The Fundamental Tension Between Market Wages for Women and Comparable Worth

M. Neil Browne*

Introduction

The division of rights and income among different groups of workers is a source of persistent dispute. Granting a particular income to individual A often results in individuals B and C having either reduced or nonexistent income in later periods.[1] Given this inherent conflict in the distribution of income, certain elements of society aggressively protect the existing pattern of distribution,[2] while other elements protest systematic inequity. Comparable worth actions constitute one modern mechanism for women to oppose existing market wages.[3] The comparable worth doctrine suggests that the most pervasive and persistent inequity in employment compensation systems is generated by gender discrimination.[4]

Opponents of comparable worth claims typically respond with the explicit or implicit assumption that existing markets distribute resources better than any other available means.[5] In brief, these opponents argue that the market automatically and accurately determines the relative worth of individual male and female workers.[6] The theoretical basis for this reliance on mar-

* Professor of Economics, Bowling Green State University, Bowling Green, Ohio 43403. B.A., 1965, University of Houston; Ph.D., 1969, University of Texas; J.D., 1981, University of Toledo.

1. A firm, like an economy, has a limited amount of potential income to distribute among its workers. Thus, increasing the income of any person or group reduces the capacity of a firm or economy to pay income to others.

2. *See* Morris Cohen, *Property and Sovereignty*, 13 Cornell L.Q. 8, 13 (1927). Property law does more than simply protect possessions; it, like wage regulation, establishes the framework on which future income flows will be based.

3. *See* Barbara Norris, *Comparable Worth, Disparate Impact, and the Market Rate Salary Problem*, 71 Calif. L. Rev. 730 (1983); Carol Pint, *Value, Work and Women*, 1 Law & Inequality 159 (1983). Both articles succinctly discuss the evolution of comparable worth actions and statutes.

4. Arguments concerning the doctrine are summarized in a relatively comprehensive fashion in Michael Gold, A Dialogue on Comparable Worth (1983).

5. *See* David Gregory, *Comparable Worth: The Demise of the Disparate Impact Theory of Liability*, 1982 Det. C.L. Rev. 853, 898.

6. *See* Christensen v. Iowa, 563 F.2d 353, 356 (8th Cir. 1977); Lemons v. City

ket optimality is neoclassical economic theory. Proponents of this market defense tend to exaggerate the advantages of current market decisionmaking and almost categorically reject the capability of rational groups to create an efficient compensation pattern through collective negotiation. They see legal or political distributional alternatives to the market as subjective, bureaucratic, non-operational, and susceptible to capricious manipulation.

In part, the market defense achieves its intellectual appeal because of an unstated faith that a free and fair market is already dispensing incomes.[7] Additionally, people who advocate the superiority of market mechanisms necessarily adopt certain assumptions describing the characteristics of the setting in which markets function. The market theory of wages, then, operates freely and fairly only within a world having these assumed characteristics. If a person's income is determined in a context not closely approximating these characteristics, the theory is inapplicable. In such a case, the market defense to existing wage differentials becomes a shallow attempt to preserve a male-dominated social structure.[8]

This paper explores the assumptive underpinnings of the market defense. An understanding of these assumptions alerts those responding to the defense to its vulnerability. The first section of the paper, Part I, enumerates the assumptions made by those who use the market defense. The analysis explores the role each assumption plays in validating market outcomes as voluntary, efficient, and fair. Part II argues that neoclassical market theory, and its underlying assumptions, do not reflect the reality of the marketplace. This part explores alternative labor market theories without neoclassical assumptions, exposing a far more complex, and real, labor market than that assumed by neoclassical doctrine. This discussion exhibits the polymorphic nature of the abstraction called "the market." Fi-

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of Denver, 17 F.E.P. Cases 906, 914 (D. Col. 1978), *aff'd* 620 F.2d 228, 229 (10th Cir. 1980), *cert. denied*, 449 U.S. 888 (1980); Vuyanich v. Republic Nat. Bank of Dallas, 505 F. Supp. 224, 284 (N.D. Tex. 1980); Equal Empl. Opport. Com'n v. Akron Nat. Bank, 497 F. Supp. 733, 751 (N.D. Ohio 1980). These cases represent instances where courts took judicial notice of "economic realities" in deciding that the market wage provided a satisfactory measure of a worker's value.

7. *See* Sar Levitan, Garth Mangum & Ray Marshall, Human Resources and Labor Markets 97 (3d ed. 1981).

8. *See* Cotton Lindsay, Equal Pay for Comparable Work: An Economic Analysis of a New Antidiscrimination Doctrine 4-16 (1980) (relatively clear exposition of neoclassical labor market theory, the technical argument for the market defense).

nally, this paper concludes that the very real complexity of the labor market undercuts the usefulness of neoclassical theory as the basis for legal arguments concerning relative wages. Since the market defense is based upon unrealistic neoclassical assumptions, the market defense lacks substance as a defense against comparable worth claims.

