ARTICLES

CAN THEORIES OF INTENTIONAL WAGE DISCRIMINATION AND COMPARABLE WORTH HELP BLACK PEOPLE?*

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I. INTRODUCTION

The Black worker faces many obstacles to full and fair employment in American industry and government. Although the post World War II Black protest efforts produced an expanded Black middle class in the 1970's and 1980's,[1] large sections of the Black labor force remain concentrated in low-paying jobs. Blacks still constitute a disproportionately high share of the laborers, operatives, and helpers.[2] Wage disparities between Black and white workers persist in the American workplace. The incomes of Black families lags far behind the incomes of white families.[3] Labor-displacing technology, labor market segmentation and race and sex discrimination all work to impede the employment opportunities of the Black worker.

Many strategies have been developed to improve the economic status of the Black worker including economic boycotts, civil disobedience, and vocational training. Litigation under Title VII of the Civil Rights Act of 1964,[4] serves as an additional means to relieve the weak position of Black workers. Title VII was enacted at the height of the civil rights movement to prohibit job discrimination based upon race, sex, color, religion, or national origin.[5] This essay will explore the litigation frameworks of battling wage and salary dis-

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* Editor's Note: After this article was written, the Supreme Court decided Bazemore v. Friday, 54 U.S.L.W. 4972 (1986). The *Bazemore* case deals with the discriminatory wage practices of a public employer and the holding is fully consistent with the arguments raised in this article.

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1. In 1964, less than 10% of Black families made over $15,000, and by 1982, 30% made over $20,000. MONEY INCOME OF HOUSEHOLDS, FAMILIES AND PERSONS IN THE UNITED STATES: 1982, BUREAU OF CENSUS, U.S DEP'T OF COMMERCE; FAMILIES BY TOTAL MONEY INCOME, RACE AND SPANISH ORIGIN OF HOUSEHOLDER, 1947-1982, 35-36 (1982), BUREAU OF CENSUS, U.S. DEP'T OF COMMERCE.

2. Forty percent of those Blacks who are employed are general laborers, helpers in the transportation and material moving occupations and general operators. 1 GENERAL SOCIAL AND ECONOMIC CHARACTERISTICS OF THE UNITED STATES, U.S. SUMMARY 45 (1983), BUREAU OF CENSUS, U.S. DEP'T OF COMMERCE.

3. W. TAYLOR, ACCESS TO ECONOMIC OPPORTUNITY, MINORITY REPORT, 41 (L. Dunbar ed. 1984).

4. 42 U.S.C. §§ 2000e - § 2000e - 17 (1976).

5. 42 U.S.C. § 2000e - 2(a) (1976).

crimination against Black people.[6]

Under Title VII, employers are specifically prohibited from discrimination in hiring, promotion, discharge compensation and other employment practices.[7] For the past twenty years, litigation under Title VII has concentrated on eliminating racially discriminatory hiring and promotion practices. This focus produced many important gains for Black workers by breaking down racial barriers in the steel, textile, and other industries. Emphasis on the hiring and promotion policies of employers and unions was appropriate since Blacks faced broad exclusion from quality jobs in order to protect the privileges of white workers and keep Black wages low. Hiring and promotion litigation provided a means for the upward occupational mobility of Black workers.

However, two decades of job discrimination litigation has failed to adequately remedy race discrimination in the workplace. Although Title VII was designed, in part, to outlaw the centuries-old custom of paying Blacks and women less simply because of race and sex, wage and salary discrimination persists. Recent cases have focused attention on sex discrimination in pay systems.[8] The women's movement of the 1970's and 1980's leads the way in developing new legal theories to address wage discrimination. Pay equity, comparable pay, comparable worth and comparable work are among the labels attached to these theories. However, the current public focus on alleviating sex discrimination should not overshadow the continuing problem of the inequitable salaries afforded Blacks and other minorities.

II. Sources of Race Discrimination in Wages and Salaries

Domination of the Black worker in America began with the enslavement of Africans in the 1700's. Under the plantation slavery systems, Blacks produced tobacco, cotton and other agricultural products for their white masters without earning wages. Under the domination of slavery, Black workers were essentially excluded from independent wage-paying employment. Blacks had no economic freedom and no chance to develop earnings. Those free Blacks who did have independent work were largely segregated in Southern towns. Segregation of Black craftsmen provided a mechanism by which whites could pay little for products and services under the guise of "Black inferiority."[9]

American whites, Southern and Northern, maintained the regime of Black economic subjugation following the legal termination of slavery. Black sharecroppers remained oppressed by a farm credit and land ownership sys-

6. Discrimination against Black people is usually based on race, and in the case of Black women is based upon both race and sex. The primary focus of this essay is on race discrimination; however, sex discrimination against Black women is also discussed in the text. For a more thorough analysis of sex discrimination in pay see the growing literature which includes: comment, *Comparable Worth, Disparate Impact and the Market Rate Salary Problem*, 71 Calif. L. Rev. 730 (1983); Blumrosen, *Wage Discrimination, Job Segregation and Title VII of the Civil Rights Act of 1964*, 12 U. Mich. J. L. Ref. 397 (1979); Nelson, Opton & Wilson, *Wage Discrimination and the "Comparable Worth" Theory in Perspective*, 13 U. Mich J. L. Ref 233 (1980) B. Schlei & P. Grossman, Employment Discrimination Law, 436-81 (1983).

7. *See* 42 U.S.C. § 2000e-§ 2000c-17.

8. *See, e.g.*, Spaulding v. Univ. of Washington, 740 F.2d. 686 (9th Cir. 1984); Lemons v. City and County of Denver, 620 F.2d. 228 (10th Cir. 1980); Christensen v. Iowa, 563 F.2d 353 (8th Cir. 1977); *cert. denied* 449 U.S. 888 (1980); Briggs v. City of Madison, 536 F.Supp. 436 (D. Wis. 1982).

9. Fredrickson, White Supremacy 207 (1981).

tem which kept them in peonage.[10] In the emerging industrial sector of the South, Blacks were either totally excluded or relegated to the lowest job positions. Factory owners and white workers coalesced to protect employment opportunities from interracial competition.[11] For example, between 1880 and 1900 the number of workers in cotton mills in the South grew from 16,741 to 97,559. Blacks were almost totally excluded from these employment positions as a result of the popular "whites-only" employment campaign.[12]

Blacks were similarly excluded from Northern factories by unions and European immigrants. As Blacks migrated to Northern industrial centers, American unions, including the American Federation of Labor, excluded Blacks from membership and employment. Although wage discrimination against Blacks was less prevalent in the North than in the South, it was by no means rare in the North. In Cincinnati, Dayton, and Springfield, Ohio, Black molders received between 20% and 45% less compensation than their white counterparts.[13]

Low pay accompanied the segregated jobs. In many industries, employers had separate Black and white departments, wherein Blacks received lower wages than their white counterparts. Blacks often had education, responsibility, skills and degrees of supervision that were equivalent to their better paid white counterparts.[14] For instance, in the late 1920's Black plumbers and gas fitters earned $4.30 per day while white craftsmen earned $8.24 per day in Virginia.[15] This wage disparity persisted throughout the building trades and other major industries in Virginia and the South. Nevertheless, employers and white workers maintained dual labor markets even when World Wars I and II created labor shortages in Northern and Southern factories. Employers hired Blacks for one set of jobs and paid them poorly regardless of skill or job peformance, while reserving the better paying jobs for whites. During World War II, the president of North American Aviation declared, "[w]hile we are in complete sympathy for the Negro, it is against company policy to employ them as aircraft workers or mechanics . . . regardless of their training. . . . There will be some jobs as janitors for Negroes."[16] Thus, labor markets were split by race.[17] The centuries-old custom of paying low wages to Blacks, supported by the segregation of split labor markets, produced an economically weak and dominated Black worker.

