Comparable Worth in the Wake of AFSCME v. State of Washington

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INTRODUCTION

Twenty years ago, Congress passed the Equal Pay Act of 1963¹ and Title VII of the Civil Rights Act of 1964,² both designed to eliminate sex discrimination in employment.³ Although some progress has been made in opening employment opportunities to women, the disparity between men's and women's average wages has actually increased since these laws were passed.⁴ A primary reason for the persistent wage gap is the starkly sex-segregated labor force,⁵ in which women predominate in lower-paying jobs.⁶

* As this Article goes to press, it appears that the parties in AFSCME have agreed to a settlement. If the settlement is finally approved, the petition for rehearing before the Ninth Circuit will be withdrawn, and the panel's original decision will stand as precedent.
† J.D., 1983, Harvard Law School, (Boalt Hall-Harvard Exchange Program, 1984-85). I would like to thank Professor Herma Hill Kay, Boalt Hall School of Law, Professor Elizabeth Bartholet, Harvard Law School, and James Larus, for reading and commenting on earlier drafts of this Article. Many thanks also to the staff of the BERKELEY WOMEN'S LAW JOURNAL for their many hours of technical and editorial assistance.
³ No separate federal legislation currently exists to address the issue of comparable worth. Rather, comparable worth claimants have argued in the courts that by not paying women according to their job worth, the employer discriminates based on sex in violation of Title VII of the Civil Rights Act.
⁴ Chamallas, Exploring the “Entire Spectrum” of Disparate Treatment Under Title VII: Rules Governing Predominately Female Jobs, 1984 U. ILL. L. REV. 1, 2 n.4 (“In 1957, women working full-time year round earned 64 cents for every dollar earned by men, compared to only 59 cents earned by women in 1977”) [hereinafter cited as Chamallas, Exploring the Entire Spectrum].
⁵ The term “sex-segregated labor force” is used in this Article to indicate that many job classifications are filled predominantly by one sex or the other. It is not intended to mean that there is a complete segregation.
⁶ See, e.g., Blumrosen, Wage Discrimination, Job Segregation and Title VII of the Civil Rights Act of 1964, 12 UNIV. MICH. J.L. REF. 397, 412 (1979) (“The female curve of wages is almost flat, indicating that most women's jobs are dead-end, with little promotional opportunity and few instances in which wages increase as a function of time or seniority. As long as women continue to be channeled into traditionally structured segregated jobs identified as women's work, their entry level pay will probably continue to approximate their average lifetime real earnings . . . .”) (footnote omitted) [hereinafter cited as Blumrosen, Wage Discrimination]; Id.
If wages paid for "women's jobs" are artificially depressed because these jobs are occupied by women, then anti-discrimination laws should be available to attack wage discrimination. Until recently, courts did not address the issue of sex-based compensation discrimination except under the narrow circumstances of "equal pay for equal work"—an ineffective approach for dealing with sex-segregated jobs. In 1981, the Supreme Court held for the first time in *County of Washington v. Gunther* that Title VII applies to sex-based wage discrimination, even in the absence of proof of "equal work." Thus, the Court opened the door to claims of "equal pay for work of comparable value," or "comparable worth."

"Comparable worth," as used in this Article, means all employees, regardless of sex, should be paid according to the value of their jobs to the employer. The concept posits that many women are not compensated for the full value of their work because they are in a sex-segregated labor force where their jobs are devalued solely because women perform the work. That devaluation constitutes sex discrimination by employers in violation of Title VII, even though the wage system is set by a purportedly neutral "free market."

Under the Supreme Court's ruling in *Gunther*, courts must explore whether there has been a Title VII violation in wage discrimination cases even where men and women are not performing the same jobs. Courts have traditionally analyzed Title VII claims in two ways: disparate treatment and disparate impact. Even courts that fear a comparable worth "doctrine" would require a radical restructuring of a labor force admit

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7 The "equal work" standard required plaintiffs to compare the wages of men and women performing the same jobs. However, in a sex-segregated labor force, men and women are generally not doing the same jobs, so a direct comparison is impossible. Instead, discrimination occurs where entire job classifications are undervalued and underpaid simply because the work is performed primarily by women.


