ef-
compensation scheme as the means used by an employer to accomplish a present policy of disparate treatment.

To the extent that job comparisons are narrowly tailored to the question of the present continuation of a policy conceded to entail disparate treatment, the use of such comparisons is unobjectionable. To the extent, however, that such comparisons are used instead to establish that a gender neutral employment practice has the effect of perpetuating a past and nonremediable act or policy of disparate treatment, they are used to impose a disparate impact prohibition. In *Westinghouse*, evidence that women overwhelmingly staffed job classifications placed by the employer in low pay grades in combination with evidence that the employer once engaged in a policy of job segregation suggested that the compensation effects of that past policy were continuing. From the perspective of a disparate impact theory, such effects, to the extent not justified by differences in the worth of jobs within distinct pay grades as disclosed by the plaintiff's job evaluation, would warrant liability. From the perspective of a disparate treatment theory, the effects of time-barred discrimination or is asserting a theory of current discrimination is a matter both of characterization and of judicial receptivity to the latter theory. In a sense, all disparate impact theory cases are perpetuation theory cases. The employer's use of a race and gender neutral criterion is unlawful because of its disparate impact, but disparate impact is a function of past wrongs. See *Griggs v. Duke Power Co.* 401 U.S. 424, 430-31 (1971) (education and testing requirements give present effect to past societal discrimination with respect to education).

For present purposes, a wage discrimination theory which relies upon job segregation may be characterized in any one of three ways affecting its viability as a theory of present (rather than perpetuated) discrimination. First, the theory may be viewed as seeking to remedy the present compensation "effects" of past and time-barred job assignment discrimination. To the extent that the theory seeks to impose a valuation scheme for comparing the relative worth of jobs predominantly staffed by males and jobs predominantly staffed by females, this characterization appears accurate. Pay "inequity", under the valuation assumption of the imposed scheme, is to be remedied because of existing segregation. Second, the theory may be viewed as stating a theory of present wage discrimination to the extent that it relies on present and purposeful employer job segregation. Although such job segregation is itself remediable (unless the BFOQ defense is applicable) and although the compensation consequences of job segregation may be remediable on a theory of liability for job segregation, the fact remains that there is a gender element to compensation paid at a time at which access to a higher paying male job is barred to females. See supra text accompanying notes 186-98. Third, the theory may be viewed as seeking to derive an inference of present compensation discrimination from the facts of job segregation and lower rates of compensation for jobs dominated by females. The coincidence raises an inference that the jobs dominated by females are compensated at a lower rate because they are dominated by females. Although such a theory of inference states a theory of present discrimination, the inference is weak, since there are explanations of the lower rate independent of employer reliance upon gender.

question presented by such effects was whether they reflected past or current employer policy. Was the employer’s facially gender neutral post-1965 assignment of job classifications to pay grades in fact not gender neutral? Evidence of the similarity of such post-1965 assignments to the employer’s pre-1965 policy would be probative of that question. The plaintiff’s job evaluation, if it duplicated the employer’s pre-1965 evaluative practices and disclosed a continuation of those practices, might also be probative of that question. The function of such evidence within the confines of a disparate treatment model is, however, to raise inferences about the employer’s current motivation for its actions, not its historical motivation for its past actions.

6. The Burden of Proof

Under County of Washington v. Gunther, the Bennett Amendment incorporates the Equal Pay Act’s affirmative defenses. Those affirmative defenses state, albeit in negative form, a disparate treatment theory. The employer is not liable if it can establish that it did not engage in disparate treatment. Although the Gunther opinion fails to provide guidance regarding appropriate schemes of proof and defense in post-Gunther compensation discrimination cases, it is at least a fair inference that the affirmative defense characterization of the Equal Pay Act’s exceptions will be retained for Title VII purposes. The immediate questions are what should a plaintiff be required to establish for purposes of a prima facie case and what standards should govern judicial assessment of an employer’s rebuttal.

