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Law, Markets, and Gender Inequality in Pay

Robert Nelson†

In 1983, Judge Tanner of the Federal District Court of Western Washington handed the pay equity movement its largest legal victory. In *American Federation of State, County, & Municipal Employees v. Washington*, the court found that the State of Washington had discriminated against workers in predominantly female jobs and awarded the plaintiffs a $400 million judgment. The decision catapulted the pay equity issue into instant prominence. In its immediate aftermath the number of states conducting pay equity studies roughly doubled to some thirty-four states, and the number of articles in leading newspapers on pay equity quadrupled. The victory was shortlived, however. In 1985, the Ninth Circuit reversed *AFSCME*. Then Judge, now Justice, Kennedy pronounced: “Neither law nor logic deems the free market system a suspect enterprise . . . . Title VII does not obligate [the State of Washington] to eliminate an economic inequality that it did not create.” According to Kennedy, the plaintiffs not only lacked a legal basis for redress, but the very nature of their thinking—their logic—was wrong. The Ninth Circuit authoritatively denounced plaintiffs’ theory of gender-based wage inequality as inconsistent with the core institution of American society—the free market.

† Research Fellow, American Bar Foundation; Associate Professor, Sociology, Northwestern University. J.D. 1979, Northwestern University. Ph.D. 1983, Northwestern University. This article draws on portions of a book manuscript under preparation by the author and William P. Bridges, Department of Sociology, University of Illinois, Chicago. The tentative title of the book is *Unequal Pay: Law, Markets, and Gender Inequality in Organizations*. The book manuscript is available from the author. This research has been supported by grants from the American Bar Foundation and the National Science Foundation (Grant No. SES-8800627). It was aided by a Fellowship at the Center for Advanced Study in the Behavioral Sciences, under support from the National Science Foundation (Grant No. SES-9022192).

1 578 F. Supp. 846 (D. Wash. 1983), rev'd, 770 F.2d 1401 (9th Cir. 1985) [hereinafter *AFSCME*].
4 Id. at 1407.
The reversal of AFSCME had a devastating effect on the pay equity movement. The market defense invoked by Kennedy supplied the basis for rejecting similar claims in cases that followed. Pay equity activity in states and municipalities slowed to a trickle. Media coverage of pay equity matters fell by more than one-half. Although wage reforms were won through state legislation and collective bargaining, even these methods garnered only mixed results. As Michael McCann recounts in his excellent analysis of the movement:

[W]age reform programs usually have fallen short of achieving full equity for female-intensive occupations. Not only has reform activity been limited primarily to the public sector, but even in "reformed" venues policy implementation has failed to close, and sometimes even to narrow significantly, the gender gap in wages.

Indeed, the demographic data on earnings remain gloomy. Despite some gains since 1970, for full-time workers as of 1990, white women earned only 69.4% as much as white men, black women only 62.5% as much, and Hispanic women only 54.3%.

In this presentation I will offer a critical empirical approach to the relationship between law, markets, and gender inequality in pay that lies at the heart of the pay equity movement, including Justice Kennedy's silencing assertion that pay equity advocates have it all wrong. Sociological theory and method can illuminate aspects of inequality systems that place women, particularly underrepresented women, in positions of social and legal disadvantage. Such analysis can also play an important role in debates with the dominant discourses of law and of economics that continue to dictate how this society conceives of the problem of gender-based wage inequality. After a brief outline of the general debate, I will summarize empirical findings from an in-depth examination of the first case decided on the basis of the market defense. I then will discuss the implications of this outcome for the pay equity debate and for the groups of underrepresented women who are the special mandate of the journal we are celebrating at this symposium.

I. DOMINANT DISCOURSES ON BETWEEN-JOB GENDER DIFFERENCES IN PAY

To be clear, a little background may be necessary. The Equal Pay Act of 1963 directly attacked pay differences between men and women doing the same job, but it became apparent by the early 1970's that this alone would not close the wage gap. There is a high degree of sex segregation by

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5 McCann, supra note 2, at 58-61.
6 Id. at 180.
7 Id. at 44.
jobs in American society and a strong negative correlation between the percentage of female workers in a job and earnings. The classic comparison is between secretaries who are almost all women and relatively poorly paid and truck drivers who are almost all men and relatively well paid. Such segregation has resulted in the pay equity movement's focus on eliminating the difference in pay between jobs held predominantly by men and those held predominantly by women.