I. Assumptions of Neoclassical Theory

A. *Standards of Judgment*

Before one can critically analyze the assumptions underlying neoclassical market theory, one must establish the standards by which the market theory is judged superior. When an analyst urges acceptance of the market as the proper arbiter of income patterns, the analyst, at least implicitly, rejects alternative distributional mechanisms such as collective bargaining, judicial rulings, or legislative regulation. Markets are judged superior to other mechanisms by the following standards:

1. Freedom. Markets are said to maximize *voluntary* exchanges among participants, enhancing the freedom of each participant.[9]
2. Efficiency. Markets are said to channel the resources of society into their most productive uses, maximizing society's gross national product.
3. Equity. Markets are said to assure equitable treatment among participants because market participants receive income only to the extent of their productivity and not on the basis of sex, race, or social status.

The specific process by which the market allegedly attains these criteria is rarely made explicit. Instead, those people who endorse market outcomes tend to link markets with freedom, efficiency, and equity almost as if the relationship were absolutely certain.[10]

This reflexive idealization of market outcomes stems from several attitudes. First, many of us distrust the ability of the human intellect to solve problems. We may channel this distrust into a preference for having intricate decisions, like who gets what income, made by impersonal market mechanisms. Second, each of us is aware of the tragic mistakes made by gov-

9. *See* Duncan Foley, *Problems vs. Conflicts: Economic Theory and Ideology*, 65 Amer. Econ. Rev. 231, 232 (1975) (discussion of the complexity inherent in labeling a situation "voluntary").

10. *See, e.g.*, Joel Kaplan & Richard Lieberman, *Comparable Pay: A Management Perspective*, 7 Equal Empl. Opp. Today 145, 147-51 (1980).

ernments in the name of the public interest or other high-sounding moral virtue. Finally, we may assume that individuals are inherently inert and rapacious. Consequently, any non-governmental but impersonal mechanism, such as "the market," that promises to stimulate productive effort and somehow to control the natural tendency of individuals toward self-aggrandizement appears highly attractive.[11]

Defenders continually describe markets as impersonal. Such a characterization is highly convenient for those who have a disproportionate influence on the determination of relative wages. Market defenders cite "the laws of supply and demand" as the determinants of what the proper gap between the income of a surgeon and a nurse both is and should be. These laws supposedly result from objective forces beyond individuals' control. Consequently, income differentials are calibrated not by a person who could conceivably be a misogynist, racist, homophobe, or ignoramus, but by forces that work mysteriously and automatically to make appropriate monetary distinctions.[12] In contrast to the allegedly impersonal market, legislators and judges are perceived as powerful individuals with a potential for abusing their authority. Market proponents also argue that legislative or judicial intervention in resulting wage decisions is a clumsy and burdensome interference with impersonal processes.[13]

Defenders of market wages claim that markets stimulate productivity, while simultaneously regulating individual selfishness in the public interest.[14] Since sellers of labor (workers) earn income only if they offer productive labor in the market, income differences theoretically stimulate workers to offer the type and quantity of labor desired by producers.[15] Under the neoclassical theory of supply and demand, producers respond to consumer demand by adjusting the quantity of goods produced to meet the quanity of goods desired. Because production of goods is inherently a function of labor and materials,

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11. Adam Smith, The Wealth of Nations 73, 324, 421 (1776); Francis Edgeworth, Mathematical Physics: An Essay on the Application of Mathematics to the Moral Sciences 16 (1881).

12. *See* Economics: An Anti-Text 94 (Francis Green & Petter Nore eds. 1977).

13. *See* Robert Solo, The Positive State 1-57 (1982) (thorough discussion of the negative connotation assigned to governmental action by neoclassical economic theory).

14. E.K. Hunt, Property and Prophets: The Evolution of Economic Institutions and Ideologies 42-43 (4th ed. 1981).

15. Lindsay, *supra* note 8, at 10.

consumer demand indirectly determines the type and amount of labor demanded by producers. If, at the given wage, a shortage of labor exists (that is, demand for labor is greater than supply), wage increases will stimulate otherwise inert workers to transfer their energies to types of work and locations where they are needed. The worker's own selfishness propels her toward socially useful tasks, thus diffusing the potentially negative social consequences of an uncontrolled release of personal selfishness.[16]

One may wonder how these market interactions between employee and employer are conducive to freedom, efficiency, and equity. Freedom, supposedly, is enhanced because no one is forced to work for a particular employer, for a particular wage, or in a particular occupation or location. Employees voluntarily exchange their labor for a pre-announced amount of money.[17] When the ongoing exchange becomes unsatisfactory to either party, the employee quits or the employer fires the employee. Mobility of labor guarantees that employers will not be able to maintain wage differentials that employee behavior has not implicitly sanctioned. Thus, wages appear to be the price at which both the buyer and the seller of labor are sufficiently satisfied with each other's offer to say, "I accept."[18]

Defenders of market wage differentials also argue that free markets encourage allocative efficiency. Free markets are efficient because the demand for labor is derived from the demand for goods and services.[19] The pursuit of profit motivates the producer to supply those goods and services most desired by consumers. To respond to consumer needs, labor must be purchased. Buyers of labor offer to pay the prospective employee the market value of the output which the employee can produce in a given time period. Ultimately, therefore, consumers' wishes as to what should be produced essentially deter-

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16. *See* Thomas Morgan, *The Deregulation Bandwagon: Too Far, Too Fast?* 2 J. L. & Com. 1, 2 (1982).

