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MEMORANDUM

THE WHITE HOUSE  
WASHINGTON

August 4, 1982

AUG 04 1982

FOR: EDWIN L. HARPER  
FROM: WILLIAM P. BARR  
SUBJECT: Comparable Worth Literature  
(Ref. 085415)

WPB

I have been in touch with both the Equal Employment Advisory Council and the National Commission on Pay Equity.

You asked to see some literature published by these groups.

EEAC has provided me with the attached materials. I also have in my files the legal briefs that they have filed in key comparable worth cases, some of which are excellent.

NCPE said they would send some material, but I have not yet received any. When I do receive it, I will forward it to you.

Please give me a brief summary of the factual basis of discrimination in the attached article.

21

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**OFFICE OF POLICY DEVELOPMENT**


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**STAFFING MEMORANDUM**DATE: 7/27/82 ACTION/CONCURRENCE/COMMENT DUE BY: 8/1/82SUBJECT: Comparable worth: the equal pay issue of the '80's.

	ACTION	FYI		ACTION	FYI
HARPER	<input type="checkbox"/>	<input type="checkbox"/>	DRUG POLICY	<input type="checkbox"/>	<input type="checkbox"/>
PORTER	<input type="checkbox"/>	<input type="checkbox"/>	TURNER	<input type="checkbox"/>	<input type="checkbox"/>
BARR	<input type="checkbox"/>	<input type="checkbox"/>	D. LEONARD	<input type="checkbox"/>	<input type="checkbox"/>
BAUER	<input type="checkbox"/>	<input type="checkbox"/>	OFFICE OF POLICY INFORMATION		
BOGGS	<input type="checkbox"/>	<input type="checkbox"/>	GRAY	<input type="checkbox"/>	<input type="checkbox"/>
BRADLEY	<input type="checkbox"/>	<input type="checkbox"/>	HOPKINS	<input type="checkbox"/>	<input type="checkbox"/>
CARLESON	<input type="checkbox"/>	<input type="checkbox"/>	PROPERTY REVIEW BOARD	<input type="checkbox"/>	<input type="checkbox"/>
DENEND	<input type="checkbox"/>	<input type="checkbox"/>	OTHER	<input type="checkbox"/>	<input type="checkbox"/>
FAIRBANKS	<input type="checkbox"/>	<input type="checkbox"/>		<input type="checkbox"/>	<input type="checkbox"/>
FERRARA	<input type="checkbox"/>	<input type="checkbox"/>	_____	<input type="checkbox"/>	<input type="checkbox"/>
GUNN	<input type="checkbox"/>	<input type="checkbox"/>	_____	<input type="checkbox"/>	<input type="checkbox"/>
B. LEONARD	<input type="checkbox"/>	<input type="checkbox"/>	_____	<input type="checkbox"/>	<input type="checkbox"/>
MALOLEY	<input type="checkbox"/>	<input type="checkbox"/>	_____	<input type="checkbox"/>	<input type="checkbox"/>
MONTOYA	<input type="checkbox"/>	<input type="checkbox"/>	_____	<input type="checkbox"/>	<input type="checkbox"/>
SMITH	<input type="checkbox"/>	<input type="checkbox"/>	_____	<input type="checkbox"/>	<input type="checkbox"/>
✓ UHLMANN	<input checked="" type="checkbox"/>	<input type="checkbox"/>	_____	<input type="checkbox"/>	<input type="checkbox"/>
ADMINISTRATION	<input type="checkbox"/>	<input type="checkbox"/>	_____	<input type="checkbox"/>	<input type="checkbox"/>

**Remarks:**

Are you or someone in OPL in touch with both Equal Employment Advisory Council and National Commission on Pay Equity? I'd like to see some literature from each group.

*Please return this tracking sheet with your response.*

**Edwin L. Harper**  
 Assistant to the President  
 for Policy Development  
 (x6515)

THE WHITE HOUSE  
WASHINGTON

Date/ # 7/26

TO: R. Porter  
D. Boggs  
R. Carleson  
D. Kass  
M. Uhlmann

FROM: Edwin L. Harper

ACTION:  FYI:

Comment: \_\_\_\_\_

Background: \_\_\_\_\_

Draft response for: \_\_\_\_\_

For your handling: \_\_\_\_\_

File: \_\_\_\_\_

Set up meeting: \_\_\_\_\_

With: \_\_\_\_\_

REMARKS: Are you or some one in OPL  
in touch with both Equal Employment  
Advisory Council & National Com on  
Pay Equity? I'd like to see some

Due Date: literature from each group

Action Completed: \_\_\_\_\_

THE WHITE HOUSE  
WASHINGTON

*The White House*

FROM THE OFFICE OF:

Wendy Borchardt  
Special Assistant to the  
President for Public Liaison  
The White House  
Washington, D. C. 20500  
(202) 456-6585

PLEASE CONTACT THE OFFICE  
IF FURTHER INFORMATION IS  
REQUIRED.

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**Wage Discrimination and the "Comparable Worth"  
Theory in Perspective**

**Bruce A. Nelson  
Edward M. Opton, Jr.  
Thomas E. Wilson**

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**WAGE DISCRIMINATION AND THE  
"COMPARABLE WORTH" THEORY IN  
PERSPECTIVE**

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## WAGE DISCRIMINATION AND THE "COMPARABLE WORTH" THEORY IN PERSPECTIVE<sup>1</sup>

Bruce A. Nelson\*  
Edward M. Opton, Jr.\*\*  
Thomas E. Wilson\*\*\*

### INTRODUCTION

Men and women often do different jobs: most carpenters, physicians, and police officers are male; most secretaries, nurses, and telephone operators are female. Despite substantial progress in the desegregation of the workplace<sup>2</sup> vocational choices and vocational opportunities are still very much affected by factors linked to sex and race.<sup>3</sup> In the economic marketplace, most traditional "women's" jobs pay less than "men's" jobs.

In a recent issue of this Journal, Professor Ruth G. Blumrosen has argued that the wage marketplace is infected with sex and race discrimination.<sup>4</sup> The type of discrimination that she alleges is the same as that addressed by the "equal worth" or "compara-

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<sup>1</sup> This article responds to Blumrosen, *Wage Discrimination, Job Segregation, and Title VII of the Civil Rights Act of 1964*, 12 U. MICH. J. L. REF. 397 (1979).

<sup>2</sup> Between 1950 and 1976, the proportion of female lawyers and judges rose from 4.1% to 9.2%, an increase of 124%. The corresponding increases for some other occupations were: accountants, 81%; engineers, 50%; physicians and osteopaths, 97%; college and university teachers and presidents, 37%; bank officials and financial managers, 111%; buyers and purchasing agents, 152%. U.S. BUREAU OF LABOR STATISTICS, DEP'T OF LABOR, U.S. WORKING WOMEN: A DATABOOK 9, Table 8 (1977) [hereinafter cited as WORKING WOMEN]. See also note 255 *infra*; H. NORTHRUP & J. LARSON, THE IMPACT OF THE AT&T-EEO CONSENT DECREE (1979) (extensive progress in desegregating jobs in telephone industry under consent decree); Hedges & Bemis, *Sex Stereotyping: Its Decline in Skilled Trades*, MONTHLY LAB. REV., May 1974, at 14-22. But see WORKING WOMEN, *supra*, at 34-35, Tables 35-37 (women's earnings substantially lower than men's in all fields; little change during years 1955-1976).

<sup>3</sup> See *Wage Discrimination*, *supra* note 1, at 400 n.3.

<sup>4</sup> See note 1 *supra*. Note the distinction between *Wage Discrimination*, a short form of citation to Professor Blumrosen's article, and "wage discrimination," that article's central concept.

ble worth" movement.<sup>5</sup> Professor Blumrosen prescribes a judicial remedy: the courts should appraise the worth of jobs and should compel employers to pay wages proportional to such "worth."

The issue is not merely academic. Professor Blumrosen is a prominent consultant to the Equal Employment Opportunity Commission (EEOC). Her thesis will no doubt strike a sympathetic chord with the Chair of that agency, Eleanor Holmes Norton, who foresees the "equal worth" question as "the women's issue of the 1980's."<sup>6</sup> It is, in Norton's view, "the same kind of outsized issue [as] school desegregation" and the "most difficult issue to arise under Title VII."<sup>7</sup>

The EEOC and other plaintiffs have litigated "comparable worth" several times, and although the theory has lost consistently,<sup>8</sup> the EEOC has not given up. It continues to maintain that "comparable worth" is the law, even though the courts do not agree.<sup>9</sup> The agency has commissioned a major study by the National Academy of Sciences (NAS) on the feasibility of a bias-free job evaluation system, the development of which would be prerequisite to large-scale enforcement of the "comparable worth" theory.<sup>10</sup> The EEOC's counterpart in the Department of

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<sup>5</sup> Professor Blumrosen's wage discrimination theory addresses the same discrimination issues as the slogans "equal pay for jobs of equal worth" and "equal pay for jobs of comparable worth." See, e.g., Lewin, *The "Pink Collar" Revolution*, NAT. L.J., Dec. 10, 1979, at 1, col. 1; Crystal, *Comparable Worth?*, Wall St. J., Nov. 5, 1979, at 24, col. 3; Address by Alexis Herman, Director, Women's Bureau, Dep't of Labor, at Organizing Conference of Coalition of Labor Union Women (Washington, Jan. 24, 1980), reprinted in DAILY LAB. REP. (BNA), No. 17, at E-1 (Jan. 24, 1980). Courts rejecting the equal worth or comparable worth approach to wage discrimination under Title VII include: *Christensen v. Iowa*, 563 F.2d 353 (8th Cir. 1977); *IUE v. Westinghouse Electric Corp.*, 19 Fair Empl. Prac. Cas. 450 (D.N.J. 1979), appeal pending, Nos. 79-1893 and 79-1894 (3d Cir.); *Lemons v. City & County of Denver*, DAILY LAB. REP. (BNA), No. 81, at D-1 (10th Cir. April 24, 1980). The slogans, however, greatly understate the proponents' demands. "Equal worth" proponents are asking not only for equal pay for jobs equal in "worth," but also for wage increases for "female" jobs that, they admit, are worth less than the comparison "male" jobs, but which, they assert, are "worth" a greater proportion of the "male" jobs' wage than they are paid. See, e.g., *Wage Discrimination*, supra note 1, at 400 & 490-501, especially the hypothetical example at 496-97. This article will use the term "comparable worth theory" to refer to the comparable worth idea as well as its synonym, the equal worth idea. However, "proportionate worth theory" would be a more accurate label.

<sup>6</sup> DAILY LAB. REP. (BNA), No. 211, at A-2 (Oct. 30, 1979) (paraphrase of Chair Norton's remarks at Conference on Pay Equity, Washington, D.C., October 23, 1979).

<sup>7</sup> *Id.*

<sup>8</sup> See cases cited in notes 4 supra and 206 & 212 and accompanying text *infra*.

<sup>9</sup> See, e.g., Address by EEOC Commissioner J. Clay Smith, Biennial Conference on Civil Rights of Ohio AFL-CIO (Feb. 6, 1980), reprinted in DAILY LAB. REP. (BNA), No. 28, at E-2 (Feb. 8, 1980). See also Remarks of Daniel G. Leach, Vice Chair of the EEOC, to the Federal Bar Association (Washington, D.C., June 9, 1978), excerpted in EMPL. PRAC. GUIDE (CCH) ¶ 5070 (July 6, 1978).

<sup>10</sup> NATIONAL RESEARCH COUNCIL/NATIONAL ACADEMY OF SCIENCES, JOB EVALUATION: AN

Labor, the Office of Federal Contract Compliance Programs (OFCCP), has included "comparable worth" in its recent Federal Contract Compliance Manual.<sup>11</sup> Thus, in the view of the federal government's equal employment opportunity agencies, proportionate pay for jobs of proportionate worth is an idea whose time is coming, if it has not already arrived.<sup>12</sup>

The EEOC's commissioning of the NAS study is an attempt to provide a scientific foundation for "comparable worth."<sup>13</sup> Professor Blumrosen's article is a parallel effort to construct a legal foundation for court appraisal of "worth." Her article argues forcefully that, when jobs are substantially segregated by sex or race, Title VII should be construed to require pay in proportion to the "worth" of jobs.

We will endeavor to show that Professor Blumrosen's article is selective and oversimplified in its "historical, anthropological, sociological and economic"<sup>14</sup> analysis. As a result, she has been misled to the conclusion that courts should in effect take judicial notice of "wage discrimination," which is a novel and controversial concept. Her article assumes, incorrectly, that wage discrimination is a proven and measurable statistic. The present article considers the legal argument that wage discrimination is prohib-

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ANALYTIC REVIEW (Interim Report to the Equal Employment Opportunity Commission) (1979) [hereinafter cited as NAS REPORT]. The reasons why a bias-free job evaluation system would be necessary are analyzed in part II B *infra*.

