The Theory of Comparable Worth as a Remedy for Discrimination

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In the legal literature, unlike the economic literature, comparable worth is usually advanced as a theory of liability for discrimination in employment. Comparable worth allows or requires an inference from pay disparities between jobs dominated by women and those dominated by men, to the existence of discrimination on the basis of gender. As a matter of statutory interpretation, the theory connects evidence of pay disparities with violation of a statute—like Title VII of the Civil Rights Act of 19641—that generally prohibits discrimination in employment on the basis of gender. To use the terms common in the economic literature,2 the theory of comparable worth connects the narrow principle of "pay equity" with the broader principle of "gender equity." In some cities and states, and in some foreign countries, however, pay equity has been advanced as an independent goal of law reform.3 These legislative reforms typically propose a separate statute or ordinance addressed specifically to pay equity, distinct from a general prohibition against discrimination based on gender. Such legislation requires a general evaluation of jobs and pay increases for those employees who hold undervalued jobs.4

The voluminous literature on comparable worth, both legal and economic, has examined the subject mainly as a theory of legal liability. It has been analyzed as a substantive prohibition on the actions of employers, enforced either through legal claims of discrimination or through administrative evaluations of rates of pay. In many respects, the theory can only be analyzed in these terms because it attempts to change the ways in which

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4. Sara M. Evans & Barbara J. Nelson, Comparable Worth for Public Employees: Implementing a New Wage Policy in Minnesota, in EQUAL VALUE/COMPARABLE WORTH IN THE UK AND THE USA, supra note 3, at 230, 248-53; see also AARON & LOUGY, supra note 3, at 24-36 (presupposing the need for such evaluations); Bellace, supra note 3, at 169 (same).
employers set levels of compensation. Professor Friesen has analyzed this approach by reviewing the economic studies of the gender gap in compensation and the costs of correcting it. I would like to analyze the theory of comparable worth, however, from a different perspective: as a remedy for discrimination, both in the narrow sense of compensating proven victims of discrimination, and in the broad sense of changing pervasive patterns of gender discrimination. To evaluate fully the theory of comparable worth, we must examine not only the discriminatory effects of existing employment practices, but also the most effective means of remedying them. This perspective will put the strengths and weaknesses of the theory in a new and different light.

The principal objection levelled against the theory of comparable worth is that it would require a wholesale reevaluation of pay scales in all jobs dominated by women. Interference with the market on this scale would result in substantial inefficiencies, both in the costly process of evaluation (often accompanied by litigation) and, more importantly, in the inaccurate and inflexible bureaucratic evaluation of the comparative worth of different jobs. Even the most sophisticated system of job evaluation cannot reproduce the decentralized decisions about compensation made in an efficient market. According to its critics, whose views are ably summarized by Professor Friesen, applying the theory of comparable worth would introduce many of the problems of central planning—a form of economic organization now rejected by most of the world.

This criticism, I believe, has considerable force. It does not, however, have much to do with the existence of discrimination. Or rather, it does so only on strong—indeed question-begging—assumptions that existing markets are efficient and that efficient markets eliminate all forms of unjustified discrimination. Professor Friesen demonstrates that the empirical studies reach far more equivocal conclusions. So do the cases on discrimination in pay. Wholesale regulation of rates of pay may be inefficient and unwarranted, but narrower forms of regulation may sometimes be necessary to remedy proven discrimination.

In Part I, I discuss cases in which courts have upheld findings of discrimination in pay and have forced employers to compensate victims of discrimination through class-wide awards of backpay. In Part II, I consider the effectiveness of the theory of comparable worth as a remedy for gender discrimination in the broad sense of reducing structural pay inequality between men and women in employment.

5. See Friesen, supra note 2, at 33-52.
6. Id. at 52-54.
7. Id. at 51-52.
I. REMEDIES FOR DISCRIMINATION IN PAY

Even without the theory of comparable worth, intentional discrimination in setting pay is still illegal. And, even in the absence of discrimination in pay, other forms of discrimination still result in liability for backpay (and, increasingly, for frontpay also). These forms of judicial interference with pay rates set by employers are routine, yet they are not thought to raise any of the problems that many believe to be endemic to the theory of comparable worth. Why not?