17. *See* Charles Lindblom, Politics and Markets 45-48 (1977) (description of the coercive aspects of market decisionmaking). Lindblom's treatment of freedom as a complex, divisible attribute of social mechanisms is particularly helpful in pointing out the ideological content of the traditional association of markets with freedom and collective decisionmaking with coercion.

18. George Hildebrand, *The Market System*, in Comparable Worth: Issues and Alternatives 85 (Robert Livernash ed. 1980).

19. Demand for goods and services is said to reflect consumer preferences. *See* Mark Sagoff, *At the Shrine of Our Lady of Fatima or Why Political Questions Are Not All Economic*, 23 Ariz. L. Rev. 1283 (1981) (thoughtful attack on the appropriateness of allocative efficiency as a policy criterion).

mine the wage paid to each type of worker.[20]

To summarize, the notion of allocative efficiency postulates that society's scarce resources must be channeled to their most productive uses; consumers express, through the market, what are and what are not productive uses; profit-inspired producers respond by directing society's resources to these most desired ends; and employees' labor, being one component of society's scarce resources, is drawn away from less productive uses (and less productive employers) into more productive uses through the mechanisms of rising market wages and social mobility. Thus, impersonal market forces guide resources to their most efficient use.

Finally, defenders of the existing market wage pattern claim that wages are fair. Wages are fair because no person is paid unless she demonstrates to some employer (buyer of labor) that she has some potential output that the employer will be able to sell. The greater the dollar value of her prospective output, the higher her income will be. This link between productivity and income is seductively simple and appealing. Those who defend existing income differentials suggest that each individual selects both the amount of training and the attitudes toward hard work which she must eventually attempt to sell.[21] Hence, the market is said to be fair in the sense that the individual employee voluntarily enters a particular wage category.[22]

This benign portrayal of the processes determining wages morally validates the market defense to comparable worth claims. If, for example, market decisions were indeed as benign in their effects as the neoclassical labor market perspective suggests, then comparable worth complainants might justifiably be defined as envious workers wishing to gain from the courts that which the market value of their labor could never provide. Actual labor markets, however, are exceedingly more complex than neoclassical labor market theory supposes. Neoclassical theory provides one model of what labor markets *might* be like. Regrettably, those who use this model to make policy statements ignore the axiom that a map or model is not

20. Ludwig Von Mises, Human Action 270-72 (1949).

21. *See* Ronald Ehrenberg & Robert Smith, Modern Labor Economics 230-41 (1982) (discussion of the choice among leisure, work, or schooling as a matter of personal preference. The many constraints on that choice, such as discrimination or family income, are conveniently ignored).

22. *See* David Gordon, Theories of Poverty and Unemployment 37 (1972).

the same as the terrain it hopes to describe.[23] Whatever the "typical" labor markets are like, some groups benefit from the wage decisions made in those markets while others do not. Not surprisingly, men who benefit from the existing system of market wages understandably embrace the neoclassical labor market model because it provides a moral justification for their economic power relative to that of women.

B. *Underlying Assumptions*

Like most economic theories, neoclassical labor market theory requires that certain assumptions be made for the model to operate in its prescribed manner. The theory's portrayal of the operation of society is accurate only to the extent that the theory's underlying assumptions reflect the real operation of the market. Inaccurate assumptions render the theoretical conclusions suspect. Focusing on these assumptions provides the groundwork for matching "the market" as neoclassical theory describes it to actual industry characteristics. The closer the match, the more credible the resulting policy claims, including the repudiation of comparable worth claims in those labor markets where neoclassical assumptions might be empirically reliable.

Before examining these assumptions about the nature of labor markets, workers and counsel responding to the market defense should reflect on two threshold beliefs shared by those who proffer markets as an allocative device. First, the market defense relies on the belief that existing income distribution is a proper starting point for determining who should be victorious in specific wage bargains.[24] This belief is central to any market defense because the demand curves for the buyer of labor's product reflect a particular income distribution: the existing one.[25] Altering income distribution thereby changes the

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23. Lester Thurow, *Why Do Economists Disagree?* 29 Dissent 176, 181 (1982).

24. *See* Louis Kaplow, *The Accuracy of Traditional Market Power Analysis and a Direct Adjustment Alternative*, 95 Harv. L. Rev. 1817, 1822-23 (1982) (discussion of the tendency of those who apply neoclassical economic theory to ignore distributional impacts of their propositions).

25. *See* Paul Wachtel, The Poverty of Affluence 269-71 (1983).

