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Comparable Worth and Discrimination in Labor Markets

Daniel R. Fischel†
Edward P. Lazear††

I. INTRODUCTION

Under the Equal Pay Act of 1963,¹ employers are prohibited from paying men and women different amounts for identical work if the only justification for the differential is sex. Similarly, Title VII of the Civil Rights Act of 1964² prohibits other forms of discrimination against women. For example, employers (with certain narrow exceptions) cannot lawfully refuse to hire women for particular jobs. But an employer in a particular business who treats men and women equally in all respects does not violate either the Equal Pay Act or Title VII. Thus, an employer of nurses who pays female and male nurses the same amount and stands willing to hire both cannot be sued under current anti-discrimination laws. Because such an employer has not discriminated between male and female nurses, he has not acted illegally.

The employer could be liable, however, under the theory of comparable worth. This theory is based on the premise that jobs of equivalent "worth" or value to an employer or to society as a whole should be compensated equally even if the jobs are dissimilar in content. The theory assumes that the proper remedy when two jobs are "comparable," but unequally compensated, is for the employer of the lower-paying job to raise employees' compensation to the level of the higher-paying job. Thus, the employer of nurses who did not discriminate between male and female nurses could nevertheless be liable under a theory of comparable worth if a

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¹ 29 U.S.C. § 206(d) (1976).

² 42 U.S.C. §§ 2000e-1 to 2000e-17 (1982).

plaintiff could demonstrate that nurses possessed skills comparable to, say, electricians, but were paid less. The employer would then be required to raise the compensation of nurses to the level of electricians.

Claims brought under Title VII that are explicitly premised on a theory of comparable worth have become much more common in recent years. So far, no court has directly endorsed the theory and several have rejected it outright.³ The Supreme Court in *County of Washington v. Gunther*,⁴ however, suggested that occupational wage differentials may be actionable under Title VII in certain circumstances. Although the Court expressly refused to address the theory of comparable worth,⁵ many commentators have interpreted the decision as a significant expansion of Title VII.⁶ Whatever the state of comparable worth in the courts, the issue remains very important. Numerous states and local governments have enacted, or are currently considering, comparable worth legislation for government employees.⁷ The same is true of foreign countries.⁸

Comparable worth has been strongly defended as a necessary extension of existing anti-discrimination legislation.⁹ Proponents note that women typically earn only sixty cents for every dollar

³ See *American Nurses Ass'n v. Illinois*, 783 F.2d 716 (7th Cir. 1986); *American Fed'n of State, County & Mun. Employees (AFSCME) v. Washington*, 770 F.2d 1401 (9th Cir. 1985).

⁴ 452 U.S. 161 (1981).

⁵ *Id.* at 166, 181.

⁶ See, e.g., Gasaway, *Comparable Worth: A Post-Gunther Overview*, 69 GEO. L.J. 1123, 1134-36 (1981); Newman & Vonnhoff, "Separate But Equal"—*Job Segregation and Pay Equity in the Wake of Gunther*, 1981 U. ILL. L. REV. 269, 272-85; Vieira, *Comparable Worth and the Gunther Case: The New Drive for Equal Pay*, 18 U.C.D. L. REV. 449 (1985).

⁷ See, e.g., BUREAU OF NATIONAL AFFAIRS (BNA), *PAY EQUITY AND COMPARABLE WORTH* 55-68 (1984) (listing existing and proposed state pay equity legislation); Rothchild, *Overview of Pay Initiatives, 1974-1984*, in 1 *COMPARABLE WORTH: ISSUE FOR THE 80's* 119, 121-23, 128 (U.S. Comm'n on Civil Rights 1984) (listing state legislation and local initiatives) [hereinafter cited as *ISSUE FOR THE 80's*].

⁸ See, e.g., Bellace, *A Foreign Perspective*, in *COMPARABLE WORTH: ISSUES AND ALTERNATIVES* 137 (E. Livernash ed., 2d ed. 1984) (analyzing the experiences of the European Community, Sweden, Canada, Australia, and New Zealand in trying to achieve "pay equity"); Gasaway, *supra* note 6, at 1149-55 (discussing comparable worth abroad).

⁹ See, e.g., Beller, *Occupational Segregation and the Earnings Gap*, in *ISSUE FOR THE 80's*, *supra* note 7, at 25-26 (discussing force of Title VII in eliminating occupational segregation); Bergman, *The Economic Case for Comparable Worth*, in *COMPARABLE WORTH: NEW DIRECTIONS FOR RESEARCH* 71 (H. Hartmann ed. 1985) (offering economic arguments for comparable worth) [hereinafter cited as *NEW DIRECTIONS*]; Blumrosen, *Wage Discrimination, Job Segregation, and Title VII of the Civil Rights Act of 1964*, 12 U. MICH. J.L. REF. 397, 490-502 (1979) (arguing that comparable worth is available under Title VII as a remedy for wage discrimination).

earned by men¹⁰ and this ratio has not changed appreciably over time, notwithstanding the passage of anti-discrimination legislation.¹¹ Moreover, a high percentage of women in the labor force still tend to be concentrated in a relatively small number of low-paying occupations.¹² Traditional anti-discrimination legislation, proponents claim, is ineffective in remedying this systemic, economy-wide discrimination under which women are segregated into a limited number of low-paying occupations. Only a remedy such as comparable worth which attacks discrimination at the occupational level rather than at the job level, it is argued, can effectively combat this systemic discrimination.

Comparable worth has also attracted its share of critics.¹³ The most frequent objection to comparable worth has focused on the premise that the comparability of different jobs can be measured or evaluated apart from values assigned in the marketplace.¹⁴ Critics claim that the "worth" of a job can only be determined by ref-

¹⁰ See *Women in the Work Force: Pay Equity*, Hearing before the Joint Economic Committee, 98th Cong., 2d Sess. 4 (1984) (statement of Heidi Hartmann) ("It is well-known that on average the earnings of women who are employed full-time are approximately 60 percent of those of men who are also employed full-time.") [hereinafter cited as *Hearing*]; *WOMEN, WORK, AND WAGES: EQUAL PAY FOR JOBS OF EQUAL VALUE* 41 (D. Treiman & H. Hartmann eds. 1981) (among full-time, year-round workers, earnings of women average less than 60% of those of men) [hereinafter cited as *WOMEN, WORK & WAGES*].

¹¹ See, e.g., *WOMEN'S BUREAU, OFFICE OF THE SECRETARY, U.S. DEP'T OF LABOR, THE EARNINGS GAP BETWEEN WOMEN AND MEN* 6 (Table 1) (1979) (figures show a persistent earnings gap over a two decade period) [hereinafter cited as *EARNINGS GAP*]; *Hearing*, *supra* note 10, at 4 (statement of Heidi Hartmann) ("It is . . . well-established that sex segregation in the labor market is extreme and has not changed much since 1900."); Blumrosen, *supra* note 9, at 411 ("After almost fifteen years of federal legislation prohibiting discrimination in compensation and segregation of jobs, the wage gap is larger now than it was before the legislation."); O'Neill, *The Trend in the Male-Female Wage Gap in the United States*, 3 J. LAB. ECON. S91, S93 (1985) (the female-to-male earnings ratio based on the annual earnings of year-round full time workers was 58% in 1939, 64% in the middle 1950's, 58% again in the mid-1960's, and 62% in 1982). O'Neill predicts that the increasing work experience of women in recent years and other factors will lead to a narrowing of the wage gap in the next 10 years. *Id.*

¹² See *WOMEN, WORK & WAGES*, *supra* note 10, at 24-41; Blumrosen, *supra* note 9, at 415.