<sup>11</sup> OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS, FEDERAL CONTRACT COMPLIANCE MANUAL § 2-250.2c (1979). The OFCCP also uses the term "wage discrimination," but not in the context of comparable worth theory. As the OFCCP defines wage discrimination, it is a concept different from anything discussed in Professor Blumrosen's article or in the present article. *Id.* at § 7-30.4.

<sup>12</sup> Some additional developments also portend increased efforts to implement the comparable worth theory. In Connecticut, the legislature has mandated a pilot study of comparable worth theory in setting wages for state employees. The AFL-CIO recently decided to support the comparable worth theory. *BUS. WEEK*, Dec. 17, 1979, at 66-69. In Canada, the Legislative Assembly of the Province of Ontario has a comparable worth statute under consideration as of January 1980. The proposed legislation would amend Chapter 112 of The Employment Standards Act, 1974, § 33, to read: "No employer . . . shall . . . establish . . . any difference in wages paid to a male and to a female employee employed in the same establishment who are performing work of equal value . . . ." Value would be defined as a "composite" of skill, effort, responsibility, and working conditions. *Id.* And the Congress has taken a first step towards adoption of equal worth theory in the Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (1978) (codified at 5 U.S.C.A. § 2301(b)(3) (West Supp. 1979)). Section 2301(b)(3) provides: "[E]qual pay should be provided for work of equal value with appropriate consideration of both national and local rates paid by employers in the private sector . . . ." This ambiguous language seems to indicate that Congress is not ready to abandon the market as the measure of appropriate pay for civil service jobs, yet Congress is concerned about possible wage discrimination in the marketplace.

<sup>13</sup> NAS REPORT, *supra* note 10, at xi.

<sup>14</sup> *Wage Discrimination*, *supra* note 1, at 401-02.

ited by Title VII.

Our article focuses primarily on one legal question: Does the wage discrimination theory, as sketched by Professor Blumrosen, fall within the remedial ambit of Title VII of the Civil Rights Act? *Wage Discrimination's* factual contentions as to the existence and universality of wage discrimination deserve equally detailed analysis, but we leave that task to scholars of the pertinent disciplines, sociology and economics. We will deal with the factual contentions of *Wage Discrimination* only so far as necessary to challenge its central factual conclusion: that a demonstration of job separation should lead to a judicial inference of wage discrimination. This assertion is crucial to Professor Blumrosen's argument because it is the basis for the proposal that incumbents of sex- or race-separated jobs are entitled, by virtue of their jobs alone, to higher wages.<sup>15</sup> Because her social science evidence is unpersuasive and her legal analysis is unsound, we conclude that the courts and the Congress have been wise in refraining from attempts to impose the "comparable worth" theory

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<sup>15</sup> This article will limit its discussion to sex discrimination. Because our discussion applies equally to race and sex, it would be redundant to mention both protected groups on every occasion. Moreover, notwithstanding Professor Blumrosen's conscientious inclusion of the word "blacks" to balance each mention of women, it appears that the primary aim of the EEOC's focus on residual wage differentials is to raise the wages of women and not of minority men. The "comparable worth" theory applies only when jobs are female-intensive or minority-intensive, and the extent of job segregation is much greater for sex than for race. The EEOC's commissioned NAS REPORT, which is extensively cited in *Wage Discrimination*, explicitly ignores race discrimination, stating as the rationale for the omission that "[c]urrent public concern is almost entirely focused on sex-based discrimination." NAS REPORT, *supra* note 10, at xii. Whatever the EEOC's intentions may be, one should not lose sight of the fact that in practice Professor Blumrosen's theories very probably would benefit white women at the expense of men, particularly blacks and other minorities. The sole empirical study of a large-scale, judicially-mandated effort to end job separation reported that the promotions and new hires opened up by the AT&T consent decree went mostly to white women. H. NORTHRUP & J. LARSON, *supra* note 2, at 48, 52-54, 77, 83-99. The relative losses by minority males occurred even though eligibility for the AT&T consent decree remedies did not require minority men to show that they worked in jobs that were seventy to eighty percent filled by minorities. Professor Blumrosen's wage discrimination theory, which would impose such eligibility limits on minority men, would be even more likely to subject them to relative losses of income. Estelle James has performed extensive statistical analyses on national data to predict which groups would gain and which would lose income if men's and women's employment were "integrated." She found that college-educated white women would gain the most, and college-educated black women would gain the least. Relative wage losses to men would be eight to eighteen percent, with poorly educated white men losing the most, and poorly educated black men also suffering large losses. These relative gains and losses are all based on the assumption that higher wages for women would not attract more women into the labor market. If, as seems likely, more women *did* enter the labor market, the relative gains and losses would be greater. James, *Income and Employment Effects of Women's Liberation*, in *SEX, DISCRIMINATION, AND THE DIVISION OF LABOR* 379, 384-91 (C. Lloyd ed. 1975).

on the American economy.

Before we examine the "comparable worth" theory, Professor Blumrosen's central concept must be defined and more accurately labeled. What she calls "wage discrimination" is the idea at the heart of her arguments, but she has used the term ambiguously. On the one hand, her idea of wage discrimination seems to be<sup>16</sup> the earnings difference between sexes and races attributable to the concentration of women and blacks in lower paying jobs. "[T]he low rates of pay associated with such segregated jobs constitute the major explanation for the 'earnings gap' between minority and female workers . . . and white males. This gap has long been considered a major benchmark . . . of employment discrimination."<sup>17</sup> If wage discrimination is merely the wage difference between jobs usually held by women and jobs usually held by men, it surely exists,<sup>18</sup> but it is not thereby illegal. This first definition of "wage discrimination" is consistent with the possibility that jobs are, on the average, paid what they are "worth."<sup>19</sup>

But Professor Blumrosen relies in large part on a different idea. Wage discrimination, she writes, means "rates paid for traditionally segregated jobs [which are] discriminatorily depressed."<sup>20</sup> Under this definition, wage discrimination means lower pay for traditionally "female" jobs based on the sex of the incumbents, and not because the job is "worth" less than a job performed by a male. Such practices would come closer to the proscriptions of Title VII, were it not for the Bennett Amendment,<sup>21</sup> whose effect we dispute with Professor Blumrosen. But it is by no means certain that wage discrimination in this sense occurs to any important extent.

The double-barreled term "wage discrimination" is unsatisfactory for another reason as well. The term is a very close paraphrase of the language of Title VII, which forbids employers "to discriminate . . . with respect to . . . compensation" between sexes and races.<sup>22</sup> The term "wage discrimination" thus begs the

<sup>16</sup> The concept of wage discrimination "seems to be" rather than "is" because it is never defined explicitly. Our discussion of its ambiguity is based on the meanings implicit throughout the text of *Wage Discrimination*, especially at 399-401.

<sup>17</sup> *Wage Discrimination*, *supra* note 1, at 400.

<sup>18</sup> *Id.* at 410-15.

<sup>19</sup> "Worth" must be set within quotation marks because, as is explained below at part I B, the worth of a job is a concept that has meaning only in reference to the very standards that Professor Blumrosen rejects.

<sup>20</sup> *Wage Discrimination*, *supra* note 1, at 401.

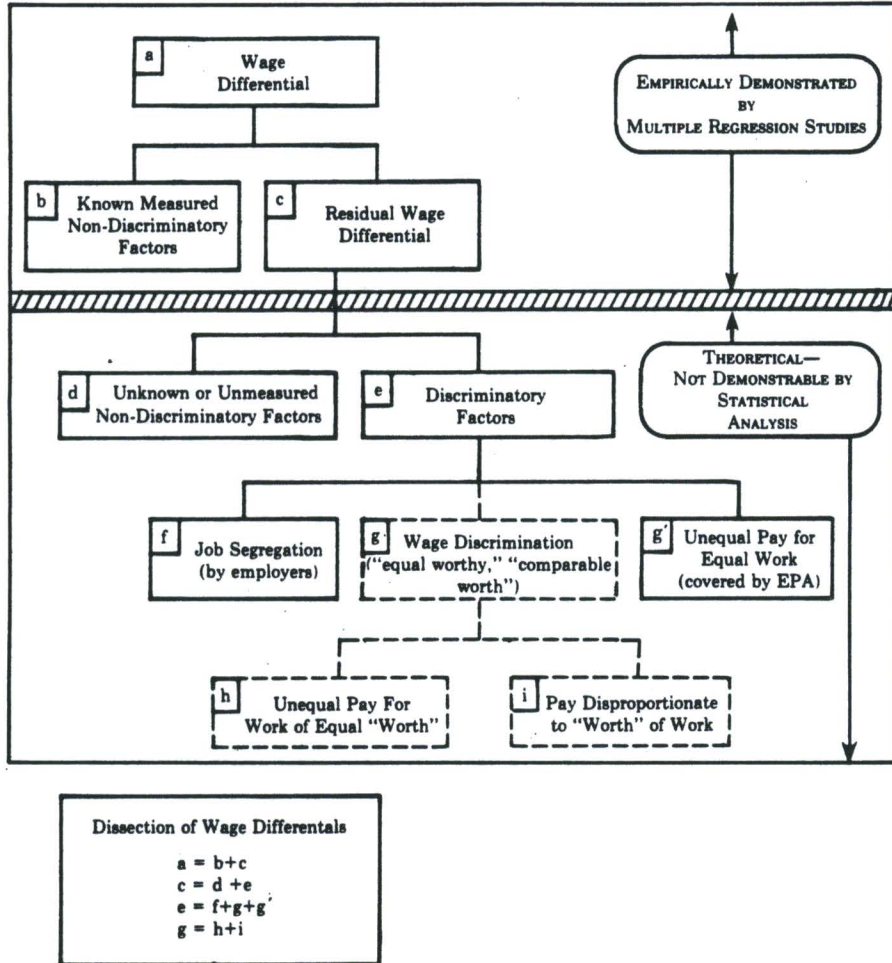
<sup>21</sup> 42 U.S.C. § 2000e-2(h) (1976). See part II *infra* for an analysis of the effect of the Bennett Amendment on Title VII.

<sup>22</sup> Pub. L. No. 88-352, §§ 701-716, 78 Stat. 253 (codified at 42 U.S.C. §§ 2000e to 2000e-

question, for it supplies an affirmative answer to the central question of the entire argument: whether low wages result from illegal discrimination.

This article therefore will employ more exact terms, as the following Figure 1 shows:

FIGURE 1



15 (1976)). The act provides in pertinent part:

§ 703(a) It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin . . . .

"Wage differential" ([a] in Figure 1) is the gross difference in wages between jobs traditionally filled by men and women. Econometric studies divide the wage differential into two components. One component is the sum of all known and measured non-discriminatory factors ([b] in Figure 1); the other is the "residual wage differential" ([c] in Figure 1). This two-component dissection is as far as most statistical analyses are able to go. Residual wage differentials are *in theory* subdividable into discriminatory and nondiscriminatory factors. The non-discriminatory factors are those that are unknown, or that are known but impractical to measure ([d] in Figure 1).<sup>23</sup> The discriminatory factors are the effects of job segregation by employers<sup>24</sup> ([f] in Figure 1) and wage discrimination ([g] and [g'] in Figure 1).

To the extent (if any) that "women's" work is paid less than "men's" work *in amount disproportionate to differences in "true worth,"* wage discrimination occurs ([g] and [g'] in Figure 1).<sup>25</sup> One form of wage discrimination is unequal pay for equal, *i.e.*, identical or very similar, work ([g'] in Figure 1). This special case is the target, and the only target, of the Equal Pay Act of 1963 (EPA).<sup>26</sup> Wage discrimination that does not involve identi-

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<sup>23</sup> Probably the most important of the unmeasurable nondiscriminatory factors is employee choice, *i.e.*, women choosing occupations that are "worth" less and paid proportionately less than occupations chosen by men. As a practical matter, it is impossible to assess the extent to which job segregation is a consequence of discriminatory job assignment by employers ([f] in Figure 1), and the extent to which it is a consequence of employee choice. Of course, vocational choices are themselves products of an entire cultural milieu, which may itself be discriminatory. This article, however, concerns the type of discrimination prohibited by Title VII and by the Equal Pay Act of 1963, Pub. L. No. 88-38, 77 Stat. 56 (codified at 29 U.S.C. § 206(d)(1) (1976)) [hereinafter cited as EPA]. That is, it concerns discrimination by *employers*. Discrimination by the total cultural milieu is not "discriminatory" within the meaning of the law, so it falls within section [d] of Figure 1.

<sup>24</sup> Hereinafter "job segregation" will mean "job segregation by employers" unless otherwise specified. See note 23 *supra* and note 45 *infra*.