As a preliminary matter, it is necessary to clarify what judicial interference interferes with. It is not always rates of pay set by the general labor market. Employers often insulate their employment practices from competition by other employers by establishing internal job markets within the firm. Familiar devices such as seniority systems, internal promotions, fringe benefits, and administratively established job classifications and levels of compensation may be affected only indirectly by the prevailing prices in external labor markets. The broad power of employers to set the terms and conditions of employment leaves them free to follow the dictates of the labor market either closely or at some distance. Ultimately, of course, private employers will succeed or fail according to the demands of the markets in which they participate. It does not follow, however, that their compensation decisions are always to offer the wages, salaries, and fringe benefits that prevail in the external labor market.

Even if external labor markets are free of discrimination, an employer may take race or gender into account in setting compensation. When an employer has done so, it can then be held liable under existing law for both compensatory and prospective relief that affects rates of pay. The case that established the current limits on the theory of comparable worth, County of Washington v. Gunther, reached this result, as did Bazemore v. Friday, a case that considered statistical evidence of racial discrimination in pay. These cases do not authorize judicial regulation of compensation decisions as broadly as they might have under the theory of comparable worth, but they do require judges to devise remedies that address certain forms of discrimination in pay. Remedyng discrimination in pay is, in principle, no different from remedying any other discriminatory practice. The primary goal of such a remedy is not to minimize judicial interference with employer autonomy, but to put the victims of discrimination in the place that they would have been in the absence of discrimination. If that requires an evaluation of the worth of different jobs, then so be it.

When courts have devised such remedies, they have ended up doing much the same thing as they would have done under the theory of comparable worth, but on a much smaller scale. Courts have had to analyze historical and statistical evidence of disparities in pay, often in jobs predominantly occupied by members of one race or sex, and they have had to make complicated calculations of the amount of backpay owed to class members, often by resorting to statistical averages.\(^1\) Such judicial decisions are based ultimately on the employer's own decisions about how much to pay employees other than the victims of discrimination. In that sense, the employer's control over compensation has been preserved, but, of course, it has been preserved only in an attenuated form. The theory of comparable worth could be said to preserve employer autonomy in an equally attenuated form by also taking as its baseline the pay for jobs predominantly occupied by men.

For instance, in Bazemore, the Supreme Court held that a regression analysis could be used as evidence of racial discrimination in pay.\(^2\) The plaintiff alleged that the defendant, the North Carolina Agricultural Extension Service, discriminated between white and black workers by perpetuating differences in pay that originated before the effective date of Title VII.\(^3\) In addition to presenting direct evidence that preexisting disparities in pay remained uncorrected, the plaintiffs relied upon a regression analysis that correlated salary with education, tenure, job title, job performance, and race. The first four factors were those used by the Extension Service itself to set pay. The last factor showed that the average black worker was paid over $300 less each year than the average white worker when the other three factors were equal.\(^4\) The purpose of this regression analysis, of course, was to compare a wide range of employees with different qualifications, including work in different jobs. If, as the Supreme Court held, a regression analysis can be used to establish intentional discrimination on the basis of race,\(^5\) it can also be used to establish intentional discrimination on the basis of sex.