There are three potential approaches to the Gunther Court’s conclusion that the Equal Pay Act’s affirmative defenses are assertable in a Title VII action alleging gender discrimination in compensation. First, that conclusion might be viewed as authorizing a plaintiff to establish comparable worth or value, under any of the versions of comparable worth theory earlier canvassed here, as a prima facie case. A prima facie case, under this version of a

262. 452 U.S. at 169.
263. See supra notes 146-52 and accompanying text.
265. See Comment, Sex-Based Wage Discrimination After County of Washington v.
post-Gunther proof schema, would not be directed to an issue of disparate treatment, but rather to an issue of equity or fairness under the valuation premises of the mode of comparison adopted by a plaintiff. The employer would then be required to rebut that showing by establishing, by a preponderance of the evidence, that it had not engaged in disparate treatment. Second, the Court’s conclusion may be viewed as authorizing a plaintiff to establish, by any evidence available to it, a credible inference of disparate treatment. Although evidence of job segregation or evidence of comparable value might in some circumstances give rise to such an inference, the plaintiff’s prima facie case would have to be consistent with the ultimate issue to be addressed by an employer’s rebuttal. The prima facie case should logically support an inference of disparate treatment. Once a prima facie case was established, the defendant would be compelled to rebut it — again by establishing by a preponderance of evidence that it had not engaged in disparate treatment. Third, the Court’s conclusion may be viewed as in


Although it is apparent that de facto job segregation in combination with a male-female wage differential in a single firm may give rise to an inference of disparate treatment in compensation, the many potential legitimate reasons for such a phenomenon render the inference rather weak. See generally Nelson, supra note 33. Similarly, a plaintiff’s job evaluation, unless it is also the job evaluation actually used by a defendant, assumes the valuation premises of the plaintiff, not the productivity premises of the employer. Its acceptance by a court as sufficient for a prima facie case would amount to a judicial approval of the plaintiff’s value premises, not to a conclusion that disparate treatment could be inferred from the evaluation. See supra notes 117-23 and accompanying text. A plaintiff’s multivariate regression study might be used either to establish an inference of disparate treatment or as a means of imposing, again as a matter of a prima facie case, the plaintiff’s view of appropriate valuation of unequal work. Which purpose judicial acceptance of such a study would serve would depend upon the plaintiff’s selection and measurement of proxy variables and the degree to which the selected proxies fit the employer’s guesses regarding productivity. See supra notes 230-46 and accompanying text.

267. Although the Ninth Circuit’s references to the question of the “reasonableness” of the employer’s use of a gender neutral criterion in Kouba v. Allstate Ins. Co., 691 F.2d 873, 878 (9th Cir. 1982) may be viewed as requiring a showing of necessity or justification rather than a showing of gender-neutral decision in a post-Gunther compensation case, it appears that those references were intended to state a standard for assessing employer credibility. On that premise, Kouba would be consistent with the second version of appropriate post-Gunther analysis.

The Supreme Court has permitted evidence of statistically disparate consequences to form a prima facie case of disparate treatment. Hazelwood School Dist. v. United States,
fact not incorporating the affirmative defense characterization, but merely as authorizing only a disparate treatment theory as the appropriate theory for approaching a Title VII claim of gender discrimination in compensation. Under this view, the burden of persuasion would remain, as in other disparate treatment cases brought under Title VII, on the plaintiff. At most, the defendant would have a burden of production in rebutting a prima facie case from which disparate treatment could be inferred.

The distinctions between these approaches are crucial. The first approach assumes the viability of comparable worth (of pay equity between males and females as groups) as a legal command and postulates a special privilege, the affirmative defense of a factor other than gender. Although employers, particularly employers with express and highly rationalized compensation policies, might find it relatively easy to invoke that privilege, the temptation to narrowly construe the privilege in cases in which an employer can rely only upon its protestations of good faith guesses regarding relative productivity will be great. Moreover, if the employer's "affirmative defense" is construed as a privilege or special plea in justification, there is a risk that judicial standards for assessing the viability of the employer's claim will, in the guise of inquiry into the credibility of the claim, take the form of inquiry into the necessity of the claim. In short, judicial acceptance of the premise

433 U.S. 299 (1979). It has however insisted that the ultimate issue is intentional discrimination, that disparity must give rise to an inference of intentional discrimination, and that the employer is entitled to challenge the prima facie case with evidence that undermines the inference of intent arising from it. Id. at 299-300; Int'l Bhd. of Teamsters v. United States, 431 U.S. 324 (1977).


269. See the employer's argument, rejected by the Ninth Circuit, in Kouba v. Allstate Ins. Co., 691 F.2d 873, 875 (9th Cir. 1982).

270. See Gwartney, supra note 88, at 657 n.68 (employers often rely upon estimates of productivity not rationalized or expressed in terms comporting either with job evaluation or human capital theory). WOMEN, WORK AND WAGES, supra note 17, at 72 (employers often use job evaluation to "capture" or make explicit existing compensation policy). Query whether a court adopting this version would permit employer rebuttal by means, e.g., of a multiple regression study which, utilizing gender neutral proxy variables selected by the employer but generally recognized as viable proxies for productivity, completely explained compensation differentials without reference to gender where the study was undertaken in preparation for litigation. See Finkelstein, supra note 142, at 744-45. If a court concludes that such a study is an after the fact rationalization, has it not imposed liability on the basis of the plaintiff's prima facie case, a case established by means of a plaintiff's job evaluation of the jobs in question?

