THE MARKET DEFENSE

Sharon Rabin–Margalioth*

I. INTRODUCTION

Women too often encounter the argument that pay disparity is the outcome of market forces, not sex discrimination. Salary differentials are attributed to individual pay demands, bargaining effectiveness, external counteroffers, and prior salaries. These are just a few examples of market justifications that employers raise to explain why similar workers performing the same job are compensated differently. The market defense posits that as long as there is a wedge between employees' reservation wages[1] and their marginal productivity, wages can be set anywhere in between. Any variance in compensation between two similarly productive employees performing the same job is the result of differences in the division of the employment contractual surplus in two separate employment relationships.

As union membership continues to decline, and the percentage of employees covered by collective bargaining agreements and other fairly rigid compensation schemes also declines, most employees face the task of bargaining over wages on their own.[2] Granting deference to market explanations in this individual bargaining setting will hinder the future quest for gender pay equality. Women, on average, tend to be less

* Professor of Law, Radzyner School of Law at the Interdisciplinary Center, Herzliya (Israel), and Global Visiting Professor of Law, New York University School of Law.

1. The reservation wage is the minimal wage for which a given employee is willing to perform a specific job.

2. In 2008, union members accounted for only 12.4% of employed wage, and only 13.7% of salary workers were covered by a union or an employee association contract. In the private sector, only 7.6% of workers were union members, and 8.4% were covered by some collective bargaining agreement. U.S. Dep't of Labor, Bureau of Labor Statistics, USDL 09-0095, UNION MEMBERS IN 2008, tbls. 1 & 3, (Jan. 22, 2009), *available at* http://www.bls.gov/news.release/archives/union2_01282009.pdf. This data demonstrates that nine out of ten workers are not represented with relation to compensation decisions. Rather, they are either negotiating individually the terms and conditions of their employment or are unilaterally offered employment contracts with no formal or informal bargaining.

effective bargainers, and in some cases, market justifications are a pretext to sex discrimination.[3]

To prevail in a compensation discrimination claim under traditional discrimination theory, a plaintiff must identify a causal link between membership in a protected group, such as being a woman, and her relatively low compensation compared to a male co-worker.[4] If the employer argues successfully that market forces cause this disparity, the fact that a woman may be paid less than a man for performing the same work is not sufficient to prevail. The market justification is thus presented to overcome the causal link between gender and compensation.

This Article argues that, usually, market justifications for pay disparity in equal-pay-for-equal-work litigation should be rejected. I do not discuss the controversial theory of equal-pay-for-comparable-worth, according to which cross-occupational demands for equal pay are made based on a claim that the intrinsic worth of the compared occupations or jobs are equivalent, although the external market places different value on the jobs at question.[5] My rejection of the market defense pertains only to individuals performing the same job.

The Article then takes on the more ambitious project of proposing an alternative model of gender discrimination, which is not restricted to causation. Anti-discrimination mandates outlaw employment practices that discriminate against women because of their sex. I argue that, in the limited case of equal pay litigation, we should abandon this causation requirement. The Equal Pay Act of 1963 ("EPA")[6] claims that an alternative model of equality should be endorsed, which would restrict an employer's ability to defend differential wages for equal work to cases where he can present evidence that individual ability or productivity considerations support the disputed pay disparity. In other words, the traditional causation model is based on an irrelevancy test. Discrimination occurs when an employment action is based on an irrelevant factor, such as sex. The other paradigm, which I term "partial causation," asks whether the decision-maker has confined himself to a checklist of relevant factors.[7] Whenever a female employee is compensated at a lower rate than a

3. *See infra* notes 29-68 and accompanying text.

4. *See infra* notes 75-80 and accompanying text.

5. I reference briefly some of the literature and leading cases based on comparable worth claims only to better understand the treatment of the market defense in the context of equal pay for equal work. *See infra* notes 53-55 and accompanying text.

6. 29 U.S.C. § 206(d) (2006).

7. I term this relevancy test as a "partial causation" model because the goal is to decrease the *gender* wage gap, not any unjustified pay inequality. To trigger review, the model insists that you target pay disparity between two workers of opposite sex. The causation requirement is relaxed only regarding the motivation or statistical impact of the practice.

comparable male employee for the same work, it triggers the obligation to inquire whether this can be justified by one of the authorized grounds listed explicitly in the Equal Pay Act.

The distinction between the two models of discrimination parallels the distinction between two possible regimes that govern the employment relationship regarding job security and the ability of employers to fire their employees without cause. The "employment at will rule," which is the default rule in most jurisdictions, allows an employer to terminate an employee for any reason — a good reason, a bad reason, or no reason at all.[8] Specific exceptions to the at will rule are carved out,[9] but other than these explicit motivations, the employer can base his decision on any factor. The employment at will rule mirrors the causation model of discrimination. Parties to the employment relationship can opt-out of the at will rule and institute a termination regime based on "just cause."[10] Under a "just cause" rule, the employer's discretion in termination decisions is limited by an identified list of authorized reasons to terminate employees, usually relating to performance, discipline, and economic needs. A "just cause" regime is similarly structured to the proposal of identifying discriminatory practices by examining whether the employer was guided by one or more of the factors authorized for determining compensation.[11]

The gender wage gap is a complex phenomenon. There are at least three causation issues that remain unsettled in the literature discussing the gender wage gap. First, disagreement surrounds the identification of the variables responsible for the wage gap.[12] Second, the relative significance of various contributing factors is disputed.[13] Third, the underlying

8. *See* Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118, 118 (1976) (defining the employment at will rule).

9. *See* Thomas J. Miles, *Common Law Exceptions to Employment at Will and U.S. Labor Markets*, 16 J.L. ECON. & ORG. 74, 75 (2000) (listing specific exceptions to the employment at will rule).

10. Montana is currently the only jurisdiction that opted for a mandatory "just cause" regime. Montana Wrongful Discharge From Employment Act, MONT. CODE ANN. §§ 39-2-901 to -914 (2009). In the unionized sector, however, most collective bargaining agreements incorporate job security protection clauses, which limit employer's prerogative to terminate employees according to a restricted list of events.

11. I thank Cindy Estlund for pointing out the similarity between job security regimes and the two possibilities of conceptualizing discriminatory practice.

12. *See* Francine D. Blau & Marianne A. Ferber, *Discrimination: Empirical Evidence from the United States*, 77 AM. ECON. REV. 316, 316 (1987) (reviewing theories used in determining the extent of discrimination; Alan Manning & Joanna Swaffield, *The Gender Gap in Early-Career Wage Growth*, 118 ECON. J. 983, 983 (2008) (exploring reason for the UK's gender gap in early-career wage growth).

13. *See* Stephanie Boraas & William M. Rodgers III, *How Does Gender Play a Role in the Earnings Gap? An Update*, MONTHLY LAB. REV., Mar. 2003, at 9, 9 (noting that although the existence of the gender pay gap is well documented, the factors that contribute to it are still debated); Dan A. Black, Amelia M. Haviland, Seth G. Sanders & Lowell J.

relationship between some factors and past and present societal discrimination is also often questioned.[14] In this climate of empirical uncertainty, adherence to a definition of discrimination, which requires the plaintiff to articulate causality between the employer's seemingly neutral and market-guided compensation policies and sex, will frustrate most claims of pay discrimination. Broad interpretation of what constitutes a valid defense may undermine the EPA's goal of eliminating unjustified wage disparities. Some defenses, especially variants of the market force defense, are actually discriminatory practices since they disadvantage women as a group.

The courts overlooked the opportunity to interpret the EPA as restricting employer's discretion to disparately compensate employees of opposite sexes to a checklist of authorized factors relating to productivity and ability.[15] Currently, EPA jurisprudence is under-theorized. In a series of decisions, the courts interpreted the EPA to emulate Title VII of the Civil Rights Act of 1964[16] models of discrimination, which are based on strong causation.[17] Employers were able to make use of the market defense to sever the causal link between sex and compensation. However, in January 2009, Congress passed H.R. 12, the Paycheck Fairness Act.[18] This bill, amending the EPA, clarifies that the scope of the employer's affirmative defense is quite narrow and in fact, is limited to considerations closely related to individual ability and productivity. If this important legislation becomes law, the market defense will be eliminated altogether from the EPA framework of discrimination.

This Article proceeds as follows: Part II explores what employers

Taylor, *Gender Wage Disparities among the Highly Educated*, 43 J. HUM. RESOURCES 630, 631 (2008) (discussing the widely different regression specifications and different data sets used in the literature studying the gender wage gap); Marianne Bertrand, Claudia Goldin & Lawrence E. Katz, *Dynamics of the Gender Gap for Young Professionals in the Financial and Corporate Sectors* 3-4(Nat'l Bureau of Econ. Research, Working Paper No. 14681, 2009), *available at* http://www.economics.harvard.edu/faculty/goldin/files/Dynamics.pdf (identifying three proximate factors that may explain the large and rising gender gap in earnings).

14. *See* Jane Waldfogel, *Understanding the "Family Gap" in Pay for Women with Children*, 12 J. ECON. PERSP. 137 (1998) (examining the wage differential between women with and without children); Daniel Fischel & Edward Lazear, *Comparable Worth and Discrimination in Labor Markets*, 53 U. CHI. L. REV. 891 (1986) (providing a critique of comparable worth that does not depend on acceptance of the market price as dispositive).

15. *See infra* notes 126-142 and accompanying text for a discussion of the judicial oversight.

16. 42 U.S.C. §§ 2000e-2000e-17 (2006). Title VII prohibits employment-related discrimination on the basis of five group membership classifications: race, color, national origin, sex, and religion.

17. *See* discussion *infra* Parts III.A-B.

18. Paycheck Fairness Act, H.R. 12, 111th Cong. (2009), *available at* http://www.govtrack.us/congress/bill.xpd?bill=h111-12. The bill is pending in the Senate.

assert when offering a market defense to discriminatory compensation claims. It offers the normative analysis of why the market defense should be rejected. It draws on the growing body of research demonstrating gender differences in negotiation skills, self entitlement, and competitive behavior. Part III explains how traditional models of discrimination, based on causation, are ill-equipped to deal with pay disparities resulting from market behavior of individual employees. Part IV develops the argument that we should abandon the causation requirement for pay disparity claims, substituting it with a checklist of relevant factors which will govern compensation decisions. It then explains why the EPA was interpreted as embracing a causation model, although its structure clearly indicates a departure from traditional discrimination models. Part IV also discusses the Paycheck Fairness Act. If passed, this bill will settle the ambiguity surrounding the reach of the market defense.[19] Part V concludes with a response to criticism voiced against eliminating the market defense from the EPA.

II. WHY ARE SOME MARKET JUSTIFICATIONS TO THE GENDER WAGE GAP DISCRIMINATORY?

A. What Are Market Justifications?

A market explanation harnesses free market principles, such as supply and demand equilibrium, promotion of self interest, and/or profit maximization to justify contested wage disparities. Early on, employers turned to market justifications to distance themselves from accusations that their animus toward women (and other protected groups) motivated their adverse decisions.[20] Basically their defense culminated in asserting "it's not me, it's the market, which forced me to treat women unfavorably." In effect, two market theory assumptions were brought together. First, employers are usually not wage setters, but rather wage takers - following the market rate, which is dictated by the supply and demand for employees in the specific industry or profession. Second, efficient labor markets will gradually eliminate any irrational or animus-based discrimination. The concept that an employer can excuse sex-based decision-making with rational and profit maximizing reasoning (as opposed to animus) was quickly dismissed by the Supreme Court. In *Corning Glass Works v. Brennan*,[21] women inspectors working the day shift demanded pay equal to

19. The Supreme Court has declined to settle this question in Randolph Cent. Sch. Dist. v. Aldrich, 506 U.S. 965 (1992).

20. Corning Glass Works v. Brennan, 417 U.S. 188 (1974).

21. *Id.*

that of male inspectors working the night shift. For other jobs, there was one wage rate applied both to day and night shifts. Corning argued that the wage differential between day and night shift inspection jobs resulted from the resistance of men to perform inspection work - work perceived by these workers as demeaning feminine tasks.[22] In order to fill the night shift, Corning had to offer higher compensation than that offered to women working the day shift. The Court determined that "the differential arose simply because men would not work at the low rates paid to women inspectors, and it reflected a job market in which Corning could pay women less than men for the same work. That the company took advantage of such a situation may be understandable as a matter of economics, but its differential nevertheless became illegal once Congress enacted into law the principle of equal pay for equal work."[23]

After the Court held that the EPA prohibited compensation decisions that consider sex, even if such pay disparities are supported by market justification, a more subtle form of the market justification emerged. One variation focuses on the legitimacy of the employer attempting to extract as much of the contractual surplus as possible. In these cases, for example, an employer argues that there is no legal obligation to offer individual workers more than their initial pay demands, even if implementation of a wage scheme based on employee wage demands ultimately disadvantages women.[24] Another strand emphasizes specific circumstances where

22. *Id.* at 205.