Note the distinction between discrimination due to job segregation and wage discrimination. A woman discriminatorily assigned to a low status job that is paid in proportion to its true "worth" suffers only discrimination due to job segregation. If she is non-discriminatorily assigned to a job that is paid less in proportion to its true "worth" than "men's" jobs are paid, she suffers only wage discrimination. If she is discriminatorily assigned to a job whose true "worth" is less than that of the job she would have obtained in the absence of discrimination, *and* the wage for her job is less in proportion to its "worth" than the wage for "men's" jobs, then she suffers both from job segregation and from wage discrimination.

<sup>25</sup> This definition is the idea intended by Professor Blumrosen's definition quoted in the text accompanying note 20 *supra*.

<sup>26</sup> See note 23 *supra*. The EPA provides in part:

No employer having employees subject to any provision of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the



cal male and female jobs is the object of "equal worth" or "comparable worth" theory ([g] in Figure 1). It may consist of unequal pay for different jobs that are equal in "worth" ([h] in Figure 1), or it may consist of pay that is disproportionately unequal to differences in true job worth, e.g., a male is paid one hundred percent more than a woman for a job that is alleged to be "worth" only fifty percent more ([i] in Figure 1).

Although *Wage Discrimination* is a long article, its argument may be summarized simply. First, *Wage Discrimination* points out that women and blacks work mainly in certain sectors of the economy.<sup>27</sup> Jobs filled by women and blacks tend to be low-wage jobs, and according to the article, the low wages cannot entirely be explained as the result of the several legitimate reasons for lower pay that are known to be associated with women and black workers.<sup>28</sup> Women's work, it is said, has always and everywhere been devalued, and the devaluation has resulted in lower wage rates for women and blacks than for white men.<sup>29</sup> The exclusion of women from "men's" jobs — "job segregation" — has been so intimately linked to discriminatory devaluation of women's work that, the author states, the two are really one and the same:

Thus, job segregation has an integral characteristic, the assignment of lower values to the jobs which are available to minorities and women than would otherwise be the case. This evidence establishes that it is more likely than not that where job segregation exists, the wages of those jobs assigned to minorities and women have been depressed by virtue of the fact of their minority or female status.<sup>30</sup>

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opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: *Provided*, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

29 U.S.C. § 206(d)(1) (1976).

<sup>27</sup> *Wage Discrimination*, *supra* note 1, at 402-10.

<sup>28</sup> *Id.* at 410-15. The legitimate reasons that account for at least part of the sex differentials in wages and earnings are the lesser overtime worked by women, the more frequent employment of women on a part-time basis, the different kinds of training, education and counseling acquired by women, and the lesser work experience of the average woman worker. *Id.* at 414.

<sup>29</sup> *Id.* at 415-28.

<sup>30</sup> *Id.* at 427-28.



*Wage Discrimination* then sets forth a theory of the means by which employers allegedly translate their devaluation of the work of women and minorities into low wages.<sup>31</sup> Employers set wages by two principal standards: internal comparison of the "worth" of each job as compared to other jobs within the enterprise, and external comparison with the job market. Neither standard is immune from discrimination. Internal comparisons necessarily are subjective, and if those who set the wages devalue the work of women, their judgments will reflect their prejudices. Setting wages by rates prevailing in the external job market imports whatever collective stereotypes and prejudices infect the economy as a whole. *Wage Discrimination* acknowledges that in classical economic theory the job market values each job at its true worth to the employer, but the article criticizes the classical theory as outmoded.<sup>32</sup>

In a brief but very important section, *Wage Discrimination* summarizes eight published and unpublished econometric studies of sex and race differentials in wages.<sup>33</sup> By a statistical technique known as multiple regression analysis,<sup>34</sup> the authors of these studies were able to account for zero percent to fifty-five percent of the gross wage differentials between sexes and races.<sup>35</sup> The remaining wage differentials, which the present article terms the residual wage differentials, have not evaporated under the spotlight of multiple regression analysis. *Wage Discrimination* assumes that these residual wage differentials must be the fruits of illegal discrimination and contends that wage discrimination must be presumed to exist whenever jobs are occupied largely by members of one sex and/or race. This article will show that the assumption is mistaken and that the contention therefore fails.

Part II of Professor Blumrosen's article is devoted to argu-

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<sup>31</sup> *Id.* at 428-57.

<sup>32</sup> *Id.* at 445-54. In classical economic theory, the job market awards wages to each job according to its true worth, which is proportional to the value of the contribution of workers doing each job to the enterprise as a whole. If an employer offers less than the "true" value, competitors will outbid it for the available workers; if it offers more than the true value, the enterprise will lose money and become insolvent. The criticisms of this so-called "invisible hand" all argue that, although the "law of supply and demand" may prevail in the aggregate and in the long run, it is subject to local perturbations and imperfections, including those resulting from imperfect competition (monopoly, oligopoly, monopsony) and from prejudice, stereotype, and custom. *Wage Discrimination's* extended review of economic theory supports only a single contention: that the market value of a job may be more or less than its "true" economic worth.

<sup>33</sup> *Id.* at 454-56.

<sup>34</sup> See text accompanying note 85 *infra*.

<sup>35</sup> *Wage Discrimination*, *supra* note 1, at 456, Table 1.

ments that residual wage differentials are prohibited by Title VII<sup>36</sup> and that this prohibition is not restricted by the Bennett Amendment,<sup>37</sup> a statutory provision that many courts have interpreted as limiting wage discrimination claims brought under Title VII to the scope of the Equal Pay Act.<sup>38</sup> Her theory would *not* require a plaintiff doing a traditional "women's" job to show that she was paid less than she rightfully should have been paid.<sup>39</sup> The plaintiff would have to show only that her job was "segregated," i.e., that more than seventy or eighty percent of the incumbents were female or minority.<sup>40</sup> In such cases, the workers would be entitled to an injunction<sup>41</sup> raising their pay unless the employer could prove that it would pay no more for the job if the employees were male. "Evidence of segregated jobs," Professor Blumrosen asserts, "justifies an inference of discrimination in compensation."<sup>42</sup>

Finally, *Wage Discrimination* considers the problem of remedies. The article recognizes that the amount of the residual wage differential may be indeterminate in any particular instance, but it argues that the courts should provide a remedy anyway.<sup>43</sup> If the exact amount cannot be specified, the courts can apply general principles, especially the alleged findings of economists that "[f]rom 20% to 50% of the wage differential between men and women has been attributed to factors which cannot be justified on grounds unrelated to discrimination."<sup>44</sup> Alternatively, the court could require the use of a "reformed" job evaluation system to rewrite the employer's wage and salary structure.<sup>45</sup> The present article will argue that such remedies would be grossly

<sup>36</sup> *Id.* at 457-501.

<sup>37</sup> 42 U.S.C. § 2000e-2(h) (1976).

<sup>38</sup> See cases cited in notes 175-76 *infra*.

<sup>39</sup> *Wage Discrimination*, *supra* note 1, at 457-59, 466.

<sup>40</sup> *Id.* at 461.

<sup>41</sup> *Id.* at 490.

<sup>42</sup> *Id.* at 465.

<sup>43</sup> *Id.* at 495-98.

<sup>44</sup> *Id.* at 497 (footnote omitted). See also *id.* at 500. The earnings of women in 1973 were about fifty-seven percent of men's earnings, *id.* at 410 n.52, so an injunction to eliminate the twenty to fifty percent of the differential that Professor Blumrosen attributes to discrimination would mean pay raises of fifteen to thirty-eight percent ( $((100-57) \times .2) \div 57 = 15\%$ ;  $((100-57) \times .5) \div 57 = 37.7\%$ ).

<sup>45</sup> *Id.* at 494. We use the term "separation" rather than Professor Blumrosen's term "segregation" because we reserve the latter term to describe discriminatory actions by employers. Male-intensive and female-intensive jobs also can occur as the result of applicant choice, even in the face of substantial efforts by employers to integrate the work force. As we shall use the terms, job *separation*—the existence of female-intensive jobs—includes the effects both of applicant choices and of discriminatory actions by employers. We will use the term "segregation" to refer only to employer actions. See notes 23-24 *supra*.

unfair and impracticable, and would cause a drastic and undesirable upheaval in the American economy.

### I. THE EXISTENCE OF WAGE DISCRIMINATION

The component of residual wage differentials that Professor Blumrosen calls "wage discrimination" is a concept far removed from such everyday facts as "wages" or "hours of work." It is a theoretical idea rather like Adam Smith's "invisible hand,"<sup>46</sup> like the inevitability of socialism in Marxist theory,<sup>47</sup> and like Keynes' multiplier value of government expenditures:<sup>48</sup> that is, residual wage differential is an inference based on the application of multi-layered, complex and controversial theory to a broad range of facts. *Wage Discrimination* asserts that residual wage differentials are so conclusively established and so universal that the courts are forced, as a practical matter, to order wage increases for all jobs in which women or minorities are concentrated, for the presumption of discrimination is, in effect, irrefutable.<sup>49</sup> *Wage Discrimination* would lift the burden of proving discriminatory wage differentials from plaintiffs and place on employers the burden of proving the negative. For example, an electrical contractor paying craft workers (mostly male electricians) more than clerical workers (mostly female clerks and bookkeepers) would be presumed to be discriminating against the clerical workers unless the employer could demonstrate that no part of the wage differential was attributable to discrimination. The contractor could cite neither traditional job evaluation

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<sup>46</sup> A. SMITH, *THE WEALTH OF NATIONS* Book IV, ch. II (1776). See P. SAMUELSON, *ECONOMICS* 728-29, 840-41 (10th ed. 1976).

<sup>47</sup> K. MARX, *DAS KAPITAL* (1867, 1885, 1894). See generally J. ROBINSON, *ESSAY ON MARXISM* 954 n.15 (London 1942, 1964); P. SAMUELSON, *supra* note 46, at 865.

<sup>48</sup> J. KEYNES, *THE GENERAL THEORY OF EMPLOYMENT, INTEREST AND MONEY* (1936). See P. SAMUELSON, *supra* note 46, at 244.

<sup>49</sup> *Wage Discrimination's* argument is as follows: (1) Sex and race discrimination has existed and still exists. (2) One form of discrimination is job segregation, for example, hiring all male crafts workers and all female clerks. (3) Another form of discrimination is wage discrimination, that is, paying less for jobs performed by women or minorities than would be paid if those jobs were performed by white men. (4) Because job segregation is still quite prevalent, it is likely that wage discrimination is also still the rule rather than the exception. (5) The statistical technique of multiple regression analysis can identify wage differences attributable to legitimate factors such as education and experience; the remaining, unexplained statistical variance—residual wage differential—must be attributable to wage discrimination. (6) Econometric studies have demonstrated residual wage differentials. (7) Therefore, to make a prima facie case of wage discrimination, a plaintiff should have to show only that she or he works in a job category occupied mainly by women or minorities.

However, the prima facie case is irrefutable as a practical matter. See part III A 1 *infra*.

studies nor prevailing wages in the marketplace in its defense, because both are allegedly infected with discrimination.<sup>50</sup> Professor Blumrosen boldly asserts that wage discrimination is so universally pervasive and proven as to warrant shifting the burden of proof, mandating a decision for the employee unless the employer can prove the negative. The employer's burden, as we will show below, would be an impossible one. But the structure of theory and fact upon which the claim is asserted to rest will not bear its weight.

A. *The Inadequacy of Wage Discrimination's Facts and Analysis*

In Section I,<sup>51</sup> *Wage Discrimination* cites statistics that show that jobs are to a very considerable degree still separated, i.e., women are employed — by choice or compulsion — in different jobs from men, and most women's jobs pay less. This is indisputable, but it tells us nothing about *why* most women's jobs pay less. Among the several possibilities are (1) most women choose jobs that are "worth" less than most "men's" jobs; and (2) women are often discriminatorily assigned to jobs that are "worth" less than most men's jobs.<sup>52</sup> *Wage Discrimination* does not attempt to choose among the possibilities.

Part I B<sup>53</sup> is entitled "Links Between Job Segregation and Wage Discrimination," but the reader finds therein nothing on "links": no examples of linkage and no theory of linkage. Rather, part I B consists of three independent subsections.

Subsection 1,<sup>54</sup> "The Findings of Social Sciences and Empirical Studies," summarizes sociological and anthropological evidence that invidious stereotypes of women and "women's work" are widespread in Western and other cultures. Such stereotypes are probably a necessary precondition of wage discrimination, but the existence of sexual prejudice hardly establishes "links" between job separation and wage discrimination. Proof of linkage is crucial to *Wage Discrimination's* argument, for the article proposes that occurrence of female-intensive work raises a legal presumption of wage discrimination. In this subsection, *Wage Dis-*

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<sup>50</sup> *Wage Discrimination*, supra note 1, at 429-41, 445-46.