271. See Kouba v. Allstate Ins. Co., 691 F.2d 873, 875 (9th Cir. 1982). It is unfortunately a short step between asking whether the employer's claimed reason for a differential is credible and asking whether that reason is necessary to the efficient conduct of the em-
that male and female workers as groups should be compensated fairly or equitably risks a narrow construction of the employer’s “absence of disparate treatment” defense and risks strict scrutiny of the employer’s gender neutral reasons for disparate compensation effects - risks inconsistent with the congressional policies underlying the equal work standard. The second approach does not treat the employer’s affirmative defense as a privilege or plea in justification. Rather, it treats the central issue of the case as disparate treatment, requires the plaintiff’s case to address that issue, and imposes the risk of non-persuasion on the employer once the plaintiff has established an inference of disparate treatment sufficient to warrant a finding in the plaintiff’s favor. The employer’s affirmative defense does not take the form an affirmative defense takes in, for example, the law of tort or criminal law; it is not a justification or privilege assertable in avoidance of liability for conduct conceded to be unlawful, absent justification or privilege. Rather, the defense is merely a step in a logical progression of steps designed to reach an ultimate question regarding the lawfulness of conduct. More importantly, 


What is risked is the imposition of a disparate impact prohibition. The point is perhaps best illustrated by the potential use of multiple regression. A plaintiff might, for example, attempt to establish a prima facie case by use of a regression study which includes as explanatory variables only productivity variables, i.e., human capital variables which focus upon worker characteristics. An employer might then be required to affirmatively prove that it relied on factors “other than sex.” One potential means of doing so is to introduce a regression study which includes both additional productivity considerations omitted from the plaintiff’s study and job characteristic variables such as job differences and job or grade levels. The employer’s additional productivity factors are subject to the objection that they are mere proxies for the employer’s subjective guesses about productivity and were not in fact considered by the employer. The employer’s job characteristics variables are subject to the objection that they mask potential or possible discrimination in hiring or promotion. See Vuyanich v. Republic Nat’l Bank of Dallas, 505 F. Supp. 224 (N.D. Tex. 1980).

If the employer has the burden of proof, a court may be warranted in requiring the employer to make some showing that the variables claimed by the employer are gender neutral. But a requirement that the employer affirmatively establish that the variables are “necessary” or “job related” is also a possibility. Id. at 313.

The approach is suggested by cases in which a plaintiff’s failure to account for job differences in a regression study prompted rejection of the study. See, e.g., Valentino v. United States Postal Serv., 674 F.2d 56, 71 (D.C. Cir. 1982); Wilkins v. Univ. of Houston, 654 F.2d 388 (5th Cir. 1981).

See McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973). The second approach is essentially the Fifth Circuit’s interpretation of Green prior to the Supreme Court’s
the second approach does not adopt the premise that fairness or equity between male and female workers as groups, as defined by the premises of a selected basis for comparison of values, as the premise to be rebutted. It does not therefore implicitly adopt the regulatory balancing of interests approach underlying a disparate impact theory.\(^{275}\) The question is whether the employer was motivated by gender; it is not whether the employer's decision comports with a judicially defined standard of the value of work or whether the decision is necessary, under such a standard, to the employer's pursuit of its legitimate interests.

The third approach is consistent with the second but imposes the risk of non-persuasion on the plaintiff. It is therefore consistent with the Supreme Court's view of appropriate analysis in Title VII disparate treatment cases not entailing gender discrimination in compensation claims. It is, of course, inconsistent with characterizing the Equal Pay Act exceptions incorporated, under Gunther, as affirmative defenses. There is nevertheless a justification, beyond symmetry, for viewing Gunther's interpretation of the Bennett Amendment as requiring use of Title VII's usual disparate treatment approach rather than as incorporating affirmative defenses. There is nothing in the nature of a gender discrimination in compensation claim which would warrant the imposition of a greater burden of proof on the employer than is the case in other, race and gender, claims of disparate treatment brought under Title VII. Indeed, the policies underlying the Equal Pay Act's equal work standard - policies emphasized by the court in Gunther in referring to the Equal Pay Act's fourth affirmative defense - suggest that the normal allocation of the risk of judicial error to the plaintiff should be maintained in the present context.\(^{276}\)

IV. Conclusion

Underlying the distinct and often inconsistent theories of Title VII liability, disparate treatment and disparate impact, are distinct and often inconsistent policy objectives; equal treatment of individuals and equal achievement for groups.\(^{277}\) The legal conceptions decision in Texas Dept. Community Affairs v. Burdine, 450 U.S. 248 (1981). See East v. Romine, Inc., 518 F.2d 332 (5th Cir. 1975).