9 See infra text accompanying notes 20-42.
that plaintiffs are entitled to relief when they can prove "intentional" discrimination under a disparate treatment analysis.\textsuperscript{10} Many courts, however, have held that disparate impact analysis is not available in compensation cases to attack an employer's policy of using market rates to determine wages.\textsuperscript{11} The District Court in \textit{American Federation of State, County, & Municipal Employees v. State of Washington}\textsuperscript{12} was the first to hold an employer liable under both disparate treatment and disparate impact analyses across an entire labor force and to order the implementation of a comparable worth plan as the remedy to the Title VII violation. However, the District Court’s decision was reversed by a panel of the Ninth Circuit on September 4, 1985.\textsuperscript{13} The court held that the plaintiffs failed to prove discriminatory intent, and that the impact analysis could not apply to a compensation scheme based on the free market. Plaintiffs applied for a rehearing en banc before the Ninth Circuit on October 9, 1985. Even if the panel’s decision is left standing, a critical analysis is nevertheless vital for the development of future comparable worth cases.

\textit{AFSCME} put the entire legal debate over comparable worth into focus because the plaintiffs attempted to use both disparate treatment and disparate impact theories to prove sex-based wage discrimination under Title VII where the employer paid workers in female-dominated job categories disproportionately less of their evaluated worth than the employer paid workers in male-dominated categories.

In a cursory opinion, the Ninth Circuit dismissed much of the plaintiffs' evidence of disparate treatment. Nevertheless, the many methods used to show intentional discrimination in a compensation case involving

\textsuperscript{10} These cases did not involve claims of wage discrimination across an entire labor force, but rather relied on an Equal Pay Act type of analysis to show that the plaintiffs were entitled to equal pay for similar or comparable work. Thus, the remedy for the violation did not require the implementation of a comparable worth scheme involving dissimilar jobs. Nevertheless, the cases are important as a first step in showing how courts have been able to determine that some jobs are comparable, and therefore deserve to be paid equally by the employer. See Taylor v. Charley Bros. Co., 25 Fair Empl. Prac. Cas. (BNA) 602 (W.D. Pa. 1981) (warehouse employees performing same type of labor were sex-segregated depending on the product being stored in the warehouse); Lanegan-Grimm v. Library Ass’n of Portland, 560 F. Supp. 486 (D. Ore. 1983) (female worked as “bookmobile driver/clerk” and males worked as “delivery truck drivers”); Bartelt v. Berlitz School of Languages, 698 F.2d 1003 (9th Cir.) (two female directors of schools paid less than their predecessors and male directors at other schools), \textit{cert. denied}, 104 S. Ct. 277 (1983); Goodrich v. International Bhd. of Elec. Workers, AFL-CIO, 712 F.2d 1488 (D.C. Cir. 1983) (female at union headquarters paid less than males who held similar jobs); Briggs v. City of Madison, 536 F. Supp. 435 (W.D. Wis. 1982) (female public health nurses paid less than male public health sanitarians). \textit{See also} Decision of the EEOC No. 85-8, 2 Empl. Prac. Guide (CCH) ¶ 6849 (June 17, 1985). But see, Cox v. American Cast Iron Pipe Co., 585 F. Supp. 1143 (N.D. Ala. 1984) (court refused to find Title VII violation where plaintiffs could not establish that their jobs were “essentially the same” as those of men).

\textsuperscript{11} \textit{See infra} cases cited at note 162. \textit{See also} Spaulding v. University of Wash., 740 F.2d 686 (9th Cir.), \textit{cert. denied}, 105 S. Ct. 511 (1984).

\textsuperscript{12} \textit{AFSCME} v. Washington, 578 F. Supp. 846 (W.D. Wash. 1983) [hereinafter cited as \textit{AFSCME}, 578 F. Supp. at —], \textit{rev’d}, 770 F.2d 1401 (9th Cir. 1985), \textit{reh’g en banc requested} (Oct. 9, 1985) [hereinafter cited as \textit{AFSCME}, 770 F.2d at —].

\textsuperscript{13} \textit{AFSCME}, 770 F.2d at 1408.
a wide variety of job classifications may be instructive to other plaintiffs. Moreover, the court rejected the use of a disparate impact analysis by ignoring recent developments in Title VII law. Therefore, its opinion should not have persuasive precedential effect.

Part I of this Article presents a brief summary of Equal Pay Act and Title VII law and the development of sex-based wage discrimination claims beyond the "equal work" standard. Part II describes the factual and procedural background of AFSCME v. State of Washington. Part III analyzes the District Court's and Ninth Circuit's approaches to intentional discrimination and how other courts have determined intent in wage discrimination cases. Part IV argues that the District Court's finding of intentional discrimination should have been upheld. Part V argues that the Ninth Circuit's analysis of disparate impact theory is wrong and that the theory can be properly applied to sex-based wage discrimination claims.