A demand curve for any good or service expresses the amount of money consumers will spend on that good or service. Every consumer has many wants. Only a subset of those wants, however, are reflected on demand curves. The amount of income one possesses, among other things, determines the size of the disparity between wants and demand. Thus, the legitimacy of any set of demand curves depends on our satisfaction with the income distribution that determines their level.

demand curves constructed on that pattern of dollar votes.[26] Changed demand curves result in new income differentials transformed to reflect the new distributional starting point.[27] Embracing the current division of income among groups is thus a precondition for allegiance to the legitimacy of current wage bargains.

A second belief held by those who defend market outcomes is that the *rational* employer and employee will each shape wage and employment decisions by calculating the net pecuniary benefit to herself. That economic actors might be motivated by altruism, community well-being, or moral principles is dubbed "remote" by market advocates.[28] In neoclassical economic theory, human nature is not necessarily devoid of moral content; instead, moral actions are defined in terms of efficient and individualistic calculations. The moral employee or seller of labor acts to maximize her income; the moral employer or purchaser of labor acts to maximize her profit.[29] This belief is essential to the efficiency claims of market outcomes. Supposedly, the employer always searches for the most productive employee, and the employee readily leaves a job when the wage lags behind the market value of her marginal output.

These two presumptive beliefs relate to the underlying nature of labor market participants. One may question the legitimacy of these beliefs. In so doing, one may argue against the neoclassical market defense regardless of the characteristics of the particular market whose outcomes are being challenged in a comparable worth action.

A second level of beliefs, held by market defenders, pertains to the structural organization of particular markets. The structural assumptions include:

1. All product and factor markets are fully competitive and free.
2. There is extensive sharing of information among all buyers and sellers of labor.

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26. Lester Thurow, *The Illusion of Economic Necessity*, in Value Judgment and Income Distribution 250-53 (Robert Solo & Charles Anderson eds. 1981).

27. M. Neil Browne & John Hoag, Understanding Economic Analysis, ch. 10 (1983).

28. *See* John Braithwaite, *The Limits of Economism in Controlling Harmful Corporate Conduct*, 16 L. & Soc'y Rev. 481 (1981-82) (discussion of the negative impacts of this moral relativism in regulating hazardous industrial practices).

29. *See* Edward Herman, Corporate Control, Corporate Power 9-10 (1981) (criticism of this profit-maximizing hypothesis).

3. The factors of production, that is, labor and materials, are perfectly mobile.
4. The productivity of every individual can be operationally measured.

When these characteristics are not empirically observed, but only hypothetically assumed, the theory suffers in its ability to explain reality. Consequently, those who employ a flawed theory to defend market outcomes lose argumentative credibility and, in a court of law, do not deserve judicial respect. This analysis now focuses on the importance of each of these four assumed market characteristics.

1. Competitiveness of Product and Factor Markets

Neoclassical theory assumes that product and factor markets are competitive.[30] If product markets are to be non-coercive and fair allocative mechanisms, sellers must be powerless to demand a price that exceeds the minimum value of what they sell.[31] Because relative prices represent the comparative value of resources, a seller who can violate this criterion causes the market to distort the real value of the resource, thereby disrupting allocative efficiency. A buyer cannot maximize her welfare if prices reflect power rather than the value prescribed by consumer sovereignty![32] Moreover, those sellers who possess market power guide market decisions rather than respond to them as neoclassical theory assumes.[33]

Contrary to economic reality, neoclassical labor market theory assumes that participants make wage decisions in a power vacuum.[34] Buyers and sellers of labor are assumed powerless to set wages that violate the correlation between productivity and income. If the employer pays employees less than their worth, higher wages elsewhere will lure the employees

30. In economic theory, factor markets are those markets which distribute the factors of production among producers. Labor and raw materials are both examples of factors of production. In factor markets, producers are the purchasers of labor and raw materials. Correlatively, product markets are those markets which distribute goods and services to consumers. In product markets, producers are the sellers and consumers are the purchasers.

31. Browne & Hoag, *supra* note 27, at ch. 8.

32. *See* Robert Dahl, After the Revolution 121 (1970). Dahl focuses on the "optical illusion" required to hypothesize the giant firm as a private enterprise. Dahl ridicules the tendency of neoclassical economists to reduce the complex modern firm to the single, independent, and rational entrepreneur.

33. *See* Barbara Deckard & Howard Sherman, *Monopoly Power and Sex Discrimination*, 4 Pol. & Soc'y 475, 478-80 (1974).

34. John Kenneth Galbraith, *Power and the Useful Economist*, 63 Am. Econ. Rev. 1, 6 (1973).

away. If the employer pays employees more than their worth, the employer will realize no profit. As long as labor markets are competitive, the employer has no choice but to pay employees what the market says they are worth. Since product markets are competitive, the employer has no surplus to pay workers in excess of the competitive market value of their marginal output.[35] Thus, the market defense contains a tone of dismay that market wage differentials are even questioned.[36]

This assumption of powerless economic agents also supports the idea that market exchanges are voluntary. When two powerless groups interact, the outcome reflects objective, impersonal considerations of resource value — there are no rogues or scheming manipulators in this scenario, only passive recipients of price and wage data determined by technological considerations and consumer tastes. No one is forced to pay or accept a particular wage by a more powerful party, so the wage is the outcome of a voluntary process.