<sup>51</sup> *Id.* at 402-15.

<sup>52</sup> We agree with *Wage Discrimination* that jobs which are unequal in "worth" should be paid unequally. We also agree with *Wage Discrimination* that if women are consigned to jobs of less worth because of their sex, they have a legal right to promotion under Title VII.

<sup>53</sup> *Id.* at 415-28.

<sup>54</sup> *Id.* at 415-20.

*crimination* cites not only scholarly studies, but also political documents<sup>55</sup> and a work of popular polemics.<sup>56</sup> Yet the subsection only asserts — without establishing or citing any authority that purports to establish — a linkage between female-intensive jobs and wage discrimination. We have made our own search for linkage between job separation and wage discrimination; such evidence as we have found indicates an *absence* of linkage.<sup>57</sup>

Subsection 2,<sup>58</sup> "The Persistence of Stereotypes," reiterates that sex stereotypes do exist and are persistent. This subsection deals with quite global beliefs such as the belief that "a woman's primary commitment is to her family."<sup>59</sup> But demonstration that such beliefs exist, even that they are widespread among both men and women, is logically far removed from the proposition to be proved: that female-intensive jobs are *ipso facto* underpaid jobs, that is, that job separation and wage discrimination are *linked*.<sup>60</sup>

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<sup>55</sup> See, e.g., INTERNATIONAL LABOUR OFFICE, EQUALITY OF OPPORTUNITY AND TREATMENT FOR WOMEN WORKERS, REPORT VIII (Int'l Labour Conference, 60th Sess., 1975), cited in *Wage Discrimination*, *supra* note 1, at 417 n.88.

<sup>56</sup> K. MILLETT, SEXUAL POLITICS (1970), cited in *Wage Discrimination*, *supra* note 1, at 416 n.86. See also *id.* at 420 n.99.

<sup>57</sup> Professional sports is one of the very few types of employment in which available statistics permit independent estimates of job segregation and wage discrimination. The economists Pascal and Rapping have applied an exceptionally elaborate multiple regression analysis to the statistics of major league baseball performance, salary, and race. They found strong evidence of job segregation, both as to entry into the major leagues (some qualified minority players were still excluded) and as to job assignment (e.g., fifty-three percent of outfielders but only nine percent of pitchers were black). But job segregation was *not* linked to wage discrimination. Pascal and Rapping found no evidence of wage discrimination. Black players, on the average, earned more than whites and were more valuable players as measured by hits, runs, and other pertinent categories. Pascal & Rapping, *The Economics of Racial Discrimination in Organized Baseball*, in RACIAL DISCRIMINATION IN ECONOMIC LIFE 119 (A. Pascal ed. 1972). *Wage Discrimination* cites the book in which this study was published, *Wage Discrimination*, *supra* note 1, at 447 n.191. but the author apparently overlooked the negative implications of the Pascal-Rapping study for her thesis.

Of course, one analysis of race discrimination is hardly conclusive even as regards race, let alone sex discrimination. But the Pascal-Rapping study is significant because it is the only empirical analysis located by either Professor Blumrosen or the present writers that provides direct evidence as to the existence or lack of linkage, between job segregation and wage discrimination. When the only direct evidence points to a lack of linkage, courts cannot be expected to rule that a showing of job segregation warrants a presumption of wage discrimination.

<sup>58</sup> *Wage Discrimination*, *supra* note 1, at 420-21.

<sup>59</sup> *Id.* at 420.

<sup>60</sup> The only truly pertinent evidence cited in this subsection is *contrary* to *Wage Discrimination's* thesis. The article's handling of this evidence is revealing. *Id.* at 420 n.100. The article notes that the NAS REPORT, *supra* note 10, summarized a social psychological experiment in which men and women evaluated the job of administrative assistant. Some of the male and female evaluators were told that the job incumbent was male; others were told that the incumbent was female.

Subsection 3,<sup>61</sup> "The Factor of Historical Overt Wage Discrimination," gives examples of disproportionate wages from the period of the Second World War, thirty-five to forty years ago.<sup>62</sup> The history is interesting, but hardly conclusive as to the degree, or even the existence, of wage discrimination in the 1980's. Yet *Wage Discrimination* concludes that "[t]his evidence establishes that it is more likely than not that where job segregation exists, the wages of those jobs assigned to minorities and women have been depressed by virtue of their minority or female status."<sup>63</sup>

The inadequacy of such evidence will be apparent if one imagines the same sort of reasoning applied in a slightly different context. Suppose an age discrimination plaintiff asserts that he is underpaid. His evidence is that sociologists have found widespread devaluation of old people in American society. Historically, he demonstrates, derogatory stereotypes of older people were prevalent for many years, even as recently as the Second World War. Therefore, he asserts, "this evidence establishes that it is more likely than not that the wages of older people, myself specifically, have been depressed on the basis of age." Discrimination is so much more likely than not, the plaintiff argues, that the court ought to presume it unless the employer can rebut the presumption: every older employee ought to have his or her pay raised by court order unless the employer can prove that each would have been paid no more if he or she were younger. The burden of proof would often be impossible, and almost all older employees would get raises, regardless of the fairness of their pay.<sup>64</sup>

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The sex of the hypothetical administrative assistant made no difference to the evaluators. Men who were told that the administrative assistant was a man rated the job no higher than did men who were told that the administrative assistant was a woman. The only sex difference observed was that men rated the job somewhat higher than did women — regardless of the sex of the incumbent. Arvey, Passino, & Lounsbury, *Job Analysis Results as Influenced by Sex of Incumbent and Sex of Analyst*, 62 J. APP. PSYCH. 411 (1977).

*Wage Discrimination* describes these facts but ignores the implications, which run counter to that article's thesis. Instead, *Wage Discrimination* surmises that the experimental results may demonstrate self-hatred on the part of women, because "[w]omen tended to grade more harshly." *Wage Discrimination*, *supra* note 1, at 420 n.100. That inference would have had some support if women had evaluated the administrative assistant job lower ("more harshly") when they were told that the incumbent was a woman. But since the women evaluators rated the job the same regardless of the sex of the incumbent, *Wage Discrimination's* speculation about "self-hatred" has no logical basis at all.

<sup>61</sup> *Id.* at 421-28.

<sup>62</sup> For additional details on this period, see Clive, *Women Workers in World War II: Michigan As a Test Case*, 20 LAB. HIST. NO. 1, at 5 (1979).

<sup>63</sup> *Wage Discrimination*, *supra* note 1, at 427-28.

<sup>64</sup> The analogy is less than perfect, however, in one important respect. Many older

The last section of part I, "Translation of Discriminatory Devaluation Into Lower Pay Rates,"<sup>65</sup> begins by describing how prejudice could operate to reduce wages for women's jobs. Job evaluation systems require the exercise of judgment. If the persons making judgments are biased, their job evaluation decisions may reflect their biases.<sup>66</sup> The subsequent subsections theorize that it would be possible for bias to enter into the determination of wages by other routes: through reliance on other employers' pay scales,<sup>67</sup> through the continuation of historically biased wage rates,<sup>68</sup> or through collective bargaining by biased representatives.<sup>69</sup>

These are plausible theories, but they do not help the reader — or the courts — to answer the critical questions: does wage discrimination exist in the wage structures of particular employers, and if so, which employers, and how much wage discrimination? Theories that suggest, however plausibly, that biases can enter into the setting of wages have the same limitation as the following analysis of predatory pricing in the antitrust context: (1) merchants can attempt to gain a monopoly by predatory pricing; (2) several methods exist of implementing predatory pricing; (3) in the past, many merchants have used predatory pricing; (4) it seems probable that many merchants are using predatory pricing now; (5) therefore, the courts should presume that every merchant accused by its competitors of predatory pricing is liable for damages unless it can prove otherwise. The logical defect is that none of the four propositions, nor all of them combined, logically warrants the conclusion, which is the analog of *Wage Discrimination's* proposed presumption that all "women's" jobs are paid less than their true "worth."

Subsections 6 and 7<sup>70</sup> review the controversies among theoretical economists as to residual wage differentials. Professor Blumrosen acknowledges that in the classical economic theory of free

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people work in jobs identical to those done by younger people, and for equal pay. In those situations, the employer can prove fairness by demonstrating equal pay for equal work. In *Wage Discrimination's* comparable worth theory, the male and female jobs are different by definition (the theory applies only to comparisons of different jobs), so direct comparisons of wage rates would prove nothing.

<sup>65</sup> *Wage Discrimination*, *supra* note 1, at 428-57.

<sup>66</sup> Job evaluation systems require judgments at the levels of job analysis, job description, and selection and weighting of compensable factors. Bias could distort any of these judgments. *Id.* at 428-41.

<sup>67</sup> *Id.* at 441-43.

<sup>68</sup> *Id.* at 443-44.

<sup>69</sup> *Id.* at 444-45.

<sup>70</sup> *Id.* at 445-54.

markets, discrimination on the basis of sex is impossible.<sup>71</sup> Of course, sex discrimination *does* occur, so neoclassical economists have posited that employers may discriminate at least insofar as they are willing to pay for the exercise of their "taste" for discrimination by earning lower profits,<sup>72</sup> or insofar as they are forced into discrimination by the discriminatory "tastes" of male employees, or by their perceptions of employees' preferences.<sup>73</sup> The classical and neoclassical economic theorists have been challenged by competing theories which predict that employers can, in some circumstances of imperfect competition, profit by paying women proportionately less than men.<sup>74</sup> The bearing of these several economic theories on the issue for which they are cited might be summed up as follows. Economists disagree: some theories allow coexistence between the profit motive and wage discrimination; others do not.

The entire argument of *Wage Discrimination* up to this point is theoretical and inferential, a series of permutations of one basic theme. That theme is: (1) prejudice against women is widespread; (2) prejudice against women could result in disproportionately low wages for women's jobs; (3) therefore, the wages for women's jobs probably are lower than would be the case if the jobs were performed by men. While each premise is plausible, the syllogism is hardly conclusive and, most importantly, offers no hint as to how much disproportion in wages exists or which employers are paying disproportionately. If, as *Wage Discrimination* contends, Title VII prohibits residual wage differentials, the prohibition would have to remain a dead letter unless the courts could determine *which* employers are underpaying "women's" jobs, and *by how much* the jobs are underpaid.

The final section<sup>75</sup> of *Wage Discrimination's* part I is therefore of great importance to its thesis. In the entire 101-page article, only these four pages cite data that allegedly bear directly on the assessment of residual wage differentials in modern business enterprises.<sup>76</sup> It is surprising that this brief section consists of little

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<sup>71</sup> *Id.* at 446.

<sup>72</sup> *Id.* at 446-47. The leading theoretical work of this persuasion, G. BECKER, *THE ECONOMICS OF DISCRIMINATION* (2d ed 1971), has been cogently criticized in J. MADDEN, *THE ECONOMICS OF SEX DISCRIMINATION* 37-39, 42-48, 105-06 (1973).

<sup>73</sup> *Wage Discrimination*, *supra* note 1, at 447-48.

<sup>74</sup> *Id.* at 448-54.

<sup>75</sup> *Id.* at 454-57.

<sup>76</sup> In other contexts, *Wage Discrimination* cites extensively to a report that contains such data, U.S. COMM'N ON CIVIL RIGHTS, *SOCIAL INDICATORS OF EQUALITY FOR MINORITIES AND WOMEN* (1978) (cited by *Wage Discrimination*, *supra* note 1, at nn.17, 21, 22, 23, 25, 50, 56, 58, 68, 78, 82, & 232). But *Wage Discrimination* does not review the multiple regression analyses cited in this report.



more than an attempt to explain away the findings of the econometric studies, for they run contrary to Professor Blumrosen's thesis.<sup>77</sup> Even more surprising is the fact that the studies to which she refers do not attempt to separate wage discrimination from discriminatory job assignment.<sup>78</sup> The economic studies *Wage Discrimination* cites are, therefore, irrelevant to its thesis. The author is simply incorrect when she asserts: "These studies confirm that there is a significant relationship between job segregation and wage discrimination against the minorities and women holding the segregated jobs."<sup>79</sup> The economic studies do not and could not support any such conclusion, as will be demonstrated below.<sup>80</sup>

<sup>77</sup> Professor Blumrosen does not specify the particular economic studies to which she refers in *Wage Discrimination*, *supra* note 1, at 454-55, as running counter to her thesis. She writes, "[t]hese studies have used," "many of the studies, however," "these analyses," "the analyst," "[t]hese studies tended," and "[t]he studies rarely examined," *id.* at 454, without citing any of the primary sources she has in mind.