Black women, large numbers of whom worked outside of their homes, faced additional exclusion and discrimination based on sex. Prior to World War II, Black women were largely employed in low paying domestic service jobs.[18] Women generally were paid as part-time employees, and their wage

10. *See* M. BERRY & J. BLASSINGAME, LONG MEMORY 196 (1982); *see also*, J. MANDLE, ROOTS OF BLACK POVERTY: THE SOUTHERN PLANTATION SYSTEM AFTER THE CIVIL WAR 47-50 (1978).

11. *See* P. FONER, HISTORY OF THE LABOR MOVEMENT IN THE UNITED STATES 137-42 (1964).

12. FREDRICKSON, *supra* note 9, at 209.

13. S. SPERO & A. HARRIS, THE BLACK WORKER 176 (1930).

14. *See, e.g.*, Quarles v. Phillip Morris, Inc., 279 F.Supp. 505 (E.D. Va. 1968) (Black workers had same skills and responsibilities as whites but were segregated and paid less).

15. S. SPERO & A. HARRIS, *supra* note 13, at 172.

16. P. FONER, ORGANIZED LABOR AND THE BLACK WORKER 1619-1981, 238 (1981).

17. *See* Bonacich, *Advanced Capitalism and Black/White Relations in the United States, A Split Labor Market Interpretation*, AM. SOC. REV. 41 (February 1976).

18. SOCIAL AND ECONOMIC STATUS OF THE BLACK POPULATION: 1790-1978, BUREAU OF THE CENSUS, U.S. DEP'T OF COMMERCE 74 (1979).

rates were not designed to support a family. Following World War II, Black women obtained clerical work positions and entered the professions, especially teaching, at an increasing rate. However, domestic and clerical work remained sex-segregated and low paying. The tradition of paying women low wages resulted in a double burden on Black women workers.

Thus, at the time of the passage of Title VII of the Civil Rights Act of 1964, the Black male and female worker faced well-established practices and customs, which produced racially discriminatory economic subordination to whites.[19] While anti-discrimination legislation and the civil rights movement have pushed the nation toward fair employment practices, the Black worker today still remains subject to race discrimination.[20]

III. Application of Legal Theories to Address Wage Discrimination Against Black People

After massive Black protest and Congressional lobbying by a labor-Black-liberal alliance, Congress passed the Civil Rights Act of 1964. The Act included Title VII which made wage discrimination and other types of employment discrimination unlawful.[21] Enforcement of these prohibitions can be partly achieved by addressing four primary instances of illegal wage differentials: (1) where an individual Black worker performs a job which is identical to a white worker, but receives less pay; (2) where an individual Black worker performs a job which is substantially equivalent to that of a white worker, but receives less pay; (3) where a group of Black workers perform work substantially equivalent to that of a relevant group of white workers, but receive less pay; and (4) where sex instead of race explains wage differentials of Black women workers.

The Supreme Court has developed two primary ways of establishing discrimination under Title VII. Plaintiffs may either show that (1) an employer has intentionally caused Blacks to receive different treatment than whites (disparate treatment), or (2) that an employer's policy has more of a negative impact on Blacks than whites (disparate impact). The major difference between the two approaches is that a showing of intentional discrimination is required under the first approach, but is not required under the second. Circuit and district courts have followed *McDonnell Douglas v. Green*,[22] *Texas Dep't of Community Affairs v. Burdine*,[23] and *Teamsters v. United States*,[24] in providing a framework for litigating intentional wage discrimination claims. These cases establish that the plaintiff has the ultimate burden of proving discrimination and must initially make out a prima facie case of race or sex discrimination.[25] The prima facie case is the plaintiff's initial showing of

19. Congress clearly recognized the domination of Black workers in employment. *See, e.g.*, S. Rep. No. 415, 92d Cong., 1st Sess. 6-7, at 9-14 ("Negroes are concentrated in the lower paying, less prestigious positions in industry."); H.R. Rep. No. 238, 92d Cong., 1st Sess. 4, at 17-19 (perpetuation of segregated job ladders by state and local governments).

20. *See* Darity, *Illusions of Black Progress*, Rev. Black Pol. Econ, 153-68 (Winter 1980).

21. *See* 42 U.S.C. §§ 2000e - 2000e - 17 (1976).

22. 411 U.S. 792 (1973).

23. 450 U.S. 248 (1981).

24. 431 U.S. 324 (1977).

25. *McDonnell Douglas*, 411 U.S. at 802; *Teamsters*, 431 U.S. at 358 n.44; *see also* EEOC v. Inland Marine Industries, 729 F.2d 1229, 1233-35, *cert. denied*, 105 S.Ct. 180, *reh. denied*, 105 S.Ct.

intentional discrimination. The defendant employer then has the burden of production to show that a legitimate, nondiscriminatory purpopse explains the wage differential.[26] If the defendant does produce a viable nondiscriminatory reason for the wage differential, then the employee has a last chance to show that the defendant's reason is merely a pretext for discrimination.[27]

Under the discriminatory impact approach, an individual establishes a violation of Title VII by showing that an employer's policy, although fair in form, has an adverse impact on Blacks.[28] If the employment policy is unjustified by a legitimate business necessity, then the plaintiff wins.[29] While the vast majority of hiring and promotion discrimination cases follow this approach, much debate surrounds its application to wage discrimination cases. These concerns will be discussed later in the text.

Although wage discrimination cases follow the above frameworks for litigation, the Supreme Court has not yet validated these approaches in wage-setting disputes. As a result, several important questions remain unanswered: (1) may an employer be liable for disparate impact discrimination as well as intentional wage discrimination; (2) which defenses are ultimately exonerating; and (3) are the burdens of proof and persuasion identical to those in hiring and promotion cases?

A. *Establishing a Prima Facie Case*

Raising the inference of discrimination is the first step in a job discrimination action. The focus of the prima facie case is to provide sufficient direct and/or circumstantial evidence to indicate that race partly explains the wages received by Black workers. The Supreme Court explains that the prima facie case "raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors."[30] Litigators must provide evidence of discriminatory intent following the general four-prong *McDonnell Douglas* approach.[31] In intentional wage discrimination cases, federal courts have developed a flexible standard for making a prima facie case which includes the following elements:

> [(1)] [plaintiff] was paid less than a member of a different race;
> [(2)] for work requiring substantially the same responsibility; and/or

449 (1984) (9th Cir. 1984); Carpenter v. Stephan F. Austin State Univ., 706 F.2d 608, 625-626 (5th Cir 1983); Pittman v. Hattiesburg Municipal Separate School Districts, 644 F.2d 1071, 1074-75 (5th Cir. 1981).

26. *McDonnell Douglas*, 411 U.S. at 802; *Teamsters*, 431 U.S. at 361-62.

27. *McDonnell Douglas*, 411 U.S. at 804; *Burdine*, 450 U.S. at 256. *See also*, *Pittman*, 644 F.2d. 1076.

28. Griggs v. Duke Power Co., 401 U.S. 424 (1971); *see also* Segar v. Smith, 738 F.2d. 1249 (D.C. Cir. 1984), *cert. denied*, 105 S.Ct. 2357, (1985).

29. 401 U.S. 424, 431-32; *see also* SCHLEI AND GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 1328 (1983).

30. Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978).