23. *Id.*

24. *See, e.g.*, Horner v. Mary Inst., 613 F.2d 706 (8th Cir. 1980) (The plaintiff, a female physical education teacher, accepted an initial job offer of $7,500. Subsequently, a male teacher was hired, but did not accept the initial offer of $7,500 and demanded $9,000. Special authorization by the school's governing board was given to meet this compensation demand. The court accepts this as a legitimate reason for the pay disparity, a reason other than sex); *see also* Walter v. KFGO Radio, 518 F. Supp. 1309 (D.N.D. 1981) (Individual negotiations for initial pay that resulted in higher pay for a male employee performing the same job is not a violation of the EPA). Even the Equal Employment Opportunity Commission, in its compliance manual for avoiding compensation discrimination, instructs employers that as long as the employer treats women and men similarly when engaging in compensation negotiations, any pay differentiation resulting from the negotiations is to be attributed to a factor other than sex: "CP, a certified public accountant (CPA), claims that R accounting firm violated the EPA by offering her a lower starting salary than it offered a male CPA. R proves that it offered a higher salary to the male because he had very favorable job references based on his productivity and successful track record in providing tax advice to clients; he received other job offers at the higher salary; and he relied on those job offers as a bargaining tool for negotiating the higher salary. R began salary discussions with CP with the same opening offer as given to the male, and indicated it was 'willing to go higher if necessary.' But CP did not bargain as assertively as the male CPA, and ended up with a lower starting salary. There is no evidence that R treated CP any differently than the male in salary negotiations. R has proved that the compensation disparity is based on a factor other than sex, and therefore no EPA violation is found." EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, COMPLIANCE MANUAL, § 10 ex. 42 (2000), *available at*

employers are compelled by external market pressures to raise the compensation of one employee but not another. For example, an employee presents a counteroffer and threatens to quit if his current employer does not match it.[25] Similarly, temporal changes in the market wage in an industry or profession can result in disparate compensation of two equally productive employees, hired in separate time periods.[26]

The strength of these new versions of the market defense is that they purport to sanction neutral criteria that regrettably resulted in an individual female employee being paid less than a male co-worker,[27] rather than being offered as a justification for an intentionally sex-based compensation decision. Employers have utilized these versions of the market justification to overcome the causal link between sex and compensation level that a plaintiff must prove under the traditional theory of discrimination. Courts have accepted this line of reasoning in varying degrees.[28]

In the next subsections, this paper explores whether market explanations do, in fact, undermine the causal link between wages and gender. I set out to prove two assertions: First, despite being neutral on their face, some market justifications adversely impact women as a group, and therefore, the causal link between gender and pay is still present.

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http://www.eeoc.gov/policy/docs/compensation.html.

25. *See, e.g.*, Taylor v. White, 321 F.3d 710 (8th Cir. 2003) (The employer asserted a retention policy as a gender-neutral defense to the employee's unequal pay claim. The court rejected the employee's argument that a salary retention policy could not serve as a factor other than sex if it resulted in pay disparity between men and women); Winkes v. Brown Univ., 747 F.2d 792, 792 (1st Cir. 1984) (An associate professor alleged that the raise given to his female colleague was in violation of the EPA, after defendant matched the salary offered to a female associate professor by another institution in order to dissuade her from taking other employment. The court found that defendant sufficiently demonstrated that it had a customary de facto policy of responding to outside offers from other universities when it desired to keep a professor and his or her qualities merited such an action).

26. *See, e.g.*, Ciardella v. Carson City Sch. Dist., 671 F. Supp. 699, 701 (D. Nev. 1987) (Explaining that due to economic changes in the job market, the employer was required to extend an offer of compensation of approximately $10,000 more per year than the plaintiff was receiving while performing the same job).

27. Another commentator made a similar distinction dubbing the *Corning Glass* type of market defense as the market conditions defense and the newer version as a market value defense: "The market value defense differs from the market conditions defense in one important aspect. Under the market value defense, the defendant attempts to prove an actual difference in market demand for a particular employee. Under the market conditions defense, the defendant makes broad assumptions about an entire class of employees based on sex. The Court in *Corning Glass* clearly rejected a defense based on broad assumptions about market conditions. Because the market value defense more strongly reflects a defendant's prudent business judgment, however, the issue of whether courts should accept a market value defense is a closer question." Thomas H. McCarthy, Jr., Note, *"Market Value" as a Factor "Other Than Sex" in Sex-Based Wage Discrimination Claims*, 1985 U. ILL. L. REV. 1027, 1037 (1985).

28. *See infra* discussion of case law in section IV.C.

Second, employers sometimes claim that their decisions are constrained by external market pressures, when in fact their decisions are not subject to such pressures. Rather their compensation schemes are a product of internal institutional policies and politics that are sometimes entangled with gender stereotypes and other sex-based considerations. If this is an accurate description of labor market practices, market justifications as a normative matter should not be accepted as a legitimate defense in pay discrimination cases. Denying such defenses will also promote uniformity and coherence in the treatment of market-based defenses that disadvantage women.

B. Market Justifications Feed and Perpetuate the Gender Wage Gap

In their influential book, *Women Don't Ask: Negotiation and the Gender Gap*, Linda Babcock and Sara Laschever present empirical evidence on the difference between the manner in which women and men engage in salary negotiations.[29] The results of their research pose disturbing implications for the impact of allowing market justifications upon the gender wage gap. The essence of their findings is that women are more hesitant than men to initiate and pursue negotiations over wages.[30] Women are less likely than men to negotiate over initial wage offers when accepting a new job.[31] They are also less likely than men to demand a raise or seek counteroffers to boost their current compensation.[32] The different negotiation skills that women and men bring to the bargaining table impact the gender wage distribution in institutions that rely heavily on individual bargaining to set wages.

The book first illustrates the disparity in starting salaries of graduates with a master's degree from Carnegie Melon University. Male graduates received an initial average salary 7.6% higher than that of female graduates.[33] The cause of the gendered differential in the average wage was that 57% of men negotiate over the initial offer they received, while only 7% of the female graduates did so.[34] This data shows that a majority of men used an initial salary offer as a starting point for negotiations, while most women simply accepted the initial offer.

The researchers point to the attainment of early childhood social skills as the explanation for the difference in negotiation skills. Boys are

29. LINDA BABCOCK & SARAH LASCHEVER, WOMEN DON'T ASK: NEGOTIATION AND THE GENDER DIVIDE (2002).

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.* at 1-2.

encouraged to ask for things they want and tend to believe that they have control over the circumstances that shape their lives. Young girls are taught to focus on the needs of others and to apply less control in altering their own situation. Therefore, women are less inclined than men to come forward and demand raises, bargain over initial wages, or approach other employers to solicit competing job offers.[35]

Another line of research complementing the gender negotiation literature investigates the correlation between competitive behavior and gender. Muriel Niedele has been conducting experiments demonstrating that women shy away from competitive environments, while men not only welcome them, but perform better when competing.[36] Wage negotiations are commonly seen as a competition, and women tend to avoid it. Again, the variance in attitudes and performance in a competitive setting is linked to the development of early social skills and a disparity in the self-confidence women and men exhibit in their belief in the chances of winning the competition.[37] These beliefs affect both one's willingness to compete and performance in competition. The negotiation literature also emphasizes the importance of the negotiator's self-confidence and optimism. There is correlation between self–confidence, optimism, and the final outcome of the negotiation: If you expect more, you will get more.[38]

Tied to these findings are experimental studies, revealing that women, absent external information, value the economic worth of their work less than do men.[39] In one of the first studies on self-perception of entitlement, participants were requested to perform a task.[40] After completion of the task, participants were divided into two groups.[41] The first group was

35. *See id.* at 62-84.

36. *See generally* Uri Gneezy, Muriel Niederle & Aldo Rustichini, *Performance in Competitive Environments: Gender Differences*, 118 Q. J. OF ECON. 1049 (2003) (stating that when women and men compete against one another, women may perform less well than men, even if they perform similarly in non-competitive environments); Muriel Niederle & Lisa Vesterlund, *Gender Differences in Competition*, 24 NEGOTIATION J. 447 (2008) [hereinafter *Gender Differences*]; Muriel Niederle & Lisa Vesterlund, *Do Women Shy Away from Competition? Do Men Compete Too Much?*, 122 Q. J. OF ECON. 1067 (2007) [hereinafter *Women Shy Away*].

37. *See Gender Differences in Competition*, *supra* note 36, at 456-57.

38. *See* Babcock & Laschever, *supra* note 29, at 130-42.

39. *See* Hart Blanton et al., *Contexts of System Justification and System Evaluation: Exploring the Social Comparison Strategies of the (Not Yet) Contented Female Worker*, 4 GROUP PROCESSES & INTERGROUP REL. 126 (2001) (comparing women's satisfaction with pay rate with men's); Brett W. Pelham & John J. Hetts, *Underworked and Overpaid: Elevated Entitlement in Men's Self-Pay*, 37 J. EXPERIMENTAL SOC. PSYCHOL. 93 (2001) (discussing University of California study on depressed entitlement).

40. *See* Charlene M. Callahan-Levy & Lawrence A. Messe, *Sex Differences in the Allocation of Pay*, 37 J. PERSONALITY & SOC. PSYCHOL. 433 (1979) (interpreting results of a study at Michigan State University).

41. *Id.*

asked to assign compensation to themselves for performing the task.[42] The second group was asked to decide the compensation other participants received for the task.[43] On average, women in the first group assigned 19% lower compensation for themselves than men did, but when compensating other participants, women were slightly more generous than men regardless of the sex of the participant they were compensating.[44] However, there was no difference in the participants' evaluation of the quality of their work.[45] These results show that women undervalue their work but are able to more objectively assess the value of others' work. Men, on the other hand, did not exhibit such a discrepancy. A follow up study included a third group, which was required to assign compensation to themselves, like the first group, but were provided with a bogus list containing information on how much other participants paid themselves. Under these conditions, women adjusted their compensation upward to meet the rates included in the list.[46] The results of this study suggest that a lack of information about the going rate of compensation tends to depress women's wages and contributes to the gender wage gap[47].

These empirical findings can also shed light on why women's reservation wage is often lower than men's. The conventional explanation emphasizes market discrimination[48] and the greater variance in women's attachment to the paid labor market than men's.[49] But a low self-valuation

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.* Two decades later, at Yale College, female students still paid themselves 18% less than male students did, for work that was indistinguishable in quality or content. John T. Jost, *An Experimental Replication of the Depressed-Entitlement Effect Among Women*, 21 PSYCHOL. WOMEN Q. 387 (1997). In another experiment, participants were instructed to perform a task until they thought they earned four dollars. Women worked on average 22% longer than men and were 32% more productive than men. Brenda Major et al., *Overworked and Underpaid: On the Nature of Gender Differences in Personal Entitlement*, 47 J. PERSONALITY & SOC. PSYCHOL. 1399 (1984).

46. Major, *supra* note 45.

47. *See also* Ledbetter v. Goodyear Tire & Rubber, 550 U.S. 618, 650 (2007) (Ginsburg, J., dissenting) (rejecting the majority opinion, which denies an Equal Pay Act claim). Justice Ginsburg references the importance of allowing women to access reliable information on compensation when combating compensation discrimination in the workplace. The Paycheck Fairness Act similarly addresses the issue of the lack of vital wage information. The bill institutes a retaliatory cause of action against employers who retaliate against employees that engage in information sharing and inquire about wages. It also requires the EEOC to survey pay data and obligates employers to submit any needed pay data identified by the race, sex and national origin of employees. The Paycheck Fairness Act §§ 3, 8, *supra* note 188.

48. *See* Heather Antecol & Peter Kuhn, *Gender as an Impediment to Labor Market Success: Why Do Young Women Report Greater Harm?*, 18 J. LAB. ECON. 702 (2000) (analyzing effects of age and gender on employment).