How different is the proof necessary to establish intentional discrimination in pay from the proof required under the theory of comparable worth? As a matter of statistical techniques and evidence, the regression equations used to prove intentional discrimination differ from those used under the theory of comparable worth. The equations used to prove intentional discrimination often contain variables for different job titles, which reflect

\(^2\) Bazemore, 478 U.S. at 387.
\(^3\) Id. at 399 (Brennan, J., concurring).
\(^4\) Id.
\(^5\) Id. at 397-404.
nominal differences in jobs that receive different rates of pay. In a comparable worth study, however, these variables would have to be replaced by variables that reflect genuine differences in the work performed in different jobs. On the one hand, this substitution would make the plaintiff's case easier to prove because the defendant would no longer have a defense based on job titles alone. On the other hand, the plaintiff's regression analysis would also be more difficult to conduct because the variables for genuine differences in jobs would be more difficult to measure. Even if the defendant bore part of the burden on the issue of genuine differences in jobs, the plaintiff would still have to show some similarity in the jobs being compared. For example, the theory of comparable worth would not support a claim that nurses are entitled to the same pay as doctors based solely on proof that most nurses are women and most doctors are men.

As a matter of legal doctrine, proof of intentional discrimination differs from proof under the theory of comparable worth because it requires something more than proof of simple disparities in pay. This, at least, was the suggestion of the Supreme Court in County of Washington v. Gunther. In Gunther, the court reasoned that the Bennett Amendment—a technical provision in Title VII intended to harmonize it with the Equal Pay Act—requires plaintiffs who allege gender-based discrimination in pay to prove intentional discrimination; they cannot rely upon the theory of disparate impact. Neither this holding, nor the Bennett Amendment itself, applies to plaintiffs who allege racial discrimination in pay, as did the plaintiffs in Bazemore v. Friday. Both Gunther and the Bennett Amendment are explicitly limited to claims of gender discrimination. Nevertheless, claims of racial discrimination in pay have been treated just like claims of gender discrimination. They have succeeded only when the plaintiff has proved intentional discrimination, even though proof of discriminatory effects would, in theory, be sufficient. In Bazemore v. Friday, the seemingly heavier burden of proving intentional discrimination appears to have been met by the history of de jure segregation by the Extension Service. In other cases, it might be met by any of a number of forms of different evidence, from intentional discrimination in hiring and

16. See, e.g., id. at 398; see also Walter Fogel, Class Pay Discrimination and Multiple Regression Proofs, 65 Neb. L. Rev. 289, 313-21 (1986) (arguing that a job level variable must be included in regression analysis in the absence of direct evidence of discrimination in setting pay for different jobs).
17. See Aaron & Lougy, supra note 3, at 24-36.
18. 452 U.S. at 166, 170, 181.
22. Id.
promotions\textsuperscript{24} to direct evidence that gender was taken into account in setting salaries.\textsuperscript{25}

The theory of comparable worth does not require any such additional evidence. Under the theory of disparate impact, recently strengthened by the Civil Rights Act of 1991,\textsuperscript{26} the plaintiff need only prove that neutral employment practices resulted in a discriminatory effect; the plaintiff need not prove discriminatory intent. Even under the amended civil rights act, however, the theory of comparable worth requires something more than proof of a simple disparity in pay. A plaintiff who establishes that the pay for jobs dominated by women is less than the pay for jobs dominated by men would still have to establish some causal connection between a particular employment practice and the disparity in pay.\textsuperscript{27} Several different employment practices may cause such a disparity in pay, ranging from the employer’s selection procedures to its methods of setting pay for different jobs. If the plaintiff chooses the former alternative, an action challenging discrimination in pay is transformed into one challenging selection procedures. If the plaintiff chooses the latter alternative—the employer’s general method of setting pay—the employer’s justification will also focus the case on selection procedures. The employer can defend its pay scales only by proving that they are “job related for the position in question and consistent with business necessity.”\textsuperscript{28} A rate of pay can be shown to be job related and consistent with business necessity only by examining the qualifications for the job. Not surprisingly, the structure of proof ends up looking like the existing methods of proving pay discrimination in “substantially equal” jobs under the Equal Pay Act.\textsuperscript{29}