31. The Supreme Court identified the following factors:

> [1][plaintiff] belongs to a racial minority;. . . [2]that he[or she] applied and was qualified for a job for which the employer was seeking applicants; and . . . [3]after his rejection, the position remained open, and the employer continued to seek applicants from persons of complainant's qualifications.

McDonnell Douglas, 411 U.S. at 802. The Supreme Court also stated that these factors should be applied with flexibility to fit differing factual situations. *McDonnell Douglas*, 411 U.S. at 802 n.13.

[(3)] [he] or [she] occupies a race-segregated job classification.[32]

In each circumstance of discrimination, the elements of a prima facie case will vary to some degree. However, the task of isolating race or sex as factors in the wage-setting behavior of an employer remains the focus of all anti-discrimination cases. The plaintiff maintains the ultimate burden for demonstrating the discriminatory intent and consequences of an employer's practices.[33]

B. *Unequal Pay for Identical Work*

The most blatant form of race discrimination in wages occurs where an individual Black worker performs a job which is identical to a white worker's, but receives less pay. Although such discrimination has declined as a result of the civil rights movement, recent cases indicate that the problem persists. *Pittman v. Hattiesburg Municipal Separate School District*[34] is the leading case establishing a litigation framework for this type of race discrimination. In *Pittman*, a Black printer was hired to replace a white printer, in a small shop. Plaintiff was paid $50 a month less than the former white printer, while performing work with "substantially the same responsibility."[35] The court's analysis of the work performed by the Black and white printers focused on a showing of virtually identical work, although the court used language of "substantially the same responsibility." After two years of work, the Black printer received two pay raises, but his wage rate remained below that of the prior white printer. Although there was conflicting evidence concerning the relative job responsibilities of the Black and white printers, the court held that the plaintiff had made a prima facie case because he produced evidence ". . . that he was paid less than a member of a different race was paid for work requiring substantially the same responsibility."[36]

After *Pittman*, in order to make a prima facie case, a Black worker must provide evidence that he/she performed the same work as his/her white counterpart and that the pay differential reflects discriminatory intent. Evidence of substantially identical work may be established through job descriptions, job classifications, or merit and seniority systems. Where a Black worker replaces a white worker, demonstrating that the work is identical may be fairly simple. However, experience and responsibility may distinguish the two workers. On the other hand, job classifications may disguise an actual policy of paying Blacks less for the same work. Additionally, the failure of an employer to take the hard work and intelligence of a Black employee into account may support a claim that a Black and white worker perform similar work. For example, in *EEOC v. Inland Marine Industries*,[37] the employer's subjective wage rate determinations ignored the quality of job performance by Black workers which resulted in the employer's depreciation of the Black laborer's work. Ignoring

32. *See, e.g., Pittman*, 644 F.2d. 1071, 1074; Segar v. Civiletti, 508 F.Supp. 690, 712, (D.D.C. 1981), *aff'd in relevant part sub nom* Segar v. Smith 738 F.2d. 1249 (D.C. 1984), *cert. denied*, 105 S.Ct. 2357 (1985); *Quarles*, 279 F.Supp. 505, 509.

33. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981) ("The ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff") (citations omitted).

34. 644 F.2d. 1071 (5th Cir. 1981).

35. *Id.* at 1074.

36. *Id.* at 1075.

37. 729 F.2d. 1229 (9th Cir. 1984).

the hard work and intelligence of Black workers contributed to a Black-white wage gap and bolstered plaintiff's claim of unequal pay for the same work.

Evidence of discriminatory intent may take the form of clear and direct statements and behavior, or the actions may be more subtle. A subtle form of discriminatory intent has been found where an employer knows of wage disparities between Black and white workers in the same position but fails to rectify the situation. In *Houston v. Inland Marine Industries,*[38] Black employees received 50 cents less per hour than white workers who held identical positions. The court stated, "[Inland Marine had] ample opportunity to adjust and correct the problem . . . [but] acquiesced therein and chose to maintain [the wage disparity].[39] Specific culpability of an employer is not required to demonstrate discriminatory intent."[40]

Since the skill, training, and responsibility of persons in identical jobs is presumably equivalent, then an impermissible factor such as race or sex is likely to explain a wage differential. Circumstances like those in *Pittman* and *Inland Marine* provide less complicated issues of proof than in other wage discrimination cases. Black workers have only to present credible, not conclusive, evidence of intentional discrimination in wage-setting for jobs which are the same as those performed by whites to establish a prima facie case.[41] The defendant employer has ample opportunity to refute the charges of discrimination in the second phase of the litigation.[42]

C. *Unequal Pay for Substantially Equivalent Work*

Black plaintiffs face more challenging problems of proof where the jobs of Black and white workers are not identical but race discrimination is still suspected as the reason for the wage differential. The litigator's task remains one of isolating race as the reason for the wage differential. Many legitimate reasons may explain a wage disparity between two different jobs. The key task is to control for differences in skill, training, level of responsibility, degree of supervision differences and other market factors as reasons for the wage differential. Nevertheless, in cases which require analysis of very similar, as well as very distinct, job classifications courts have recognized race discrimination in pay.

Black workers established a prima facie case of race discrimination by comparing the skill, effort and responsibility of two similar jobs in *Members of Bridgeport Housing v. City of Bridgeport.*[43] In that case, Blacks and Hispanics employed as housing patrolmen to police housing projects received fewer fringe benefits and a salary much lower than the regular city police patrolmen,

38. No. 81-4729 - RPA. slip op. (N.D. Cal. June 24, 1982) (unpublished opinion and order), *aff'd*, 729 F.2d. 1299 (9th Cir. 1984).

39. *Id.* at 3.

40. EEOC v. Inland Marine Industries; *see also*, United Papermakers v. United States, 416 F.2d. 980, 997 (5th Cir.1969), *cert. denied*, 397 U.S. 919 (1970) ("The requisite intent may be inferred from the fact that the defendants persisted in the conduct after its racial implications had become known to them.").

41. *See* Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253, 255 n.8 (1981); Gay v. Waiters' and Lunchmen's Union, 694 F.2d. 531, 544 n.11 (9th Cir 1982).

42. *See supra* notes 28-34 and accompanying text.

43. 85 F.R.D. 624 (D.Conn 1980); 499 F.Supp. 760 (D.Conn. 1980), *aff'd in relevant part*, 646 F.2d. 55 (2d Cir. 1981).

and had no effective retirement plan. The regular city police force was 87% white while the housing patrolmen were all Black and Hispanic. The housing patrolmen had training virtually identical to that of the regular city patrolmen, attending the same classes in some cases, and they performed with equal competence in the common job training certification program. The housing patrolmen investigated misdemeanors and felonies, and had the same power to arrest as did the regular patrolmen. The Bridgeport Police Department supervised the housing patrolmen as a unit, even though the Bridgeport Housing Authority controlled their salaries and benefits. The housing patrolmen performed with competence and received praise for their efforts. In every salient respect, the housing patrol officers performed work similar to the predominantly white city patrolmen. Consequently, the district court held that the housing patrolmen clearly established a prima facie case of unequal pay for similar work.

Bridgeport provides Black workers with a precedent for looking beyond job classifications and focusing on basic job similarities between workers. Where evidence of discriminatory intent exists based upon substantial job segregation, as in *Bridgeport*, or based upon other evidence, a comparison of similar jobs in separate job classifications can raise the inference of race discrimination. When Black workers receive less pay than whites for work which is substantially equivalent, then Title VII is violated.

