

# An Observation About Comparable Worth

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During the past several years, an idea called "comparable worth" has received a fair amount of national comment, much of it quite hyperbolic. The idea is not so radical or extreme to generate the sometimes virulent opposition it has; on the other hand, its champions may be overstating its value, and implementation of the idea might produce problems that dictate, at most, cautious use.

In 1963, Congress passed the Equal Pay Act<sup>1</sup> which, despite its mandate of equal pay for "equal work," has been understood from its inception to require only that an employer pay women equal wages for doing work virtually identical to the work done by the employer's male employees. The Act has not been interpreted to require courts to find equality in jobs that are significantly different in substance, despite the oft-present fact that the jobs may be "equal," at least in some persons' eyes, in terms of demand and stress, responsibility, skill, educational background, value of the work's product, or worth to the employer. The concept of "comparable worth" incorporates qualities like these and dictates that they be weighed to assess the "real" value of employees' work. If it is determined that jobs dominated by women are undervalued in the wage scheme, comparable worth tells us the law should be interpreted to correct the undervaluation. Without a doubt the Equal Pay Act has not been interpreted in this manner. The Act only tells employers, "Look, if you have men and women doing the same work, don't be a sexist bully; pay them the same wage."

One year after the Equal Pay Act, Congress enacted the Civil Rights Act, including Title VII.<sup>2</sup> In general, Title VII's taboo is much broader than the Equal Pay Act's, for it outlaws all sexist or ethnicist discrimination in employment.

As a model, the two statutes solve the problem of discrimi-

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1. 29 U.S.C. § 206(d).

2. 42 U.S.C. §§ 2000e-2000e-17.

nation against women in employment. (Indeed, Title VII alone does it.) Women are entitled to equal access to all jobs and to equal pay for doing the same work men do. If we assume the model works, we must conclude that any "substandard" pay for women in our society is due to the choice of women to take lower paying jobs. But there are two problems with the model. First, there is the matter of definitions. What do words like "discrimination" and "equal" mean? Second, there is the matter of the model not working because it excludes consideration of relevant material.

From Title VII's inception, there was never any question that the statute outlawed employer behavior based on consciously motivated discrimination against women; the Act clearly does forbid such behavior. In 1971, the Supreme Court decided *Griggs v. Duke Power Co.*,<sup>3</sup> and the authoritative scope of Title VII was dramatically expanded. In *Griggs*, the Court held either that (1) where an employment practice has an impact upon a protected group (for example, a race, a sex, or a religion), and the impact is sufficiently disparate from the impact upon another, comparable group (such as another race, sex, or religion), the employer must justify the disparity, or (2) if an employer has a disparity in its employment complement between relevant comparable groups of employees, the employer must justify the disparity. Whichever *Griggs* means, failure by the employer to justify the disparity results in a finding of a violation of the Act. While motivated discrimination continues to run afoul of the law, *Griggs* authorizes findings of unlawful discrimination based on effects, regardless of the employer's state of mind. The practical results of *Griggs* are (1) to create a form of affirmative action, and (2) on a corollary theme, to place some of the burdens of society's apparent failures upon employers whose numbers are not integrated "enough."

There is no question that the average female employee is paid less than the average male employee. Surely, there are many reasons for this indisputable fact, which shows no signs of becoming less of a presence in the near future. Some of it has to do with seniority (which, in turn, to some extent may reflect past as well as present exclusivity and discrimination). Some of it reflects educational background (which, also, may reflect past exclusivity). Arguably, some reflects ability. Some has to do with

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3. 401 U.S. 424 (1971).

the market value of the products of the work. What is more, much may be a result of voluntary choices of employees. (These choices almost surely reflect, at least to some extent, exclusive practices.) Finally, however, and more to the point of this Observation, some of the low pay may be directly a product of sexism; that is, a product of either the idea that women sell (or must sell) their services for less than men or the idea that work dominated by women is undervalued to some extent because it is perceived by the actors in society as women's work.

When wage disparities exist between job categories staffed predominantly by men on the one hand and by women on the other, one is presented, at least arguably, with a *Griggs* scenario. That is, the employer pays one group (for example, secretaries) less than another (truck drivers). The impact of that on-its-face sex-neutral employment practice (truck drivers are paid more than secretaries, regardless of which are men or women) is to pay a group that is primarily women less than a group primarily made up of men. If one could demonstrate that secretaries' products or work were worth the same as truck drivers', it is hardly a radical notion to argue that *Griggs* dictates that there is a violation of the Act. A more far reaching, but still hardly radical, argument would be that once the disparity is demonstrated, the employer must persuade us that truck drivers' work is worth more than secretaries'.