\(^{275}\) See supra notes 101-15 and accompanying text.


\(^{277}\) See Fiss, supra note 108, at 237-40. See also Vuyanich v. Republic Nat'l Bank of
invoked by each theory, illicit motive in the case of disparate treatment, insufficiently justified disparities in the benefits received by or burdens imposed upon distinct groups in the case of disparate impact, express and impose those distinct policies. The disadvantage inherent in a disparate treatment theory is that it is extraordinarily difficult to discover illicit motive. The judicial response to that disadvantage has been to infer illicit motive from evidence of the disparate consequences employer action may have on groups protected by the legislation. The disadvantage inherent in a disparate impact theory is that it subjects employer decision, decision presumed by disparate impact theory to have been motivated by considerations independent of race or gender, to intensive reevaluation by the judiciary. It should be obvious that the more willing a court to infer illicit motive from disparate consequences, the more the court moves in the conceptual and therefore policy direction of a disparate impact model. It should be equally obvious, therefore, that such a willing court incurs greater and greater risks of imposing the regulatory disadvantage inherent in a disparate impact theory as it becomes more willing to infer motive from consequence.

It is the risk of regulatory intrusion which Congress sought to preclude by means of the equal work standard in enacting the Equal Pay Act. The Supreme Court, in Gunther, circumvented that means of preclusion by narrowly construing the Bennett Amendment to Title VII. It has been the contention here, however, that the Court imposed a distinct means of accomplishing that same end. Disparate treatment is the sole available theory for imposing Title VII liability for post-Gunther claims of gender dis-


278. See Cox, supra note 47, at 213-18 (arguing that illicit motive conception is not merely a self-blinding conceptual excuse for decision, but a means of expressing a policy and confining decision within the boundaries established by that policy, and arguing further that a decision to adopt an effects and balancing test for decision is a choice of a distinct policy).


280. It is recognized that this may not be thought a disadvantage by some. Congress of course thought it a disadvantage in enacting the Equal Pay Act's equal work standard, supra notes 144-49 and accompanying text, but the potential criticism should perhaps be more directly answered. The primary disadvantage of judicial regulation is that courts are poorly designed to anticipate the sociological and economic consequences of the sort of broad policy decisions contemplated by comparable worth theory. See Meltzer, supra note 131, at 457-59. That difficulty aside, courts are also poor legislators of such policy decisions. See Cox, Book Review, 1982 Utah L. Rev. ____ (forthcoming).

281. See supra notes 144-49 and accompanying text.
crimination in compensation. Whether these means will success-
fully preclude regulatory intrusion is dependent upon the
discipline with which the courts adhere to illicit motive as the legal
conception underlying the disparate treatment prohibition and,
therefore, upon the degree of their willingness to infer motive from
disparate group consequences.

It has not been the contention here that inference from conse-
quence is never warranted. Rather, the contention has been that
compensation disparities are the consequence of diverse phenom-
enon only some of which are potentially attributable to illicit em-
ployer motivation. A court which uncritically assumes that compo-
nents of a compensation differential not explicable by reference to
the objective standards an economist or job evaluator may assert
as theoretical explanations of compensation imposes a discrimina-
tion prohibition far broader in meaning and scope than a disparate
treatment theory would permit. It may be that there are only a
limited number of factors which plausibly explain compensation
within the boundaries of an economic theory of compensation, but a court is not, absent congressional acceptance of such a the-
ory, entitled to adopt those boundaries. What a court is entitled to
do is to utilize evidence of the employer's actual behavior, to criti-
cally examine and use evidence of disparate consequences where
probative of and confined to the issue of illicit motive, and to im-
pose liability for the reason of illicit motive where discovered. The
mood with which a court should approach that task is a mood of
humility, humility in the sense that the immediate achievement of
fair and equitable shares of the compensation pie for male and fe-
male workers as groups is not, absent legislative action, the court's
legitimate objective.

283. Cf. Mincer, supra note 66, at 284 ("although it may be 'traditional' . . . to mea-
sure discrimination by the residual - after various other factors have been netted out - I
think a more humble attitude is to think of the residual as a measure of our ignorance . . .").