¹³ See, e.g., Killingsworth, *The Economics of Comparable Worth: Analytical, Empirical, and Policy Questions*, in *NEW DIRECTIONS*, *supra* note 9, at 86; Lindsay & Shanor, County of Washington v. Gunther: *Economic and Legal Considerations for Resolving Sex-Based Wage Discrimination Cases*, 1 SUP. CT. ECON. REV. 185 (1982); O'Neill, *An Argument Against Comparable Worth*, in *ISSUE FOR THE 80's*, *supra* note 7, at 177; RITA RICARDO-CAMPBELL, *WOMEN AND COMPARABLE WORTH* (Hoover Inst. Monograph Series 1985).

¹⁴ See, e.g., O'Neill, *supra* note 13, at 178 ("In a free market, wages and prices are not taken as judgments of the inherent value of the worker or the good itself, but reflect a balancing of what people are willing to pay for the services of these goods with how much it costs to supply them. . . . There is simply no independent scientific way to determine what pay should be in a particular occupation without recourse to the market.").

erence to the wage that prevails in the market as a result of the forces of supply and demand. Thus, the critics argue, it is a fundamental contradiction to argue that jobs that are valued differently in the market are nevertheless comparable. The debate about comparable worth, in this view, is simply a modern manifestation of the question that has confounded philosophers for centuries concerning the meaning of a "just" price or wage.

While this standard market critique of comparable worth is powerful, it is not compelling. Many situations exist where market prices are not accepted as final. In antitrust cases, for example, a common inquiry is whether prices charged to consumers are too high as a result of the exercise of market power. Similarly, in cases under the Equal Pay Act, the effect of alleged discrimination on wages paid to men and women is critical. Unless one is willing to argue that the market price should be accepted as dispositive in these other contexts, the standard market critique of comparable worth is not entirely convincing.

We provide a critique of comparable worth that does not depend on acceptance of the market price as dispositive. On the contrary, we freely concede for purposes of argument that observed wage differentials among occupations may, at least in theory, reflect discrimination against women. While we discuss some of the explanations for the wage differentials between men and women—specifically the "crowding" and "choice" hypotheses—we do not attempt to discover the cause of the differentials here. Rather, we argue that comparable worth is *never* the correct remedy, even if wage differentials and job segregation are the product of discrimination against women.

The essence of our argument is as follows. Assume that women are discriminated against and wrongfully denied entry into a male-dominated occupation, say, electronics. Women prevented from becoming electricians will flood other occupations such as nursing. The increased supply of women in nursing and other female-dominated occupations may well have the effect of depressing wages. The proper solution, however, is not to raise the wage of nurses while doing nothing about barriers to entry in electronics. Such a remedy would merely combat one inefficiency in the economy (barriers to entry in electronics) by creating a second inefficiency (a minimum wage in nursing). Yet this is precisely the effect of comparable worth.

We then discuss the moral argument that comparable worth is compelled by the need for pay equity for women. We argue that the attempt to justify comparable worth on moral grounds only

serves to obscure the effects of comparable worth on various groups. In fact, many women may be hurt by comparable worth. If a consensus exists that women should be compensated for the effects of past discrimination, such compensation should be in the form of a direct public subsidy rather than comparable worth.

Finally, we assess the argument that comparable worth is simply an extension of existing anti-discrimination legislation. Because comparable worth imposes a minimum wage but does nothing about discrimination in the economy, we argue that it is fundamentally inconsistent with, rather than an extension of, existing anti-discrimination legislation. In practice, however, existing anti-discrimination legislation may have the same perverse effects as comparable worth. But even if we assume that Title VII and the Equal Pay Act are beneficial, they still provide no support for comparable worth.

We conclude the article with a discussion of the implications of our analysis for comparable worth cases in the courts and for the *Gunther* case. We argue that *Gunther* provides no support for the theory of comparable worth and is probably wrongly decided on its own facts.

II. THE SIGNIFICANCE OF EARNINGS DIFFERENTIALS

Full-time working women earn approximately sixty percent of what full-time working men earn.¹⁵ Much if not all of this differential is attributable to the disproportionate concentration of women in lower-paying occupations rather than men and women being paid differently for identical work.¹⁶ This much is uncontroversial. The hard question, however, is *why* women are found in lower paying occupations. We show in this section how wage differentials may or may not reflect discrimination against women. We also demonstrate the deficiencies of job evaluation studies which are frequently performed to analyze whether wage differentials among occupations are a product of discrimination against women.

¹⁵ See sources cited *supra* note 10.

¹⁶ See, e.g., EARNINGS GAP, *supra* note 11, at 2 ("Of prime importance . . . in explaining the earnings differential is the concentration of women in relatively low-paying occupations and lower status jobs even within the higher paying occupation groups."); Newman & Vonhof, *supra* note 6, at 270 ("the current disparity is not primarily due to unequal pay for equal work . . . but rather to the concentration of women in low-paying jobs which are different in content from men's jobs") (footnote omitted); Oaxaca, *Male-Female Wage Differentials in Urban Labor Markets*, 14 INT'L ECON. REV. 693, 708 (1973) (same).

A. Wage Differentials and Discrimination

Wage differentials among occupations are the norm rather than the exception. Successful athletes and entertainers commonly earn more than Nobel Prize winners; brilliant artists often cannot earn enough to survive while mediocre investment bankers flourish. Within the academic community, law professors generally receive higher salaries (even ignoring consulting opportunities) than professors of political science, even though the skills required for both are quite similar. The examples could be multiplied indefinitely.

Why does anyone choose a lower paid occupation such as political science over a higher paid one such as law? Assuming that individuals are free to choose, the answer must be that they prefer political science (at least at the time the decision is made) even at a lower wage. Perhaps they view the prospect of law school as abhorrent; perhaps they view legal research as dull; perhaps they view lawyers as social parasites or buffoons; perhaps they think law students are more demanding and decide that it would be more enjoyable to teach political science. Whatever the reason, it must be true that individuals who are free to choose law, but voluntarily choose to enter the lower-paying occupation of political science, cannot be worse off. We refer to this scenario as the "choice" explanation for wage differentials.

Now suppose that certain individuals are arbitrarily precluded from entering law. Political science might then be flooded with individuals who would otherwise prefer to teach law, but are crowded out by the entry barrier. Because of the increased supply of individuals going into political science, wages in this area will be artificially low while wages in law will be artificially high. Those willing to work in the lower-paying area of political science may only be willing to do so because they are denied the opportunity to teach law by the entry barrier.¹⁷ We refer to this scenario as the "crowding" explanation for wage differentials.¹⁸

This simple example of how both the choice and the crowding explanations can explain wage differentials between two occupations when sex is not an issue is illustrative of the ambiguity of

¹⁷ In all probability, entry barriers would have to be pervasive for there to be a depressing effect on wages for political scientists. For purposes of analysis, we assume that all barriers to entry in one occupation depress wages in other occupations.