<sup>78</sup> *Wage Discrimination* refers, through a summary in a secondary source, to primary sources, some unpublished, by Blinder, Cohen, Fuchs, Malkiel & Malkiel, and Oaxaca. *Id.* at 456 n.220, Table 1. These studies do not separate wage discrimination from discriminatory job assignment. See note 85 *infra*.

<sup>79</sup> *Id.* at 454.

<sup>80</sup> It may be noted that the tone of *Wage Discrimination's* section on economic analyses is apologetic. Although it makes one flat (but incorrect) statement that economic analyses support the existence of wage discrimination, see *id.* at 454 & nn.33 & 92, the bulk of conclusory language in this section attempts to explain away embarrassing results:

These studies have used varying methods and different data which make comparisons difficult . . . . Many of the studies, however, defined discrimination to include only actions motivated by ill will. Discrimination identified by a showing of adverse effect on minorities and women is excluded from these analyses . . . . Hence, the conclusions reached may be understated . . . . The studies rarely examined the interaction of wage discrimination and restrictions on upward mobility together, which has been the focus of Part I of this article.

*Id.* at 454. This assertion is not only an "explaining away" qualification, it is also inaccurate. All of the econometric studies cited by *Wage Discrimination* consider job segregation and wage discrimination together. Professor Blumrosen's real complaint is not that the studies failed to examine job segregation and wage discrimination "together," but rather that the two were examined together, not separately. But as explained in part I of the present article, lumping together of job segregation and wage discrimination (if it occurs) is inherent in econometric methods. *Wage Discrimination* continues: "[M]uch of the difference between the studies is explainable because of different notions of what are legitimate productivity characteristics. One's choice of variables, in fact, can eliminate discrimination completely." *Id.* at 455.

The section on economic analyses then concludes with an entire paragraph of qualification:

[T]he economists' judgment . . . may be useful . . . subject to the cautionary note . . . suggested above . . . . [N]o mechanical application . . . would be appropriate. At the most, the economists' views might provide a useful starting point in the shaping of a remedy which will be based on the facts before the court, not abstract economic considerations.

*Id.*

Even if the econometric study of multiple regression residuals did tend to support

*Wage Discrimination's* citation of the economic literature consists of three secondary sources which review a substantial number of econometric research studies.<sup>81</sup> The studies all attempt to dissect the gross earnings differentials among sexes and/or races into components. Some components clearly are legitimate: for example, women are employed on the average fewer hours than men, hence they earn less.<sup>82</sup> The legitimacy of some other statistical correlates of wage differentials is open to question. For example, older blacks have, on the average, less education than older whites, and the racial earnings gap is largest among older workers.<sup>83</sup> Thus, statistically speaking, education "explains" part

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*Wage Discrimination's* position, no conclusions could be drawn with the certainty that courts would require before taking an enormous leap into judicial restructuring of the economy. Economists are aware that statistics have their limitations as well as their uses. For example, in a book cited by *Wage Discrimination*, economists Wohlstetter and Coleman conclude:

These examples suggest how hard it is to disentangle the effects of current discrimination in the marketplace from the various results of multiple past discriminations that may in turn have made it unlikely that a minority can compete currently on equal terms . . . . The proportion of the current income differences that is attributable to current discrimination in the marketplace is extremely difficult to determine and, in spite of several attempts, does not seem to us to have been measured convincingly.

Wohlstetter & Coleman, *Race Differences in Income*, in RACIAL DISCRIMINATION IN ECONOMIC LIFE 3, 44-45 (A. Pascal ed. 1972), cited in *Wage Discrimination*, supra note 1, at 447 n.191.

In sum, part I of *Wage Discrimination* attempts to establish wage discrimination as a fact, but it consists of fifty-four pages of abstract theory and general induction, and only a little more than one page of references to secondary data sources. Neither the secondary sources nor the studies on which the secondary sources are based support *Wage Discrimination's* theory. As *Wage Discrimination* obliquely recognizes, the most that can be said of the economic studies is that they do not disprove the wage discrimination hypothesis. Thus the answer to the questions, "Does wage discrimination exist, and if so, how much, and in what companies and jobs?" is: no one knows. The wage discrimination idea is novel and untested. It is, in fact, untestable by any economic or statistical method now known. Wage discrimination must remain merely an abstraction until a method is discovered to measure the "true worth" of jobs. No such method has yet appeared on the horizon.

<sup>81</sup> The secondary sources cited in *Wage Discrimination*, supra note 1, at 454-56 nn.218-20, are Kahne & Kohen, *Economic Perspectives on the Role of Women in the American Economy*, 13 J. ECON. LIT. 1249 (1975); Marshall, *The Economics of Racial Discrimination: A Survey*, 12 J. ECON. LIT. 849 (1974); and Oaxaca, *Theory and Measurement in the Economics of Discrimination*, in EQUAL RIGHTS AND INDUSTRIAL RELATIONS (L. Hausman, O. Ashenfelter, B. Rustin, R. Shubert, & D. Slaiman eds. 1977).

<sup>82</sup> Cohen, *Sex Differences in Compensation*, 6 J. HUMAN RESOURCES 434, 442-43 (1971). Cohen's econometric analysis reported that, among nonprofessional men and women employed full time, the average workweek for men was more than 10% longer than for women. The greater number of hours worked by men accounted for about 20% of the difference between the sexes in gross earnings. The proportion of the earnings gap accounted for would be greater if premium overtime pay were taken into consideration.

<sup>83</sup> See U.S. DEP'T OF COMMERCE, BUREAU OF THE CENSUS, SOCIAL AND ECONOMIC CHARACTERISTICS OF THE OLDER POPULATION: 1978 (Special Studies Series P-23, No. 85, 1979), at 16, Table 14 (education and race) & 24-27, Tables 22-24 (income and race); F. DAVIS, THE

of racial earnings differences. Whether educational differences justify earnings differences morally or legally is a question that the economists recognize as beyond the scope of their statistical analysis. At least one component of statistical dissection clearly represents illegal discrimination: unequal pay for equal work, when experience, seniority, and productivity are also equal. But, as acknowledged in one of the reviews that *Wage Discrimination* cites, this practice is so rare that it is of little or no practical consequence.<sup>84</sup>

The statistical technique of such dissections is multiple regression analysis. The economist gathers a number of data about each employee, for example, sex, race, age, education, experience, seniority, and geographic region, as well as earnings. Although no two employees are identical, multiple regression allows the statistician to estimate what earnings would have been if the employees were identical in every respect measured except the variables of interest, e.g., sex and race.<sup>85</sup>

Statistical dissection cannot separate the effects of job separation from wage discrimination. Consider, for example, the electrical contractor, mentioned above, which pays its crafts workers, primarily male electricians, more than its clerical workers,

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BLACK COMMUNITY'S SOCIAL SECURITY 71 (1978) ("The ratio of Black to White median income is highest in the 14 to 24 age group and consistently declines for each age level down to, and including, the 55 to 64 age group.").

<sup>84</sup> Kahne & Kohen, *supra* note 81, at 1261, cited in *Wage Discrimination*, *supra* note 1, at 454 n.218.

<sup>85</sup> It must be emphasized that multiple regression yields *estimates*, which are subject to error. Among the several sources of error is the fact that the statistical model makes assumptions that are unlikely to be correct. For example, multiple regression assumes linear correlations: if education is quantified as number of years of schooling, the technique assumes that the difference between a second grade and a fifth grade education is worth exactly as much as the difference between a ninth grade and a twelfth grade education. The technique also assumes homoscedasticity (homogeneous distribution of variance) and a number of other statistical symmetries that are unlikely to exist in real-world data. Perhaps most important, multiple regression cannot distinguish the effects of discrimination from the effects of legitimate factors that it was not possible to measure. For example, the personnel files of many employers record college degrees but not fields of study. An econometric study based on such files is forced to count an assistant controller with an M.B.A. in accounting and finance as "equal" in education to a junior accountant with an M.S.W. (master's degree in social welfare). Only one of the eleven results reported in *Wage Discrimination*, *supra* note 1, at 456 n.220, Table 1, controlled for field of study, and that one study, Malkiel & Malkiel, omitted such pertinent control variables as age and race. The differences identified as "unexplained differential" in *Wage Discrimination's* Table 1 are *not* estimates of discrimination, as is incorrectly asserted in note b to Table 1. The "unexplained differential" consists of estimates of the effects of discrimination *plus all unmeasured legitimate sources of wage differences*. In drawing attention to these limitations, we do not mean to disparage multiple regression or its economist practitioners, but to draw attention to limitations inherent in the technique, limitations which *Wage Discrimination* passes over rather casually, *id.* at 455. These limitations are further discussed in part I B 1 c *infra*.

primarily female clerks and bookkeepers. A multiple regression analysis might dispose of part of the gross earnings difference by legitimate factors,<sup>86</sup> but in all probability, there would remain a substantial "residual" difference. The residual difference consists of three components that can be identified theoretically, but which cannot be separated in the realm of real-life data. One component of the "residual" is the sum of all unmeasured legitimate reasons for wage differences.<sup>87</sup> A second component is the effect of discriminatory job assignment. That is, if (1) the electrician's job is "worth" more than the job of clerk, (2) both jobs are paid what they are worth, and (3) absent discrimination, some of the female clerks would have been electricians, then (4) the female clerks who would have been electricians have lost wages because of discriminatory job assignment.<sup>88</sup> The last component of the statistical residual is that portion, if any, due to wage discrimination. For example, the work of the clerk may be equal in "worth" to the work of the electrician, but may be paid only two-thirds as much, or the clerk's job may be "worth" two-thirds as much as the electrician's but may be paid only one-half as much. This is the "pure wage discrimination" referred to in *Wage Discrimination*.<sup>89</sup>

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<sup>86</sup> For example, the electricians may work a longer workweek, more overtime, and in less pleasant surroundings than the clerks.

<sup>87</sup> See FIGURE 1 in text following note 22 *supra*.

<sup>88</sup> Statistical analyses tend to overestimate the magnitude of employer job segregation because no means is available to separate the effects of job segregation by employers from job segregation by choice of individual employees. Professor Blumrosen acknowledges, as do almost all commentators, that in American society women have been conditioned to enter traditional "women's" vocations by the entire social milieu. *Wage Discrimination*, *supra* note 1, at 416-21. See also J. GALBRAITH, *ECONOMICS AND THE PUBLIC PURPOSE* 37 (1973); Cohen, *Sex Differences in Compensation*, 6 J. HUMAN RESOURCES 434, 437-38 (1971); Fuchs, *Differences in Hourly Earnings Between Men and Women*, MONTHLY LAB. REV., May 1971, at 9; Lloyd, *The Division of Labor Between the Sexes: A Review*, in SEX, DISCRIMINATION, AND THE DIVISION OF LABOR, *supra* note 15, at 1, 15; Sawhill, *The Economics of Discrimination Against Women: Some New Findings*, 8 J. HUMAN RESOURCES 383, 391 (1973); Stephenson, *Relative Wages and Sex Segregation by Occupation*, in SEX, DISCRIMINATION, AND THE DIVISION OF LABOR, *supra* note 15, at 175, 197-98; Gwartney & Stroup, *Measurement of Employment Discrimination According to Sex*, 39 SOUTHERN ECON. J. 575 (1973). If the hypothetical electrical contractor's electricians are almost all male, that job segregation may be partly the result of the employer's discriminatory rejection of qualified female electricians and partly the result of a lack of female applicants for electrician jobs. The employer is legally accountable only for the former, but statistical studies, unable to distinguish between employer preferences and applicant choices, frequently lump the two together and attribute the entirety of job segregation to employer discrimination. In practice, applicant choice is a powerful factor. See, e.g., H. NORTHRUP & J. LARSON, *supra* note 15, at 60-64 (extensive recruiting necessary to attract modest number of female "outside" electrical craft trainees; program suffers heavy female attrition).

<sup>89</sup> *Wage Discrimination*, *supra* note 1, at 455-56 n.220.

Economists who have studied discrimination generally have not attempted to measure the "worth" of jobs independently of wage rates.<sup>90</sup> No yardstick exists by which such measurements could be made.<sup>91</sup> Without an independent measure of job worth, it is impossible to distinguish statistically between the results of job separation and the results of "pure" wage discrimination. Moreover, as noted above, none of the forms of discrimination can be dissected statistically from legitimate but unassessed reasons for different pay. Consequently, *Wage Discrimination's* reading of the economic literature is seriously misleading. The literature shows no "significant relationship between job segregation and wage discrimination."<sup>92</sup> The literature does not even demonstrate that "pure" wage discrimination exists, nor do *Wage Discrimination's* economic authorities purport to do so.<sup>93</sup> The most that multiple regression analyses can tell us is that some of the gross earnings differences between the sexes are accounted for legitimately, while the remainder must result from unmeasured legitimate sources, and/or from job separation, and/or from wage discrimination.