49. *See* Audra Bowlus, *A Search Interpretation of Male-Female Wage Differentials*, 15

of one's work, whether intrinsic or caused by a lack of relevant and accurate information, depresses women's reservation wage. There is a correlation between a high estimation of the market value of the job performed and a high reservation wage.[50] Holding productivity constant, a lower reservation wage translates into a larger contractual surplus to be divided between the employer and employees. Even if the employer extracts an identical share of the surplus through bargaining, the employee will end up with lower wages than a co-worker whose reservation wage was initially set higher.

To illustrate the insights discussed so far, take for example two employees, Emma and Ben, with equivalent productivity of $100 per day. This sets the upper limit to their compensation at a rate of $100 per day. Due to the constraints described above, Emma values her productivity at $80, while Ben estimates his productivity at $95. Emma sets her reservation wage, which is the minimum wage she is willing to work for, at $50 and Ben sets it at $60. The fact that Emma estimates her productivity will be lower than Ben does not necessitate that her reservation wage must also be lower; she could be unwilling to work for less than $75 a day, even if she estimates her productivity only at $85.[51] The contractual surplus in Emma's case is $50 and in Ben's case it is only $40. This puts Ben at an advantage, because even if in both cases bargaining will result in splitting the surplus evenly, Emma will end up with a wage rate of $75 per day and Ben with $80. Taking into account their subjective evaluations of their productivities, Emma estimates the contractual surplus at $30 compared to Ben's estimate of $35. Splitting the employee-perceived surplus evenly in both cases will result in $65 for Emma and $77.50 for Ben.

When incorporating the information about the systemic differences in the way women and men approach and handle wage negotiation, it is fair to assume that Ben will be able to extract a higher share of the actual employment contractual surplus. Emma may not engage in bargaining at all, and if she does, she will be less effective. Emma will set her bargaining goals lower, partly because both her reservation wage and subjective estimation of her productivity is lower than Ben's, and partly

J. LAB. ECON. 625 (1997) (showing that differences in anticipated labor force attachment led to lower reservation wages for women).

50. *See* Peter Orazem, James Werbel & James McElroy, *Market Expectations, Job Search, and Gender Differences in Starting Pay*, 24 J. LAB. RESEARCH 307 (2003) (demonstrating that women had lower starting salary expectations, even with the same major, labor market information and job search strategies; lower pay expectations led to lower pay outcome for women).

51. I structured the dollar amounts in the example to mirror the findings that women on average estimate their productivity lower than men and also have a lower reservation wage. It is also a plausible assumption that when you estimate your productivity at a lower rate there is a depressing effect on your reservation wage.

because she is not socialized to bargain for her own benefit and is averse to the competitive environment of wage negotiations. If this results in Emma extracting 10% of the surplus while Ben succeeds in extracting 20%, Emma will be compensated at a rate of $55 compared to Ben's compensation of $72.

This hypothetical example illustrates that various factors pertaining to individual salary negotiation may contribute to gender wage disparity. None of these factors is connected to any objective measure of productivity, but some are linked to gender, and adversely impacting women, thus meeting the causation requirement underlying traditional discrimination law, under disparate impact law.

C. Market Justifications May Serve as a Pretext for Discriminatory Behavior

The strand of the market justification, emphasizing external market pressures, assumes that both employers and employees are "price takers" in the sense that the external market determines the wage rate for industries and occupation. Under this theory, the only discretion an employer exercises is determining how many employees they are willing to hire at the going wage. It is thus argued that when the employer is not the one who is actively setting wages, but simply following the market rate, he should not be held liable for the external valuation of worth.[52]

This intuition is probably one of the main causes for the failure of the comparable worth movement. In the late seventies to mid eighties, comparable worth proponents advanced, unsuccessfully, the argument that when job segregation results in the depression of wages of female occupations compared to comparably worth male occupation, this should be perceived as sex discrimination.[53] But courts resisted expansion of discrimination law based on this theory, explaining that when an employer pays his workers according to the market's going wage, wages are not actively set in a discriminatory manner. The employer is simply following the rules of supply and demand for the various jobs, even if the outcome is that female-dominated occupations attain lower compensation levels than comparably worth male-dominated occupations.[54] The rejection of

52. An exception to the underlying assumption that employers should not be held liable for following the market wage rate are cases in which the employer intentionally classifies employees by sex to take advantage of women's lower reservation, as was the situation in the Corning Glass plant. Corning Glass Works v. Brennan, 417 U.S. 188, 215 (1974).

53. *See generally* Paul Weiler, *The Wages of Sex: The Uses and Limits of Comparable Worth*, 99 HARV. L. REV. 1728 (1986) (arguing that there is real value in comparable worth).

54. The final blow to the endeavor to incorporate comparable worth into Title VII was in *American Nurses' Association v. Illinois*, 783 F.2d 716, 722 (7th Cir. 1986) (allowing a suit by nurses on separate discrimination grounds, but denying the applicability of

comparable worth rested partially on the strong belief that employers are wage takers for the various occupations for which they hire workers.[55]

In the past decade, new sociological research challenged the assumption that employers are mere wage takers when determining compensation. In some cases, internal institutional constraints and politics play a greater role than we (and the courts) are willing to acknowledge. Although employers are taking into account prevailing market wage rates for the relevant positions at issue,[56] they are also influenced by internal power dynamics and patterns of conflict vis-à-vis different groups of employees. This may result in managerial decisions to compensate some groups or occupations beyond the rate warranted by external market constraints.

Although this research targets gender-based occupational segregation, it is also relevant to the general discussion about the validity of the market defense. The market defense draws its strength from the assertion that wages are determined by external forces. If this premise questioned by empirical analysis, employers can no longer claim that they are not actively participating in setting wages. If they have some input in determining wages, and consciously decide to adhere to demands of specific groups of employees by compensating them above the market rate and this decision results in pay disparity between men and women, then this could be conceptualized as sex discrimination. At this point, pay disparity would not be the product of adhering to the external market valuation, but rather following some internal process of institutional decision-making. If this is the case, the market cannot be blamed for the wage disparity across individuals or groups of employees.

In *Legalizing Gender Inequality: Courts, Markets and Unequal Pay for Women in America*,[57] sociologists Robert Nelson and William Bridges conduct a thorough qualitative investigation, which they term "critical

comparable worth).

55. *See* AFSCME v. State of Washington, 770 F.2d 1401, 1408 (1985) ("The State of Washington's initial reliance on a free market system in which employees in male-dominated jobs are compensated at a higher rate than employees in dissimilar female-dominated jobs is not in and of itself a violation of Title VII, notwithstanding that the Willis study deemed the positions of comparable worth. Absent a showing of discriminatory motive, which has not been made here, the law does not permit the federal courts to interfere in the market-based system for the compensation of Washington's employees."); Briggs v. Madison, 536 F. Supp. 435 (W.D. Wis. 1982) (granting dismissal of a sex discrimination claim where the defendant argued that higher market wages for sanitarians than for nurses were responsible for pay disparities between female and male employees).

56. Usually pay does not fall under the prevailing market rate.

57. ROBERT L. NELSON & WILLIAM P. BRIDGES, LEGALIZING GENDER INEQUALITY: COURTS, MARKETS, AND UNEQUAL PAY FOR WOMEN IN AMERICA (Cambridge University Press 1999).

empiricism," into four high profile comparable worth cases.[58] They examine whether market forces, as argued by the defendants and accepted by the courts, were the cause of the pay disparity across gendered occupations. As students of organizational behavior, they are interested in understanding how organizations unconsciously effectuate gender inequality.

In one of the cases, *Christensen v. Iowa*,[59] female clerical workers filed a pay discrimination lawsuit against the University of Northern Iowa.[60] They claimed that they were underpaid in comparison to male physical plant workers, even though both occupations were assigned identical pay grades in an internal job evaluation report.[61] Specifically, the report stated that physical plant workers were overpaid relative to clerical workers and that the physical plant workers' pay was inflated compared to external market pay rates for similar jobs.[62] The University chose not to implement the recommendations; it sincerely feared that it would not be able to attract physical plant workers at the wage rate that it was paying the predominantly female clerical workers.[63] The market justification was not presented as an excuse for conscious sex discrimination and a deliberate decision to pay male occupations more, but rather as an unconscious process in which internal power structures affected how management perceived market rates for the gendered jobs.[64]

The University's perception that it could not lower the current wages of physical plant workers was based on the organizational strength of that group of workers. "The Physical plant workers, informally known as the 'meatpackers', because of their identification with unionized workers engaged in self-conscious collective bargaining. The clerical workers, in contrast, were content to participate in amicable 'committee' meetings with university officials."[65] This led the University to "worry about the union guys but not the women".[66] The authors argue that while the employer was speaking in terms of the market to justify its pay scheme "the market did not compel the University's decision. Organizational politics compelled the University to give selective attention to the demands of workers in predominantly male jobs."[67]

58. *See id.* at 101-05.
59. Christensen v. Iowa, 563 F.2d 353 (8th Cir. 1977).
60. *Id.* at 354
61. *Id.*
62. *Id.*
63. Nelson & Bridges, *supra* note 57, at 156-58.
64. *Id.* at 160-66.
65. *Id.* at 162.
66. *Id.* at 166.
67. *Id.*

This study, as well as others,[68] demonstrate that even if we generally embrace the market defense, i.e. accept wage disparities resulting from external market forces, we may encounter circumstances where what initially is deemed an external factor turns out to be an internal institutional decision unrelated to external market wage rates. Since discerning which cases carry a true market component and which reflect institutional politics and structures is a tricky matter, we should be extremely suspicious of any market claim presented.

D. Current Treatment of Market Justifications is Inconsistent

Paying women less than men just because the employer realizes he can hire women for less pay than men is discriminatory.[69] This type of behavior falls neatly within the traditional framework of antidiscrimination theory. The employer is basing employment decisions, compensation, on the applicant's or employee's gender and is offering less pay, because an applicant or employee is a woman. The causation requirement is clearly met, despite the employer's ability to differentiate compensation based on factors external to his operation. On the other hand, when an employer bases compensation decisions on factors other than sex, and these other factors are not related to ability or productivity, the law is ambiguous. In that situation, courts implicitly instruct that as long as the employer did not resort to sex-based classifications, he is on safe grounds. The employer is free to construct whatever wage structure he desires, extracting profit from the fact that reservation wages, compensation expectations, and negotiation skills vary among the pool of similar job applicants.

However, relying on a market justification can result, in both scenarios, in gender wage disparities. In *Corning Glass Works v. Brennan*[70] and *Christensen v. Iowa*,[71] the employer explained his wage structure in terms of external market constraints or opportunities (to pay women less than men). In both cases, external market valuations were blamed for generating the internal gender wage disparity. The reason the University of Iowa prevailed, while Corning failed, relates to the source of the employer's own classification. Corning confessed it classified employees based on sex, while the University of Iowa admitted only to

68. *See* Robert L. Nelson, Ellen C. Berrey & Laura Beth Nielsen, *Divergent Paths: Conflicting Conceptions of Employment Discrimination in Law and the Social Sciences*, 4 ANN. REV. L. SOC. SCI. 103 (2008) (surveying social scientific research which documents the pervasiveness of unintentional bias and the persistence of organizational processes that generate workplace discrimination).

69. *See* Corning Glass Works v. Brennan, 417 U.S. 188, 215 (1974) (espousing this rationale).

70. *Id.*

71. 563 F.2d 353 (8th Cir. 1977).

classification based on occupation. Usually, employers arguing that the sources of the pay disparity are classifications or factors other than sex can successfully defend their market explanation.

This doctrinal inconsistency in addressing market arguments is driven by the centrality of the causation model. Only in cases such as *Corning Glass*, where evidence that a causal link between the sex of the plaintiffs and the compensation decision exists, are the courts willing to dismiss the market defense.[72] In other cases resulting in similar pay discrepancies between men and women, the market justification is given credence.[73] After all, no causal link between the compensation practice and the sex of the plaintiffs was articulated, and the courts respect the employer's apparently nondiscriminatory business judgment.[74]

The similarity between these two scenarios warrants parallel treatment of the market defense. In both cases, the employer is not driven by animus toward women, but rather by profit maximization considerations. In both cases, women's wages are adversely affected by a compensation policy, contributing to the gender wage disparity. The fact that in the latter case one cannot pinpoint the causal process that connects the decision to gender should not serve as a strong basis for sanctioning market arguments. The rationale of *Corning Glass Works*—that an employer cannot pay women less than men for performing the same work—should govern all circumstances of market driven wage disparities.