¹⁸ The crowding explanation for wage differentials in the context of racial discrimination is articulated and formalized in Bergmann, *The Effect on White Incomes of Discrimination in Employment*, 79 J. POL. ECON. 294, 299-301 (1971).

statistical disparities in wages when sex is an issue. Women may choose lower-paying occupations because of certain attributes of those occupations; alternatively, they may choose lower-paying occupations because they are denied entry into other higher-paying occupations.

Why might women voluntarily choose lower-paying occupations? One explanation is that many women choose to specialize in child bearing and raising as well as in the production of household services. If women specialize in this manner (while men specialize in the production of income), they may select careers where they are free to enter and leave the workforce with minimum penalty. They may choose to acquire skills that do not depreciate rapidly with temporary absences from the workforce. Conversely, they may avoid occupations (or specialties within occupations) which require long training periods, long and unpredictable hours, willingness to relocate, and other attributes which are inconsistent with specialization in child care and other household responsibilities. Finally, women may expend less effort for any given number of working hours because of their child care and household responsibilities.¹⁹ By choosing to invest less in developing the value of their human capital and to expend less effort, however, women must pay a price in the form of lower wages. But women are not the victims of discrimination under this scenario because they prefer the lower-paying occupations or sub-occupations over higher-paying ones that make production of household services (including child bearing and raising) more difficult.

The alternative explanation for wage differentials is that women do not voluntarily choose lower-paying occupations but, rather, are forced into those occupations by discriminating employers and social prejudices. If employers in certain occupations have a taste for discrimination, they may refuse to hire qualified women.²⁰ More generally, subtle society-wide prejudices may induce women to avoid certain occupations in favor of others that are perceived as more suitable for women. Indeed, the "choice" of

¹⁹ G. Becker, *Human Capital, Effort, and the Sexual Division of Labor*, 3 J. LAB. ECON. S33 (1985).

²⁰ See generally GARY BECKER, *THE ECONOMICS OF DISCRIMINATION* 39-50 (2d ed. 1971) (discussing effect of employers' discrimination on labor markets). Alternatively, employers with a taste for discrimination may hire women but pay them less than men. Other groups such as unions or consumers may also have a taste for discrimination. Unions may refuse to admit women to membership; consumers may refuse to patronize firms which do not discriminate against women. Such actions by unions or consumers may create entry barriers to women even if employers do not have a taste for discrimination.

women to specialize in child bearing and raising and the production of household services may itself result from discrimination at the societal level. If this societal discrimination did not exist, women's choices might also be different.²¹ Whether the discrimination is by employers in a particular occupation or by society as a whole is irrelevant; the effect will be the same. Women crowded out of certain occupations will flood others and this increase in supply will have a depressing effect on wages in occupations dominated by women. We take up the notion of societal discrimination again in section C of part III.

B. The Empirical Evidence

On a theoretical level, it is impossible to decide whether the choice or the crowding explanation better explains wage differentials. The issue is necessarily empirical. Unfortunately, it is extremely difficult to disentangle, even empirically, the sources of the wage differential.

The basic problem is that there is no direct measure for what we would like to test—the causal effect of discrimination on wage differentials. As a result, economists have attempted to measure the effect of discrimination on wages indirectly by measuring how much of the wage differential between men and women can be explained by such factors as education, work experience, seniority, number of hours worked, continuity within the workforce, and so forth. Numerous studies have been performed along these lines.²² Their general conclusion is that less than half of the wage differential can be explained by taking all these factors into account.²³ Many have interpreted this large unexplained residual as establishing, or at least creating a presumption, that discrimination against women has had a depressing effect on wages in female-dominated occupations.²⁴

²¹ See Sunstein, *Legal Interference with Private Preferences*, 54 U. CHI. L. REV. (forthcoming) (discussing adaptive preferences).

²² For a concise summary of these studies, see WOMEN, WORK & WAGES, *supra* note 10, at 13-42.

²³ See, e.g., *id.* at 42 (attempts to explain differentials on the basis of such factors as education, labor force experience, labor force commitment, or other human capital factors "usually account for less than a quarter and never more than half of the observed earnings differences"); Blinder, *Wage Discrimination: Reduced Form and Structural Estimates*, 8 J. HUMAN RESOURCES 436, 449 (1973) (two-thirds of male-female wage differential attributable to outright discrimination in labor markets).

²⁴ See, e.g., WOMEN, WORK & WAGES, *supra* note 10, at 24 ("[R]esearchers have consistently found that a substantial part of the earnings difference cannot be explained by factors thought to measure productivity differences. Taken at face value, these results create a pre-

Others, however, have questioned this interpretation of the data for several reasons.²⁵ First, the existence of an unexplained residual does not directly establish discrimination. The residual may instead be due to some other factor that is not being tested. Second, when the data is analyzed more carefully, certain basic inconsistencies arise between the data and the crowding hypothesis. The crowding hypothesis would predict, for example, that the wage differential between men and women will not be a function of the marital status of either group. In fact, however, marital status and other family characteristics are crucial.²⁶

Women who have never been married appear to have complete wage parity with men who have never been married. Conversely, women who are currently married earn less than half of what men who are currently married earn. Family size is also relevant. The larger the number of children, and the greater the spacing between children, the larger the wage differential. Age matters as well. Earnings differentials are the smallest in the early years, then increase until about age 40, and then decline again.²⁷

Each of these statistics is consistent with the choice theory of wage differentials (where women specialize in child bearing and other household services), but inconsistent with the crowding theory. However, the failure of the choice hypothesis to explain much of the wage differential—even when as many factors as possible are held constant—cautions against its easy acceptance. Given the current state of learning, the causes of wage differentials remain something of a mystery.

sumption of additional factors at work, possibly including institutional barriers and discrimination.”); Oaxaca, *Theory and Measurement of the Economics of Discrimination*, in *EQUAL RIGHTS AND INDUSTRIAL RELATIONS* 25 (L. Hausman, O. Ashenfelter, B. Rustin, R. Schubert & D. Slaiman eds. 1977) (discrimination accounts for between 58 and 75% of the gross wage differential).

²⁵ See, e.g., E. Landes, *Sex-Differences in Wages and Employment: A Test of the Specific Capital Hypothesis*, 15 *ECON. INQUIRY* 523, 523 (1977) (at least two-thirds of wage differential between men and women within occupations is accounted for by nondiscriminatory employment practices); Lindsay & Shanor, *supra* note 13, at 217-21 (wage differentials could be explained by factors other than discrimination if the data were suitably refined); O'Neill, *supra* note 13, at 183 (“the true effect of sex on occupational differences or wage rates is [an] unresolved issue”); Polachek, *Women in the Economy: Perspectives on Gender Inequality*, in *ISSUE FOR THE 80's*, *supra* note 7, at 45 (human capital model explains nearly 100% of the wage differential); Roberts, *Statistical Biases in the Measurement of Employment Discrimination*, in *COMPARABLE WORTH: ISSUES AND ALTERNATIVES*, *supra* note 8, at 173-95 (inference of discrimination is largely a function of biases in statistical methodologies).

²⁶ See Polachek, *supra* note 25, at 40-43.

²⁷ *Id.* at 40.