#### B. Problems With Wage Discrimination's Factual Thesis

In its Part I, *Wage Discrimination* attempts to establish "the factual aspects of the thesis that wage rates of jobs into which women and minorities have been historically segregated are likely to be depressed because those jobs are occupied by 'disfavored groups.'"<sup>94</sup> This factual proposition is demonstrated, according to *Wage Discrimination*, by "historical, anthropological, sociological, and economic studies."<sup>95</sup> In summarizing *Wage Discrimination's* evidence, the present article has drawn attention to some of the most apparent inadequacies of reasoning and of evidence. However, the defects of *Wage Discrimination's* analysis run deeper than the flawed logic and thin evidence that would warrant a "not proven" verdict. More fundamentally, the

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<sup>90</sup> See, e.g., SEX, DISCRIMINATION, AND THE DIVISION OF LABOR, *supra* note 15; WOMEN IN THE LABOR MARKET (C. Lloyd, E. Andrews, & C. Gilroy eds. 1979).

<sup>91</sup> See part I B 1 c *infra*.

<sup>92</sup> *Wage Discrimination*, *supra* note 1, at 454.

<sup>93</sup> The economic studies cited by *Wage Discrimination* (see note 78 *supra*) calculate "unexplained differential" in wages between men and women or between whites and blacks. *Wage Discrimination*, *supra* note 1, at 456 n.220, Table 1. The "unexplained differential" includes unmeasured legitimate causes of wage differentials and the effects of all sources of discrimination, i.e., all the components of [c] in Figure 1 *supra*. See note 85 *supra* and part I B 1 c *infra*.

<sup>94</sup> *Wage Discrimination*, *supra* note 1, at 401.

<sup>95</sup> *Id.* at 401-02.

evidence runs strongly counter to *Wage Discrimination's* thesis on all three dimensions of its attempted proof: theory, authority and fact.

1. *The logic of economic theory* — The immediately preceding section of this article has demonstrated that the economic studies which, *Wage Discrimination* supposes, reveal wage discrimination actually show no such phenomenon. Instead, the economists have demonstrated residual wage differentials, a term that includes unmeasured nondiscriminatory factors, the effects of job separation, and the results, if any, of wage discrimination. The problem for a wage discrimination theory, however, is not just that available data are unsatisfactory, but also that the entire idea of wage discrimination is grounded on an economic theory, the logic of which precludes an assessment of wage discrimination.

Wage discrimination is a concept that has meaning only with respect to the worth of jobs. If a female nurse's work is worth seven-eighths as much as that of a male real estate appraiser, but is paid only five-eighths as much, it may be argued that wage discrimination is occurring.<sup>86</sup> The basic idea of wage discrimination is that wages are disproportionate to the worth of work performed. Absent some way of establishing the "worth" of jobs, wage discrimination loses all meaning. It must further be shown how the worth of work should be measured.

One could attempt to evaluate the worth of jobs in three important ways. These may be called (a) market value, (b) job evaluation systems, and (c) marginal productivity analysis.

a. *Market value.* The market value of a job is the common sense meaning: the conjunction of what an employer is willing to pay and what a worker is willing to accept. "Worth" in this sense may be determined individually, as when an executive negotiates an employment contract, or collectively, as in bargaining between unions and employers. Market value serves well enough for most purposes, and it has the great virtue of determinateness. A job's market value is what is paid. For purposes of detecting wage discrimination, however, market value is of no use. As *Wage Discrimination* points out,<sup>87</sup> market value includes whatever distortions discrimination may cause.<sup>88</sup>

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<sup>86</sup> See, e.g., *Lemons v. City & County of Denver*, 17 Fair Empl. Prac. Cas. 906 (D. Colo. 1978), *aff'd*, DAILY LAB. REP. (BNA), No. 81, at D-1 (10th Cir. April 24, 1980).

<sup>87</sup> *Wage Discrimination*, *supra* note 1, at 441-43.

<sup>88</sup> It would be possible to assess the "worth" of jobs by a criterion closely related to, but distinct from, market value: the opinions of employees as to a fair wage for each job. The opinion standard would, of course, be of no use for proving wage discrimination, as it would be subject to the same kinds of biases as the market value standard.

b. *Job evaluation systems.* Job evaluation systems attempt to assess such factors as skill, effort, responsibility, and working conditions, so as to rank the relative worth of jobs.<sup>99</sup> But for a number of reasons which are ably set forth in *Wage Discrimination*,<sup>100</sup> job evaluation systems are inherently too subjective to be useful as anchors for the concept of wage discrimination. Job evaluation systems are basically methods for systematizing and recording subjective judgments, and at each stage in the process — job analysis, job description, selection of compensable factors, weighting of compensable factors, and the selection of the breadth of jobs to which a particular system will be applied — the necessarily subjective judgments inevitably incorporate individual and societal biases.<sup>101</sup> *Wage Discrimination* is correct in

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However, opinions concerning the fairness of men's and women's wages do have important implications for the practicality of the remedies that *Wage Discrimination* would prescribe. An employer, court, or legislature that attempts to impose a pay schedule that violates employees' beliefs about fairness of wages will produce low morale, high turnover, and loss of productivity. Thurow, *Equity Concepts and the World of Work*, in *MEASURING WORK QUALITY FOR SOCIAL REPORTING* 207, 207-13 (A. Biderman & T. Drury eds. 1976).

Men's and women's beliefs about the fairness of their pay have been studied. R. CURTIN, *INCOME EQUITY AMONG U.S. WORKERS* (1977). Curtin's data show widespread satisfaction with the fairness of one's own pay as compared with the pay of others, and the proportion of satisfied workers increased between an initial survey in 1973 and a later survey in 1975. *Id.* at 36. When respondents were asked to compare their pay rate with that of others in their own occupation, women were more often satisfied with the fairness of their pay than were men. When the comparisons were across occupations, e.g., comparing a secretary with an electrician, the proportions of women and men who felt that they were paid the "amount deserved or more" were very nearly equal.

The implication of this data is that if *Wage Discrimination's* proposals were adopted, and most women's wages substantially increased, a large proportion of women would be paid much more, and a large proportion of men much less, than they believe their jobs are worth. If the existence of wage discrimination is not even perceived by most workers, male and female alike, it would be a bold employer, court, or Congress that imposed such a remedy.

<sup>99</sup> NAS REPORT, *supra* note 10, at 1-7. See also *Wage Discrimination*, *supra* note 1, at 428-34.

<sup>100</sup> *Wage Discrimination*, *supra* note 1, at 434-41.

<sup>101</sup> *Id.* at 435-41. The quest for a purely technocratic method of wage determination—a job evaluation system independent of subjective judgments and biases—is futile. Job evaluation systems mute individual biases, but a committee's consensus is not objective just because several people participated. As prospective yardsticks for assessment of job "worth," job evaluation systems also suffer from the problem that no one system is adaptable to all jobs. Even for jobs as similar as those in the steel and aluminum industries, the job evaluation system developed for one industry was unsuited to the other. NAS REPORT, *supra* note 10, at 6. If jobs in the steel and aluminum industries require different job evaluation systems, it would seem unlikely that a single system can serve as the measure of "worth" for the entire spectrum of jobs, from abrasive tool operator to zymurgist. An additional difficulty that would confront an effort to set wages according to a universal job evaluation system is the fact that job evaluation systems have purposes and uses other than the setting of wages. See, e.g., Suskin, *Job Evaluation—It's More Than a Tool For Setting Pay Rates*, 31 *PUB. PERSONNEL REV.* 283 (Oct. 1970). A multi-

noting that job evaluation systems are inherently too subjective to be satisfactory observation points from which bias could be detected.

The EEOC has commissioned a study of job evaluation systems by the NAS in the hope that a new system, unbiased and universally applicable, can be developed.<sup>102</sup> Such a job evaluation system (JES) presumably would be the fulcrum from which all types of pay "inequities" could be levered into line. If the NAS's interim report<sup>103</sup> presages its final conclusions, the EEOC will be disappointed. According to the NAS Report, job evaluation systems are problematic and have troublesome features.<sup>104</sup> The best-known JES, the proprietary Hay Associates system, is extremely subjective and fails to distinguish well at lower job levels.<sup>105</sup> Different JES's can produce quite different evaluations of the "worth" of the same job.<sup>106</sup> Even in two basic metal industries, steel and aluminum, which cover a very small segment of the spectrum of all jobs, it has proved impossible to develop a single JES suitable to both.<sup>107</sup> And even if a universally acceptable and fair JES were possible, the unreliability of ratings probably would preclude its use.<sup>108</sup> All in all, the NAS Report concludes, "the evidence is not particularly encouraging."<sup>109</sup>

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purpose system will necessarily be a compromise and not precisely fitted to any single purpose.

<sup>102</sup> See text accompanying note 10 *supra*. The Women's Bureau of the Department of Labor also plans to fund research with this objective. Remarks of Alexis Herman, Director, Women's Bureau, to Organizing Conference of Coalition of Labor Union Women, Washington, D.C. (Jan. 24, 1980), in *DAILY LAB. REP.* (BNA), No. 17, at E-1 (Jan. 24, 1980).

<sup>103</sup> NAS REPORT, *supra* note 10.

<sup>104</sup> *Id.* at xii, 30.

<sup>105</sup> *Id.* at 22-23.

<sup>106</sup> *Id.* at 35, 39.

<sup>107</sup> *Id.* at 6.

<sup>108</sup> *Id.* at 41. Reported reliabilities of job evaluation systems range from about .34 to about .95 on the correlation coefficient scale of 0 to 1. *Id.* Even when reliability is as high as .90, serious misclassification will occur with considerable frequency. For example, if jobs were graded on a scale from 1 to 16, and reliability were .90, one of twenty jobs whose true grade was 8 would be misgraded into grades 1-4 or grades 12-16. While a reliability of .90 is satisfactory for purposes of aggregate statistical analysis, a serious misgrading of 5% of jobs obviously would be unacceptable. The NAS REPORT properly concludes: "[J]ob evaluation procedures may not be very reliable given the purpose they are meant to serve." *Id.*

<sup>109</sup> *Id.* at 40. See also Paterson & Husband, *Decision Making Responsibility: Yardstick for Job Evaluation*, 2 *COMPENSATION REV.*, No. 2, at 21 (1970). This article, cited by *Wage Discrimination* for another purpose, is highly critical of existing job evaluation systems. On the failure of job evaluation systems as applied to high-level jobs, see G. WASHINGTON & V. ROTHSCHILD, 1 *COMPENSATING THE CORPORATE EXECUTIVE* 23 n.75 (3d ed. 1962); Mautz & Rock, *The Wages of Management*, 11 *U. FLA. L. REV.* 474, 508 (1958). See also Patton, *What Is an Executive Worth?*, 39 *HARV. BUS. REV.* 65, 72 (March-April 1961).



c. *Marginal productivity analysis.* Marginal productivity analysis measures the worth of work by the value that the work adds to the total output of the enterprise.<sup>110</sup> For example, suppose that widgets are manufactured by first stamping them from sheets of widget-stock, then polishing them. A widget stamper and a widget polisher each can process 100 widgets per day. If widget stock costs 10¢ per widget, and if stamped but unpolished widgets are worth 50¢ each, and if polished widgets are worth \$3.00 each, the work of the polisher is worth \$250 per day, while the work of the stamper is worth only \$40 per day.<sup>111</sup> This is what economists usually mean when they speak of the theoretical or "true worth" of jobs.<sup>112</sup>

In spite of the intellectual elegance of marginal productivity theory, real-world wages are rarely, if ever, set by reference to marginal productivity analysis.<sup>113</sup> One reason is that few enterprises are as conveniently compartmentalized as the theoretician's widget factory. The typist, the security guard, the supervisor, the maintenance mechanic, and the receptionist all perform vital functions in modern industry, but economists recognize that it would be futile to try to identify the increment in profit

<sup>110</sup> N. TOLLES, *ORIGINS OF MODERN WAGE THEORIES* 19-20 (1964).

<sup>111</sup> The example is oversimplified for purposes of illustration, as it does not take capital costs into account. If the stamping machine had a fair rental value of \$10 per day, and the polishing machine rented for \$220 per day, the productivity of the labor involved in the two jobs would be equal.

<sup>112</sup> Where the schools of economic theory differ is in the size, distribution, and explanation of differences between the "true worth" of jobs as measured by marginal productivity and the "worth" of those same jobs in the marketplace. See, e.g., N. TOLLES, *supra* note 110, at 8-24. For a more technical explanation of marginal productivity as the theoretical measure of job worth, see P. SAMUELSON, *ECONOMICS* 541-45 (10th ed. 1976).