72. Other cases clarifying this point are *Brennan v. City Stores, Inc.*, 479 F.2d 235, 241 n.12 (5th Cir. 1973) (stating that:

> "Loveman's contends that the tighter market for salesmen and male tailors justifies its hiring of men with such skills at a rate higher than that paid to obtain women of similar skills. While factors other than sex (customer embarrassment primarily) justify the employer in seeking male personnel to work in conjunction with selling and fitting male clothing, this is no excuse for hiring saleswomen and seamstresses at lesser rates simply because the market will bear it. Just such disparities were what Congress intended to correct by this legislation.").

See also Hodgson v. Brookhaven General Hosp., 436 F.2d 719, 726 (5th Cir. 1970) ("Clearly the fact that the employer's bargaining power is greater with respect to women than with respect to men is not the kind of factor [other than sex] Congress had in mind. Thus it will not do for the hospital to press the point that it paid orderlies more because it could not get them for less.").

73. *See supra* notes 24-26 and *infra* notes 127-131 and accompanying text.

74. *See* McCarthy, *supra* note 27, at 1042 ("If the defendant must pay certain employees more either to attract or to keep those employees, then prudent business judgment would require that the defendant pay those employees more. The defendant's business judgment is facially nondiscriminatory.").

III. THE DIFFICULTY OF USING TRADITIONAL DISCRIMINATION MODELS TO CONFRONT MARKET JUSTIFICATIONS

A. The Traditional Discrimination Framework: Emphasizing Causation

The market-defense controversy presents a challenge to employment discrimination theory due to the centrality of causation in conceptualizing discrimination in American law. Fundamentally, discrimination is understood to be the action of treating people differently on the basis of some prohibited group classification.[75] In the case of sex discrimination, it is taking action based on gender. The causal link between the scrutinized action and group membership must be articulated.

Title VII embraces the causation requirement both in its disparate treatment model and disparate impact model. The causation requirement is salient in disparate treatment theory. The ultimate question in any disparate treatment litigation is whether a plaintiff was able to meet her burden of persuasion and demonstrate that sex (or any other regulated group membership category) was a motivating factor in the employment decision.[76] There are a couple of ways to meet this burden. A plaintiff could resort to direct evidence or circumstantial evidence (including statistical evidence).[77] Nevertheless, at the end of the day, she must convince the fact finder that her gender was a motivating factor in the final decision regarding compensation, denial of promotion, termination, or sexual harassment.

In disparate impact theory, the centrality of the causation requirement is covert, but nonetheless present. Under disparate impact theory,[78] a plaintiff argues that an employment practice adversely impacts members of a protected group. This is a statistical claim. The claim is that there is a strong statistical correlation between group membership and the employment practice. If no data on statistical correlation are offered, the

75. *See* Mark Kelman, *Market Discrimination and Groups*, 53 STAN. L. REV. 834, 859-867 (2000) (surveying the justifications for the group-based theory of discrimination).

76. *See* Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133 (2000) (stating that acceptable evidence of discrimination for an ADEA claim was present); St. Mary's Honor Center v. Hicks, 509 U.S. 502, 519 (1993) (rejecting idea that nondiscriminatory interest completely destroys a discrimination claim).

77. *See* Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981) (stating that a legitimate reason eliminates the need to prove nondiscriminatory intent); Swierkiewicz v. Sorema, 534 U.S. 506 (2002) (holding that a race and age discrimination complaint does not require a pleading to be more detailed than normal).

78. *See* Griggs v. Duke Power, 401 U.S. 424 (1971) (initially articulating disparate impact). The disparate impact framework was later codified in Title VII, 42 U.S.C. § 2000e-2(k).

employer is not required to defend his decision making process.[79] Since disparate impact is based on providing statistical data on the correlation between employment practices and group membership, it also entails a causation requirement. Although the plaintiff is relieved of the requirement to demonstrate that employment actions were based on group membership, she is still obliged to demonstrate the statistical correlation (i.e. impact) between employment practices and group membership.

B. Limitation of the Causation Model in Addressing Gender Wage Disparities

i. Disparate Treatment Law

Disparate treatment law is ill-suited to deal with gender pay disparity resulting from market considerations. An employer can avoid liability if they can persuade the fact finder that pay decisions were solely based on other factors than the employee's gender. Offering market justifications for the decision severs the causal link between the sex of the plaintiff and the lower compensation level. A genuine external market justification does not fit within the causation model described. It is not because of the plaintiff's sex that she was paid less than another co-worker performing the same work, but because of a factor unrelated to sex - such as the fact she did not demand annual raises, did not negotiate her initial salary, or another factor which is not regulated by law.

As discussed above, in disparate treatment litigation, plaintiffs will only prevail in the limited cases in which they can establish causation between their sex and wage determination. *Corning Glass* is of limited application. Presently, most employers do not intentionally pay women less than men. Arguments that employers basing compensation decisions on factors such as prior salaries are engaging in intentional sex discrimination because those prior salaries reflect sex discrimination in the labor market have also failed under disparate treatment law, unless a plaintiff can offer specific evidence that the previous employer engaged in discriminatory practices when setting wages.[80]

79. *See* 42 U.S.C. § 2000e-2(k)(1)(B)(ii) ("If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.").

80. *See* Wernsing v. Dep't of Human Services, 427 F.3d 466, 470 (7th Cir. 2005) ("Wage patterns in some lines of work could be discriminatory, but this is something to be proved rather than assumed. Wernsing has not offered expert evidence (or even a citation to the literature of labor economics) to support a contention that the establishments from which the Department recruits its employees use wage scales that violate the Equal Pay Act and thus discriminate against women. If sex discrimination led to lower wages in the 'feeder'

Ambiguity of the market justification and obstacles in verifying its existence hinder the success of sex discrimination claims based on disparate treatment. The sociological studies revealing salience of intra-institutional structures and internal firm politics to wage determination could possibly aid prospective plaintiffs. If the claim is that the employer is responsible for setting lower pay for women performing equal work as male co-workers and that this process is independent, or loosely dependent, on external market constraints, one can possibly meet the causation requirement that the employer is basing his decision on sex (and not the market). But as empirical studies illustrate, providing the background information for such a factual claim is an onerous, time-consuming and expensive task. In individual claims this may not be worth the cost. In group-based claims, such as a class action, the investment in collecting information, hiring expert witnesses, and laying out the argument of intentional internal practices rather than market driven disparities may be an economically sensible decision.

Plaintiffs could present social framework evidence[81] to support their claim that underlying sex discrimination was a motivating factor in compensation decisions. Such evidence was successfully utilized in high profile discrimination cases such as *Price Waterhouse v. Hopkins*[82] and *Dukes v. Walmart Inc*.[83] In social framework testimony an expert witness can explain how "general research results are used to construct a frame of reference or background context for deciding factual issues crucial to the resolution of a specific case."[84] In the context of employment discrimination litigation it usually is offered to "educate fact-finders about the conditions under which gender stereotypes and prejudices are likely to influence impressions, evaluations and behavior in social and organization settings."[85]

jobs, then using those wages as the base for pay at the Department would indeed perpetuate discrimination and violate the Equal Pay Act."); Kouba v. Allstate Insurance Co., 692 F.2d 873, 876 (9th Cir. 1982) (presenting the same contention as *Wernsing*).

81. The use of social framework evidence in employment discrimination litigation has recently come under attack from the same scholars who introduced the term. *See* John Monahan, Laurens Walker & Gregory Mitchell, *Contextual Evidence of Gender Discrimination: The Ascendance of "Social Frameworks*," 94 VA. L. REV. 1715 (2008); *but see* Melissa Hart and Paul Secunda, *A Matter of Context: Social Framework Evidence in Employment Discrimination Class Actions*, 78 FORDHAM L. REV. 37 (2009) (presenting a warm endorsement of the practice).

82. Price Waterhouse v. Hopkins, 490 U.S. 228 (1989).

83. Dukes v. Walmart Inc., 222 F.R.D. 137 (N.D. Cal. 2004), *aff'd* 509 F. 3d 1168 (9th Cir. 2007), *review en banc granted*, 2009 WL 365818 (9th Cir. Feb. 13, 2009).

84. Laurens Walker & John Monahan, *Social Frameworks: A New Use of Social Science in Law*, 73 VA. L. REV. 559, 559 (1987).

85. Susan T. Fiske & Eugene Borgida, *Providing Expert Knowledge in an Adversarial Context: Social Cognitive Science in Employment Discrimination Cases*, 4 ANN. REV. L. &

When using social framework testimony to explain how employers stereotype women according to gender roles, the argument is clear: women are not expected to behave like men, and those that do are punished for this cross-gender behavior.[86] This satisfies the causation requirement that the disparity in treatment was "because of sex." When we enter the domain of internal firm processes affecting terms and conditions of employment we are on less stable grounds.[87] While the theory that the employer is partially insulated from external market forces is easy to articulate, providing evidence in specific cases that this amounts to sex based discrimination is more difficult.

Take for example, *Christensen v. Iowa*,[88] where an expert witness explained that the university was basing its compensation scheme on an unfounded perception that it could not hire physical plant workers at lower rates than it was currently paying. Although this perception was based on the internal pressure this group of employees was exerting on management, this still does not necessarily lead to the conclusion that it was paying them more because of their sex. Perhaps it was just their organizational power, and the fact that they were men was incidental. The expert testimony could only refute the employer's offered explanation that external market forces warranted the higher wages for the male dominated occupation. This does not amount to proving a causal link between sex and lower wages for women.[89] Disparate treatment theory places the ultimate burden of

SOC. SCI. 123, 128 (2008).

86. This notion was the crux of the expert testimony in the *Price Waterhouse* litigation. Susan Fiske, a renowned social psychologist, testified about how the plaintiff, Ann Hopkins, was denied partnership at an accounting firm due to gender stereotyping and the discomfort of her colleagues caused by her seemingly masculine behavior. The court dismissed the employer's objection to relying on testimony which applies general psychological research to the facts of the case: "Indeed, we are tempted to say that Dr. Fiske's expert testimony was merely icing on Hopkins' cake. It takes no special training to discern sex stereotyping in a description of an aggressive female employee as requiring 'a course at charm school.' Nor, turning to Thomas Beyer's memorable advice to Hopkins, does it require expertise in psychology to know that, if an employee's flawed 'interpersonal skills' can be corrected by a soft-hued suit or a new shade of lipstick, perhaps it is the employee's sex and not her interpersonal skills that has drawn the criticism." Price Waterhouse v. Hopkins, 490 U.S. 228, 256 (1989).

87. There is no exclusion of sociologists giving expert testimony, although the common practice is to hire cognitive and social psychologists. Matthew Wise, *From Price Waterhouse to Dukes and Beyond: Bridging the Gap Between Law and Social Science By Improving the Admissibility Standard for Expert Testimony*, 26 BERK. J. EMP. & LAB. L. 545, 561 (2005).

88. 563 F.2d 353 (8th Cir. 1977).

89. Nelson and Bridges are aware of the caveat: "if the trial court had come to the same interpretation of the events as we offer, it does not necessarily follow that the plaintiffs would have prevailed. The option of the court of appeals contains language that might treat the political effectiveness of various groups of workers as a valid basis for paying them different wages." Nelson & Bridges, *supra* note 57 at 167.

persuasion on the plaintiff.[90] The fact that the plaintiff was able to discredit the external market defense with expert testimony does not mandate liability.[91] The fact finder must also be convinced that sex was a motivating factor in the compensation decision.[92] Not all internally-driven compensation schemes that result in lower wages for women performing the same work as men satisfy this condition.

ii. Disparate Impact Law

At first blush, disparate impact law seems an adequate means of handling the market defense. Disparate impact law is all about identifying and then scrutinizing the business-relevancy of neutral employment practices that adversely impact a protected class.[93] In theory, this is the vehicle to examine whether market-based practices are harming women, and if there is an adverse impact, to assess whether there is a legitimate management interest in continuing such a market-based practice. However, disparate impact proves to be an unfaithful servant to wage equality because of doctrinal and practical issues.

The first problem is that it is unclear whether disparate impact theory is available for plaintiffs claiming gender based pay discrimination. The Bennett Amendment, a coordination clause between the EPA and Title VII, states that there will be no Title VII violation if the compensation differentiation is "authorized by the provision of section 206 (d) of title 29"[94] of the EPA. There are two possible interpretations of the Bennett Amendment. A broad interpretation would preclude a finding of violation in a case of gender based pay discrimination, unless the practice would have violated the Equal Pay Act as well, including the restrictive condition of "equal work." A narrower reading of the amendment would incorporate only the four affirmative defenses of the EPA[95]

In *Washington v. Gunther* the Supreme Court opted for the narrow interpretation, enabling plaintiffs basing their wage discrimination claims

90. *See* Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981) (holding that employer bore no burden of persuasion that legitimate, nondiscriminatory reasons for the challenged employment action existed).