C. Job Evaluation Studies

The above analysis suggests that wage differentials among occupations are not a subject of concern unless there has been a barrier to entry which makes free choice impossible. Plaintiffs in comparable worth cases, however, have not established the existence of such barriers. Rather, they have introduced job evaluation studies which purport to demonstrate that certain occupations such as nursing are "comparable" in "worth" to others such as electronics but are paid less.

Such studies of "worth" in labor markets, however, are inherently unreliable. To illustrate this point, it is useful to consider an example drawn from product markets. Consider a hypothetical survey to determine whether water has a value comparable to diamonds. The individual who is conducting the study can resolve this question easily by reference to the market price of water (very low) and diamonds (very high). Of course, this would eliminate the need for the survey in the first place.

But now assume that market prices are discarded because they are somehow biased. What should the author of the study do now? A natural conclusion in the absence of market prices is that since water is necessary for life and diamonds are not, water should rise in price relative to diamonds.

Such a conclusion would, however, overlook the importance of marginal values and thus be a serious error. Water is cheap because of its relative abundance. The first units of water are necessary for life and thus are surely worth more than diamonds. But more water exists than is necessary to support life. Thus, each additional unit of water is worth less than the first and the last marginal units can be used for such nonessential activities as swimming. Raising the price of water to its intrinsic (average) value would preclude its use for swimming even if an ample supply exists for this purpose.

The value of diamonds presents other problems. True, diamonds are scarce, but not as scarce as, say, a painting by one of the authors of this paper. If the author of a "beauty" survey concluded (by some miracle) that our painting was as beautiful as a diamond but more scarce, should our painting sell for more?

Equally intractable problems arise in value studies of labor markets. The criteria for measuring "worth"—e.g., for measuring whether successful athletes are worth more than Nobel Prize winners—are completely subjective and lack any benchmark apart

from market price.²⁸ Moreover, the meaning of "worth" or "value" is not well specified. The value produced by the first worker, the average worker, and the last worker hired by an employer are all different and are likely to differ further across occupations. Which value counts and how is it to be measured apart from employers' willingness to pay? These problems and others doom, for all practical purposes, using job evaluation studies to establish discrimination, particularly where no showing has been made of any barrier to entry into higher-paying occupations.²⁹

III. THE PROPER REMEDY

Any persistent wage differential among occupations must either be non-discriminatory (i.e., compensation for attractiveness of work or some other legitimate factor) or must reflect a barrier to entry in higher-paying occupations.³⁰ In the former situation, the proper course is to do nothing. Eliminating non-discriminatory wage differentials would create misallocations similar to those that would arise if the price differential between water and diamonds were eliminated. For purposes of analysis, we ignore the choice hypothesis in the remainder of this section and assume that occupational wage differentials reflect a barrier to entry. We demonstrate

²⁸ The Ninth Circuit's discussion of the job evaluation study in *AFSCME v. Washington*, 770 F.2d 1401 (9th Cir. 1985), illustrates the pervasive subjectivity inherent in such studies:

Comparable worth was calculated by evaluating jobs under four criteria: knowledge and skills, mental demands, accountability, and working conditions. A maximum number of points was allotted to each category: 280 for knowledge and skills, 140 for mental demands, 160 for accountability and 20 for working conditions. Every job was assigned a numerical value under each of the four criteria.

Id. at 1403. The study found a wage disparity of about 20% between jobs held predominantly by women and jobs held predominantly by men. *Id.*

The arbitrariness of such a study is obvious. Why are there four as opposed to three or ten categories that count? Why does each category have the weight that it does? How are points assigned to different occupations? Who decides all these questions? What would be the result of application of these four criteria to wage differentials between law and political science professors?

²⁹ Another problem with using occupational job evaluation studies to establish discrimination is that such studies focus on inter-occupational wage differentials and ignore intra-occupational differences. As a result, they may conclude that discrimination exists when none is present. For example, if wages in male-dominated occupations are higher than wages in "comparable" female-dominated occupations but females in each occupation are paid more than males, the studies would wrongly predict that women were being subjected to discrimination. Alternatively, occupational job evaluation studies may fail to recognize discrimination when it exists if it averages out across occupations.

³⁰ If wage differentials were not compensating, and if there were no barriers to entry, all workers would leave the low-paying job for the higher-paying one. This would result in either the equalization of wages or in the complete extinction of the low-paying occupation.

that, even in this situation, comparable worth is the wrong remedy.

A. Labor Market Distortions and the Crowding Hypothesis

The crowding hypothesis assumes that wages are set by the forces of supply and demand but that women are precluded from entering certain occupations. The spillover of women from the restricted to the unrestricted occupation forces wages up in the former and down in the latter. The restricted occupation becomes male dominated and the unrestricted occupation becomes female dominated. The following diagram illustrates this point:

FIGURE 1

Panel A shows supply and demand in the unrestricted occupation which ends up being female dominated and Panel B shows supply and demand in the restricted occupation which ends up being male dominated. Without any restrictions on entry into occupation B, the wage would be W_M^* and the quantity employed would be M^* . Barriers restricting women from entering occupation B reduce the effective supply of workers from S^* to S , driving the wage up to W_M and the quantity employed down to M . The restriction on

employment also forces women into occupation A, shifting the supply curve from S^* , where it would be in the absence of mobility restrictions, to S . This lowers the wage in the female-dominated occupation from WF^* to WF and increases the number employed there from F^* to F .

The proper remedy should restore wages and the allocation of labor in the economy to that which would exist were there no restrictions on entry. In the context of Figure 1, the goal is to raise wages from WF to WF^* in the female-dominated occupation and reduce employment there from F to F^* . Similarly, the goal is to lower wages from WM to WM^* in the male-dominated occupation and to raise employment there from M to M^* . If the barriers to entry were eliminated, the only wage differentials that would persist are those that resulted from choice and, as discussed above, would thus be compensatory.

Does the remedy of comparable worth, which raises the wage of females to that of males in "comparable" occupations, accomplish this result? Clearly not. The goal should be to raise wages in the female-dominated occupation from WF to WF^* and decrease the level of employment there from F to F^* . Comparable worth, by contrast, raises wages in the female-dominated occupation from WF to WM , not from WF to WF^* as is desired. WM may be above or below WF^* depending on the elasticities of demand in the two occupations. Only in the rarest of circumstances would the "appropriate" wage for females be achieved by this approach. A corollary is that only under the rarest of circumstances will the desired reduction of employment from F to F^* be achieved in the female-dominated occupation.

Significantly, the reduction of employment in the female-dominated occupation under comparable worth is not caused by an exit of women into the male-dominated occupation increasing employment there from M to M^* . This is because comparable worth does nothing to eliminate the barrier to entry in the male-dominated occupation. Thus wages in the male-dominated occupation do not decrease from WM to WM^* and employment does not expand there from M to M^* . The decline in the level of employment in the female-dominated occupation without a corresponding increase in the level of employment in the male-dominated occupation means that previously employed females will now be unemployed. What comparable worth does, in effect, is attack one inefficiency (barriers to entry in the male-dominated occupation) by creating a second inefficiency (a minimum wage in the female-dominated occupation). This is analogous to attacking a cartel of

oil producers (which results in an increase in the price of coal as consumers shift to substitute energy sources) by requiring coal producers to lower their prices.