<sup>113</sup> See, e.g., A. WOOD, *A THEORY OF PAY* (1978); Belcher, *Employee and Executive Compensation*, in *EMPLOYMENT RELATIONS RESEARCH* 73, 77-80 (H. Heneman, Jr., L. Brown, M. Chandler, R. Kahn, H. Parnes & G. Shultz eds. 1960) (survey of literature shows that important determinants of wages are labor market prices, union pressure, labor supply, product market competition, expected profits, employee satisfaction, and company prestige; marginal productivity is not mentioned); Foster & Kanin-Lovers, *Determinants of Organizational Pay Policy*, 9 *COMPENSATION REV.*, No. 3, at 35 (1977) (marginal productivity not mentioned); Woodhead, *Are You Using the Right Pay Policy?*, 40 *CANADIAN BUS.*, No. 12, at 40 (1975) (pay determined by several factors, not including marginal productivity). The fact that wages are set according to factors other than marginal productivity analysis does not imply that productivity and wages are unrelated. In the long run, but not in the short run, productivity and wages are closely related. Belcher, *supra*, at 76.

One reason that marginal productivity analysis is not used in setting wages is that the necessary data do not exist. L. THURLOW, *POVERTY AND DISCRIMINATION* 44 (1969). Probably the closest approach to pay on the basis of marginal productivity is in the compensation of salesworkers on a commission basis. Commissions are only a rough approximation of marginal productivity for a number of reasons, one of which is the competitive market in sales commissions. Employers must pay the "going rate" of commissions even if it exceeds the current profit per sale.

that each such job adds to the total enterprise.

Nevertheless, if wage discrimination were to have a practical meaning, the discrimination would be measured by reference to marginal productivity. This would apply both in economic theory and in a common sense meaning of "wage discrimination." To say that a person is not paid "what the job is worth" often means that there is a larger difference than is normal between the value of the job to the enterprise, in the marginal productivity sense, and the wages paid for the job. Hence the job is paid less in proportion to its marginal productivity than are other jobs.

Because the marginal productivity of jobs can almost never be measured directly, economists have used the indirect approach of multiple regression analysis.<sup>114</sup> If one assumes that everyone is employed in a job commensurate with his or her abilities, and if, on average, abilities are highly correlated with such measurable job qualifications as education and experience, then productivity would increase with job qualifications. If equally "qualified" groups of men and women, *e.g.*, college graduates, are paid differently, discrimination may be the explanation. It is this kind of indirect and inferential analysis that is employed in the econometric studies diagrammed in Figure 1 of this article,<sup>115</sup> and whose results are summarized in *Wage Discrimination's* Table 1.<sup>116</sup>

The logic of multiple regression analysis, however, precludes direct evidence of wage discrimination. Econometric studies of residual wage differentials measure differences after statistical adjustments to equate groups for education, experience, and other surrogates for the unmeasurable variable, productivity. But the residual wage differentials thus identified cannot be separated into effects of differential job choice, job segregation, and wage discrimination ([d], [f] and [g] respectively in Figure 1). The reason will be apparent if one considers again the hypothetical example of the electrical contractor. Suppose the contractor's receptionist, a female, earns one-half the salary of the male electrical crafts workers, and suppose she is equal to the average electrician in experience, education, and seniority. With no inde-

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<sup>114</sup> See, *e.g.*, R. TSUCHIGANE & N. DODGE, *ECONOMIC DISCRIMINATION AGAINST WOMEN IN THE UNITED STATES 29-50* (1975) [hereinafter cited as *ECONOMIC DISCRIMINATION*]; Stevenson, *Relative Wages and Sex Segregation by Occupation*, in *SEX, DISCRIMINATION, AND THE DIVISION OF LABOR*, *supra* note 15, at 175; M. Hamilton, *A Study of Wage Discrimination by Sex: A Sample Survey in the Chicago Area* (unpublished Ph.D. Dissertation, Univ. of Pa. 1969).

<sup>115</sup> See text accompanying note 22 *supra*.

<sup>116</sup> *Wage Discrimination*, *supra* note 1, at 456 n.220.

pendent measure of the marginal productivity of jobs, one has no evidence to inform a choice among the following possibilities:

- (a) The residual wage differential is entirely due to job segregation. That is, the receptionist is fairly paid in relation to the work that she does, but she has been discriminatorily assigned to a job that is "worth" less, in the marginal productivity sense, than the jobs reserved for the male electricians.
- (b) The same as (a), but the receptionist's job assignment is hers by her choice; the discrimination was in her upbringing, not by her employer.
- (c) The residual wage differential is entirely due to wage discrimination. That is, the marginal productivity of the receptionist's job, if it could be measured, would be equal to that of the electrician's; it is because the receptionist's job is "women's work" that it is underpaid.
- (d) Any combination of (a), (b), and (c).

Except in rare instances,<sup>117</sup> all econometric studies of wage discrimination must use the same basic logic and thus must produce equally inconclusive results. One is forced to the conclusion that for purposes of evaluating alleged wage discrimination, none of the three theoretical methods of assessing job "worth" is viable. Market value is relatively precise, but if wage discrimination exists, it may be incorporated in market rates. Job evaluation systems are highly imprecise and, like market rates, may or may not be biased. Marginal productivity cannot be measured at all for most jobs, and even if it could, multiple regression analysis cannot dissect wage discrimination from other sources of residual wage differentials.

Suggestive but fragmentary evidence on the relative importance of job separation and/or individual choice, on the one hand, and wage discrimination, on the other hand, exists in the contrasts among econometric studies that have analyzed wide versus narrow ranges of jobs. At one extreme are studies that encompass a very wide range of jobs, jobs that obviously vary in "worth" by any definition. Such studies invariably find substantial residual wage differentials, and it is a fair inference that much of the residual wage differential are the consequence of job segregation ([f] in Figure 1) and/or individual choice ([d] in

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<sup>117</sup> The rare exceptions are those in which the men and women perform identical work, and in which, therefore, their marginal productivity is known to be the same or nearly the same. As to these situations, see text at notes 119-22 *infra*.

Figure 1).<sup>118</sup> At the other extreme are studies in which only one job ([g'] in Figure 1) or a narrow set of jobs is analyzed, e.g., the study of racial differences in pay of baseball players.<sup>119</sup> It is to such studies that *Wage Discrimination* refers when it speaks of "controlling for occupational affiliation."<sup>120</sup> When the range of jobs is narrowed, *Wage Discrimination* acknowledges, the result is a diminution in "the estimated effects of discrimination."<sup>121</sup> Thus, *Wage Discrimination* admits, "[o]ne's choice of variables, in fact, can eliminate discrimination completely."<sup>122</sup> The elimination of statistical suggestions of discrimination occurs when one focuses on the one situation in which effects of job segregation and individual vocational choice are eliminated, and in which, therefore, any discriminatory residual wage differentials must be due to wage discrimination. That situation is the comparison of men and women doing identical jobs ([g'] in Figure 1). *Wage Discrimination* admits that relatively little discrimination occurs in the context of women and men performing equal work.<sup>123</sup>

The virtual disappearance of residual wage differentials when the effects of job separation are eliminated at first seems strong evidence *against* the existence of substantial wage discrimination. It is possible, however, that employee resistance to the unfairness of unequal pay for identical work discourages wage discrimination when jobs are very similar but not when jobs are dissimilar. Nevertheless, what evidence there is *against* the existence of substantial wage discrimination is important when contrasted with the complete absence of econometric evidence *for* the existence of substantial wage discrimination.<sup>124</sup>

<sup>118</sup> See, e.g., ECONOMIC DISCRIMINATION, *supra* note 114.

<sup>119</sup> See note 57 *supra*. See also Fuchs, *supra* note 88, at 9.

<sup>120</sup> *Wage Discrimination*, *supra* note 1, at 455 n.220.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 455; accord, J. MADDEN, *supra* note 72, at 92.

<sup>123</sup> *Wage Discrimination*, *supra* note 1, at 454 n.218, quoting Kahne & Kohen, *supra* note 81, at 1261.

<sup>124</sup> In conjunction with the upsurge of feminist activity during the 1970's, economists, and especially feminist economists, greatly elaborated and expanded econometric studies of sex discrimination. The most recent, and by far the most technically developed, collection of such studies appeared too late for citation in *Wage Discrimination*. WOMEN IN THE LABOR MARKET, *supra* note 90. This collection represents the most scientifically advanced analysis ever published on the economics of sex discrimination, yet it in no way disturbs the conclusions of the present article. The conclusions of one of the chapter authors, Chiplin, are typical: "This article has questioned whether the residual [wage differential] approach . . . can provide any guidance to the existence or extent of sex discrimination . . . . [M]any of us might believe that sex discrimination exists, but do we know?" Chiplin, *An Evaluation of Sex Discrimination: Some Problems and a Suggested Re-orientation*, in *id.* at 266-67.

2. *Lack of authority for Wage Discrimination's thesis* — Before the courts or the Congress would act on the premise that jobs done largely by women and blacks are paid less than they are "worth," they would likely require near unanimity among the experts that the problem at least exists.

It is not possible to mobilize such a showing of authoritative opinion. Part I of Professor Blumrosen's article is a compilation of authorities regarding a great many forms of economic and social discrimination against women and blacks, *but not wage discrimination*. If one were to read part I hastily, one could come away with the impression that wage discrimination is an accepted concept and a proven fact, for the article cites many economists on many facets of labor economics. A close reading, however, reveals that none of Professor Blumrosen's authorities is claimed to have proven or even to have discussed wage discrimination in the sense that she uses the term. The closest that her authorities come to her concept is in the studies of residual wage differentials, and that is an idea of very much broader scope than wage discrimination.<sup>125</sup>

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<sup>125</sup> See text accompanying notes 86-92 *supra*. The principal economic studies cited in *Wage Discrimination* are those by the distinguished liberal economist, John Galbraith, J. GALBRAITH, *ECONOMICS AND THE PUBLIC PURPOSE* (1973); the present Secretary of Labor, Ray Marshall, *supra* note 81; a recent Secretary of Commerce, J. KREPS, *SEX IN THE MARKETPLACE: AMERICAN WOMEN AT WORK* (1971); and the academicians Lloyd, Sawhill, Oaxaca, Madden, and Kahne & Kohen. Kahne & Kohen, *Economic Perspectives on the Role of Women in the American Economy*, 13 J. ECON. LIT. 1249 (1975); Lloyd, *The Division of Labor Between the Sexes: A Review*, in *SEX, DISCRIMINATION, AND THE DIVISION OF LABOR*, *supra* note 15, at 1; J. MADDEN, *supra* note 72; Oaxaca, *supra* note 81; Sawhill, *supra* note 8. Kreps, Floyd, Sawhill, Madden and Kahne are female. The scope of Professor Blumrosen's authorities is very broad, for four of the works she cites are surveys of the entire literature on discrimination against women in the workplace. See the works of Marshall, Kreps, Oaxaca, and Kahne & Kohen *supra*.

Surprising as it may seem, nowhere in these works does one find even the *idea* of wage discrimination, much less assertions that it exists to a significant degree, or that it exists at all. In a search for scholarly opinion and data on wage discrimination, the present authors have reviewed a number of authorities not cited by Professor Blumrosen. Such opinion and data were notable by their paucity.

We have located only two works by economists which recognize the possibility of wage discrimination. ECONOMIC DISCRIMINATION, *supra* note 114; L. THUROW, *supra* note 113. Writing in the context of race discrimination, Thurow dissects the theoretically conceivable types of invidious economic discrimination into seven categories, one of which is wage discrimination. Although Thurow recognizes wage discrimination as a theoretical possibility, he is hesitant to draw conclusions from his econometric analysis. L. THUROW, *supra* note 113, at 7, 44. As remedies for the seven types of discrimination, in whatever proportions they may occur, Thurow proposes a large number of government interventions, but *not* the direct assault on presumed wage discrimination that Professor Blumrosen proposes. He makes a strong case, instead, for changes in government control of the economy as a whole, or what are commonly referred to as aggregate economic policies:

As a practical policy instrument, creating tighter markets presents several advantages. Aggregate economic policies are impersonal. They can be implemented

It is difficult to find discussions of wage discrimination even if one moves outside the realm of economics. For example, one might expect to find the concept discussed in hearings before the EEOC, but in the hearings cited by *Wage Discrimination*, nearly one thousand pages were devoted to job separation, yet wage discrimination was never mentioned.<sup>126</sup>

3. *Alternatives to the thesis* — No one disputes that residual wage differentials occur. The question is what causes these differences: wage discrimination, other factors, or both? Professor Blumrosen assumes that the role of wage discrimination must be large, but this assumption is unwarranted. The importance of alternative explanations has been amply demonstrated.

a. *The factor of job separation.* None of the parties to the comparable worth controversy argues that all jobs are of equal value. None would dispute that managerial jobs are "worth" more than production jobs, that craft jobs are "worth" more than semiskilled jobs, or that jobs that require extensive specialized training and education are "worth" more than those that do not. Professor Blumrosen has cited many studies that show beyond any doubt that managerial jobs, crafts jobs, and jobs that require extensive specialized training and education are jobs performed mainly by men.<sup>127</sup>

To the extent that this job separation is caused by employer discrimination against women, remedies already exist in Title VII: it is illegal to refuse to hire or promote into high-value jobs because of sex.<sup>128</sup> The comparable worth theory and Professor

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without recruiting a bureaucracy of administrators, trainers, teachers and social workers. They do not require state and local cooperation. They do not interfere with personal choice. They can be quickly implemented; they are cheaply implemented; and they can become effective in a short period time.