91. *See* St. Mary's Honor Center v. Hicks, 509 U.S. 502 (1993) (holding that the trier of fact's rejection of employer's asserted legitimate, nondiscriminatory reasons for its challenged actions does not entitle employee to judgment as a matter of law under the *McDonnell Douglas* scheme applicable to discriminatory treatment cases).

92. *Id.*

93. Andrew Spiropoulos, *Defining the Business Necessity Defense to the Disparate Impact Cause of Action: Finding the Golden Mean*, 74 N.C. L. REV. 1479 (1996).

94. *See* 42 U.S.C. § 2000e-2(h) (2000).

95. *See* Weiler, *supra* note 53, at 1734-35.

on Title VII to avoid proving the jobs compared involved "equal work."[96] But the Court did explain the amendment could have significant consequences for Title VII litigation, on account of the fourth affirmative defense to an EPA claim. This defense states the employer can justify pay disparity resulting from "any other factor other than sex" (Hereinafter: "AFOTS defense"). The court intimated but did not decide whether the AFOTS defense undermines *Griggs*-type disparate impact analysis under the EPA, and by the Bennett Amendment, under Title VII as well.[97] The Court did not conclusively decide this issue in *Gunther*.[98] On this judicial intimation several jurisdictions have interpreted the EPA and Title VII as restricting sex based compensation discrimination claims to disparate treatment type analysis.[99] Other courts resisted, continuing to apply disparate impact analysis to both EPA and Title VII claims.[100]

In *Smith v. City of Jackson*, an age discrimination case that looked into the applicability of disparate impact to the Age Discrimination in Employment Act (1967),[101] the Supreme Court noted in a footnote: "if Congress intended to prohibit all disparate impact claims, it could have certainly done so.[102] For instance, in the Equal Pay Act, Congress barred recovery if pay differential was based "on any other factor"—reasonable or unreasonable—"other than sex."[103] Again, there is a strong suggestion, albeit in dictum, that the EPA's fourth affirmative defense effectively rules out disparate impact.[104]

96. Washington v. Gunther, 452 U.S. 161 (1981).

97. *Id.* at 170-71.

98. The court addressed this issue in *Gunther* only to explain why a narrow reading of the Bennett Amendment would not necessarily render it superfluous. *Id.* at 171 ("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 . . . we consider it clear that the Bennett Amendment, under this interpretation, is not rendered superfluous.").

99. *See generally* cases discussed *infra* notes 127-131 and accompanying text.

100. *See, e.g.*, EEOC v. J.C. Penney Co., Inc., 843 F.2d 249, 253 (6th Cir. 1988) ("In our circuit, however, the Bennett Amendment cannot constitute a blanket bar to all claims of wage discrimination based on disparate impact because the 'factor other than sex' defense does not include literally any other factor, but a factor that, at a minimum, was adopted for a legitimate business reason."). For a full discussion of the split among this circuits pertaining to the interpretation of the AFOTS defense, see Ruben Bolivar Pagan, *Defending the "Acceptable Business Reason" Requirement of the Equal Pay Act: A Response to the Challenges of Wernsing v. Department of Human Services*, 33 IOWA J. CORP. L. 1007 (2008).

101. 29 U.S.C. § §621-633a (2000).

102. Smith v. City of Jackson, 544 U.S. 228 (2005).

103. *Id.* at 239.

104. The suggestion in *Gunther* that disparate impact is not available under Title VII is misguided. This suggestion would lead to an implausible situation where two similar claims of Title VII compensation discrimination, one claiming race or national origin base discrimination and the other claiming sex based discrimination, would not be offered the

For individual claimants, the disparate impact course of action may prove too expensive. It is not sufficient to argue that to prove specific practices disparately impact women compared to men, the plaintiff has to offer statistical data supporting the claim which requires collecting data and hiring experts to conduct regression analysis. Take, for example, the argument presented in section II.B that variance between the sexes in negotiation skills and styles can adversely impact the compensation of women. General reference to the negotiation literature on this topic will not satisfy the requirement of statistical proof of disparate impact.[105] Thus, a successful plaintiff will have to engage in at least a three step process to establish his prima facie case of disparate impact: (1) identify the particular "market" practice they deemed discriminatory,[106] (2) collect data from within the organization on how this practice affected the wages of individual employees, and (3) run the statistical regression analysis to show the required disparity between men and women. It is highly unlikely that individuals will find it worthwhile to invest the resources to pursue such analysis.

But even if we focus on class action cases, where investment in preparing a disparate impact claim may prove economically worthwhile, the theory will encounter doctrinal hurdles. Statistical disparity resulting from application of a neutral employment practice establishes only a prima facie case of discrimination. At this point the employer has the opportunity

same scope of protection. The sex based claim would be restricted to disparate treatment, while the race claim would resort to the disparate impact model as an alternative.

105. *See* New York City Transit Auth. v. Beazer, 440 U.S. 568 (1979) (showing that general population comparisons discounted by the Court). *But see* Dothard v. Rawlinson 433 U.S. 321 (1977) (finding that disparate impact was proven by using general population data on how height and wage requirements disparately impact women in comparison to men). The argument that negotiation practices adversely impact women more resembles the Beazer decision, which dealt with the adverse impact of denying employment to individuals who participated in methadone maintenance program on racial minorities. In both cases there could be some variance between the impact of the practice on the defendant's work force and the impact on the general population. When dealing with height and weight requirements, using general population data may be appropriate because there is no reason to suspect that a specific workplace will display different patterns from the general population. Many nuanced considerations are usually present when dealing with compensation determination. The employer can rightly demand that the statistical regression analysis will be conducted on his actual workforce.

106. The Civil Rights Act of 1991, which codified disparate impact law, relieves the plaintiff of the requirement to isolate specific employment practices for the statistical analysis in cases where "the complaining party can demonstrate to the court that the elements of a respondent's decision making process are not capable of separation for analysis" in which case "the decision making process may be analyzed as one employment practice." 42 U.S.C. § 2000e-2(k)(1)(A)(i) (2000). But this exemption is usually irrelevant to the situation discussed in this Article, where the plaintiff targets a specific employment practice, such as reliance on prior salaries, matching counter offers, or individual negotiations, which can be separated from the bottom-line compensation decision.

to demonstrate that the challenged practice is "job related for the position in question and consistent with business necessity."[107] This is a relevancy test. In other contexts of disparate impact law the business necessity defense has been interpreted quite broadly.[108] Although cost-saving justifications have been rejected in the context of disparate treatment,[109] usually when an employer raises a cost-saving or profit-enhancing argument for his disparate impact practice, it will qualify as a "business necessity."[110] Structuring pay levels in a manner that takes into account employee individual wage expectations or demands may meet the applied standard of Title VII business necessity. The business necessity defense is not restricted to productivity or ability arguments. It is rather a loose-reviewing mechanism, which engages in a balancing act between the interest of protected group members and the interest of the employer.[111] When it comes to profitability or labor cost saving claims, the scale is skewed toward the employer's interest.[112] Under this standard of review,

107. *See* 42 U.S.C. § 2000e-2(k)(1)(A)(i)(2000).

108. *See* Michael Selmi, *Was the Disparate Impact Theory a Mistake?*, 53 UCLA L. REV. 701, 705-706 (2006) (concluding that "while it is true that the disparate impact theory allows proof of discrimination without the need to prove intent, employers are allowed to justify their practices under a business necessity test. Because that test allows for normative judgments regarding what practices are properly defined as discriminatory, courts readily accept most proffered justifications."); Spiropoulos, *supra* note 93 (The Supreme Court has implemented two standards of review for the business necessity defense. When skill and jobs can be measured by scientific validation techniques the court is more willing to scrutinize the business justification of the employer. But for jobs requiring special skills and other qualities that cannot be measures empirically the courts give more latitude to the employer's discretion.).

109. *See* Los Angeles Dep't of Water and Power v. Manhart, 435 U.S. 702, 717 (1978) (holding that challenged differential violated Title VII); *see also* Wilson v. Southwest Airlines Co, 517 F. Supp. 292 (N.D. Tex. 1981) (presenting a similar rejection of a profit argument under the Bona Fide Occupational Qualification (BFOQ) defense in a disparate treatment case).

110. Mark S. Brodin, *Costs, Profits, And Equal Opportunity*, 62 NOTRE DAME L. REV. 318 (1987).

111. After the employer establishes a business necessity defense, the plaintiff can still resort to offering an alternative employment practice which achieves the same goal as the disparately impacting practice. *See* 42 U.S.C. § 2000e-2(k)(1)(A)(ii)(2000). Yet plaintiffs will find it hard to come up with alternative practices which are as cost effective.

112. *See, e.g.*, EEOC v. J.C. Penney Co., Inc., 843 F.2d 249 (6th Cir. 1988) (detailing how an employer "head of household" benefit scheme was challenged under disparate impact law. The employer covered only spouses of employees that earned more than half of the couple's total income. This program disparately impacted the coverage of women as compared to men. Business necessity was established since the objective was to cover the neediest employees, at the lowest cost. Taking cost into account was not governed by the *Manhart* decision since it did not intend to discriminate between the sexes.); Wambheim v. J.C. Penny Co. 705 F.2d 1492 (9th Cir. 1983) (stating the same contention); Christensen v. Iowa, 563 F.2d 353, 356 (8th Cir. 1977) (willing to accept, under Title VII jurisprudence, an employer's adherence to market pressure in setting wages: "We find nothing in the text and history of Title VII suggesting that Congress intended to abrogate the laws of supply and

proponents of the market justifications can argue that negotiation techniques which may disparately impact women are lawful.[113] If the techniques are aimed at promoting profitability by extracting more of the contractual surplus, they may meet the threshold of the business necessity standard.

Ian Ayres offers the following guidelines for crafting the contours of "business necessity" with relation to the increasing profitability argument[114]:

> Policies that exploit a firm's market power to extract supra-competitive profits from employees or consumers should not fall within the limits of the business necessity defense in disparate impact litigation. Even though such policies can substantially enhance a firm's profitability, profits that are the byproduct of market failure are less justified than those that are a byproduct of competition. By enjoining employment and consumer policies that extract supra-competitive profits disproportionately from racial minorities and other protected classes, disparate impact law can help make markets both more competitive and less racially discriminatory.[115]

Ayres's contribution is in noticing "not all increments to profitability deserve equal judicial respect."[116] He sketches this vignette:

> An employer pays high-school graduates an amount equal to their marginal productivity but institutes a new policy of paying non-high school graduates less. Imagine that the policy has a disparate impact against African Americans, who, in this hypothetical, are less likely to have a high school diploma. The employer might justify the pay difference by arguing that non-graduates tend to be less productive than high-school graduates. I will call this the productivity defense. In the alternative, the employer might try to justify paying non-graduates less, not

demand or other economic principles that determine wage rates for various kinds of work. We do not interpret Title VII as requiring an employer to ignore the market in setting wage rates for genuinely different work classifications.").

113. The Supreme Court has stated that an employer's decision to grant a larger raise to lower echelon employees for the purpose of bringing salaries in line with that of surrounding police forces was a decision based on a "reasonable factor other than age" in relation to an age discrimination disparate impact claim. *See* Smith v. City of Jackson, 544 U.S. 228, 242 (2005). Although Smith is an age discrimination disparate impact case relating to the disparate impact of a raise policy on younger verses older employees, the rationale of granting deference to the employer's business judgment about salary setting may be applicable to Title VII disparate impact wage discrimination jurisprudence.

114. Ian Ayres, *Market Power and Inequality: A Competitive Conduct Standard for Assessing When Disparate Impacts Are Unjustified*, 95 CAL. L. REV. 669 (2007).

115. *Id.* at 669.

116. *Id.* at 672.

> because the non-graduates are less productive, but solely because these employees have fewer employment alternatives than high-school graduates. For example, imagine that non-graduates were more tied to their hometown than graduates and hence had fewer work alternatives. I will call this the market power defense, because the lower pay is a function of the employer's greater market power over the non-graduates. Note that both of these defenses are, at core, about profitability. The productivity defense in essence says that the policy enhances the firm's profitability because the employer will be more profitable if it is not forced to pay workers more than their marginal productivity. A firm that pays less productive workers the same as more productive workers will tend to be unprofitable. But the market power defense is also about profitability, because finding a group of workers who will work for a sub-competitive wage is also an effective way for a firm to increase its profits.[117]

From a normative policy perspective, Ayres may be right that the "business necessity" defense should be scrutinized more closely to ascertain what type of profitability argument the employer is promoting. When the employer is claiming the market enables him to extract a larger share of the contractual surplus from one group of employees than from another for the same work (in our case – extracting more from women on average than from men) this should fall outside the boundaries of a business necessity defense. Regrettably, this approach has yet to be implemented in Title VII disparate impact litigation, where it is quite clear that profit-enhancement justifications are treated with deference. Nonetheless, as I discuss in section IV.D, Ayres's distinctions are easier to implement in the EPA framework.