Comparable worth also operates as a penalty against blameless employers. Neither employers in female-dominated occupations nor our analogous coal producers (unlike employers in male-dominated occupations or oil producers) have engaged in any conduct that should be deterred. Both have acted as pure price-takers by setting wages (or prices) at the competitive level, given the market distortion over which they have no control. Indeed, both have mitigated the plight of workers (consumers) caused by others: the employers in the female-dominated occupation by hiring women excluded from other occupations by discriminating employers or unions rather than excluding them as well; the coal producers by expanding production to provide a substitute source of energy. Subjecting them to legal sanction for behaving in a socially desirable way will eliminate their incentive to employ more women or produce more coal. Yet this is precisely the effect of comparable worth; it illustrates why creating a minimum wage is inferior to attacking the source of discrimination directly.

It is also important to recognize that the creation of this minimum wage will only make the underlying problem worse. Wage differentials under the discrimination hypothesis exist because too many women want to enter the female-dominated occupation. The correct solution is to induce some women to exit. Comparable worth has the opposite effect. By raising wages in the female-dominated occupation, comparable worth causes *more* women (and men) to enter, not less, and at the same time shrinks the number of places available by driving down demand.

B. The State as the Employer in Both the Male-Dominated and Female-Dominated Occupations

The situation is somewhat more complicated when, as frequently will be the case, the state is the employer in both the male-dominated and female-dominated occupations. An argument could be made that by raising the cost of labor to the state in the female-dominated occupation, the state will be less likely to engage in discrimination in the male-dominated occupation. Attacking the barrier to entry directly, however, is superior to this indirect approach.

The difficulty with the indirect approach is that there is no guarantee that raising the cost of labor to the state in the female-dominated occupation will eliminate the discriminatory entry bar-

rier. The reason is that the incidence of the increased labor costs is indeterminate. The state may simply hire fewer women; alternatively, it may pass on the increased costs to consumers and taxpayers through higher prices or higher taxes. Another alternative is for the state to divest itself of one of the two occupations—i.e., get out of the health care business and thereby not hire nurses.³¹ Under any of these alternatives, some groups are worse off (women, consumers, or taxpayers) while barriers to entry in the male-dominated occupation are unaffected. Only by attacking the entry barriers directly can it be guaranteed that discriminating employers will be forced to end their discriminatory practices and that women will be able to enter male-dominated occupations.

C. Societal Discrimination as the Barrier to Entry

Some argue that the source of discrimination against women is not employers or unions but society as a whole. This societal discrimination, it is claimed, manifests itself in different ways. Young girls are encouraged to play with dolls while boys play with chemistry sets. Girls are socialized to become full-time wives and mothers and to believe that traits needed for career success are not feminine while boys are socialized to pursue a career and not share the burdens of child rearing and household duties. Because of these and other forms of societal discrimination, the argument runs, women systematically choose low status and low-paying occupations. Implicit in this argument is the assumption that more women would choose to enter male-dominated occupations in the absence of societal discrimination than do at present.

Consistent with our approach throughout, we make no attempt to evaluate the merits of the claim that wage differentials result from societal discrimination. Rather, we assume for purposes of argument that the claim is true and demonstrate that comparable worth is still the wrong remedy.

Suppose that societal discrimination has prevented women from acquiring the skills or the desire to enter the higher-paying male-dominated occupations. Comparable worth is still an inappropriate remedy for a number of reasons. First, it does nothing to correct the initial problem. Women will continue to lack the skills needed for male-dominated occupations, perhaps even more so be-

³¹ If comparable worth is interpreted to mean that occupations that have the same value to a particular employer (rather than to society as a whole) must be paid the same, states can avoid being challenged by providing governmental services only in occupations that are "non-comparable."

cause the higher wages of the female-dominated occupations make acquiring male skills less attractive. Second, women who are by hypothesis already victims of societal discrimination will be victimized further by comparable worth. Recall that societal discrimination, like other forms of entry barriers, causes too many women to want to enter female-dominated occupations. Comparable worth does not alter the societal discrimination that creates this oversupply of women into certain occupations. It just makes it more difficult for women, given the existence of societal discrimination, to act on their preferences because there will now be greater competition for fewer positions available in female-dominated occupations. Third, since society as a whole is to blame, particular employers should not be subject to legal sanction. It makes no sense to force the particular employers who hire the most women to suffer the greatest costs for actions taken by society as a whole.³²

In the final analysis, therefore, barriers to entry caused by societal discrimination are no different from barriers to entry caused by the refusal of particular employers or unions to hire qualified women. Whatever the form of barrier to entry, the proper solution is to attack it directly rather than impose comparable worth.

IV. THE MORAL ARGUMENT FOR COMPARABLE WORTH

Comparable worth is frequently defended on moral grounds. One common claim is that the goal of pay equity for women compels comparable worth. The negative implication of such a claim, of course, is that only those in favor of inequitable treatment of women would oppose comparable worth.

Attempting to seize the moral high ground as a form of argument is a well-known and frequently effective rhetorical device. In the case of comparable worth, however, the moral claim is extremely dubious. The moral claim is obviously weakest if wage differentials are a function of choice rather than crowding. In this event, women (like men) only enter certain occupations if they perceive they are made better off by doing so. Under this scenario, wage differentials between nursing and electronics are no more "inequitable" than differentials among other occupations.

The moral claim for comparable worth is weak even if we assume that wage differentials are the product of discrimination against women. No connection exists in comparable worth cases between the party being penalized and the party who engaged in

³² See *supra* section A of Part III.

wrongful discrimination. In addition, the correlation between the victims of discrimination and the beneficiaries of comparable worth is imperfect at best. If a consensus exists that some compensation should be paid to victims of past discrimination, direct financial transfers from general revenues are superior to comparable worth. We expand on these points below and end the section with a brief discussion of an alternative interpretation of comparable worth which attempts to explain its support on non-moral grounds.

A. The Effects of Comparable Worth on Various Groups

1. *Women in Female-Dominated Occupations.* Comparable worth does nothing about barriers to entry in male-dominated occupations; women who want to enter those occupations are still prevented from doing so. Wages for women remaining in female-dominated occupations will rise to a level that, as we have discussed above, may or may not be higher than what it would be if the barrier to entry were eliminated. This will be of particular benefit to younger women who have long futures in the work force. Older women (who have been in the labor market longer and thus probably have been discriminated against the most) get the higher wage for a lesser number of years.

Comparable worth will also hurt some women. As wages are forced up in the female-dominated occupation, the supply of workers (both men and women) wanting to enter that occupation will increase. At the same time, however, the increased cost of labor will in all probability cause fewer workers to be employed. This greater competition for fewer positions may result in some workers, primarily women (but also men³³), being fired and fewer being hired in the future. Marginal workers, such as the relatively unskilled, the young, minorities, and middle-aged women who have recently re-entered the workforce will in all probability be the biggest losers. And since comparable worth does nothing about eliminating barriers to entry in male-dominated occupations, there is no place for these women to go. They will be unemployed. Thus, one important (and inequitable) consequence of comparable worth is that it creates intra-occupational inequality among workers where none existed before in an attempt to remedy inter-occupational

³³ The case of male employees in female-dominated occupations is slightly different. These employees are there by choice so they are not directly affected by barriers to entry. While some men will benefit from the wage increase resulting from comparable worth, some men will also be hurt. As wages rise and the level of employment in the female-dominated occupation is reduced, some men previously employed in that field will be unemployed.

inequality.