2. Widespread Availability of Labor Market Information

Rational economic calculations depend on the existence of necessary information.[37] Both the employer and employee must have considerable information about a particular job to match precisely the employee's wages with the value of the employee's marginal output and simultaneously to provide the employer with the optimal bargain consistent with the profit maximization objective. Many types of information, including the productivity of all pertinent potential employees, all alternative wages available to every employee, quality of alternative jobs in other geographic regions, and the market value of an employee output[38] must be considered prior to such wage setting. Without this data, market defenders' characterization of a wage decision as objective and rational is absurd.

On both efficiency and equity grounds, lack of information

35. Richard Lipsey, Peter Steiner & Douglas Purvis, Economics 341, 343 (7th ed. 1984).

36. John Bunzel, *To Each According to Her Worth?*, Public Interest, Spring, 1982, at 77, 81.

37. *See* J.P. Golbert & Paul Lowenstein, *The Court and the Marketplace: Who Should Regulate Whom*, 34 Baylor L. Rev. 39, 44-45 (1982).

38. This list is by no means complete or exhaustive. *See* Lester Thurow, Generating Inequality 220-21 (1975) (knowledge is never perfect regarding future conditions and substantial ignorance will often exist about current conditions).

in a labor market damages the market defense.[39] Allocative efficiency evolves from market values that signal to resource users the relative worth of alternative resources. These signals become confused when they arise from serious information deficiencies on the part of the parties to the exchange. Wage differentials created in an atmosphere of sustained lack of information cannot validly measure the social worth of different groups' labor.

In a market characterized by a lack of information, to claim that an employee freely chose a particular line of work and made the corresponding investment decisions is, at best, unfair. Recall that the link between productivity and income appears fair only if the prospective employee makes calculated training decisions leading to a particular occupation.[40] In effect, the young worker decides the future wage that she will earn through foresight. Certain groups in our society are better informed than others about the pay-offs from alternative training. This means that market wage differentials eventually reflect a systematic inequity due to the availability of information about occupational opportunities. For instance, many women may opt only for jobs in employment categories having a high proportion of female employees. These particular occupations may be precisely those in which discrimination against women is pervasive. Since women see female role models in only certain occupations, they may limit their selection of training slots to a tiny subset of those chosen by others having the same *potential* productivity. Any wage that results from such a constricted choice loses its moral legitimacy.

3. Mobility of the Factors of Production

The ultimate form of expression available to the unhappy

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39. Thomas McGarity & Elinor Schroeder, *Risk-Oriented Employment Screening*, 59 Tex. L. Rev. 999, 1015 (1981).

40. The neoclassical model explains the training decisions of prospective employees as an investment decision similar to that made regarding other capital assets. Neoclassical theorists use this human capital theory to explain wage differences. *See* Solomon Polachek, *Occupational Segregation: An Alternative Hypothesis*, 5 J. Contemp. Bus. 1 (1976) (an explanation of human capital theory). Polachek concludes that the theory fails to account for the bulk of occupational sex segregation. *See also* Paula England, *The Failure of Human Capital Theory to Explain Occupational Sex Segregation*, 17 J. Hum. Resources 358 (1982). Yet another study found that the human capital theory is less powerful than a structural-stratification theory in explaining variance in earnings for a national sample of manual workers. Robert Bibb & William Form, *The Effects of Industrial, Occupational, and Sex Stratification on Wages in Blue-Collar Markets*, 55 Soc. Forces 974 (1977).

employee is exit. Neoclassical labor market theory ascribes powerful efficiency effects to the market mechanism because it presumes that the market wage cannot persist below the value of an employee's output. Discrimination can exist temporarily, but soon some other profit hungry employer will lure the justifiably dissatisfied employee to a workplace where her true value is appreciated. In reality, this may not be the case. Many employees will not abandon a job that pays less than the value of marginal output. Cultural or pecuniary reasons, as well as an employee's failure to perceive the discrimination, cause this immobility. Under these circumstances, wage inequities persist.[41] Thus, one basis for resisting a market defense to comparable worth claims is to highlight the immobility of the workers whose wages are being analyzed.

The effect of macroeconomic conditions on workers' expectations about mobility in various occupational classifications must also be examined before accepting the argument that market wages exist without continuous sale of labor at less than marginal value. As indicated previously, the market defense gathers moral strength by portraying wage decisions as voluntary. Because a worker remains in her position, neoclassical theory presumes that she is content with her current income. If she were not content, she would voluntarily move to a different job. Macroeconomic conditions, however, also affect the amount of worker mobility in any given market. In a period of high unemployment and persistent recession, for example, workers move from job to job less often than under more prosperous macroeconomic conditions. Macroeconomic conditions have a definite effect on the amount and degree of mobility that can realistically be expected from workers. Yet, no worker controls the macroeconomic conditions affecting her. Mobility, therefore, is not simply a matter of individual choice in society, contrary to what neoclassical theory assumes.