There has been considerable controversy in the social sciences about the reasons for differences in pay between female and male occupations. Crudely stated, economists have emphasized market processes, viewing women's lower wages as the product of choices by women workers and their employers. Sociologists have emphasized gender bias and discrimination—processes which show up in the general socialization of women, in institutions that prepare workers for the labor market, and in the hiring, promotion, and pay practices of employers. Those who advocate a "pure comparable worth" position have argued that it is necessary to move away from market-based wage rates in favor of wage rates based on job evaluation. They maintain that workers should be paid according to their evaluated worth (or comparable worth) to their employer. Other pay equity proponents, including myself, favor the regulation of markets and pay practices to redress gender bias, rather than a total rejection of markets as a mechanism for setting wage levels.

The dominant discourse concerning between-job wage differences, however, both in judicial opinions on comparable worth and in labor economics, is that either: 1) the differences in wages are produced outside the organization—that is, they are the product of "the market" rather than the responsibility of the employer; or 2) the differences are based on efficiency considerations—that is, reasonable, noninvidious, economic motivations. Recall the quote from Judge Kennedy.

II. An Organizational Theory of Between-Job Gender Inequality in Pay

It is precisely this dominant position that I reject. In a project in which I am working with labor market sociologist William Bridges, we argue that a substantial portion of the between-job wage difference, especially in large organizations, cannot be attributed to the market and does not rest on efficiency principles. Instead, we suggest that much wage inequality is attributable to organizational processes for which employers could be held responsible, and that groups of women within the workplace should target such organizational processes for political action.

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Our project examines these issues in depth in four case studies—two in the public sector and two in the private sector. We rely to a large extent on documents produced in litigation which provide us, as sociologists, with a rare opportunity to examine how organizations set pay levels for different kinds of jobs. The two public sector cases are *AFSCME* and a case I will discuss in some detail, *Christensen v. Iowa*. The two private cases are *EEOC v. Sears, Roebuck & Co.* and a case which we refer to by the pseudonym *Glass v. Coastal Bank*.

We find somewhat different kinds of inequality systems across these organizations. The biggest differences are between the pay systems of public sector organizations and private sector firms. Yet there are crucial similarities across organizations. In each we find that “the market” is not an adequate explanation of wage differentials. Although the management of these organizations hold an ideological commitment to paying “market rates,” and pervasively use the idiom of market rates in official pronouncements on wage policies, we find that market rates are socially constructed by various actors within the organization. Indeed, in some instances market data are completely ignored. These and other pay practices tend to reproduce hierarchies of gender and race among workers.

What we propose is an organizational theory of between-gender wage inequality, which emphasizes two dimensions of organizational life as significant sources of pay disparity: 1) organizational politics; and 2) the organizational reproduction of cultural advantage. Organizational politics tends to favor male jobs due to the superior political organization and positioning of male workers compared to female workers and the greater receptivity of male management to these efforts. For example, in analyzing *AFSCME* we found that: 1) jobs that were farthest from the market in terms of salary comparisons with what other employers paid their workers contained the greatest amount of gender inequality; 2) the supposedly technical, neutral wage survey conducted by the state was itself a highly politicized process that incorporated the participation of various interest groups within the state employment system, among which women were not well represented; and 3) an overwhelming proportion of favorable exceptions to the wage survey’s pay recommendations were given to predominantly male job categories, due to lobbying by male department heads and male representatives of state worker unions.