A summary of my concerns about the prospects of disparate impact law to serve as a gatekeeper against employer market based justifications of gender pay disparity would go thus: disparate impact law requires the analysis of statistical data to establish the correlation between specific employment practices and wage levels across gender lines. The law requires the data be firm specific, necessitating both expertise and resources, which make such an analysis economically infeasible in many cases brought by individuals. Even if the initial burden of demonstrating statistical disparate impact is met, courts often defer to employers' explanations of business needs and profit maximizing behavior, which fall neatly within current interpretation of the business necessity defense. Lurking in the background are at least two remarks by the Supreme Court that disparate impact analysis is unavailable in gender wage discrimination cases.

117. *Id.* at 672-73.

IV. THE PARTIAL CAUSATION MODEL FOR WAGE DISCRIMINATION CLAIMS

A. Initial Justification for a Partial Causation Model

Embedded in Title VII theory of discrimination is a causal link between group membership and adverse treatment of group members.[118] This concept of discrimination impedes the ability to combat discrimination when such causation is unverifiable or too complex. Ascertaining which factors contribute to disparity in compensation between two similarly situated employees is one such case. Absent direct evidence that the employer intentionally took gender into consideration when setting wages (the *Corning Glass* scenario), and especially if the employer insists that market constraints or opportunities warranted paying one employee who happened to be male more than his female colleague, the causation model is of limited use. In theory, resorting to disparate impact analysis, we can go about weeding out which factors correlate with gender and thus meet the causation requirement, but in practice, this is usually impossible.

Sex discrimination is treating people differently on the basis of their gender. The causation model opts to prove discrimination by requiring the plaintiff to present evidence of causation – how the prohibited factor (sex) directly or indirectly affected the decision. The model emphasizes the need to show how the irrelevant factor, gender, found its way into the decision-making process.

Another way to define gender discrimination is by focusing on whether the employer has used relevant factors in setting pay. The policymaker identifies the range of pertinent factors for determining compensation. Any wage disparity between men and women that cannot be explained by one or more of these legitimate factors is deemed as a matter of law a manifestation of gender discrimination. One way to legally formulate this concept of discrimination is to institute an irrebuttable presumption of discrimination when an employer cannot offer an explanation that meets one of those authorized reasons. Any other basis for the disparity, if not on the list of qualified explanations, is rejected and the fact finder must conclude that sex discrimination has tainted the decision-making process. The difference between the two frameworks can be articulated as follows: the traditional model is formulated as a negative command "sex is an irrelevant factor". It permits broad discretion; allowing the decision maker to base his decision on infinite grounds, restricted only by gender based decisions. The proposed model is

118. Kelman, *supra* note 75.

structured around a positive command "you can base your decision only on an authorized list of factors".

Application of the market defense to these two frameworks can exemplify their divergence. In the traditional framework the market argument aims to show that the employer based his decision on some factor other than sex. The relevance of that other factor is not closely scrutinized. Under the proposed model, the market explanation must be examined to see whether it falls within the scope of the relevant factors. The defense will only be established if it is determined that the specifics of the market justification are in fact relevant to wage determination. Under this regime the ability to justify wage disparities with market based arguments is bounded by a relevancy test.

The traditional model of defining discrimination by irrelevant factors has at least three strong justifications. First, it safeguards the actor's freedom. Restrictions are placed on the employer only in the prohibited zone; any other motivations, frivolous or irrational, are not subject to review. Second, it is assumed that it is an easier task to identify what are the wrong reasons to reach a certain decision, than to compile a complete list of the "good reasons." The risk of making an error is higher when we are required to compile a conclusive list of relevant inputs than when we are only committed to make sure that the factors on our "bad list" are indeed irrelevant and socially harmful. The possibility that there are additional unidentified harmful motives does not derogate the task, since the focus is on particular wrongs – making sure that those already identified are regulated. Later the list of irrelevant factors can be expanded, as was the experience with employment anti-discrimination mandates, expanding its reach from the initial five core categories of race, color, religion, sex, and national origin to issues such as age based discrimination, disability and pregnancy. Lastly, if our objective is to combat discrimination, especially discrimination based on group membership, the negative definition framework seems to provide a natural fit. It accomplishes what it set out to do: weeding out only practices or decisions that are based on group membership. On the other hand, following the relevant factor list may result in interfering with decisions that are not motivated or affected by group membership considerations.

The relevant-factor definition of discrimination has its advantages too. Assuming we want to control only decisions based on group membership, turning to this definition may advance this goal. When the decision-making process is complex and based on multiple factors, or subjective decentralized evaluations, filtering it through a comprehensive checklist of authorized factors may prove beneficial.[119] The traditional model raises the

119. This proposal stems from a similar understanding of the complexity of workplace

question whether group membership played a role in the decision-making, but the answer in many cases is usually inconclusive. We don't know, and therefore our understanding is that the plaintiff's burden of persuasion has not been met. The law has developed evidentiary presumptions and tools to aid a plaintiff in meeting his causation burden. Both disparate treatment law and disparate impact law have moved in this direction.[120] But at the end of the day, as the market defense has proven all too well, the causation requirement effectively precludes liability in these complex multi-component cases, enabling employers to evade liability in some cases where causation to group membership is present, but cannot be isolated and verified among the myriad factors contributing to the decision. On the other hand, the relevant-factors approach keeps things simple. Once the decision maker fails to show that he was guided by the authorizing factors, he is liable. Liability attaches even in cases when he can point to other factors, not on the list, which have no known statistical correlation with membership in the protected group.

Applying the traditional model will result in false negatives. Some decisions are sanctioned, although they are based on group membership, in the disparate treatment or disparate impact sense. Causation may exist in fact but not be detected due to information and verification problems or the complexity of the causal link between some factors known to affect the decision and membership in the protected group. Turning to the positive definition model will lead to false positives. Some decisions will be deemed discriminatory, since the decision-maker relied on factors not on

decision-making that is driving a growing number of scholars to recommend that employers adopt structured processes and protocols to self regulate their compliance with Title VII. *See, e.g.*, Susan Sturm, *Second Generation Employment Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458 (2001) (proposing a structural regulatory solution to second generation employment discrimination); Tristin K. Green, *Discrimination in Workplace Dynamics: Toward a Structural Account of Disparate Treatment Theory*, 38 HARV. C.R.-C.L.L. REV. 91 (2003); Cynthia Estlund, *Rebuilding the Law of the Workplace in an Era of Self-Regulation*, 105 COLUM. L. REV. 319, 366-372 (2005). The structural approach is an attempt to improve compliance with anti-discrimination mandates in situations we fear that the employer is perhaps engaging in unconscious bias and discrimination. Instituting self evaluation and prophylactic measures is presumed to decrease the risk of the employer unconsciously and unintentionally reaching unlawful discriminatory decisions. The difference between my proposal and the structural approach is that the latter builds on establishing process and procedures to de-bias the institution from its unconscious discriminatory practices. Yet the structural approach is still focused on causation. Process is established to make sure, as a prophylactic measure, that prohibited considerations are not part of the decision-making process.

120. In disparate treatment law, the landmark decision of *McDonnell Douglas v. Green*, 411 U.S. 792 (1973), established the four prong prima facie case (PFC) for an individual disparate treatment case and articulated the burden of production the employer carries to answer the PFC. In disparate impact, the Civil Rights Act of 1991 codified the various stages and burden of persuasion shifting, 42 U.S.C. § 2000e-2(k) (2000).

the affirmative list, but these factors have no underlying causal links to membership in the protected group.[121] Given that both models have their costs, the question is which model is ultimately more beneficial.

As a starting point, one should always turn to the traditional model. But in cases where there is growing confirmation of its failure to identify discrimination, serious consideration should be given to switching to the relevant-factors model. In other words, if there is suspicion that too many false negatives are occurring, the traditional model is ineffective in achieving its goal of eliminating group-based discrimination. The second qualification for considering the relevant-factors model is the confidence that a policymaker has in its ability to identify many pertinent factors. If the affirmative list is comprised of the majority of appropriate grounds, this decreases the chance that there will be false positive determinations of discrimination.

The endeavor to eliminate the gender wage gap is an area of discrimination law where we should start questioning the effectiveness of the traditional model. The gender wage gap remains a persistent barrier to sex equality in the workplace. The average earnings of women working full time is still around twenty percent less than the average earnings of men holding a full time job.[122] The wage gap has not diminished in any meaningful way in the past decade.[123] Section II outlined circumstances where the causation model failed to identify gender-based compensation schemes. The failure was not due to a lack of understanding of how to apply the causation model. The failure was imminent due to the structural constraints of the traditional framework. Given the complexity of how gender and sex correlate with other social factors such as negotiation skills, mobility, career expectations, social norms, and various other issues we

121. One such false positive case is when the disparity in compensation is due to changes over time in the demand or supply of employees in an industry, profession, or geographical area as was the case in *Ciardella v. Carson City School District*, 671 F. Supp. 699 (D. Nev. 1987) (showing that due to economic changes in the job market, the employer was required to extend an offer of compensation of approximately $10,000 more per year than the plaintiff was receiving while performing the same job). In these situations, there is no underlying, unidentified statistical correlation between the temporal market conditions and the sex of the workers hired at the different points in time. But since market conditions are not listed on the affirmative list, an employer maybe found liable. In these situations, the positive definitions of discrimination entail costs.

122. In the first quarter of 2009, women who worked full time had median earnings of $649 per week, or 78.9 percent of the $823 median for men. U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, USDL 09-1242, *Usual Weekly Earnings of Wage and Salary Workers: First Quarter 2009* (2009), *available at* http://www.bls.gov/news.release/pdf/wkyeng.pdf.

123. In 1998, women earned about 76 percent as much as men. The median weekly earnings of female fulltime wage and salary workers were $456 compared to $598 for men. U.S. DEP'T OF LABOR, BUREAU OF LABOR STATISTICS, REPORT 928, *Highlights of Women's Earnings in 1998, available at* http://www.bls.gov/cps/cpswom98.pdf.

have not even begun to think about, the causation model lets too many of these factors escape meaningful review. The result is too many false negatives, errors that keep feeding the gender wage gap.

Implementing the relevant-factors model cannot solely be based on a high rate of false negatives. Equally important is the consideration of whether policymakers are capable of ascertaining the appropriate factors. This is an essential prerequisite, needed to ensure that unnecessary or unfair restrictions are not placed on the decision maker's discretion. Compensation determinations meet this perquisite. We can ascertain that compensation should somehow correlate with the job or task being preformed and individual productivity. We can state that employees performing the same job, under similar conditions, with equal productivity should be compensated similarly. How we classify the "sameness" of jobs or working conditions and how to exactly measure productivity is debatable. But this is an issue where we have an initial agreement of what are the relevant factors.[124]

B. Is The Equal Pay Act a Partial Causation Model?

The Equal Pay Act consists of two parts. The first part, the prima facie case (PFC), sets out the criteria for determining which jobs are deemed equal and warrant equal pay to employees of opposite genders. The PFC elements are that an employer pays: (1) different wages (2) within the same establishment (3) to employees of opposing sexes (4) for equal work on jobs that require equal skill, effort, and responsibility and which are preformed under similar working conditions. The second part of the EPA lists the four affirmative defenses: (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or production, or (iv) a differential based on any other factor other than sex. Once the plaintiff establishes her PFC, the burden of persuasion shifts to the defendant employer to show the disparity is caused by one of the four affirmative defenses.[125]

The PFC's fourth element focuses on general attributes of the jobs compared, making sure that the positions are "equal," in essence, requiring

124. Guaranteeing reduction in false positive rates requires restrictive definitions of what qualifies as equal work and what qualifies as equal productivity.