4. Measurability of Individual Productivity

For wages to serve as an accurate measure of the value of a worker's output, the individual worker must have a particular productivity that both the employer and the employee can measure and then compare to the productivity of other employees.[42] This assumption is especially important because critics

41. Levitan, Mangum & Marshall, *supra*, note 7, at 116.

42. In reality, productivity is less an individual phenomenon than it is a joint interactive effort. *See* Wilburn Manuel, *Productivity Experiences at*

of comparable worth actions repeatedly make invidious comparisons between the precise measures of relative worth "determined" in the labor markets and the nebulous nature of comparable worth.[43] If market measures of worker value are to be accorded operational superiority, they must be based on discrete productivity calculations.[44] A sound market defense cannot rest merely on the deductive and circular argument that wages measure productivity and productivity is measured by wages.

Fairness of market incomes depends on the productivity-income nexus. If an employer does not make the marginal productivity calculations in the manner presumed by neoclassical labor market theory, the employer cannot logically rely on the market defense in comparable worth actions. Those defending market compensation systems argue that despite the fact that productivity calculations are not made, the market determines relative wages as if the calculations had been made. This argument, however, depends on the existence of competitive markets because the neoclassical theory assumes that no firm can exist in the long run if it pays a wage either less or greater than the value of the marginal product of its employees.

This analysis emphasizes an understanding of neoclassical market assumptions, rather than an empirical evaluation of their accuracy. The empirical accuracy of any particular assumption depends on the particular labor market in which the comparable worth claim is made. Consequently, the validity of a particular assumption may vary greatly among different markets. For this reason, this analysis avoids generalizations about the empirical accuracy of the separate assumptions. Such generalizations would be inappropriately abstract. Instead, this

Nucor, in Productivity Improvement 49 (Vernon Buehler & Y. Krishna Shetty eds. 1981). Measuring an individual's productivity would provide a meaningful comparative yardstick of worker value only if discrete marginal output were attributable to each individual worker. *See also*, David Macarov, Worker Productivity 12, 17 (1982). Almost without exception, productivity figures are generated from gross output data divided by the number of employee hours worked. Such data loses credibility as a means of comparing the value of alternative labor units when one considers that actual human labor may take credit for less than one-third of the numerator in the resulting productivity ratio.

43. George Milkovich, *The Emerging Debate*, in Comparable Worth: Issues and Alternatives 33-37 (E. Robert Livernash ed. 1980); Schwab, *Job Evaluation and Pay Setting: Concepts and Practices*, in Comparable Worth: Issues and Alternatives 58-59 (E. Robert Livernash ed. 1980); Lindsay, *supra* note 8, at 31.

44. *See* Harry Magdoff, *The Economists' New Clothes*, 234 Nation 359-61 (1982) (criticism of the use of productivity indices on the grounds that they are imaginary).

analysis suggests important dimensions that anyone evaluating a market defense should investigate. As Barbara Norris points out, comparable worth is not merely a means to achieve pay equality. Comparable worth is also a doctrine that requires employers to open their particular wage pattern to public inspection and to justify explicit wages using job-related criteria.[45] By requiring employers to open their wage determination processes to examination, comparable worth doctrine permits courts to apply economic theory to actual situations. If an employer attempts to defend his wage disparities on the basis of neoclassical market theory, then the court must be convinced that the actual labor market in which the employer participates fits the hypothetical labor market in neoclassical theory. Only where a particular wage pattern was actually created in a manner that follows the market model used by those opposing comparable worth claims, can that defense have any justification.

II. Labor Market Theories: Alternatives to the Neoclassical Model

The neoclassical concept of the wage as a clearing device which balances the profit-maximizing urges of buyers of labor with the income-maximizing efforts of workers has not gone unchallenged.[46] Critics of neoclassical labor market theory tend first to praise the logical qualities of the model and then criticize the theory as artificial and inapplicable to most labor market decisions.[47] Other theories of labor market behavior are constructed on different sets of assumptions than those underlying neoclassical labor market theory.[48] Not ironically, opponents of comparable worth claims avoid the alternative theories, even though these theories employ assumptions more

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45. Norris, *supra* note 3, at 756-57.

46. *See* Jobs for Disadvantaged Workers: The Economics of Employment Subsidies (Robert Haveman & John Palmer eds. 1982) (several articles applying non-neoclassical labor market theories to the measurement of effects generated by governmental employment subsidies). This book illustrates the growing awareness that a multiplicity of reasonable perspectives can aid analysis of labor market behavior.

47. *See* Women, Work, and Wages: Equal Pay for Jobs of Equal Value 44-45 (Donald Treiman & Heidi Hartmann eds. 1981).