On a nationwide basis, there are some jobs that are notoriously dominated by female employees. Others are equally male dominated. If one subscribes to the largely unprovable "fact" that sexism does affect the wage market, one must suspect that as job categories become more predominantly female, they are increasingly undervalued. To the extent individual employers use the market wage rate, now assumed to be sexist, the comparable worth advocates would have it that the employers are violating Title VII's prohibitions as defined in *Griggs*.

Of course, Title VII and *Griggs* hardly compel such an outcome. First, in the absence of stronger evidence, one can deny that "women's work," as such, is undervalued in the market. Second, one can reject the notion that Title VII, even as glossed by the *Griggs* Court, reaches the complex problems posed by differential pay for different jobs.

The proponents of the expansive view of Title VII, a view that would apply *Griggs* reasoning to the disparities, respond that the value of work can be quantified in an objective manner.

Professional job evaluators have been used for many years to determine the value of jobs; in the past, many employers have relied upon them. These evaluators can be used to determine whether the wage disparities being challenged by comparable worth analysis are justified. The opponents of comparable worth suggest that job evaluators are not objective, that "objectivity" in this context is, at best, a reflection of the biases and values of the evaluators who—if the process is done well—are not wholly aware as they do their work of the impact their analysis may have on women's or men's work. Nevertheless, even under the best conditions for evaluation, the alleged sexism of the evaluators themselves cannot be wholly eliminated and, more importantly, the evaluations still are only subjective estimates. While it is true that employers have used job evaluators for decades, the reasons these employers rely upon evaluations are not related, by and large, to concerns about sexism. Employers sense that such evaluations reduce biases (of all kinds) in evaluating actors in the work place, and the evaluations also constitute a less emotional, more efficient process by which to set wages, regardless of how "accurate" the resulting wage scales may be.

The foregoing is the essence of the legal debate over comparable worth. The ultimate legal question is: Does Title VII incorporate the comparable worth doctrine? The courts are saying, "No."<sup>4</sup> Their reasoning is, at best, unpersuasive. Indeed, often their reasoning is nothing more than mere conclusion. Given what I have described briefly as the legal arguments pro and con, one can easily understand that so long as *Griggs* remains a part of the Title VII scene, there is a rational but not compelling argument to incorporate comparable worth into the Act. How, then, does a court decide? The following discussion is offered not as an example of desirable or undesirable judicial analysis. It is, I believe, a fairly realistic description of what the courts are probably considering, perhaps consciously. I leave to others the plaudits for, or condemnation of, what I suggest is judicial

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4. See, e.g., *AFSCME v. State of Washington*, 770 F.2d 1401 (9th Cir. 1985) ("[T]he decision to base compensation on the competitive market, rather than on a theory of comparable worth, involves the assessment of a number of complex factors not easily ascertainable, an assessment too multifaceted to be appropriate for disparate impact analysis . . . . A compensation system that is responsive to supply and demand and other market forces is not the type of specific, clearly delineated employment policy contemplated by . . . *Griggs* . . . ."); *Plemer v. Parsons-Gilbane*, 713 F.2d 1127, 1134 (5th Cir. 1983) ("It is not the province of the courts . . . to value the relative worth of . . . differing duties and responsibilities . . . .").

thinking.

The courts are not sure of the consequences of the comparable worth doctrine. Given that fact and the further, almost-certain, fact that the 1964 Congress did not consider comparable worth (indeed, almost surely the federal legislature did not consider the entire *Griggs*-type thesis), the courts are not prepared to impose relatively blindly the equivalent of a nationwide wage schedule on virtually all employers. Their hesitancy is emboldened and their guilt partially assuaged by the fact that comparable worth is being embraced on some municipal and individual employer levels. Local experimentation will educate society, including the judges, about some of the gains or losses of applying comparable worth. Moreover, while accomplishing some of the perceived objects of comparable worth, such local efforts may avoid some of the more serious fears one may have about the concept on a national scale.