Where duties are very different, Black workers may find more difficulty making a prima facie case of discrimination. Differences in skill and responsibility usually explain wage and salary differences between dissimilar jobs. At least two primary approaches have been proposed as means to isolate race or sex as factors in wage-setting between dissimilar jobs. Under the comparable worth theory, proponents argue that women (or any protected group) should receive equal pay for work deemed of equal "value" to the employer. The challenge here is to show that dissimilar jobs have an equal value to an employer (e.g., secretary and truck unloader). If the jobs are of equal value and the employer maintains a wage policy which results in lower pay for women or Blacks, then comparable worth proponents charge discrimination on the basis of sex or race. Courts have not accepted the comparable *worth* theory of discrimination as appropriate under the Equal Pay Act[44] or Title VII of the 1964 Civil Rights Act. Nevertheless, courts have made comparisons of dissimilar jobs in analyzing claims of intentional race discrimination under a comparable *work* approach. Establishing similarities in actual work duties between two different jobs provides the focus under the comparable work approach.

Establishing substantially equivalent work between Black and white workers who's duties are dissimilar was achieved in *Quarles v. Phillip Morris, Inc.*[45] In *Quarles* the court compared the work of a Black casing attendant in a tobacco preparation plant to that of a white gasic machine operator in the same plant, who was paid more than the Black worker. The casing attendant position was traditionally assigned to a Black person and the machine operator position was reserved for whites. Comparing the two positions the court stated:

44. 29 U.S.C. § 206(d)(1) (1976). The Equal Pay Act provides that women must be paid an equal wage for work which is equal to that of male employees.

45. 279 F. Supp. 505 (E.D. Va. 1968).

> Both Briggs (Black) and the operator (white) are doing work which requires substantial training and experience. Both are subject to supervision, and neither is expected to perform major repairs. Both have considerable responsibility with respect to the equipment and raw material with which they work. Briggs's working conditions are far less desirable than a machine operator's.[46]

The court analyzed the skill, experience, responsibility and degree of supervision, and held that the two employees performed work requiring substantially the same level of responsibility.[47]

The *Quarles* analysis, though similar to *Pittman* and *Bridgeport*, contrasts with the comparable worth theory. The focus in *Quarles* is not on a deemed value of the job to the employer, but instead on the duties and responsibilities of each worker. *Quarles* presents a narrower theory of liability than the comparable worth theory: a comparable *work* theory.

Although there was no scientific job evaluation study in *Quarles*, the structure of the tobacco plant permitted a close comparison of job duties and responsibilities, i.e., both parties performed semi-skilled factory labor. The actual work of the Black and white worker were found to be substantially similar, without further analysis of a deemed job value for each position. Where a comparison involves greater job dissimilarities, e.g., secretary and a truck unloader, then job "value" becomes a useful but imprecise base concept.

The existence of disparate treatment may be bolstered by evidence of past racial discrimination. The *Quarles* court paid special attention to the history of race discrimination and racial segregation of jobs at the employer's plant. The employer in *Quarles*, Phillip Morris, operated a plant much like other plants before the civil rights movement, where Blacks were paid less than their white counterparts as a matter of custom and policy. Separate lavatories and rest areas for Blacks and whites were common in Southern plants. Furthermore, Blacks were relegated to and segregated in difficult and dangerous work. The court linked the past racial exclusion to the the current employer practices by stating that the low wages paid to Black workers were "a vestige of the old policy under which Negroes were paid less than white persons for jobs requiring substantially equal responsibility."[48]

Bridgeport and *Quarles* provide examples of persistent racism in America and of legal challenges to such practices. In both cases the initial inference of discrimination was established because race appeared as a likely factor in the determination of the wages paid to Black employees. The comparable work analysis employed by the court serves as a narrower theory of liability than the comparable worth theory. However, Black plaintiffs have had a measure of success under a comparable work analysis. Until the problems of proof of equal job "value" for dissimilar jobs can be overcome, Black workers should follow the *Bridgeport/Quarles* framework.

D. *Unequal Pay for Class-Wide Substantially Equivalent Work*

Black workers face race discrimination not only as isolated individuals, but in broad classwide circumstances as well. An employer may pay all

46. *Id.* at 509.
47. *Id.*
48. *Id.*

Blacks in a job classification less than whites in a similar job classification, or may systematically channel qualified Blacks into low paying jobs while placing similarly qualified whites in higher paying job positions. However, if by overt or subtle devices Black workers are paid less than whites for performing substantially equivalent work, there is unlawful race discrimination. Such discrimination can be discovered and proven by identifying wage disparities along racial lines, comparing the jobs of the Black and white workers and obtaining additional evidence of discriminatory purpose behind a wage-setting policy.

Establishing a prima facie case of intentional classwide race discrimination is very similar to making a case of individual discrimination. Where large numbers of Blacks are performing work identical to that of white workers and Blacks are paid less, then a showing of discriminatory intent will establish a prima facie case. Where large numbers of Blacks perform work which is not identical to that of white workers and Black workers are paid less, then a showing of comparable *work* and discriminatory employer purpose makes a prima facie case. However, where wage disparities exist between somewhat dissimilar jobs on a class-wide basis difficult problems of proof arise. Courts will use statistical analysis, job evaluation studies and other sophisticated and controversial techniques to compare dissimilar jobs and identify wage disparities based on race or sex. Once the Black workers prove comparable work between Blacks and whites, coupled with a corresponding wage disparity, an inference of discriminatory purpose may be further supported by practices of job segregation or prejudicial and subjective wage rate considerations.

Statistical evidence is commonly used to reveal wage disparities between Black and white workers performing dissimilar jobs which are nevertheless substantially equivalent. Statistical evidence is probative in establishing a prima facie case of discrimination in hiring, promotion and wages. In some cases, statistical evidence standing alone establishes a prima facie case because "absent explanation", statistical disparities are "a telltale sign of purposeful discrimination."[49] In *Segar v. Civiletti*,[50] a class of Black special agents of the Federal Drug Enforcement Administration (DEA) charged their employer with race discrimination in salaries, hiring, and initial job assignments. The Black employees as a class presented multiple regression statistical analyses comparing Black and white special agents who had similar education and experience in criminal drug investigations. The statistical analysis which controlled for education and experience showed gross disparities between the compensation of "comparably qualified" Black and white agents.[51] Comparability of jobs was based upon the type of work performed, and levels of education and experience. Since the most common factors for pay differentials between jobs were eliminated, and gross disparites remained between the races, a prima facie case was clearly established.[52] Although there were differences in supervisory responsibility between Black and white workers, the court found further race discrimination in job assignments and promotions as the

49. Teamsters v. United States 431 U.S. 324, 339-40 (1977).

50. 508 F. Supp. 690 (D.D.C. 1981), *aff'd in relevant part sub nom.* Segar v. Smith 738 F.2d. 1249 (D.C. Cir. 1984).

51. *Id.* at 712.

52. *Id.*

reason for those differences.[53]

Statistical evidence is most probative when the analysis controls for the most common nondiscriminatory reasons for wage differentials, *i.e.*, education, experience, responsibility, and degree of supervision. Controlling for responsibility and degree of supervision is of more limited value, however, since placement of overqualified Blacks into "low" job classificiations may disguise a true wage differential.[54] The plaintiffs in *Segar* revealed such a discriminatory process by focusing on education and experience. Their evidence showed that Blacks were concentrated in the lower paying undercover work positions although they had, as a group, sufficient education and experience to warrant greater representation in higher paying administrative and supervisory positions.