48. *See* Lester Thurow, Generating Inequality (1975) (enumeration of the many labor market anomalies that neoclassical labor market theory fails to explain). The distribution of income, for example, is more unequal than is the distribution of qualitative measures of "ability" such as IQ, physical attributes, and educational attainment. This reality conflicts with the result projected by the productivity/income nexus in neoclassical theory, that the qualitatively most productive employees will earn the highest incomes. *See supra* note 22 and accompanying text.

closely approximating the real behavior of the market. They do so because these alternative theories do not advance the market defense. Those who use market defenses to comparable worth claims rely exclusively on neoclassical labor market theory because neoclassical theory provides the strongest support for rejecting judicial and legislative "tampering" with market wages. Consequently, comparable worth claimants should familiarize themselves with alternative theories that explain the wage determination process. Given the fact that no single economic theory is universally accepted, the courtroom is an excellent forum for proposing the merits of alternative thought, especially in the context of existing comparable worth doctrine.

This section briefly highlights a few alternatives to neoclassical labor market theory in order to illustrate different attitudes toward existing wage differentials. This description may inform those who respond to comparable worth claims that labor economists are not unified in their understanding of the wage determination process. Knowledge of alternative models provides a foundation from which to perceive the strengths and weaknesses of a particular market defense as well as to establish the validity of comparable worth claims.

To begin with, several shared characteristics typify alternative labor market theories. Most noticeably, they deny the realism of many of the neoclassical assumptions analyzed in Part I. Persuaded by the many cumbersome qualifications of neoclassical theory, advocates of alternative models are convinced that neoclassical doctrine cannot realistically explain income differentials. For instance, power plays a key role in determining wages in each of the non-neoclassical labor market models.[49] Consequently, non-neoclassical theories question the legitimacy of initial power distributions and the need for collective, non-market participation in wage choices. Another belief common to these theories is that the existing income distribution is unfair.[50] Thus, these theories provide comparable worth claimants with a counterargument to the market defense which is straightforward and based upon the real operation of the market.

Perhaps the most significant difference between neoclassi-

49. Recall that neoclassical theory assumes that market participants are powerless. *See supra* notes 31-36 and accompanying text.

50. *See* Glen Cain, *The Challenge of Segmented Labor Market Theories to Orthodox Theory: A Survey*, 14 J. Econ. Lit. 1215 (1976). Recall that neoclassical theory assumes that the initial income distribution is fair. *See supra* notes 24-27 and accompanying text.

cal and alternative labor market theories is that alternative theories do not presume that there is a monolithic labor market. Instead, alternative theories suggest the existence of several forms of labor markets, each of which varies considerably in structure. In other words, the neoclassical assumptions approximate actual conditions in so few labor markets that the arguments stemming from that model lack credibility. In most markets, a different set of assumptions is required to explain market behavior. For example, certain external labor markets do resemble the market form analyzed by the neoclassical model.[51] Internal labor markets,[52] however, do not comport with neoclassical theory because the transfer from one job slot to another is not effectuated by a bidding process whereby competing employees attempt to attain the position by taking a lower wage than other qualified employees.[53] In internal labor markets, employers do not, except under conditions of financial exigency, reduce wages when the demand for their output falls, nor do they increase wages when the demand for labor rises.[54] Contract provisions, worker morale, and long-run efficiency considerations combine to prevent the wage from functioning as the neoclassical equilibrating device.[55]

Two types of alternative labor market theories illustrate the perspectives of such theories. The first type categorizes the labor market into distinct subdivisions. The dual labor market theory, for example, explains the different characteristics of each market subdivision according to the different treatment of workers. Another example of this first type, the segmented labor market theory, recognizes the infeasibility of workers in one segment of the market freely moving into a better segment. A second type of alternative labor market theory is exemplified by the job competition model of a labor market. This model

51. External labor markets are those in which firms hire employees from a pool of workers outside the firm itself. In such markets, firms are in direct competition with other potential employers so discrimination is more difficult to maintain. Lloyd Reynolds, Labor Economics and Labor Relations 96 (8th ed. 1982).

52. Internal labor markets are those in which employers fill job vacancies from within the firm having the vacancy. Daniel Hamermesh & Albert Rees, The Economics of Work and Pay 177 (3d ed. 1984).

53. *See* Peter Doeringer & Michael Piore, Internal Labor Markets and Manpower Analysis (1971) and Francine Blau, Equal Pay in the Office (1977) (discussion of the significance of internal labor markets for the wage setting process).

54. Levitan, Mangum & Marshall, *supra* note 7, at 104.

55. Michael Piore, *Unemployment and Inflation: An Alternative View*, in Unemployment and Inflation: Institutionalist and Structuralist Views 6 (Michael Piore ed. 1979).

posits that wages are attached to jobs, not to workers themselves or to the amount of training that they have undergone. In this model, the concept of the wage as a market clearing device is virtually nonexistent. Thus, comparative *access* to job positions is the key to an understanding of relative wages. Access, not willingness to accept lower wages, determines the type of jobs available to women.

Dual labor market theory and segmented labor market theories are the first alternatives to the neoclassical model. The former argues that there are essentially two different sectors of labor markets, which it labels primary and secondary labor markets.[56] Primary labor markets are characterized by relatively high wages, career ladders, and employment security. Secondary labor markets are characterized by poor working conditions, few opportunities for advancement, high turnover rates,[57] and, especially important in comparable worth claims, a highly personalized relationship between supervisors and workers.[58] This latter characteristic allows the supervisor broad latitude to determine wages on the basis of arbitrary judgments.[59] Mobility from the secondary to the primary sector is so rare that these markets function virtually independently.