These elements of the theory of disparate impact—either proof of disparate impact by the plaintiff or proof of job relationship by the defendant—reveal that this general theory was designed to challenge qualifications for employment, not rates of pay.\textsuperscript{30} Disparate impact analysis is thus ill-suited to the narrower theory of comparable worth. The virtually complete absence of cases finding racial discrimination in pay under the theory of disparate impact demonstrates this to be so. Under \textit{Gunther}, the Bennett Amendment stands in the way of the theory of disparate impact as applied to claims of gender discrimination, but neither that case nor the

\textsuperscript{25} See Sobel v. Yeshiva Univ., 839 F.2d 18, 28-29 (2d Cir. 1988); Gibbs v. Pierce County Law Enforcement Support Agency, 785 F.2d 1396, 1401-02 (9th Cir. 1986).
\textsuperscript{27} Id. § 2000e-2(k)(1)(A)(i).
\textsuperscript{28} Id.
\textsuperscript{30} The leading cases on the theory of disparate impact are concerned only with qualifications for employment. See Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975); Griggs v. Duke Power Co., 401 U.S. 424 (1971).
amendment apply to claims of discrimination on the basis of race. Instead, it is the conceptual mismatch between the theory of comparable worth and the theory of disparate impact that has hindered development of a theory of discriminatory effects based solely on the disparity in pay between jobs dominated by women and those dominated by men. The gap between these two theories must be filled by additional evidence of discrimination. Further evidence, typically of some form of discrimination in hiring or promotions, must be added to establish a violation of Title VII; a topic that I will return to in Part II of this article.

Disparities in pay also figure in the exclusively remedial phases of a lawsuit. If an employer has been found guilty of discrimination, whether or not it concerns discrimination in pay, the victims of discrimination are entitled to be made whole. After a finding of discrimination, there is a strong presumption in favor of an award of backpay. Such an award “should be denied only for reasons which, if applied generally, would not frustrate the central statutory purpose of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination.” This deceptively simple principle has required courts to make extremely complex calculations, especially in class actions, of the amount of backpay owed to proven victims of discrimination.

To avoid what the Fifth Circuit has called “a quagmire of hypothetical judgment,” courts have often used statistical techniques—although seldom as sophisticated as those used in Bazemore—to approximate the backpay recoverable by members of the plaintiff class. These statistics estimate the pay that members of the class were likely to have received in the absence of discrimination, just as regressions on the issue of liability estimate the pay for different jobs in the absence of discrimination. Depending upon the particular form of discrimination in which the employer was engaged, the regression analysis used to determine backpay may take into account the qualifications, vacancy rates, and pay for a wide variety of jobs. These factors differ only in degree, not in kind, from the statistical evidence that might be used under the theory of comparable worth. For instance, in Segar v. Smith, the D.C. Circuit used regression analyses both to establish discrimination in hiring and promotions and to compute the amount of backpay owed to the class. Again, the only difference between the regressions applied in Segar and the regressions used to support a claim of comparable worth is that variables for different job titles would have to be replaced by variables for different job characteristics.

31. Albemarle, 422 U.S. at 421.
34. 738 F.2d 1249 (D.C. Cir. 1984).
35. Id. at 1274, 1280, 1290-91.
Judicial intervention into an employer’s business is more easily justified in the remedial phase of a lawsuit than in the liability phase. After an employer has been found liable for discrimination, there is a strong presumption in favor of compensatory relief. The employer can be forced to carry the burden of proving that a compensatory remedy should be denied. Under existing law, however, doubts cannot be resolved against an employer until discrimination has been found. The theory of comparable worth is directed at the existence of liability and, thus, poses a greater threat of judicial intervention than even the most complex awards of backpay. Under the theory of comparable worth, courts would more frequently evaluate different jobs and use these evaluations to impose liability upon employers. They would not be limited to devising remedies in the far narrower class of cases in which they have found discrimination under other theories of liability.