125. Corning Glass Works v. Brennan, 417 U.S. 188, 196-97 (1974) ("[W]hile the Act is silent on this question, its structure and history also suggest that once the Secretary has carried his burden of showing that the employer pays workers of one sex more than workers of the opposite sex for equal work, the burden shifts to the employer to show that the differential is justified under one of the Act's four exceptions. All of the many lower courts that have considered this question have so held, and this view is consistent with the general rule that the application of an exemption under the Fair Labor Standards Act is a matter of affirmative defense on which the employer has the burden of proof.").

equal skill effort and responsibility and performed under similar working conditions. It is the plaintiff's burden to present the case for this general equivalence. The affirmative defense shifts the focus to individual differences between two or more people performing "equal work." Basically what the employer is arguing, when raising one of the four affirmative defenses, is that although the plaintiff and the comparator (the individual whom the plaintiff is comparing herself to) are performing the same job, they are not entitled to equal compensation due to differences in their individual performance or work history. Seniority, merit, and quantity based earnings all relate to individual attributes of specific individuals.

The PFC of the EPA certainly deviates from the causation model. A plaintiff neither has to show that the employer took into account her sex when determining compensation, nor does she have to demonstrate the disparate impact of the employer's practice on women as a group. The omission of causation in the PFC makes the EPA accessible to individual employees. One does not need extraordinary resources to argue, "I am performing the same job, in the same establishment, but being paid less than comparable men." The plaintiff does not have to offer any theory or evidence of causation between her sex and her lower compensation. She just has to present factual evidence that she is being paid less than a male co-worker performing the same job. The PFC stage relies on a relevancy test only. It takes pain to detail the relevant factors such as working in the same establishment, equal work, equal skill, effort and responsibility, and work under the same working conditions. All these factors are related to productivity. Making sure that the plaintiff and the comparator are performing jobs that have the potential of generating the same productivity is central in modeling employer decision-making.

The affirmative defense stage turns to the issue of individual productivity. If the plaintiff is successful in meeting her burden of persuasion to show the jobs are potentially equal (can generate the same output from the employer's perspective), the employer can argue that pay differentials are due to individual variations in the performance of the plaintiff and the comparator. The three specific affirmative defenses authorize pay systems based on seniority, merit, or production. All three reference factors that proxy individual productivity. It is assumed that more experience (seniority), more training or credentials (merit), and contributing more production (production) enhance an individual's productivity. These three defenses fall squarely in the relevancy model, encompassing factors that are relevant to pay variations.

The fourth defense, "any other factor other than sex" (AFOTS), poses a serious challenge to my argument that the EPA is a partial causation model of discrimination. The AFOTS defense uses language associated with the causation model. "Any other factor other than sex," sounds

equivalent to a mandate prohibiting only decisions that are driven by sex-based motivations. It suggests that any non-sex based factor is an acceptable justification for gender wage disparity. I think that normatively (if not linguistically), this is a wrong reading of the AFOTS defense. If any factor other than sex could justify pay disparity, this would make the three specific defenses redundant. Why mention merit, seniority, or individual production if all three fall in the catchall exemption of "any other factor?" A better interpretation of AFOTS is that the catchall exemption references only to explanations that correlate with productivity, as long as they are not tainted by intentional sex discrimination. If AFOTS is interpreted in this limited fashion, the EPA is an application of the partial causation model of discrimination. It does not require the plaintiff to demonstrate causation between her sex and lower compensation, and it does not relieve an employer of liability by severing causation between sex and compensation. Looking at the mandate as a whole, it can be summarized as requiring the employer to provide productive workers of opposite sex, who are performing the same job, with equal pay. Whenever an employer deviates from this mandate he is deemed discriminatory, even if there is no indication that he was motivated by sex based considerations or that the factors he relied on adversely impact women as a group.

C. Why Was The Equal Pay Act Interpreted as a Causation Model?

EPA jurisprudence has not indicated any willingness to deviate from the traditional understanding of what constitutes sex discrimination and the centrality of the causation model. This can be displayed by the treatment of the market defense. A conflict among the Circuits exists with regards to the proper contours of the catchall affirmative defense, "any factor other than sex" (AFOTS). The Supreme Court has resisted settling this conflict.[126]

In the conservative camp, the Eighth Circuit led the way in *Strecker v. Grand Forks County Social Service Board*,[127] holding that any determination by an employer that he established a neutral pay system qualifies as "any other factor other than sex."[128] The Seventh Circuit followed suit in *Wernsing v. Department of Human Services*,[129] where a female employee challenged the practice of basing compensation on

126. Randolph Cent. Sch. Dist. v. Aldrich, 506 U.S. 965 (1992).

127. 640 F.2d 96 (8th Cir. 1980).

128. Another 8th Circuit decision affirming the *Strecker*'s standard is *Taylor v. White*, 321 F.3d 710, 719 (8th Cir. 2003) ("[w]e 'do not sit as a super-personnel department that re-examines an entity's business decisions . . . .' As such we are reluctant to establish a per se rule that might chill the legitimate use of gender-neutral policies and practices.").

129. 427 F.3d 466 (7th Cir. 2005).

previous salaries of lateral hiring because it resulted in substantially different pay for male and female employees. The Seventh Circuit stated that the EPA only "asks whether the employer has a reason other than sex--not whether it has a 'good' reason."[130]

The broad interpretation of the AFOTS defense transforms the EPA into a disparate treatment only model of discrimination (not allowing consideration of disparate impact).[131] Since the employer can justify his pay decisions by any non-sex factor, endeavors like those of the plaintiff in *Wernsing* to show how the challenged practice affected women's compensation are futile. The EPA under this interpretation regulates only intentional sex based compensation decisions. The Eight and Seventh Circuits' reading of the EPA, especially the AFOTS defense, leaves no doubt that they did not acknowledge any innovative understanding of what are unlawful wage practices. This understanding is grounded deep within the causation model, limited to conventional intentional disparate treatment.

Other Circuits are more open-minded about scrutinizing employers' market based explanation for wage disparity. Probably the most cited example is the Ninth Circuit decision in *Kouba v. Allstate Insurance Co.*[132] In that case, the plaintiff argued that her employer's practice of using prior salaries to determine compensation was discriminatory because it resulted in the average female sales agent being paid less than her average male counterpart. When considering possible interpretations to the AFOTS defense, the court rejected the two extreme options: one that would enable the employer to evade liability by showing he relied on any factor other than the employee's sex. This interpretation was dismissed since employers can manipulate factors having close correlation to gender.[133] The second interpretation rejected is one that would deny employers the opportunity to use acceptable factors, if it perpetuates historic sex discrimination.[134] Instead the court required that the employer show that the pay system was based on an "acceptable business reason."[135] The Sixth Circuit also incorporated the "acceptable business reason" limitation into the AFOTS defense. In *EEOC v. J.C Penney Co.,* it reasoned, "The 'factor

130. *Id.* at 468.

131. *Id.* at 469 ("An analogy to disparate-impact litigation under Title VII does not justify a 'business reason' requirement under the Equal Pay Act, however, because the Equal Pay Act deals exclusively with disparate treatment. It does not have a disparate-impact component.").

132. 692 F.2d 873 (9th Cir. 1982).

133. *Id.* at 876.

134. *Id.*

135. *Id.* at n.6 (declining to articulate what falls within the standard of "acceptable business reason" leaving the compiling of a list of unacceptable reasons or a more concise formulation of the standard to "another day".).

other than sex' defense does not include literally any other factor, but a factor that at a minimum, was adopted for a legitimate business reason." [136] The Eleventh Circuit followed suit in *Glenn v. General Motors Corp.* adopting the reasonable business reason standard when reviewing the employer's explanation that to encourage people to move out of hourly wage jobs into salaried tracks, it established a policy against requiring an employee to take a cut in pay, and that this policy, and not the sex of the employees, was the cause of the pay disparity between men and women.[137] Rejecting this explanation the court stated that "[t]he legislative history thus indicates that the 'factor other than sex' exception applies when the disparity results from unique characteristics of the same job; from an individual's experience, training, or ability; or from special exigent circumstances connected with the business. The pay disparity at issue here does not result from any of these reasons."[138] Finally, the Second Circuit in *Aldrich v. Central School District*, asserted that "we believe that Congress specifically rejected blanket assertions of facially-neutral job classification systems as valid factor-other-than-sex defenses to EPA claims." [139] It required the employer to prove that a bona fide business-related reason exists for the gender neutral factor that resulted in wage differentials.[140]

The "acceptable business reason" limitation of the AFOTS defense does not convert the EPA into a partial causation model of sex discrimination. The line of decisions which require the employer to offer an acceptable business reason for his pay practices simply incorporate a variance of disparate impact into the EPA,[141] in contrast to the more conservative circuits which permit only disparate treatment type claims. In essence, what the courts are saying is that in cases where the plaintiff meets her PFC, we require the employer to explain why his pay scheme, which resulted in the plaintiff being paid less than her male co-workers for equal work, is sound from a business perspective. In spirit, this is analogous to the "business necessity" defense. The "acceptable business reason" standard leaves employers with more latitude than the "business necessity" standard, which is constrained by the accumulative requirements of

136. EEOC v. J.C Penney Co., 843 F.2d 249, 253 (6th Cir. 1998).

137. 841 F.2d 1567 (11th Cir. 1988).

138. *Id.* at 1571.

139. 963 F.2d 520, 524 (2d Cir. 1992).

140. *Id.* at 526.

141. This is also how the *Wernsing* court characterizes the *Kouba* standard. "*Kouba*, which originated the 'acceptable business reason' requirement, did not explain its genesis; it was advanced as ukase. The ninth circuit proceeded as if the Equal Pay Act worked like the disparate-impact theory under Title VII: if the plaintiff shows that an employment practice adversely affects protected workers as a group, then the employer must provide a strong reason ('business necessity') for the practice." Wernsing v. Dep't of Human Servs., 427 F.3d 466, 469 (7th Cir. 2005) (citation omitted).

showing both job relatedness to the position in question *and* business necessity. It is hard to envision the "acceptable business reason" standard as invigorating a relevancy-based model of discrimination because it requires only cursory review of the business soundness of pay practices resulting in lower wages for women workers, without further guidance that these justifications must relate only to productivity concerns.

Why are the courts resisting the partial causation model? First and foremost, any relevancy-based theory of discrimination is antithetical to the historical and cultural basis of employment discrimination law in the United States. If jurists, litigators, and judges are educated and trained to conceptualize discrimination only as basing decisions on prohibited factors such as race or sex, it is extremely difficult to make the mental leap to the relevancy definition, which asks whether the decision was based only on relevant factors. It is inevitable that with this indoctrination the disposition is to construct the EPA as a traditional anti-discrimination mandate. But there are also at least three linguistic foundations within the language of both the EPA and Title VII that may have contributed to this interpretation.

First, whether you apply a broad or narrow interpretation, the AFOTS defense uses language associated with the causation model. It suggests that any non-sex-based factor is an acceptable justification for gender wage disparity. This linguistic reading certainly influenced the Seventh and Eight Circuits' understanding of AFOTS defense. The Bennett Amendment also contributes to the application of the causation model within the EPA. Although merely a coordination clause, which the objective was to clarify that employment practices authorized by the EPA shall not be considered a violation of Title VII, the Bennett Amendment was implicitly comprehended as bridging the gap between the two statutes, and partially unifying them to one body of law with respect to sex-based compensation discrimination.[142] If the two statutes are interrelated, then one theory of discrimination, the causation model, should govern them both. This conclusion is not warranted by the Bennett Amendment. It is a one-way coordination clause, restricting only Title VII by the EPA and not vice versa. Actually, if the premise is that the EPA and Title VII are virtually the same, there would be no need for a coordination clause. It is only when we recognize existing differences between the theory and elements of liability that a coordination mechanism is meaningful. The last linguistic hint of a causation model is the opening proviso of the EPA: "No employer . . . shall discriminate . . . on the basis of sex."[143] This language could also be understood as embracing the Title VII causation model. The

142. The court acknowledged that there are variations between the two statutes in the prima facie case and the scope of the employer's defense, but they do not consider these differences to be foundational. Washington v. Gunther, 452 U.S. 161 (1981).

143. 29 U.S.C. § 206(d) (2006).

proviso, however, should not be interpreted as an endorsement of the causation model. The following sentence, the substantive part of the EPA, immediately explains what it means in the context of the EPA to discriminate in terms of pay on the basis of sex, resorting to the relevancy model. The proviso is simply a term that is followed by its definition.