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11 563 F.2d 353 (8th Cir. 1977).
12 628 F. Supp. 1264 (N.D. Ill. 1986), aff’d, 839 F.2d 302 (7th Cir. 1988).
13 For prudential reasons, we have decided not to identify the parties in this case or to indicate where the case decision is published. A fuller discussion of the litigation is contained in the book manuscript, *Unequal Pay*, on file with the author.
The organizational reproduction of cultural (read white male) advantage is manifested in various ways in the case studies. In the Sears case, for example, bonuses were almost automatically granted for relocating. The expression was, “to get ahead in Sears, you have to move.”\textsuperscript{15} This had obvious disparate impact on men and women workers because men typically are in a much better position to move. Yet the court gave no indication that this relocation policy was anything other than a neutral business practice.\textsuperscript{16}

In the Coastal Bank case, cultural advantage was maintained partly by the existence of a male profit-making club. The top thirty-three officers of the bank, all white males, participated in a management fund that granted substantial bonuses based on the bank’s overall profits. According to some economists, discrimination is inefficient because it entails hiring and paying workers on some basis other than price and productivity. The bank’s incentive program would thus appear to discourage discrimination. Yet we find that the “members” of the profit-making club were selected based on status class characteristics, such as which college they attended and whether they were outstanding athletes. Women and Jews were excluded from the top group, even though some had generated significant profits for the bank. In the non-officer segment of the pay system, we found that the bank played tough with the market for lower-level, predominantly female jobs, while being more generous vis-a-vis market rates for upper-level, predominantly male jobs. Other predominantly male jobs were excluded from the regular job evaluation system altogether and were paid significantly higher wages than most jobs held by women non-officers.

III. \textit{Christensen v. Iowa}

I want to give more extended attention to one of our case studies, \textit{Christensen v. Iowa},\textsuperscript{17} because it nicely illuminates the political and cultural sources of gender inequality in organizations, and it is the kind of organization—a university—in which most of us work.

\textit{Christensen} is perhaps the first comparable worth lawsuit brought under Title VII, although the term never appears in the opinions or briefs. Female clerical workers sued the University of Northern Iowa (UNI) because it continued to pay male physical plant workers some $1700 more a year on average, even though pay consultants who had conducted job evaluation studies of the university workforce had recommended putting many of


\textsuperscript{16} 628 F. Supp. at 1344.

\textsuperscript{17} 563 F.2d 353 (8th Cir. 1977).
the male and female jobs in the same job grades. Plaintiffs lost at trial, and their appeal was rejected by a court of appeals panel that ruled:

Appellants have failed to demonstrate that the difference in wages paid to clerical and plant employees rested upon sex discrimination and not some other legitimate reason. The evidence shows that UNI paid higher wages to plant workers because wages for similar jobs in the local labor market were higher than the wages established under the [pay consultant's] system.\(^{18}\)

The court of appeals ruling is perhaps understandable, in light of the fact that the question of market necessity was not well litigated. After extensive empirical analysis, however, we have concluded that the university's behavior in continuing wage differentials was not market determined. First, labor market statistics showed high unemployment for blue collar jobs at this time. Second, there was considerable range in the rates other employers paid their workers, which introduces considerable arbitrariness into the definition of market rates. Third, statistical analyses of the university's payroll data showed that even after controlling for seniority and the market wage data presented in the consultant's report, there was a 17% wage difference between men and women that is unexplained. Finally, data on turnover did not indicate differences between male and female workers that would justify higher wage rates for males.

But if the university was not prompted by market considerations, then by what? Our answer is politics and paternalism. The physical plant workers had become a self-consciously organized group. Because many were former union members in local meatpacking plants, some of which were in the process of going bankrupt, they were informally referred to as "the meatpackers." They held confrontational meetings with university personnel administrators in which they made concrete demands about wages and working conditions. Also, they staged an illegal strike in 1969 which closed the campus for three days before the administration granted some wage increases.