While this essay does not attempt a discussion of the strengths and weaknesses of statistical techniques, two points should be noted. Federal courts have widely accepted the use of statistical evidence where gross disparities based on race or sex exist because statistical analyses reveal patterns of behavior.[55] In wage discrimination cases, the elimination of the most common reasons for wage disparities between similar jobs, education and experience, indicate that an uncommon reason explains the wage difference. Employers retain the opportunity to produce a legitimate nondiscriminatory reason for the pay difference.[56] Therefore, if race is not the reason for the pay gap, employers may so demonstrate. At the same time, courts recognize that in light of American history, gross dispariites in pay which follow a pattern of race or sex strongly indicate impermissible discrimination.

Similarly, job evaluation studies serve the purpose of comparing dissimilar jobs. Job evaluation studies are also probative since they provide a standard basis for comparing job content with pay, even though the job may be unique, and thus provide some basis for making a meaningful comparison of male and female-dominated jobs.[57] Where the employer has itself adopted a particular job evaluation system, plaintiffs ordinarily should be permitted to rely on that system in establishing their prima facie case.[58] Few employers have completed such studies, but where an employer concludes that two jobs are substantially equivalent, then a wage disparity along racial lines is suspected.

Black employees who suffer from wage discrimination in large numbers, may respond through litigation by first establishing the prima facie case under Title VII. While many problems of proving comparable work between dissimilar jobs remain, courts have followed a pattern of making comparisons based

53. *Id.*

54. *Id.*

55. *See Teamsters*, 431 U.S. 339-40; Hazelwood School District v. United States, 433 U.S. 299, 307-312 (1977); Trout v. Hidalgo, 517 F.Supp. 873, 882 (D.D.C. 1981) (multiple regression analysis used to make prima facie case of wage discrimination); Valentine v. Postal Serv., 511 F.Supp. 917, 955-57 (D.D.C. 1981), *aff'd* 674 F.2d. 56 (D.C. Cir. 1982). *See also* Vuyanich v. Republic National Bank, 505 F.Supp. 224 (N.D. Tex 1980); *aff'd in part, vacated in part* 723 F.2d 1195 (5th Cir. 1984) (provides thorough discussion of statistical methods to prove and disprove wage discrimination).

56. *See* Paxton v. Union National Bank, 519 F.Supp 136 (E.D. Ark. 1981) (defendant used statistical analysis to refute plaintiff's prima facie case).

57. Heagney v. University of Washington, 642 F.2d. 1157, 1164-65 n.6 (9th Cir. 1981).

58. *See* County of Washington v. Gunther, 452 U.S. 161, 180-81 (1981); *see also Heagney*, 642 F.2d at 1160, 1165-66.

upon education, experience, and type of work performed. Although comparable worth comparisons have been rejected by the courts, statistical analysis and job evaluation studies may help to provide job comparisons which further bolster scientific data supporting the inference that race, in part, accounts for a class-wide pay disparity.

E. *Prima Facie Cases of Sex Discrimination for Black Women*

Black women facing sex as well as race discrimination have several ways to attack wage discrimination. Claims for sex discrimination can be asserted under the Equal Pay Act[59] or Title VII. Under the Equal Pay Act (EPA), employers are required to follow an equal pay for equal work policy toward women. Therefore, if a Black woman is performing the same job as a man, then she must receive equal pay. The prima facie case under the EPA requires a showing of unequal pay and equal work. Discriminatory purpose is not a necessary element of the prima facie case. However, courts have followed a fairly narrow definition of equal work.[60]

In many cases, Black women will face sex discrimination in pay when their jobs are not identical to those performed by males. In *County of Washington v. Gunther*,[61] the Supreme Court implicitly recognized this. The Court accepted that sex discrimination in pay violates Title VII "where there is direct evidence that an employer has *intentionally* depressed a woman's salary because she is a woman."[62] While the majority of the Court expressly declined approving a cause of action based on the comparable worth issue, they decided that the narrow equal work standard of the EPA was *not* incorporated into Title VII.[63]

The Supreme Court in *Gunther* provided limited guidance on how to establish a prima facie case of sex discrimination in pay under Title VII. However, in the lower federal courts, these sex discrimination cases largely mirror the race discrimination in pay cases. A woman would have to show (1) unequal pay for (2) work substantially equivalent to that performed by a man due to (3) purposeful discrimination by an employer. Although the Supreme Court has not pronounced the elements for the prima facie case, federal courts have uniformly adopted these elements.[64]

Proof of intentional sex discrimination in pay may be obtained by the

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59. The Equal pay Act of 1963 provides in relevant part:

> No employer . . . shall discriminate, within any establishment . . . on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any factor other than sex. . . .

29 U.S.C. § 206(d)(1) (1976).

60. *See, e.g.*, Angelo v. Bacharach Instrument Co., 555 F.2d 1164, 1176 (3d Cir. 1977) (court looked to job context of female-dominated bench assemblies and male-dominated heavy assemblers in finding unequal work, the court requested a comparable work standard).

61. 602 F.2d 882 (9th Cir. 1979), *aff'd in relevant part*, 452 U.S. 161 (1981) (differences between male and female prison guards failed to satisfy the Equal Pay Act equal work standard, and was actionable under Title VII).

62. *Gunther*, 452 U.S. 161, 204 (1981) (Rehnquist, J., dissenting).

63. *Id.* at 168, 189.

64. *See, e.g.*, Wilkins v. Univ. of Houston, 654 F.2d 388 (5th Cir 1981), *vacated on other grounds*,

same evidence as in race discrimination cases, *e.g.*, direct and circumstantial evidence, statistics, job evaluation studies and other indicia of discriminatory practices. Some critics of the sex discrimination suits, under Title VII have asserted that sex-segregation does not indicate a discriminatory purpose.[65] Proponents of "free" markets repeatedly assert that the segregation of women into a narrow set of clerical positions occurs from voluntary job selection and not invidious employer or labor market behavior.[66] Critics claim that the hours, duties, socialization and other factors attract women to a small set of jobs.[67] Wages are low in these occupations as a function of market factors such as supply and demand, because the abundance of workers in low skill positions produces low earnings. They claim that the markets for particular skills in certain geographical settings determine wages and salaries, not external discriminatory motives of employers.

The arguments for voluntary job selection by Black women and market-determined wages are plausible, but suffer from serious weaknesses. First, plaintiffs may provide direct evidence of the employers' intent to segregate work on the basis of sex. For example, where "help wanted" advertisements in local newspapers list "male" and "female" jobs, these advertisements clearly indicate an employer's intent to segregate jobs based on sex. Second, Congress and the Supreme Court have recognized that employers have historically identified women's work and men's work, and have excluded women from male jobs.[68] Congress explicitly set out to eradicate the sex-segregation of jobs in American industry with Title VII. Third, many labor economists assert that the presence and effect of sex segmented labor markets channel women into a narrow set of jobs; the fact that some women have internalized and accepted sex discriminatory labor markets by selecting "traditional" women's work is evidence of structural sex discrimination not voluntarism.[69] Furthermore, a record of past intentional sex-segregation is clearly probative, if not determinative of discriminatory intent.[70] Where purposeful segregation cannot be proven, but a sex-segregated effect remains, the historical record of

103 S.Ct. 51 (1982); *Cf.* Briggs v. City of Madison, 536 F. Supp. 435, 445 (W.D. Wis. 1982) (court affirmed that the following factors establish a prima facie case of sex discrimination under Title VII:

> (1)[Plaintiffs] are members of a protected class, (2) occupying a sex-segregated job classification, (3) are paid less than a sex-segregated job classification occupied by men, and (4) the two job classifications at issue are so similar in their requirements of skill, effort and responsibility, and working conditions that it can reasonably be inferred that they are of "comparable value" to an employer.