Normative considerations are also important. Parting from the causation model in favor of a relevancy test carries with it hefty limitations on managerial discretion in setting individual wage rates. It is feared that it will result in the elimination of differential pay altogether, as employers will constantly worry about employees coming forward with claims of pay inequality. Under a relevancy test, the burden to justify the pay scheme is substantially heavier than under the irrelevancy test, where you simply have to convince the fact-finder that sex considerations did not taint your decision-making process. The conflict among the circuit courts about the proper interpretation of the AFOTS defense can be explained by the discrepancy among the circuits regarding the latitude employers should have in constructing their pay schemes. The conservative camp shields employers from any intervention with managerial discretion beyond intentionally sex-based decisions, while *Kouba* and its progeny place some restrictions on employers, but only on the outskirts.[144] Shifting to a partial causation model takes a significant step forward in regulatory intervention, since any justification is screened against strict productivity-enhancing criteria. It should be clear that even under the strict standard, there is still ample room for individual differentiation (based on productivity considerations).

D. Can the Partial Causation Model be Resurrected within the Equal Pay Act?

Absent legislative amendments clarifying the structure of the EPA by highlighting the foundational differences from Title VII jurisprudence, it is unlikely the relevancy-based model of discrimination will be implemented. As illustrated, all of the federal circuits that have interpreted the EPA AFOTS defense share an implicit understanding that causation is the core issue of liability. Nonetheless, I think that one can build on the existing "acceptable business reason" advanced in *Kouba* and its progeny to emulate a paradigm that operates fairly similarly to the relevancy test. Although the theoretical foundation will be lacking, the end result would be satisfactory.

The "acceptable business reason" is a standard of review that

144. These decisions only accomplish in broadening the EPA to include disparate impact type claims. *See supra* notes 132-140 and accompanying text.

scrutinizes the employer's explanation for wage disparities. It currently provides employers considerable leeway, only ensuring that the employer's explanation is not hiding traditional sex discrimination. A similar outcome to fully implementing a relevancy test can be achieved by heightening scrutiny on employers, and requiring them to detail and substantiate their claims with facts and data supporting their contention that productivity enhancement is the underlying basis for the pay disparity.

Here, we can draw on Ayres' proposal to distinguish between general profitability claims and specific claims pertaining to productivity.[145] I have questioned the prospect of applying this important insight to Title VII's "business necessity" defense, but I am more optimistic of implementing it through the EPA AFOTS defense. Title VII is more of a market-driven statute than the EPA. The EPA is incorporated into the Fair Labor Standard Act of 1938 ("FLSA").[146] The central purpose of the FLSA is to secure minimum wage and overtime pay to covered employees, and to place restrictions on child labor.[147] These provisions are all anti-market measures. Regulations on minimum wage, overtime, and child labor all spur from an ideology that sometimes market outcomes are either inefficient or inequitable, even if they enhance profitability. The FLSA is about regulating market pressures, and the quest of employers to extract profits. In this statutory environment it is easier to explain why not all profit-maximizing behavior should be authorized. It is thus feasible to apply Ayres' distinction between profits sustained through depressing wages of one group of employee, which is not a valid "acceptable business reason," and profits gained through applying a policy that increases productivity, which is acceptable.[148]

In summary, the EPA can be salvaged. Meeting the PFC will require the employer to provide a productivity rationale for his general compensation system or for specific productivity variance between the plaintiff and her comparator. The failure to offer productivity related rationales will give rise, as a matter of law, to an irrebuttable presumption that the disparity is "because of sex." This framework preserves the causation model as the theoretical foundation of the EPA, but for all practical matters relieves the plaintiff of the need to point to causation either through disparate treatment or disparate impact analysis. Under this proposal, carrying the burden of the EPA prima facie case will establish a substantially stronger inference of discrimination than under Title VII discrimination claims.

145. Ayres, *supra* note 114.
146. 29 U.S.C. §§ 201-219 (2006).
147. *Id.*
148. Ayres, *Market Power and Inequality*, *supra* note 114.

E. The Paycheck Fairness Act

The best prospect for implementing a partial causation model within the EPA is the Paycheck Fairness Act.[149] The bill is an amendment to the EPA, and is currently pending in the Senate after passing in the House of Representatives. Section 3 revises the AFOTS defense by limiting its application only to differentials based on "a bona fide factor other than sex, such as education, training, or experience."[150] The bona fide factor defense applies only if the employer demonstrates that such a factor: (i) is not based upon or derived from a sex-based differential in compensation; (ii) is job-related with respect to the position in question; and (iii) is consistent with business necessity.[151] The defense does not apply where the employee demonstrates that: (1) an alternative employment practice exists that would serve the same business purpose without producing such differential; and (2) the employer has refused to adopt such alternative practice.[152]

The Paycheck Fairness Act includes other important provisions such as expanded retaliation protection that covers inquiries and disclosure of information about wages;[153] strengthened remedies, including compensatory and punitive damages;[154] requiring the EEOC to provide training on issues pertaining wage discrimination;[155] and authorizing the Secretary of Labor to make grants to programs providing negotiation skills training for girls and women, and to conduct studies and provide information regarding the means available to eliminate pay disparities between men and women.[156]

This bill addresses many of the barriers to gender pay equality discussed in this Article, including the significant impact of lack of information and negotiation skills on the wages of women. The new catchall exception is substantially narrower. First, it applies only to a bona fide factor.[157] Second, examples follow the general principle listing education, training, and experience, all issues relevant to productivity. There is no mention of any market justifications or sheer profit

149. Paycheck Fairness Act**,** H.R. 12, 111th Cong. (2009), *available at* http://www.govtrack.us/congress/bill.xpd?bill=h111-12.

150. *Id.* at § 3(a)(2).

151. *Id.* at § 3(a)(3).

152. *Id.*

153. *Id.* at § 3(b).

154. *Id.* at § 3(c).

155. *Id.* at § 4.

156. *Id.* at §§ 5, 6, and 9.

157. The bona fide requirement was implicitly incorporated in the existing interpretation of the AFOTS. None of the circuits interpreting the AFOTS defense alluded to the possibility that they will not review a claim that the defense served as a subterfuge for intentional discrimination.

maximization arguments. Third, any defense would be scrutinized under the equivalent of the Title VII "business necessity" standard.[158] One should note that the "business necessity" standard is applicable only to productivity justifications-– those factors that are listed as examples of the AFOTS, such as education, training, and experience. This would bar all non-productivity factors, and subject productivity-related factors to the additional scrutiny of the "business necessity" standard.[159]

Although the proposal incorporates Title VII "business necessity" language, it is not a revival of disparate impact theory within the EPA. The bill does not require the plaintiff to offer evidence that the scrutinized factor disparately impacts women, nor does it limit its application to any factor. The adoption of the "business necessity" standard is limited in scope. Only justifications such as those listed as examples of legitimate factors are subject to "business necessity" scrutiny. All other explanations, including market-based justifications are dismissed a priori, without "business necessity" scrutiny. The structure of the amended AFOTS defense is a true manifestation of a partial causation model of discrimination. It takes pain in explaining what counts as a legitimate factor to make compensation decisions: a productivity-related explanation that fulfills the business necessity requirement. The bill implicitly states that, as a matter of law, sex discrimination is established when gender pay disparities are the outcome of utilizing a criteria not authorized by the statute.

V. CONCLUSION

When discussing my ideas about pay equality with colleagues and friends, I am usually confronted by one of three reactions. The skeptical want to know how it is possible that an employer can pay two equally productive workers different wages. They think that the disparate pay is the ultimate proof that these two workers are not equally productive. If indeed they are equally productive, a profit-maximizing employer should opt for hiring only employees willing to work for the lower wages, leading to a new equilibrium where again all workers with equal productivity are compensated at the same wage rate. The skeptical also make the argument

158. The Act uses almost identical language to the definition of "business necessity" defense of Title VII. *Compare id. with* 42 U.S.C. § 2000e-2(k) (2006).

159. Section 3(a)(3)(B) of the bill states that "[t]he bona fide factor defense described in subparagraph A (iv) [the AFOTS] shall apply only if the employer demonstrates" business necessity. Paycheck Fairness Act**,** *supra* note 131, at § 3(a)(3)(B). I read this to mean that the employer has to meet two accumulative conditions. First, he has to identify the bona fide factor other than sex, which is limited only to productivity issues such as education, training, and experience. In addition, he has to demonstrate that these factors meet the "business necessity standard" of Title VII. This is a very strict standard.

that negotiation skills are relevant vocational abilities, which enhance the performance of employees. The libertarians are worried about managerial discretion and the ability under my thesis to actually implement deferential pay based on individual merit and productivity. They fear employers will react by instituting rigid pay schedules, similar to the ones in the unionized sector. These pay schemes will undermine productivity because they will curtail any individual incentive to excel and work hard. The enthusiasts want more; they inquire where else can the model of partial causation be applied? They support the idea of relevancy checklists to combat discrimination.

The response to the skeptical is threefold. The formal answer is that the partial causation model does not have any qualms with employers that argue that the plaintiff and the comparator are not equally productive. This is precisely what the model wants the employer to come forward and say. The model applies only if the employer insists on raising non-productivity claims, implicitly conceding that in terms of productivity, the workers are equal. For example, an employer can justify pay disparity if he argues that negotiation skills are a good proxy for future performance on the job. This may be true in specific professions and positions, but not across the board. This transforms the market argument into an ability criterion which is legitimate if the employer successfully presents evidence of a productivity enhancing attribute.[160] But it is not good enough for the employer to only justify the disparity by arguing he was not forced by market constraints to raise the wage of the female employee.

Why do employers keep hiring the higher paid individuals when they can hire equally productive employees for lower wages? In some industries and occupations, this is exactly what is happening, resulting in a labor market segregated across gender lines. The partial causation model does not apply to comparable worth claims. In industries and occupations where the supply of individuals willing to work for lower wages does not meet the aggregate demand, if given the chance the employer will engage in wage discrimination, paying individuals willing to work for lower wages their reservation wage, and filling the remaining vacancies with individuals demanding higher pay.[161] With the current economic meltdown, there are

160. The fact that some women are as effective as men when negotiating on behalf of third parties should be taken into account when an employer raises the argument that promotion of self-interest in pay bargaining is a relevant trait to the job in question.

161. *See* DAVID CARD & ALAN B. KRUEGER, MYTH AND MEASUREMENT: THE NEW ECONOMICS OF THE MINIMUM WAGE (Princeton University Press 1995) (Questioning the assumption that competition drives employers to pay all employees within one industry or regional area a "market rate." Some employers are able to attract employees at below market rates, but supply of these below market wage employees does not meet demand. The authors argue that a small increase in the minimum wage will not necessarily result in higher unemployment rates, since mandating employers to pay higher wages through

reports that men are disproportionally the victims of layoffs, while the female unemployment rate has been increasing at a slower rate.[162] Layoff decisions are keyed to labor costs and individuals with a higher pay productivity ratio, disproportionally men, are targeted. This supports my argument that employers are in fact sustaining workforces with equally productive workers, performing the same work, for different pay.

The libertarians' concerns are well-grounded. If you care more about managerial autonomy than sex equality, you should not endorse partial causation. But libertarians should acknowledge that sticking with the causation model comes at a price. Many sex-based compensation decisions fly under the radar. Applying partial causation will curb managerial discretion, but it will also preserve the most important aspect of managerial discretion: to design compensation schemes that promote productivity. It will force management and human resource professionals to sit down and engage in serious deliberation and data analysis to identify factors and pay-incentive mechanisms that actually increase productivity. Advocating for partial causation is not equivalent to advocating for rank-based compensation. To the contrary, it is about consciously tying individual pay to individual productivity.

To the enthusiasts, I can only reply, "I don't know." I have identified a special case, a specific area of discrimination law in which applying a relevancy test makes sense. This is an area where traditional legal tools are of limited service. Pay inequality is an issue too important to be left untreated. After all, the essence of the employment relationship is work performed in consideration for pay. The overwhelming majority of individuals participating in the paid labor market do so to earn a living and to support themselves and their families. We have to make sure they are not being underpaid due to unfair and unlawful sex discrimination.

minimum wage regulation will enable them to fill vacancies that existed when the employer paid below market rates that were above the minimum wage.).

162. *See* Barbara Hagenbaugh, *Men Losing Jobs at Higher Rate Than Women in Recession*, USA TODAY, Jan. 12, 2009, *available at* http://www.usatoday.com/money/economy/2009-01-11-unemployment-rate-sexes_N.htm ("In the year since the recession began in December 2007, the jobless rate for men rose from 4.4% to 7.2%. At the same time, the jobless rate for women rose from 4.3% to 5.9%."). Some attribute the differences in the rising unemployment rates as caused by the segregated labor market. For example, female occupations such as those in the health and education industries were more insulated to layoffs than male occupations in the construction and manufacturing industries. *Id.*