By contrast, the clerical workers were locked into paternalistic relations with the administration. In an employment relations committee similar to the one where the plant workers made wage demands, clericals were not even directly represented but instead chose a male administrator to be their liaison. We asked the Vice President for Personnel about the clerical committee:

Q: What kind of things did the clericals want?
A: Well, hard to remember. Things like the Christmas party. Actually they wanted to be able to take off from work to do their shopping instead of going to the party. We told them...[no]. So that was one they didn’t win. But there were other things we helped them with. Like...health insurance...life

\(^{18}\) Id. at 355.
insurance. There was discussion about a clerical lounge. Things like that, nothing big.\textsuperscript{19}

The same official commented on the contrast between male and female workers:

There was a big difference between the physical plant and the clerical workers. The physical plant people work on teams, so they're used to doing things together. The clericals are spread all over campus and they identified more with their supervisors and units. I would say it is sort of a dispersion thing.\textsuperscript{20}

In short, the male administrators were afraid of the male physical plant workers, but unthreatened by the female clerical workers. This lack of collective support probably seriously hurt the lawsuit as well. Only two women, the two named plaintiffs, came forward to testify about the discrimination they had experienced in the university workforce.

Of course we should keep in mind that these comments concern events in 1974, and things may have changed in terms of workplace paternalism. But I think many of us could identify vestiges of paternalism that inhibit and constrain women in university workplaces today.

\section*{IV. Implications}

Our results have three sets of implications. The first implications concern the \textit{Christensen} case itself. The market necessity argument employed by the court is empirically wrong. Even amateurs like my colleague and me can readily poke holes in the market defense here. Yet \textit{Christensen} still stands as authority for the validity of the market defense. This doctrine disempowers women as a group because it allows for no analysis of internal organizational politics. Instead, it rebuffs women's claims solely by reference to a nameless, faceless monolith—"the market."

The second set of implications concerns the debate on pay equity. Perhaps the most common critique of pay equity reforms is the subjective nature of job evaluation.\textsuperscript{21} But, here we see that "market" rates also are very much subject to manipulation and reconstruction. In addition, our results here and in other cases suggest the importance of organizational politics no matter what form the pay regime takes—whether it be a market-based or a job evaluation system. It is crucial to examine who controls the pay system and how. The failure to recast internal organizational politics appears responsible for undoing many of the comparable worth programs that have been adopted.

\textsuperscript{19} Telephone Interview with Vice President for Personnel, University of Northern Iowa (July 30, 1986).

\textsuperscript{20} \textit{Id.}

Third are implications for underrepresented women. The demographic data reveal that differently disadvantaged groups of women are more disadvantaged economically as well. Our organizational theory of wage inequality suggests that some portion of this is attributable to the problems such groups face in gaining political influence within organizations and in overcoming the organizational reproduction of certain favored cultural characteristics. It also is clear that the pay equity issue is closely connected to the economic fates of women in poverty. By one estimate as many as 40% of working poor women would be lifted above the poverty line through the adoption of broad-based comparable worth reforms.22

V. Conclusion

Our research suggests that neither law nor the market has functioned to eliminate basic inequities in the pay of women workers. In the cases we have examined, the courts have been too willing to accept the orthodox legal and economic position that male-female wage differences are produced by aggregate forces of supply and demand, rather than by the decision-making processes of employing organizations. In these cases, the evidence indicates that a significant portion of wage inequality derives from organizational politics and the reproduction of male cultural advantages through organizational pay practices. At the very least, our results undermine some of the leading precedents that have shaped the law on wage discrimination. If similar patterns appear in other organizational contexts, courts and lawmakers should reassess the role that anti-discrimination law can play in redressing male-female wage inequality in organizations. While we do not necessarily advocate comparable worth as the solution, courts could entertain more incisive analyses of between-job wage discrimination, and legislation could mandate that employers, in both private and public sectors, conduct independent pay equity studies of their own workforces.

Another message that can be drawn from our case studies is that women should organize at the very location in which such inequality is introduced and perpetuated: the workplace. With collective action, it is possible for women to identify and challenge the organizational practices that devalue their work. Litigation may be an essential tool in such efforts, given the imbalance of power between men and women in work organizations. But, the success of legal strategies also may depend on the capacity of grassroots organizations to sustain a legal battle and produce witnesses that can testify about their experiences of discrimination.