65. Nelson, Opton, & Wilson, *Wage Discrimination and the "Comparable Worth" Theory in Perspective*, 13 U. MICH J.L. REF. 233, 262 n.128 (1980).

66. *See id.*, at 262-63 nn.128-31; *see also* Briggs v. City of Madison, 536 F.Supp. 435, 445 n.6 (W.D. Wis. 1982).

67. *Briggs*, 536 F. Supp. at 445 n.6.

68. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, *reprinted in* U.S. Code Congressional & Admin. News 2137, 2140 (1972); S. Rep. No. 867, Vol 12,616-1, 88th Cong., 2d Sess., 12 (1964); Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 n. 13 (1978) *cited with approval in* County of Washington v. Gunther, 452 U.S. 161, 180 (1981), (Court stated that Title VII was designed to attack sex stereotypes and broad spectrum of discriminatory treatment against women).

69. Piore, *Notes for a Theory of Labor Market Stratification*, in LABOR MARKET SEGMENTATION 125-50, (Edwards, Reich and Gordon eds. 1975).

70. Electric Workers IUE v. Westinghouse Electric Corp., 631 F.2d 1094 (3d Cir. 1980).

American employers supports a presumption of discriminatory intent.[71]

Whether the "market" determines the wage level for women is more fully discussed in the context of employer defenses to the prima facie case. However, low wage levels for women and sex-segregation in jobs provide separate, albeit related, aspects of the prima facie case. Low wages for women provide a basis for showing unequal pay between men and Black women which may be explained by sex or factors other than sex. Past or present sex-segregation helps to establish the discriminatory purpose of the employer to use sex to maintain or permit wage differentials. Market-determined wages may rebut a prima facie case by providing a nondiscriminatory reason for a wage differential, but a showing of sex-segregation remains an indicator of purposeful sex discrimination.

Making the initial case of sex discrimination in pay raises many unresolved issues of proof and theory. Nevertheless, the Equal Pay Act and Title VII do provide Black women with legal means to redress discriminatory pay systems. Courts have accepted these cases which attempt to demonstrate intentional sex discrimination in pay. Following the race model they have compared identical and dissimilar jobs by type of work, education, level of responsibility and supervision. Although courts have compared similar and dissimilar jobs under Title VII, they have largely rejected a comparable worth analysis. Further, courts have largely failed to accept that the discriminatory impact of a pay system violates Title VII, without a showing of purposeful discrimination. Rooting out all pay systems which have discriminatory impact against Black women would follow the purposes of Title VII. Black women should aggressively pursue fair treatment as court interpretations of Title VII expand to address the subtleties of American racism and sexism.

F. *Defenses To The Prima Facie Case*

Once the Black workers establish a prima case, the defendant employer may present a legitimate nondiscriminatory reason for the practices in question.[72] Differences in skill, responsibility, training, working conditions, degree of supervision, in addition to seniority or merit systems, or job-related tests have provided legitimate defenses to charges of race discrimination.[73] Where a Black and white worker occupy the same job position and the Black person receives less pay, it is unlikely that a legitimate nonracial reason for the difference can be established. Minor differences in work responsibility or skill do not rebut a prima facie case.[74] Significant work differences justify pay differences, as the court noted in *Pittman* when it determined that the added supervisory responsibility of the white worker explained the Black/white wage differential.[75] Job classifications which fit into a rational job structure also

71. Mitchell v. Mid-Continent Spring Co., 538 F.2d 275, 280-81 (6th Cir. 1978) (court held that sex segregation in plant clearly violated Title VII).

72. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 254-56 (1981); McDonnell Douglas v. Green, 411 U.S. 792, 802 (1973).

73. *See, e.g.*, Members of Bridgeport Housing v. City of Bridgeport, 646 F.2d 55, 61 (2d Cir. 1981) (prima facie case was rebutted by evidence of a job-related test).

74. *Id.*

75. Pittman v. Hattiesburg Municipal Separate School District, 644 F.2d 1071, 1076 (5th Cir. 1981).

explain wage differentials based on nondiscriminatory reasons.[76]

The most popularly debated defense to wage discrimination is "the market." Federal courts have wrestled with arguments which present "the market" as a defense and in effect have recognized that the market for skills is a legitimate defense. The market for skills reflects the supply and demand for qualified individuals. Consequently, some workers will legitimately receive more pay where a demonstrated shortage of qualified applicants exist or where higher pay is required to recruit qualified applicants. Courts have recognized, however, that labor markets have put a price on race and sex in the past and continue to do so. The Fifth Circuit Court of Appeals stated that "paying the going open market rate can still violate Title VII if the market places different values on Black and white labor."[77]

Proponents of the market as a defense present several plausible arguments. First, they argue that wages paid to Black and white workers reflect the supply and demand for varying skills, education, training, and other job performance factors. They assert that workers are paid based upon market value, not race or sex. Black workers often receive a lower wage because of low skills and training, not because of racial discrimination.[78] Theorists argue in terms of Blacks bringing deficient "human capital," *i.e.*, skills and education, into the labor market and consequently receiving lower pay.[79] Theorists also maintain that labor markets effectively allocate labor and fairly determine wages. These proponents assert that the concentration of Blacks or women into a narrow set of largely low paying jobs reflects voluntary job choice and deficient human capital. Thus, less skilled individuals occupy low skill positions and receive less for such menial work.[80] Correspondingly, higher skilled individuals receive higher salaries for the special and skilled work that they perform. Since the market provides the incentive to improve skills and the opportunity for career mobility, courts should not tamper with it. The logical conclusion is that judicial or legislative intervention into the operation of the market mechanism would disrupt the "natural" job selection process. This would artificially place some workers in positions for which they are ill prepared and result in the inefficient allocation of human resources.

Supply, demand, and job performance factors often explain much if not

76. *See* Bellace, *Comparable Worth: Proving Sex-Based Wage Discrimination*, 69 IOWA L. REV. 655 (1984).

77. *Pittman*, 644 F.2d at 1074. The court also stated:

> Without needing to condemn unwritten, informal, vague, and subjective salary determination procedures as highly susceptible to the abuses of racial discrimination, it is enough to note that, if the difference in labor value of a white printer and a black printer stems from the market place putting a different value on race, Title VII is violated. It does not matter that the school officials got along with Pittman, nor does it matter how much they held their beliefs in good faith that they were not engaging in racial discrimination simply by paying the going rate for a [B]lack. The differential in pay is violative of Title VII absent some reason other than an impermissible one such as race (citations omitted).

Id.

78. *See, e.g.*, G. BECKER, HUMAN CAPITAL: A THEORETICAL AND EMPIRICAL ANALYSIS, (1964) [hereinafter HUMAN CAPITAL]; Blaug, *The Empirical Status of Human Capital Theory: A Slightly Jaundiced Survey*, J. OF ECON. LIT., 14:827-55 (1976).

79. *See, e.g.*, G. BECKER, *supra* note 77 (1964); J. MINCER, SCHOOLING, EXPERIENCE, AND EARNINGS (1974).

80. *See, e.g.*, Sowell, *Economics and Black People*, REV. OF BLACK POL. ECON., 4-5 (Winter 1971); *see also* Darity, *Economic Theory and Racial Inequality*, REV. OF BLACK POL. ECON., 232-40 (Spring 1975).

all of the disparity in wages between employees. However, claims that an employer is following a prevailing market rate should not be used to camouflage race or sex discrimination. The market defense suffers from severe limitations and should be critically assessed whenever asserted. First, substantial empirical evidence vitiates the claim that the market fully explains wage differentials. For example, Black men with college degrees earn less than white men with high school diplomas.[81] In *Segar*, plaintiffs, controlling for education and experience, compared the salaries of Black and white Drug Enforcement Administration agents and found a gross disparity between them.[82] Similar disparities have been discovered between men and women.[83] Deficiencies in human capital do not explain these wage disparities.