2. *Women Who Are Not in the Work Force.* Some women have never entered the work force. One possible reason is that these women value remaining at home more than working and would remain at home even if there were no discrimination against women. A second possibility is that they wanted to enter a male-dominated occupation but were unable to do so. These women are not helped by comparable worth because barriers to entry remain.³⁴

Still another possibility is that these women wanted to enter the female-dominated occupation but only at higher wages. Comparable worth will cause some of these women to want to enter the female-dominated occupation. The problem, however, is that comparable worth probably will also result in a reduction of the number of jobs available. Since women who have not entered the work force will in all likelihood not have invested heavily in the development of their human capital, their prospects of entering the female-dominated occupation given the reduction in the number of positions available will not be great. Thus this category of women will not benefit significantly from comparable worth.

3. *Employers.* Employers in female-dominated occupations are penalized by comparable worth even though they have engaged in no discrimination. Conversely, employers who have created barriers to entry by discriminating against women are unaffected by comparable worth. In fact, comparable worth may well benefit discriminating employers. The reason is that comparable worth raises the labor cost of those who discriminate least relative to the cost of those who discriminate most. The most discriminatory firms do not hire women. By contrast, the least discriminatory firms hire the greatest number of women. Thus these nondiscriminatory firms suffer the largest increase in average wages from comparable worth policies. Discriminating employers who do not hire women in any event are less affected.

³⁴ The harm these women suffer is necessarily less than that suffered by women who work in female-dominated occupations. A woman who stays out of the labor force reveals implicitly that she values staying at home more than her potential earnings in the female-dominated occupation. The harm suffered by these women is the difference between what their wage would have been in the male-dominated occupation absent discrimination and the value of staying at home. The loss to women who work in the female-dominated occupation is the difference between what the wage would have been in the male-dominated occupation absent discrimination and the current wage in the female-dominated occupation. Since the wage in the female-dominated occupation is necessarily lower than the value of home time for those who chose to stay home, the harm suffered by working women is greater.

As discussed above, the analysis is unaffected if the state is the employer in both the male-dominated and female-dominated occupations. The state has engaged in no wrongful conduct in its capacity as an employer in the female-dominated occupation. It should be punished, if at all, because of its discriminatory practices in male-dominated occupations. Yet comparable worth focuses on the level of wages paid by the state in the female-dominated occupation without regard to whether the state has discriminated in the male-dominated occupation.

B. Direct Transfers from General Revenues as an Alternative to Comparable Worth

In arguing that the moral claim for comparable worth is not compelling, we do not reject the possibility that women, perhaps because of past (and possibly present) societal discrimination, are deserving beneficiaries of wealth transfers. We express no opinion here on the moral entitlement of women to compensation for alleged past or present societal discrimination. Rather, our point is that even if such a moral entitlement exists, comparable worth is the wrong solution. A preferable approach would be a direct transfer to disadvantaged women from general revenues.³⁵

Direct transfers avoid the inefficiencies created by comparable worth. They do not distort the relative wages among occupations that give market participants information about the supply and demand for particular skills. Nor do they penalize employers for engaging in socially desirable conduct. Finally, direct transfers do not give employers perverse incentives to create firms which only employ workers in one occupation notwithstanding possible cost increases.

Direct transfers are also more equitable. The costs of remedying discrimination are borne by society as a whole rather than by blameless employers. In addition, victims of discrimination benefit more from direct transfers than from comparable worth in a number of different ways. First, those women who have been prevented by societal discrimination from obtaining certain skills would be compensated under a system of direct transfers. Those women are implicitly penalized by comparable worth since they lack the skills that are "comparable" to those in higher-paying occupations—skills that they would have possessed had they not been

³⁵ Such transfers could take a variety of forms ranging from direct monetary payments to subsidies for training or education.

victims of societal discrimination. Second, direct transfers could allow those who have been hurt the most—older women—to receive the greatest benefits. Comparable worth, by contrast, provides the greatest benefits to younger workers (those who keep their jobs) even though they have been hurt the least by past discrimination. Finally, direct transfers avoid the unemployment which disproportionately burdens the relatively unskilled and other weaker segments of society.

We do not suggest that implementing a direct transfer system would be easy. Identifying victims and determining how much compensation to pay would be difficult. Moreover, it seems inevitable that the fit between those who have been discriminated against and those who recover would be very imperfect. A transfer to all women, for example, would provide a windfall to some women who would have chosen to specialize in household services in any event. But these problems also exist with comparable worth. Indeed, as we have emphasized, comparable worth either hurts or provides small benefits to those who are most likely to have been victims of discrimination (older women and the relatively unskilled) while providing the greatest benefits to those who have been discriminated against the least if at all (younger skilled women). To the extent that these problems make both a direct transfer system and comparable worth relatively unattractive vehicles, the better course may be to limit recovery to those who can prove, under the Equal Pay Act and Title VII, that they were victims of discrimination by particular employers or entities. We discuss this alternative in Part V below.

C. An Alternative Explanation of Comparable Worth

While comparable worth is frequently defended on moral grounds, it is possible to analyze the doctrine from an entirely different perspective. Comparable worth can be analyzed as a conventional example of special interest regulation whereby a well organized group (workers represented by unions) attempts to use the courts or the political process to extract wealth from larger, more diffuse groups (i.e., taxpayers).³⁶

Interpreting comparable worth as a garden variety form of special interest regulation helps explain comparable worth's strong

³⁶ For general discussions of the special interest theory of regulation, see Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & ECON. 211 (1976); Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. & MGT. SCI. 3 (1971), reprinted in GEORGE STIGLER, *THE CITIZEN AND THE STATE: ESSAYS ON REGULATION* 114 (1975).

support among unions.³⁷ Comparable worth, like minimum wage laws, makes it more costly for employers to substitute relatively unskilled workers for those who are more skilled because the relative prices of the two groups narrows.³⁸ Because employers are less able to employ lower-priced labor, unions have greater ability to cartelize workers.³⁹

The special interest theory also explains why attempts to implement comparable worth have focused on the public sector. Governments are less responsive to competitive pressures than most private firms and can pass the costs of higher wages on to taxpayers. If the full costs of wage increases can be passed on to taxpayers, the pre-comparable worth level of employment can be maintained. In this event, intra-occupational inequality is avoided and comparable worth becomes a pure wealth transfer from taxpayers to workers cloaked in the rhetoric of remedying discrimination.

V. THE RELATIONSHIP BETWEEN COMPARABLE WORTH, TITLE VII, AND THE EQUAL PAY ACT

Comparable worth is frequently characterized as an extension of existing anti-discrimination legislation such as Title VII and the Equal Pay Act. This characterization is quite misleading, however, because comparable worth requires no showing of discrimination. Indeed it is a given in comparable worth cases that the employer in the female-dominated occupation has *not* discriminated; the employer has treated men and women in the female-dominated occupation alike. The allegation is that the employer in the female-dominated occupation pays both men and women wages that are too "low" according to some index.

This fundamental difference between comparable worth and existing anti-discrimination legislation suggests that Title VII and the Equal Pay Act may be the wrong benchmarks from which to analyze comparable worth. In this section, we demonstrate that the rationale for anti-discrimination legislation provides no support for

³⁷ See, e.g., BNA, *supra* note 7, at 73-78 (discussing union activities in support of comparable worth); *Hearing, supra* note 10, at 136-42 (statement of Brian Turner, Director of Legislation and Economic Policy, Industrial Union Dep't, AFL-CIO).