*Id.* at 64-65. The entire field of the economics of discrimination is in a state of flux and scholarly disagreement. See, e.g., Aigner & Cain, *Statistical Theories of Discrimination in Labor Markets*, 30 INDUS. & LAB. REL. REV. 175 (1977).

<sup>126</sup> *Hearing Before the U.S. Equal Employment Opportunity Commission on Discrimination in White Collar Employment*, 90th Cong., 2d Sess. (1968). (This volume is cited in *Wage Discrimination*, *supra* note 1, at 407 n.40, as the source of a quotation by former EEOC Commissioner Hernandez, but the citation appears to be erroneous, as Hernandez did not testify at the hearing, nor did she submit remarks for the record.)

<sup>127</sup> *Wage Discrimination*, *supra* note 1, at nn.3, 9, 10, 11, 17, 21, 26, 28, 29-39, 57, 61, 62, 65, 84-88, 194, 196, 198, & 215.

<sup>128</sup> Of course, not all job separation is the result of discrimination by employers. Parents, schools, and our society in general discriminate very strongly, producing among women and men quite different ideas as to the vocations they can and should select. This phenomenon is called sex role differentiation or sex typing. Fuchs, *Women's Earnings: Recent Trends and Long-Run Prospects*, MONTHLY LAB. REV., May 1979, at 23; J. GALBRAITH, *supra* note 125, at 37; J. KREPS, *supra* note 125, at 42-46; E. MACCOBY & C. JACKLIN, *THE PSYCHOLOGY OF SEX DIFFERENCES* 277-348 (1974); Sawhill, *supra* note 125, at 391-94; Stephenson, *Relative Wages and Sex Segregation by Occupation*, in SEX, DISCRIMINA-

Blumrosen's proposed remedies would do nothing to end job separation. In fact, her proposed pay raises for "women's" jobs would tend to perpetuate job separation by eliminating major incentives for women to seek non-traditional jobs.<sup>129</sup>

b. *The factor of "job crowding."* Job separation is most likely the consequence both of sex role differentiation<sup>130</sup> and job segregation. Regardless of the cause, the result is "crowding" of women into a restricted spectrum of jobs and a concomitant decrease in the market value of their services.<sup>131</sup> Technically, the crowding theory proposes that wage differentials occur because members of a group are excluded (or exclude themselves) from some occupations, hence are "crowded" into others. To the extent that wages are elastic with respect to the number of applicants, wages are depressed in the crowded occupations.<sup>132</sup> This situation can be alleviated by opening up all jobs to both sexes, *i.e.*, by enforcement of Title VII as Congress intended.<sup>133</sup> Court-mandated pay raises would exacerbate crowding, not alleviate it.

### C. Failure to Demonstrate Wage Discrimination

Part A of this section showed that the facts and the analysis of Professor Blumrosen's article were insufficient to make a case that wage discrimination is an important phenomenon. Part B

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TION, AND THE DIVISION OF LABOR, *supra* note 15, at 175, 197. *But see* R. KANTER, MEN AND WOMEN OF THE CORPORATION 260-64 (1977) (sex role differentiation far from complete explanation of job separation).

<sup>129</sup> Pay raises for "women's" jobs would make those jobs more attractive to men as well as women, and some integration of "women's" jobs might result. However, the entry of men into "women's" jobs would produce no reciprocal incentive for women to seek "men's" jobs.

<sup>130</sup> *See* note 128 *supra*.

<sup>131</sup> The economist and former Secretary of Commerce Juanita Kreps expressed the consensus of scholars when she wrote:

[T]he concentration of women in the accepted female occupations of elementary teaching, nursing, clerical and service-type jobs would seem . . . to indicate some reluctance on the part of women to venture into men's occupational territory, or some reluctance on the part of employers to offer men and women wider job options, probably both.

J. KREPS, *supra* note 125, at 36. Professor Kreps further states:

If women would make economic gains, they need to realize that market forces do have an impact, and that they cannot continue to offer an excess supply of a particular talent such as elementary school teaching, and yet expect the salary for that job to keep pace with that in professions which are understaffed.

*Id.* at 106-07.

<sup>132</sup> Bergmann, *The Effect on White Incomes of Discrimination in Employment*, 79 J. POL. ECON. 294 (1971); Johnson & Stafford, *Women and the Academic Labor Market*, in SEX, DISCRIMINATION, AND THE DIVISION OF LABOR, *supra* note 15, at 201, 212; Stephenson, *supra* note 128, at 175.

<sup>133</sup> *See* part II *infra*.

showed that the factual thesis of *Wage Discrimination* is mistaken in its logic and unsupported by expert authority. Moreover, well-established alternative explanations account for much, if not all, of the wage differentials that Professor Blumrosen attributes to wage discrimination. Before the law can attempt to act on wage discrimination, the phenomenon must be defined, demonstrated, and measured with a great deal more precision than now seems possible.

## II. TITLE VII AND RESIDUAL WAGE DIFFERENTIALS

A number of substantial legal problems bar the adoption of the job separation-cum-wage discrimination theory outlined by Professor Blumrosen. The first of these legal difficulties is the fact that the legislative history of the pertinent statutes is inconsistent with the interpretation that her article would place on them. If the EEOC and the courts adopt the Blumrosen theory, a major restructuring of the American economy will likely result.<sup>134</sup> It is implausible that Congress intended such an upheaval in wage structures when it enacted Title VII of the Civil Rights Act of 1964 and the amendments to Title VII in 1972 without

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<sup>134</sup> It is hard to overstate the potential dollar impact of the Blumrosen theory upon the American economy. Statistics cited by Professor Blumrosen indicate that the average earnings of full-time women workers are less than sixty percent of the average for full-time working men. *Wage Discrimination*, *supra* note 1, at 410. It is her contention that "[f]rom 20% to 50% of the wage differential between men and women has been attributed to factors which cannot be justified on grounds unrelated to discrimination." *Id.* at 497. Finally, she states that "most women work in 'women's jobs'" and that a substantial number of women work in jobs that are more than seventy percent female-intensive. *Id.* at 405-06. Given this battery of statistics, it is clear that a broad scale application of Professor Blumrosen's theory would require a vast sum of money to achieve true pay parity across the spectrum of jobs in the American work force covered by Title VII. It was estimated in 1978 that "to raise the aggregate pay of the country's 27.3 million full-time working women high enough so that the median pay for women would equal that of men would add a staggering \$150 billion a year to civilian payrolls." Smith, *The EEOC's Bold Foray Into Job Evaluation*, *FORTUNE*, Sept. 11, 1978, at 58-59. Congress could not have intended this cataclysmic impact on the American economy, since it made no reference to such a result in the legislative history underlying Title VII. The gravest consequences would inexorably flow from such a drastic imposition of liability upon employers: competition between companies would become dependent largely on pay parity factors extraneous to normal market concerns; American companies would have less ability to compete in the international market, with a corresponding increase in the balance of payments deficit; collective bargaining relations between employers and unions would become unsettled if artificial pay levels were imposed for compensation of women in unorganized occupations; and the costs of goods and services would undoubtedly increase, thus further fueling the inflationary spiral. In short, Professor Blumrosen's theory, like the equal value approach rejected in *Lemons v. City & County of Denver*, 17 Fair Empl. Prac. Cas. 906 (D. Colo. 1978), *aff'd*, *DAILY LAB. REP. (BNA)*, No. 81, at D-1 (10th Cir. April 24, 1980), is "pregnant with the possibility of disrupting the entire economic system of the United States of America." *Id.* at 907.



any substantial legislative debate on that subject. This implausibility is magnified when one considers that the EPA, a statute specifically addressed to remedying sex-based wage discrimination, is based in great part upon a legislative history that sharply limits federal intrusion into wage structures. The argument that Title VII may be invoked to equalize wage differentials is further attenuated by the Bennett Amendment,<sup>135</sup> a statutory provision which ties Title VII sex-based compensation claims to the "equal work" standard of the EPA.

A. *Congressional Intent and the "Equal Work" Standard*

1. *The EPA* — It is important to recall that both the EPA and the Civil Rights Act of 1964, of which Title VII is a part, were passed by consecutive sessions of the Eighty-eighth Congress. In every Congress since 1945, bills had been introduced regarding pay parity for women.<sup>136</sup> The Eighty-eighth Congress drew upon this background and took great pains to delineate the standard under which sex-based compensation claims would be examined under the EPA. Congress concluded that governmental intervention to equalize wage differentials was to be undertaken only within one set of circumstances: when men's and women's jobs were identical or nearly so, hence unarguably of equal worth. In order to sustain the Blumrosen theory, one must believe that the same legislators who had so carefully circumscribed legal intervention into compensation practices under the EPA threw those restrictions to the winds one year later, during the passage of Title VII, without any significant debate.

The legislative history of the EPA demonstrates the caution that Congress expressed in adopting a wage discrimination standard. The debates showed overriding Congressional concern that the EPA not be invoked by the government to mandate equality of pay for jobs of different content and, concomitantly, a concern that the latitude of administrators and courts in enforcing the EPA be clearly circumscribed by the equal work wage discrimination standard.<sup>137</sup> "What we seek to ensure," Representative Frelinghuysen explained, is "where men and women are doing the same job under the same working conditions that they will

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<sup>135</sup> 42 U.S.C. § 2000e-2(h) (1976).

<sup>136</sup> See e.g., Gitt & Gelb, *Beyond the Equal Pay Act: Expanding Wage Differential Protections Under Title VII*, 8 Loy. U.L.J. (Chicago) 723, 734-42 (1977).

<sup>137</sup> 108 CONG. REC. 14747 (1962) (remarks of Rep. St. George); *id.* at 14768 (1962) (remarks of Rep. Landrum).

receive the same pay."<sup>138</sup> He continued:

[T]he jobs in dispute must be the same in *work content*, effort, skill, and responsibility requirements, and in working conditions. . . . [The EPA] is not intended to compare unrelated jobs, or jobs that have been historically and normally considered by the industry to be different. Violations usually will be apparent, and will almost always occur in the same work area and where the same tasks are performed.<sup>139</sup>

Representative Goodell, who sponsored the bill that became the EPA, echoed Representative Frelinghuysen's comments. He noted that the bill as originally introduced had used the term "comparable work" rather than "equal work."<sup>140</sup> The former term, as Professor Blumrosen points out,<sup>141</sup> had a well-established connotation. During World War II, the regulations of the National War Labor Board (NWLB) required equal pay for "comparable work." Under these regulations, the Board had made job evaluations to determine whether pay inequities existed within a plant between dissimilar jobs.<sup>142</sup> In substituting the term "equal work" for "comparable work," Congress rejected the approach taken by the NWLB. Representative Goodell stressed the significance of adopting an "equal work" standard:

I think it is important that we have clear legislative history at this point. Last year when the House changed the word "comparable" to "equal" the clear intention was to narrow the whole concept. We went from "comparable" to "equal" meaning that the jobs involved should be virtually identical, that is, they would be very much alike or closely related to each other.

We do not expect the Labor Department to go into an establishment and attempt to rate jobs that are not

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<sup>138</sup> 109 CONG. REC. 9196 (1963) (remarks of Rep. Frelinghuysen) (emphasis supplied).

<sup>139</sup> *Id.*

<sup>140</sup> 109 CONG. REC. 9197 (1963).

<sup>141</sup> *Wage Discrimination*, *supra* note 1, at 475.

<sup>142</sup> See *Angelo v. Bacharach Instrument Co.*, 555 F.2d 1164 (3d Cir. 1977); *Shultz v. Wheaton Glass Co.*, 421 F.2d 259 (3d Cir.), *cert. denied*, 398 U.S. 905 (1970).

It should be noted that the NWLB was not a judicial tribunal in any sense. It was a tripartite body made up of public, industry, and labor representatives which had the authority to resolve disputes only by mediation or arbitration. Its recommendations did not have the force and effect of law, nor were they enforceable by court order. See National War Labor Board, *Termination Report*, Vol. I, pp. XXV-XXVI, 7, 10 (1945).