For these reasons, the whole controversy over comparable worth can be framed as a dispute over the magnitude of the plaintiff's burden of proving discrimination. Under existing law, the plaintiff must do more than show a disparity in pay in similar jobs that differ only in that some are held predominantly by women while others are held predominantly by men. The plaintiff must prove some form of intentional discrimination. Nevertheless, the use of statistics to prove intentional discrimination and to compute awards of backpay obscures this apparently sharp distinction. Courts have used the same evidence of disparities in pay that would figure in the theory of comparable worth, but they have not used them exclusively to impose liability upon employers. The question of what further evidence is necessary to establish intentional discrimination in pay has no definite answer. Nor is it clear that the theory of comparable worth could provide one. To the extent that the theory of comparable worth is based upon the more general theory of disparate impact, it also requires an examination of the jobs in which women and men are concentrated. This examination, in turn, leads to the further question of why men and women are often segregated in different jobs. It is to that question that I now turn.

II. Remedies for Job Segregation

The theory of comparable worth presupposes that men and women are segregated into jobs predominately held by members of one sex. Studies of sexual segregation in employment have shown that this form of segregation is, in fact, more widespread and more severe than racial discrimination. As

38. AFSCME v. Washington, 770 F.2d 1401, 1407 (9th Cir. 1985).
occupations are more narrowly defined—from white-collar and office worker to professional and secretary—the degree of segregation increases. Only in recent years, as women have moved into fields traditionally dominated by men, both in education and employment, has the degree of segregation begun to decrease. Indeed, as I interpret Professor Friesen's review of the theoretical explanations of the wage gap, almost all of the theories predict a high degree of occupational segregation between men and women. This presupposition of the theory of comparable worth cannot be doubted. What can be doubted is whether a theory of discrimination in pay can remedy segregation in employment. On the contrary, eliminating the disparities in pay between jobs dominated by women and jobs dominated by men would perpetuate occupational segregation. Moreover, it would do so without acknowledging that men and women may choose different occupations for reasons unrelated to any discrimination by the employer. Professor Friesen properly emphasizes these side effects of the theory of comparable worth. Since the theory eliminates disparities in pay by raising the pay in jobs dominated by women, it makes those jobs more attractive. Although raising pay might attract men to jobs formerly dominated by women, it might also allow the forces that resulted in occupational segregation in the first place to operate more effectively. Women might have less incentive to depart from traditional stereotypes that consigned them to such occupations as nurses and secretaries. At best, the effects on occupational segregation are ambiguous and undetermined. At worst, they are unwanted and undesirable. If occupational segregation is the problem, the theory of comparable worth is not the solution.

Occupational segregation is better attacked directly through a variety of different means: by attacking discrimination in promotions, hiring, and education, by eliminating sexual harassment, by protecting pregnant women from discrimination, and by sponsoring programs of affirmative action that encourage women to enter occupations formerly closed to them. If discrimination is found in the terms and conditions of employment, it can be remedied, as we have seen, through awards of backpay. If an employer intentionally discriminates in setting rates of pay, that form of discrimination can be itself the subject of a separate claim. What is hard to support using any of the prevailing theories of discrimination is how an employer’s decision to offer market rates of compensation constitutes illegal discrimination. If the employer has discriminated in assigning women and men to different jobs in its work force, that can be attacked either by claiming intentional discrimination or by applying the

40. See generally Friesen, supra note 2.
41. Id. at 37-43.
42. See supra text accompanying note 31.
theory of disparate impact. Likewise, an employer cannot pay women less simply because discrimination prevails in the market. There is no cost justification defense to intentional discrimination under Title VII. Conversely, an employer that does not discriminate in any of these ways remains free to respect the preferences of men and women for different jobs. Of course, it is conceivable that an employer might follow otherwise neutral market prices for labor or some other neutral system of compensation out of a misogynous desire to pay less to its female employees. It is conceivable, but implausible. It is hard to believe that an employer could follow such a misogynous policy without illegally segregating its female employees into lower paying jobs. Otherwise it would be forced to deviate from whatever seemingly neutral standards it had adopted in paying women in those jobs in which they were integrated with men. Any such deviation would itself amount to intentional discrimination and violate existing law.