³⁸ On minimum wage laws, see, for example, Brozen, *The Effect of Statutory Minimum Wage Increases on Teen-Age Employment*, 12 J.L. & ECON. 109 (1969); Linneman, *The Economic Impacts of Minimum Wage Laws: A New Look at an Old Question*, 90 J. POL. ECON. 443 (1982); Mincer, *Unemployment Effects of Minimum Wage Laws*, 84 J. POL. ECON. S87 (1976).

³⁹ On the cartelizing effect of unions, and of labor law in general, see Posner, *Some Economics of Labor Law*, 51 U. CHI. L. REV. 988 (1984).

comparable worth. In addition, we suggest that in practice enforcement of anti-discrimination legislation may have many of the same perverse effects as comparable worth.

A. The Rationale of Anti-Discrimination Legislation

Discrimination against women (or minorities) can occur for a variety of reasons. First, employers with a taste for discrimination may simply refuse to hire qualified women or may pay them less than equally qualified men. Second, employers who lack a taste for discrimination may still discriminate against women because they wrongly believe that women are incapable of doing a particular job. Finally, employers who themselves lack a taste for discrimination may nevertheless discriminate against women if other groups such as workers or consumers demand discrimination. If such workers or consumers are willing to accept lower wages or higher prices to indulge their taste for discrimination, the profit-maximizing strategy for employers may be to discriminate.

Economic self-interest acts as a check on discrimination against women whatever its cause. The employer who refuses to hire qualified women because of a taste for discrimination, for example, will be at a competitive disadvantage relative to non-discriminating employers who will pay less for labor. Similarly, the employer who refuses to hire qualified women out of ignorance will be at a competitive disadvantage relative to better-informed employers. Finally, the economic self-interest of workers and consumers in receiving higher wages and paying lower prices also minimizes the amount of discrimination.⁴⁰

That economic self-interest acts as a check on discrimination is not to suggest that discrimination against women does not exist.⁴¹ Anti-discrimination legislation such as Title VII and the Equal Pay Act is premised on the assumption that market pressures do not eliminate discrimination.⁴² Because these statutes

⁴⁰ This assumes the workers and/or consumers bear the cost of their taste for discrimination. Alternatively, employers may be forced to bear all or part of the costs. In this event, the economic self-interest of the employer acts as a check on discrimination by others. The employer can, for example, refuse to hire workers with a taste for discrimination unless those workers are willing to bear the full costs.

⁴¹ It does suggest, however, that there will be an inverse correlation between the extent of competition in a particular market and the amount of invidious discrimination. Thus, invidious discrimination is more likely to occur in regulated industries than in competitive industries.

⁴² The existence of discrimination is not sufficient to justify the Equal Pay Act and Title VII. It is also necessary that the social costs of discrimination exceed the social costs of

make it unlawful for employers to refuse to hire women on the basis of sex (with certain narrow exceptions) or to pay women lower wages for identical work, the costs to employers of indulging their taste for discrimination or of being ignorant are increased. The effect is to eliminate, or at least reduce, barriers to entry and other forms of discrimination in the economy. The wealth of society as well as the wealth (although not the utility) of discriminating employers will thereby be increased. The corollary is that any remaining wage differentials will then be the products of choice, not crowding. Returning to Figure 1, enforcement of anti-discrimination laws will have the desired effect, at least in theory, of raising wages in the female-dominated occupation from WF to WF^* and reducing employment there from F to F^* while lowering wages in the male-dominated occupation from WM to WM^* and raising employment there from M to M^* .

Comparable worth does not extend existing anti-discrimination legislation by creating a more effective weapon against entry barriers. On the contrary, comparable worth, as we have emphasized, does nothing about entry barriers but instead purports to attack one inefficiency by creating a second. Thus output in the female-dominated occupation is reduced and the wealth of society is decreased. As such, comparable worth is better understood as fundamentally inconsistent with, rather than an extension of, existing anti-discrimination legislation.

B. Non-Invidious Discrimination

Thus far we have been assuming that all discrimination is invidious discrimination—discrimination based on sex without regard to ability, productivity, effort, and so forth. This form of discrimination reduces wealth as it causes employers to pay more for labor than they would if they did not have a taste for discrimination. Application of anti-discrimination laws to this category of employers will have the seemingly paradoxical result of decreasing their utility while increasing their wealth.

Now suppose a particular employer with no bias against women can only make a profit if employee turnover is low. As a result, he prefers not to hire individuals with characteristics that are associated with a high level of turnover. When he does hire these individuals, he pays them less. One such group of individuals is women of child-bearing age. Let us further suppose that this

combination of sex and age is the lowest cost predictor of turnover for this particular employer.

Even though the employer in this example has no bias against women, it is certain that the employer who followed such employment practices would violate Title VII and/or the Equal Pay Act.⁴³ Application of anti-discrimination legislation against this type of employer reduces wealth; it will cause the employer to pay more for labor than he otherwise would. To avoid this effect, the employer has incentives to find subtle ways to employ fewer women or perhaps substitute capital for labor.

The perverse effects of anti-discrimination laws illustrated by this example can easily be generalized. Anti-discrimination laws, for example, may make it more difficult for members of disadvantaged groups who may have been victims of societal discrimination to compete with members of advantaged groups. If members of disadvantaged groups have fewer skills or are in general less well trained, their value to bias-free employers will be correspondingly less, at least until the gap in skills and training is eliminated. Strict enforcement of anti-discrimination laws, however, prevents employers from hiring members of disadvantaged groups at their market wage. Those employees who are hired at the higher wage level will be better off but others who would have been hired at lower wages will be hurt. Application of anti-discrimination laws, in short, can result in precisely the same type of intra-group inequality as minimum wage laws or comparable worth. All force employers to pay more for labor than competitive forces require and thus may have perverse effects.

But there is an argument that can be made in support of Title VII and the Equal Pay Act, even as applied to cases of non-invidious discrimination. In many instances, it will be difficult to distinguish the situation where a particular employer pays men and women differently because of a taste for discrimination and the situation where sex is the lowest cost predictor of another characteristic that is itself non-discriminatory (e.g., turnover). If invidious discrimination is sufficiently common, and if the costs of distinguishing it from non-invidious discrimination are sufficiently high, it may make sense to apply anti-discrimination legislation to all employers who base decisions on sex whatever the reason.

The same argument, however, cannot be made for comparable

⁴³ See, e.g., *City of Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702 (1978) (use of sex-based actuarial tables in determining pension contributions violates Title VII notwithstanding differences in life expectancy between men and women).

worth. No issue exists as to whether the employer of the female-dominated occupation is paying wages at a given level because of a taste for discrimination. By definition, the employer is paying and otherwise treating all men and women in the female-dominated occupation the same. If not, the employer would be liable under Title VII and the Equal Pay Act. The only issue in comparable worth cases is whether the wages of the whole occupation should be raised to the level of wages in "comparable" male-dominated occupations. Thus the justification for prohibiting some forms of non-invidious discrimination—the inability to distinguish non-invidious from invidious discrimination—is completely absent as a justification for comparable worth.