Segmented labor market theories arose from a dissatisfaction with the bipolar dual labor market model. They form a second model of the first type of alternative labor market theory. In the segmented labor market model, there are many particularized markets, each comprised of a largely homogenous group of employees competing for jobs with relatively narrow characteristics. Segmentation or the isolation of one labor market from another prohibits wage differentials from playing their allocative role as signals of relative resource value. Proponents of the segmented model believe that the labor market is far more complex than can be captured in a labor market model with only two forms.[60]

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56. Characteristics of the secondary labor market match the effects of job segregation. *See* Ruth Blumrosen, *Wage Discrimination, Job Segregation, and Title VII of the Civil Rights Act of 1964*, 12 U. Mich. J.L. Ref. 397, 400 (1979).

57. *See* Wendy Wolf & Rachel Rosenfeld, *Sex Structure of Occupations and Job Mobility*, 56 Soc. Forces 823 (1978) (analysis of the comparative turnover rates of men and women and the resulting impact on wage differentials).

58. Levitan, Mangum & Marshall, *supra* note 7, at 108.

59. *See* Elizabeth Almquist, Minorities, Gender, and Work 179 (1979) (discussion of the impact of this discretion on female-male wage differentials).

60. David Gordon, Richard Edwards & Michael Reich, Segmented Work, Divided Workers ix (1982).

A second type of alternative to the neoclassical labor market theory is the job competition theory. Under this theory, workers do not compete against each other in terms of wages. Instead, the demand for labor is a function of workplace and personality characteristics that make workers differentially trainable. This model views the employer as unable to bid on workers with assorted labor market skills because skills develop primarily on the job.[61] In such a setting, wage competition is undesirable because it creates disincentives for workers to train one another. Dynamic efficiency requires that seniority and other administrative criteria be used to determine advancement. The job competition model acknowledges that factors over which an individual has little control determine her income. Macroeconomic conditions and the extent to which other workers have or acquire characteristics that make them easily trainable exemplify uncontrollable factors.[62]

The job competition model also recognizes that jobs, not individuals, possess productivities.[63] Each individual possesses an array of potential productivities dependent on which job she possesses. If this latter contention is accurate, a particular productivity/income nexus becomes one of many possible links to a resource's social worth, not the single indicator as suggested by neoclassical labor market theory. A woman's productivity is not something intrinsic to herself; instead, it is a reflection of the jobs to which she is permitted access.

The logic of these alternative labor market theories is inductive.[64] That characteristic contrasts with the essentially deductive quality of neoclassical theory.[65] This distinction reflects the necessity, in neoclassical theory, of trying to match the assumptions to the specific labor market. Dual labor market theorists and other theorists found it necessary to modify the neoclassic model of labor market behavior by drawing their theory from observable facts. There are many variations in labor markets. Workers and counsel analyzing market defenses to comparable worth claims must systematically ask whether

61. Lester Thurow, The Zero Sum Society 55-57 (1980).

62. Lester Thurow, *A Job Competition Model*, in Unemployment and Inflation: Institutionalist and Structuralist Views 17 (Michael Piore ed. 1979).

63. *Id.* at 18.

64. David Gordon, Theories of Poverty and Unemployment 43-44 (1972); Piore, *supra* note 55, at 5.

65. *See* John Flynn, *The Misuse of Economic Analysis in Antitrust Litigation*, 12 Sw. U. L. Rev. 335, 337 (1980-81).

the market being challenged strongly resembles "the market" to which the defense implicitly refers.

Conclusion

No monolith called "the market" exists.[66] Rather, markets possess different forms and structures. Each market has certain predictable results in terms of who does and does not benefit from its operation. Consequently, a vehicle such as "the market defense," when used haphazardly and without regard for the characteristics of the specific market being challenged in comparable worth cases, can never provide an intellectually satisfactory defense for the wages of that market.[67] In some markets, claims of efficiency and fairness attributed to existing compensation systems may be appropriate if the actual market in question resembles the abstract idealization of markets that is presumed when making the attribution.[68] The market defense, however, more frequently functions as a rather blatant apology for the status quo.[69] It is trotted out, reflexively, to defend every outcome of a market interaction that even the most vigorous imagination cannot confuse with the ideal form of markets that activates the defense.

66. "The market", as an analytical device for justifying particular market wages, frequently reflects what Whitehead termed "the fallacy of misplaced concreteness." *See* Joseph Weizenbaum, Computer Power and Human Reason 222 (1976). The habitual deployment of hypothetical, idealized markets results in their being confused with observations of actual markets.

67. David Reisman, Tawney, Galbraith & Smith, State and Welfare 1-9 (1982).

68. *See* Schwab, *supra* note 43, at 52-55.

69. Warren Samuels, *The Historical Treatment of the Problem of Value Judgments: An Interpretation*, in Value Judgment and Income Distribution 62-64 (Robert Solo & Charles Anderson eds. 1981).