The assumption that labor markets efficiently allocate human resources has been challenged by many labor economists who argue that labor markets are segmented by race and sex.[84] Blacks and women are concentrated in low wage positions due largely to aggregate employers' decisions to prefer them in low-wage positions, while reserving more remunerative positions for white males. This labor market segmentation approach is consistent with the argument that the two centuries-old custom of paying Blacks less, which is based in slavery and segregation, became intertwined with "the market."[85] Consequently, race is a factor which operates in the market along with supply and demand. Two overlapping and intertwined markets exist: (1) the market for skills, and (2) the market for race and sex. Therefore, an enterprise which pays the prevailing market rate may be taking a step toward incorporating race discrimination into its wages.

Once the market operation is demystified, courts may consciously seek to separate legitimate from illegitimate market factors. For now, I leave open the question of whether employers should be liable for following racially discriminatory markets under a disparate impact theory. However, the market is clearly not a legitimate defense when the market puts a price on race or sex.[86]

G. *Sex Discrimination Defenses*

Once Black women establish a prima facie violation of the EPA or Title VII, then an employer may defend the wage differential on the grounds that the pay system is based on seniority, merit, the quantity or quality of an employee's work, or on any factor other than sex.[87]

An employer's assertion that a wage differential results from a factor other than sex is the most difficult defense to overcome when combating wage discrimination. This defense allows an employer to assert an "acceptable busi-

81. WILLIAMS, STATE OF BLACK AMERICA 13 (Williams ed. 1984). (Black male college graduates had a median income of $17,861 while whites with a high school diploma had a median income of $19,857 for 1983. Black male college grauduates earn 68% of what white male college graduates earn.).

82. Segar v. Civiletti, 508 F. Supp. 690, 712 (D.D.C.), *aff'd in relevant part sub nom.* Segar v. Smith, 738 F.2d 1249 (D.C. Cir. 1984).

83. TREIMAN & HARTMAN,WOMEN, WORK AND WAGES 15 (1981).

84. Piore, *supra* note 69; Bonarich, *Advanced Capitalism and Black/White Relations in the United States*, 41 AM. SOC. REV. (1976).

85. *See* Synder & Huddis, *Competition, Segregation and Minority Income*, 4 AM. SOC. REV., 209-234 (1976).

86. Corning Glass Works v. Brennan, 417 U.S. 188, 205 (1974); *Pittman*, 644 F.2d at 1075 n.2.

87. *Gunther*, 452 U.S. 161, 170-71.

ness reason" to justify a particular pay system. Courts have stated that wage differentials are valid where they exist in order to recruit qualified individuals. As in cases of wage discrimination based on race, paying the prevailing market rate is the most debated defense to charges of such discrimination based on sex. Employers assert that by paying the prevailing market rate, they are using a factor other than sex to determine wage rates.[88]

The market defense in sex discrimination cases suffers from the same weaknesses as in the race discrimination circumstances discussed above. As long as labor markets include a sex factor, then sex discrimination is perpetuated when employers follow patterns of labor market segmentation. The market should be a legitimate defense to the extent that it is sex and race neutral. Courts remain ambivalent about the market defense because they recognize the presence of sex values in the market and, on the other hand, they recognize that other market factors, *e.g.*, supply and demand for qualified individuals, are legitimate and useful for employers.

One way of resolving these concerns has been advanced by an amicus curiae brief of the NAACP Legal Defense Fund, et al.[89] They argue that the burden of demonstrating a legitimate market-based defense should be placed on the employers. An employer would have the burden of showing that legitimate market factors, such as the effort to recruit qualified applicants or the need to respond to a labor shortage, was the basis for a wage differential. The employer would further have the burden of showing that a prevailing market rate did not include sex or race factors. If the employer can then eliminate sex or race as market factors, then the prevailing rate would be a valid defense. Placing this burden on the employer is wise for several reasons. First, since the market is not race or sex neutral, generally, placing the burden on the employer pressures the employer to avoid the discriminatory aspects of the labor market. Here, the employer is encouraged to identify and avoid discriminatory social customs and practices. Second, the employer is in a better position to know of job shortages, recruitment needs or other factors which are labor market oriented. As stated by one court: "if there is another, nondiscriminatory reason for the wage disparity, such as the employer's need to compete in the marketplace for employees with particular qualifications, the employer is in the best position to produce this information at trial."[90]

H. *Disparate Impact Analysis*

Although Black workers, men and women, have strong judicial precedence to attack instances of clear intentional discrimination, proving intent may be extremely difficult. The Supreme Court has recognized, in *Griggs v. Duke Power Co*,[91] that employment policies which are fair in form may yet

88. *See, e.g.*, Marshall v. Georgia Southwestern College, 489 F. Supp. 1322 (M.D. Ga. 1980), *aff'd in part sub nom.*, Brock v. Georgia Southwestern College, 765 F.2d 1026 (11th Cir. 1985) (employer asserted, but court rejected defense of open market for wage disparities based on sex). *But see* AFSCME v. Washington, 770 F.2d 1401 (9th Cir. 1985) (court accepted the proposition that prevailing market rates determined wages).

89. Brief Amicus Curiae of the NAACP, Legal Defense Fund, in support of Appellees, AFSCME v. Washington, 578 F. Supp. 846 (W.D.Wash. 1983), *appeal docketed*, No. 84-3569; 84-3590 (9th Cir. 1984).

90. Briggs v. City of Madison, 536 F. Supp. at 446.

91. 401 U.S. 424 (1971).

have a discriminatory impact on Blacks. Employers may adopt subtle and sophisticated devices such as job tests to exclude or discriminate against Blacks. Under the discriminatory impact approach adopted in *Griggs*, Black workers can build a prima facie case of race discrimination with evidence that an employer's practice has an adverse impact on Blacks.[92] Evidence of the employer's intent is unnecessary. The employer may then rebut a prima facie case with evidence of a legitimate business purpose for the challenged policy. The vast majority of job discrimination cases challenging hiring and promotion practices are litigated under the discriminatory impact theory.

Whether the discriminatory impact approach applies to charges of wage discrimination has produced significant debate.[93] Critics of this approach assert that adverse impact alone is insufficient to establish an inference of wage discrimination because permissible reasons usually explain wage differentials. They essentially claim that an adverse impact in pay is most likely to be the result of education, experience, level of responsibility, and supervision, along with market factors, instead of race or sex. An extra showing of intent is then required to offset the common reasons for wage differentials and to avoid frivolous lawsuits.