The need for a theory of comparable worth depends upon the existence of discrimination that cannot be remedied by other means. The search for an unjustified disparate impact on pay, as we have seen, returns inevitably to an analysis of hiring and promotion practices. Existing law provides a remedy to women who were shunted into lower paying occupations, but only by attacking discriminatory selection procedures, for instance, under the theory of disparate impact. In a roundabout way, the theory of comparable worth would have the same effect. It would allow women who are the victims of occupational segregation to recover backpay (and frontpay), without attacking the practices that made them victims of discrimination in the first place. The theory of comparable worth can be justified only when a direct attack on occupational segregation is impossible.

Only one—albeit large—class of women remains unable to make claims of discrimination in job assignments: women who are locked into their jobs by past discriminatory practices. These women were denied access to better paying jobs early in their careers and committed themselves to lower paying occupations, either because they did not or could not obtain the qualifications for a better job or because they have now made significant investments in training and experience in lower paying jobs. As a technical matter, the claims of these women might be callously dismissed because they are barred by the statute of limitations. They are victims of discrimination—"merely an unfortunate event in history which has no present legal consequences." This response may be sufficient as a matter of existing law, but it justifies a complete denial of reparations only if these women had an opportunity to challenge the forms of discrimination that forced them into lower paying jobs.

44. See supra text accompanying notes 27-28.
Casting the argument for the theory of comparable worth as one for reparations reveals how distantly it is related to general prohibitions against discrimination. The strongest arguments for the theory of comparable worth are not grounded in the need to prevent present or continuing discrimination; they are, instead, based on the need to compensate long-standing victims of past discrimination. The theory of comparable worth, therefore, requires a separate justification and, like most forms of affirmative action, separate adoption or enactment. Pay increases for victims of past discrimination have a stronger resemblance to programs of affirmative action than to remedies for present or continuing forms of discrimination. For women who cannot move to new occupations, increasing the pay that they receive in their present jobs may be the only way to compensate them for discrimination that may have occurred long ago. If so, the theory of comparable worth might be worth pursuing as a program of compensation for women who entered the work force before the enactment of Title VII.

Just as the scope of the theory of comparable worth would have to be altered under this interpretation, so too would the measure of its effectiveness. It would have to be compared to programs that would benefit the same group of workers, such as affirmative action in training or promotions, or to compensation through enhanced Social Security benefits. On the one hand, the cost of computing comparable pay, according to some measure of past discrimination, might overwhelm the benefits awarded to victims of discrimination. We have already seen that the difficulty of computing ordinary backpay awards often leads to intractable difficulties. On the other hand, unlike a general theory of comparable worth, a narrow system of compensation would affect only the pay of a constantly shrinking group of workers. Women who did enter, or could have entered, the work force before 1965 are now at least in their late forties. The inefficiencies caused by compensating this group of workers would not result from bureaucratic methods of setting pay, but from the costs of administering a large scale program of redistribution. A narrower program might also have less political appeal because it would not benefit a broad constituency of women workers, and it would have to compete with similar proposals to benefit other victims of past discrimination. Nevertheless, a debate over the theory of comparable worth on these terms would at least be addressing the right issues.

CONCLUSION

The justification for the theory of comparable worth increases as its scope is narrowed from a general claim for discrimination in pay to a

46. The Supreme Court has upheld gender classifications on this basis. See, e.g., Califano v. Webster, 430 U.S. 313, 317 (1977) (per curiam); Kahn v. Shevin, 416 U.S. 351, 353 (1974).
47. See supra text accompanying notes 31-35.
limited form of compensation for past segregation in employment. Continuing occupational segregation on the basis of gender can be more directly, and more effectively, addressed by other means. Instead of a failed theory of general discrimination, the theory of comparable worth might be better interpreted as one among several remedies for past injustices. Even in this form, however, it raises questions about how best to remedy persistent forms of discrimination. Ultimately, the legal theory of comparable worth must compete, not with methods of compensation determined by the market, but with other remedies for discrimination in employment.