VI. COMPARABLE WORTH IN THE COURTS

Our analysis has important implications for the proper resolution of comparable worth claims. We discuss these implications below.

A. The Importance of Entry Barriers Created by Particular Employers or Unions

Comparable worth suits have typically been brought under Title VII on behalf of state employees in occupations that are female dominated; that is, occupations where at least roughly seventy percent of employees are women.⁴⁴ The claim is that the state compensates employees in these occupations at lower levels than it compensates employees in other occupations where males dominate even though the occupations have been identified by certain wage studies to be comparable. The relief requested is to raise the wages of employees in female-dominated occupations to the level of wages in comparable male-dominated occupations.

Such cases can be exceptionally complex. In addition to massive amounts of evidence on the particular state's occupational categories, salary structure, and male-female participation ratios, there will be the inevitable conflict among experts concerning the comparability of various male-dominated and female-dominated occupations. The result can be lengthy and costly proceedings taking years to resolve.

Our approach is far simpler. The first and most important question is whether there is any allegation that women have been denied access to male-dominated occupations. If not, it is reasona-

⁴⁴ See, e.g., *AFSCME v. Washington*, 770 F.2d 1401, 1403 (9th Cir. 1985).

ble to conclude that wage differentials are attributable to choice, not discrimination.⁴⁵ In this event, there is no problem to be addressed and the complaint should be dismissed for failure to state a claim.⁴⁶

If an allegation is made that a state or other defendant denies access to an occupation on the basis of sex, the claim should not be dismissed. But there is still no need for comparable worth; refusing to hire on the basis of sex or paying lower wages for equivalent work is already actionable under Title VII and the Equal Pay Act. The proper defendant in such an action is the discriminating employer; the proper plaintiffs are those that have been discriminated against. Employees who receive lower wages in female-dominated occupations as a result of crowding but who have not been discriminated against in the male-dominated occupation probably should have no remedy.⁴⁷

B. *County of Washington v. Gunther*

We have emphasized that the critical question in analyzing pay disparities between male-dominated and female-dominated occupations is whether barriers to entry exist in the higher-paying occupation. A different situation is presented if women cannot enter the higher-paying occupation because, by definition, it is exclusively male. This was the situation in *County of Washington v. Gunther*.⁴⁸

Gunther involved a Title VII claim by women jail guards alleging that they were paid lower wages than male jail guards. The evidence indicated that the male jail guards supervised more than

⁴⁵ The other possibility is that wage differentials are the result of discrimination but at the societal level. For the reasons discussed above, comparable worth is an inappropriate remedy for societal discrimination. See *supra* section C of part III.

⁴⁶ For example, in *AFSCME v. Washington*, 770 F.2d 1401, 1407 (9th Cir. 1985), the court stated, "[T]he State of Washington is not charged here with barring access to particular job classifications on the basis of sex." Under our approach, the absence of an allegation of a barrier to entry would have led to dismissal of the complaint, thus avoiding years of costly litigation.

⁴⁷ These employees are analogous to consumers who pay higher prices for coal because of monopoly pricing in the oil industry. Cf. W. Landes, *Optimal Sanctions for Antitrust Offenses*, 50 U. CHI. L. REV. 652, 666-68 (1983) (discussing why higher prices charged by the competitive fringe in cartelized industry do not increase social loss under certain assumptions). When consumers of the competitive fringe are allowed to recover, their cause of action is against the cartel, not the competitive fringe. *Id.* at 668 n.30 (discussing cases). By analogy, workers who have not been discriminated against should have either no remedy or a remedy against the discriminating employer. No remedy should exist against the non-discriminating employer.

⁴⁸ 452 U.S. 161 (1981).

ten times as many prisoners per guard as did the female guards and that the female guards devoted much of their time to clerical duties.⁴⁹ Nevertheless, the Court held that the differences in work performed did not preclude a claim of intentional sex discrimination.⁵⁰ The Court appears to have been heavily influenced by plaintiffs' allegation that the County had commissioned a wage study and had implemented the salary figure suggested for male guards but not the figure for female guards.⁵¹

Gunther is a hard case because its facts are unique. In most cases, the issue of whether wage differentials are compensatory or discriminatory can be analyzed directly by determining whether women are barred from the higher-paying occupation. In *Gunther*, however, it is impossible to determine whether the wage differences represent compensation for increased responsibility, risk of injury, and less pleasant working conditions because women were excluded by law from becoming guards of male prisoners. Thus female guards could not choose to guard male prisoners even if they were willing to accept increased risk and stress in exchange for increased pay.

Because *Gunther* involved a clear, albeit lawful, barrier to entry, it should not be used as a precedent for comparable worth in cases where no such barriers to entry exist. Thus *Gunther* should have no applicability to the vast majority of cases where no lawful barrier to entry prevents women from entering the higher-paid occupation.

Whether *Gunther* is properly decided under its own facts is debatable. If there were no wage study, it seems clear that an allegation that male guards earned more than female guards would fail given the differences between the jobs. The alternative result would require a court to value the difference between risk and clerical duties. While in principle this could be attempted by a study of market wages of police, guards in other places, secretaries, and so forth, the outcome of such a study is likely to be highly uncertain. It is precisely these uncertainties that are avoided, or at least minimized, by the equal work requirement of the Equal Pay Act.⁵²

⁴⁹ *Id.* at 165.

⁵⁰ The Court was careful to emphasize, however, that it was not deciding whether the women jail guards had stated a prima facie case of sex discrimination under Title VII, let alone established a right to recovery. *Id.* at 166 n.8.

⁵¹ *Id.* at 180-81.

⁵² *But see* Freed & Polsby, *Comparable Worth in the Equal Pay Act*, 51 U. CHI. L. REV. 1078 (1984) (arguing that comparable worth issues pervade cases under the Equal Pay Act). For a critical reply, see M. Becker, *Comparable Worth in Antidiscrimination Legisla-*

The issue is whether a different result should obtain in *Gunther* because of the presence of the wage study. We think not. To allow the result in cases like *Gunther* to depend on employers' compliance with wage surveys gives such surveys far more deference than they deserve for the reasons discussed above.⁵³ The very fact that the County of Washington was apparently able to hire the desired number of men and women jail guards at the wages the County was willing to pay suggests that the problem in *Gunther* was the quality of the survey, not the wage differential. Moreover, to the extent wage studies have value, increasing the legal exposure of employers who commission such studies will simply discourage their use. Thus *Gunther*, in addition to having limited applicability to other cases, is probably wrongly decided on its own facts.

CONCLUSION

Wage differentials among occupations can result from choice or from discrimination. In neither case is comparable worth the proper remedy. It has none of the appropriate incentive effects and fails to provide compensation for past wrongs to the appropriate parties. If a social consensus exists that wealth redistribution is desirable, it would be more efficient and more equitable to effectuate a direct transfer from general revenues.

tion: A Reply to Freed & Polsby, 51 U. CHI. L. REV. 1112 (1984).

⁵³ If Washington was paying too low a wage to women jail guards, there should have been unfilled positions. Conversely, if Washington was paying too high a wage to male jail guards, there should have been a queue for these positions. For an argument that virtually all cases of discrimination involve paying men too high a wage rather than paying women too low a wage, and that therefore the correct remedy is lowering men's wages, not raising women's wages, see Lindsay & Shanor, *supra* note 13, at 205-17.