What, then, are the consequences of comparable worth? In my judgment, they are both desirable and undesirable. I begin by accepting the unprovable premise that the market is sexist in setting wages. If I am correct, and I confess to almost total disbelief that I am not, the application of comparable worth addresses directly that phenomenon of sexism, one for which I can conceive of no legitimacy.

Moreover, employers will be encouraged to behave prophylactically to avoid litigation and unpleasant back pay awards. Employers may make serious efforts to integrate job categories, so that as few as possible can be denominated "women's" or "men's" work. In the absence of "women's work," the concept of comparable worth loses its entire potential applicability. Thus, the potential good for comparable worth is impressive: wage equality, integrated job classifications, or some of both.

There are, however, some real or apparent drawbacks to comparable worth. In response to the second potential benefit it may be argued that in order to avoid litigation and possible liability, employers will act in a manner that does not make business sense. The oft-discussed benefits and costs of affirmative action may have similar applicability to comparable worth.<sup>5</sup> A more serious consequence of comparable worth, however, may be the effect its application can have on women's ambitions to do

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5. See, e.g., Schatzki, *United Steelworkers of America v. Weber: An Exercise in Understandable Indecision*, 56 WASH. L. REV. 51, 58-61 (1980).

men's work. If the pay is no greater for men's work, why should women bother? This is especially likely to occur if it is true, for whatever deep seated reasons, that many women voluntarily choose (or perhaps even desire) the women's work they presently do. Is it good to reinforce this volunteerism (which may or may not reflect earlier sexist upbringing) and thereby perpetuate the segregated job categories?

As already noted, there is disagreement over the usefulness of so-called objective job evaluations to set wage rates for statutory purposes. While there is little doubt that such evaluations are in the end "subjective," they may be more useful than their detractors admit because they can be, I suspect, less sexist than the wage market. If my suspicion is correct, then—regardless of their other shortcomings—the tests can reduce the impact of sexist influences.

Yet, the evaluations process is hardly satisfactory. The wage scales that result from such evaluations may be "wrong" or "irrational." This could impose terrible inequities on employees and hopeless burdens on employers. Yet one can rightly ask: How rational is the process that presently sets wages? Indeed, can such a process be rational? If not, why not use an irrational process that at least minimizes sexist influences? The answer may be, again, intuitive. Wage setting is irrational but perhaps to a considerable extent reflects what "ought" to be reflected.

If the dilemma centered only on the matter of irrationality, one might conclude, "Let's go for comparable worth. It's fairer than what we have; the only costs, if any, are the reduced incentive for women to abandon what arguably is their free choice to do women's work and an intuitive hunch that present wage setting processes are the best we can do." There is more to the dilemma, however.

If comparable worth were fully in effect, the pay scales would be set. Would they ever be altered? How flexible would they be? Would they consistently be behind the times? Would they reflect sufficiently market forces which have a properly powerful claim on affecting wage levels? If litigation continued to be the only governmental involvement, would each and every situation be involved in an ad hoc, expensive process? These questions reflect a concern that the setting of wage levels for everyone (or even for large segments of people) throughout the country may be too much to attempt, especially by the courts.

If these concerns have some truth to them, then the ques-

tion becomes, "Is it all worth it?" The dilemmas created by national standards can be largely avoided by local implementation which, at the same time, can accomplish some of the goals of comparable worth advocates. Women's work will receive higher pay in any community where a major employer is affected by comparable worth practices. Of course, the impact will hardly be as pervasive as would a national wage standard.

In the end, whether one adopts pursuant to Title VII the idea of comparable worth turns more on one's own sense of the answers, none of which are provable, to a number of questions: How sexist is the wage market? How "anti-market" will comparable worth prove to be? To the extent present wages are set at least partially by non-sexist factors, how irrational are they? Will comparable-worth pay scales be more inefficient than the present scales? If so, how much? How much will litigation cost to correct sexist influences in wage setting? What will be the severity of the apparent drawbacks (like inflexibility, insensitivity to legitimate market demands, and bureaucracy) of administering comparable worth? With such large, imponderable questions looming (whether or not courts may legitimately consider them), and without a clear congressional mandate, it is not surprising to see judges avoid comparable worth. Yet it is far from clear that the courts' self-imposed humility is the appropriate response to the difficult problem. For all of us it would be better, at the very least, for the judges to inform us more of their motives and analyses in the comparable worth decisions.