This argument has at least four fundamental weaknesses. First, the subtle and sophisticated devices of discrimination feared in *Griggs* are also at work in wage discrimination. For example, in *Segar*, the job assignment procedure, and the failure to promote Blacks exacerbated the wage disparity between Black and white special agents. The Black employees had some anecdotal evidence of discriminatory intent in *Segar*. However, the court accepted the argument that the adverse impact against Blacks demonstrated by gross pay disparities between Blacks and whites made an inference of impermissible race discrimination inescapable.[94] Though fair in form, the job assignment and pay practices combined to injure Black employees because of race.[95]

The discriminatory impact approach is just as appropriate in wage setting cases as it is in promotion cases. The most common reasons given to explain a failure to promote are also given to explain a failure to pay on a nondiscriminatory basis. Experience, education, and job performance are the pivotal factors in deciding whom to promote and in deciding how much an employee should be paid. A promotion policy may be more subjective than a wage policy, and therefore less appropriate for broad disparate impact analysis. Pay scales are more standardized, so that a disparity in wages paid to employees performing substantially equivalent tasks indicates a clear discrepancy between general wage setting theory and actual practice. Therefore, since a dis-

92. *Id.*

93. *See* Blumrosen, *Wage Discrimination, Job Segregation and Title VII of the Civil Rights Act of 1964*, 12 U. MICH. J.L. REF. 397 (1979) (disparate impact analysis); Bellace, *Comparable Worth: Proving Sex-Based Wage Discrimination*, 69 IOWA L. REV. 655 (1984) (disparate impact analysis); Nelson, Opton, & Wilson, *Wage Discrimination and the "Comparable Worth" Theory in Perspective*, 13 U. MICH. L. REV. 231, (1980) (arguing against disparate impact); Siniscalcos and Remmers, *Comparable Worth in the Aftermath of AFSCME v. Washington*, (arguing against disparate impact) 10 EMPL. REL. L. J. 6 (1984).

94. Segar v. Smith, 738 F.2d 1249, 1288 (D.C. Cir. 1984).

95. *Id.*

criminatory impact approach addresses discretionary promotion decisions it is clearly appropriate for analyzing more standardized wage policies.

Third, the discriminatory impact approach does not remove plaintiff's burden to produce sufficient evidence to support a claim of race or sex discrimination. Contrary to the claims of some, the adverse impact approach does require an evaluation of the evidence by the court or a jury. Similarly, a prima facie case does not create an irrebuttable presumption against an employer.[96] Here, the employer may assert acceptable business purposes as reasons for the discriminatory impact, *e.g.*, job tests, recruitment needs, or shortages of workers.

Moreover, the Supreme Court in *Gunther* indicated that the discriminatory impact approach was available to all race discrimination claims.[97] The Court stated that the adverse impact approach is fully consonant with Title VII litigation.[98] The Court appears to contrast adverse impact claims under Title VII with sex discrimination claims where the any-factor-other-than-sex defense is used under Title VII as incorporated in the Equal Pay Act. The Court suggests that an adverse impact prima facie case may be inappropriate where there is an any-other-factor-than-sex defense to the claim.[99] While there is much that is unclear about the Court's intention in these passages (*e.g.*, how does the presence of this defense alter the showing of a prima facie case?), it is clear that any limitations due to the incorporation of the Equal Pay Act do not apply to Black plaintiffs.

Through the use of statistical analysis and other indicia of discrimination, Blacks may reveal underlying discriminatory wage setting policies under the adverse impact approach. Similarly, the adverse impact approach should be available to address sex discrimination in pay. Where Black women can demonstrate wage disparities, which correspond to sex, between substantially equivalent jobs, an employer should be forced to provide a nondiscriminatory reason for such a pay system.

As in the race cases, wage discrimination plaintiffs should be able to use

96. Nelson, Opton, & Wilson, *supra* note 65.

97. County of Washington v. Gunther, 452 U.S. 161, 170 (1981).

98. *Id.*

99. The Court states:

> More importantly, incorporation of the fourth affirmative defense could have significant consequences for Title VII litigation. Title VII's prohibition of discriminatory employment practices was intended to be broadly inclusive, proscribing "not only overt discrimination but also practices that are fair in form, but discriminatory in operation." Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971). The structure of Title VII litigation, including presumptions, burdens of proof, and defenses, has been designed to select this approach. The affirmative defense of the Equal Pay Act, however, was designed differently, to confine the application of the Act to wage differentials attributable to sex discrimination. H.R. Rep. No. 309, 88th Cong., 1st Sess., 3 (1963). Equal Pay Act litigation, therefore, has been structured to permit employers to defend against charges of discrimination where their pay differentials are based on a bona fide use of "other factors other than sex." Under the Equal Pay Act, the courts and administrative agencies are not permitted to "substitute their judgment for the judgment of the employer . . . who [has] established and applied a bona fide job rating system," so long as it does not discriminate on the basis of sex. 109 Cong. Rec. 9209 (1963) (statement of Rep. Goodell, principal exponent of the Act). Although we do not decide in this case how sex-based wage discrimination litigation under Title VII should be structured to accommodate the fourth affirmative defense of the Equal Pay Act, *see* n. 8, *supra*, we consider it clear that the Bennett Amendment, under this interpretation, is not rendered superfluous. (footnotes omitted).

Id., at 170-71.

statistical evidence to prove their case. Wage disparities, past and present sex segregation, and comparable work support an inference that sex, in part, explains the wages received by women. The language in *Gunther* concerning different standards between Title VII race cases and Title VII sex discrimination cases due to the incorporation of the Equal Pay Act defenses is ambiguous. The Court seems to suggest that the EPA defense of "any factor other than sex" means that courts should pay greater deference to employer reasons for pay disparities in sex discrimination than in Title VII race discrimination cases.[100]

The courts are still developing frameworks for sex discrimination in pay claims and there is much uncertainty concerning the availability of the discriminatory impact theory. Nevertheless, the persistence of sex discrimination against women in pay compels courts to follow the clear intent of Title VII, to eradicate all forms of discrimination in employment based on race and sex.

IV. CONCLUSION

Federal legislation generated by the civil rights movement of the 1960's continues to provide a means of strengthening the economic position of Black workers. Nevertheless, the Black worker still suffers from the oppression of slavery and segregation in the current forms of split labor markets and prejudice. The courts have used the Civil Rights Act of 1964 to reach discrimination in individual cases. Courts recognize a prima facie showing of wage discrimination where a Black person receives unequal pay for work identical or substantially equivalent to higher paid whites. Using a comparable work analysis, courts have made individual and classwide comparisons of jobs using statistical evidence, job segregation history, anecdotal evidence, and other techniques.

Black women have the additional pattern of sex discrimination to combat. Legal theories are still being developed to address wage disparities based on sex. However, intentional wage discrimination against Black women who perform jobs identical to or substantially equivalent to those of higher paid men violates federal law. Although a comparable worth analysis presents great problems of proof, courts are willing to compare jobs which are similar in the type of work performed, and have similar educational and experiential requirements.

Even when a prima facie showing of wage discrimination is made, employers may have a legitimate nondiscriminatory reason to explain the pay disparity. Differences in job responsibilities, degree of supervision, experience, and skill are typical reasons for pay differences. Labor market factors such as shortages of particular skills or the need to recruit qualified individuals also justify wage differentials. However, where the market incorporates or includes a race or sex ingredient, then the market perpetuates, not excuses, race or sex discrimination. Paying Blacks less as a matter of policy and custom has become intertwined with labor markets in such a manner that the market is now a carrier of discrimination.

The discriminatory impact theory of pay discrimination is the least developed approach to attacking job discrimination. Nevertheless, the danger of

100. *Id.*

permitting subtle and sophisticated devices of discrimination, which appear in hiring and promotion circumstances, is equally present in wage disparity cases. Where Black workers establish a pattern of wage setting which has a discriminatory impact due to race or sex, and where the employer cannot refute such evidence, such impermissible discrimination must be stopped. Problems of proof may make a showing of discriminatory impact difficult when dissimilar jobs are compared. However, when Black workers present sufficient evidence under the circumstances to warrant an inference that race or sex explains the wage disparity, an employer should be forced to explain the pay system. Although this essay has not fully embraced the comparable worth analysis, the anti-discrimination purpose of Title VII provides for imaginative legal theories to combat the many forms of discrimination against Black workers.