I. EQUAL PAY ACT AND TITLE VII LAW

Both the Equal Pay Act of 1963 (EPA) and Title VII of the Civil Rights Act of 1964 address sex discrimination in employment. The EPA covers only wage disparities under limited circumstances, but Title VII is a much broader remedial statute. The methods and burdens of proof differ under the two statutes and affect the types and likelihood of success of cases brought under each.

A. The Equal Pay Act

The principle of the EPA is that "equal work" should be rewarded with equal wages. However, the "equal work" standard does not require that the jobs be identical, but rather that they be "substantially equal." In order to make a prima facie case under the EPA, a plaintiff

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(1) No employer having employees subject to any provisions of this section shall discriminate within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: Provided, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.


15 Schultz v. Wheaton Glass Co., 421 F.2d 259, 265 (3rd Cir. 1970) ("Any other interpretation would destroy the remedial purposes of the Act. . . . The Act was intended as a broad charter of women's rights in the economic field. It sought to overcome the age-old belief in women's inferiority and to eliminate the depressing effects on living standards of reduced wages for female workers and the economic and social consequences which flow from it.").
has the burden of proving that the employer pays different wages to employees of opposite sexes for equal work on jobs requiring equal skill, effort, and responsibility, and which are performed under similar working conditions. Once the *prima facie* case is proven, the burden of proof shifts to the employer to show that a wage differential is justified under one of the Act's four affirmative defenses: (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex.

### B. Title VII

Title VII, on the other hand, prohibits a broad range of employment discrimination based on race, color, religion, sex, or national origin. The statute does not define the operative term "discriminate," but the courts have given it substance by requiring a plaintiff to prove a violation by either of two different methods. The two methods, disparate treatment and disparate impact, require different showings for a *prima facie* case and also allocate burdens of proof differently.

#### 1. Disparate Treatment Under Title VII

Disparate treatment, the Supreme Court explained in *International Brotherhood of Teamsters v. United States,* is found when the "employer simply treats some people less favorably than others because of their race, color, religion, sex, or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of difference in treatment." Although the "ultimate burden of persuading the trier of fact that the defendant intentionally dis-
comparable worth

The order of proofs and allocation of the burden of production follow a three-stage process in a disparate treatment case.

First, the plaintiff carries the initial burden of establishing a *prima facie* case of discrimination. Although the specific evidence required for a *prima facie* case depends on the circumstances, the plaintiff must eliminate the most obvious non-discriminatory explanations for the employer's treatment. For example, in a disparate treatment case involving hiring or promotion discrimination, the plaintiff may fulfill that burden by showing: (i) that he or she belongs to a protected class; (ii) that he or she applied for and was qualified for a job for which the employer was seeking applicants; (iii) that, despite adequate qualifications, he or she was rejected; and (iv) that, after rejection, the position remained open and the employer continued to seek applications from persons with the plaintiff's qualifications. In general, a *prima facie* case creates an inference of discrimination because if the acts remain unexplained, the court presumes they are "more likely than not based on a consideration of impermissible factors." If the plaintiff's evidence is believed, and the employer remains silent, then the court should enter judgment for the plaintiff.

The Supreme Court has not yet ruled on what constitutes a *prima facie* case of sex-based wage discrimination. However, two lower courts have suggested an analysis for determining when the plaintiffs have demonstrated an inference of discrimination sufficient to prove a *prima facie* case of disparate treatment in the wage discrimination context. In *Lanegan-Grimm v. Library Association of Portland*, the court held the plaintiffs made out a *prima facie* case of disparate treatment by showing (i) historical sex-segregation, and (ii) the "men's" jobs and "women's" jobs were "sufficiently similar," but paid differently. In *Briggs v. City of Madison*, the plaintiffs proved their *prima facie* case by showing that they (i) were members of a protected class (ii) who occupy a sex-segregated job classification (iii) that was paid less than a (iv) sex-segregated job classification occupied by men, and (v) the two job classifications are similar in their requirements of skill, effort, and responsibility, and in their working conditions. One commentator has suggested that a plain-

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22 Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981).
24 McDonnell Douglas, 411 U.S. at 802.
26 Id.
28 Burdine, 450 U.S. at 254.
tiff may make out her *prima facie* case by showing (i) she works in a female-dominated occupation that has been traditionally sex-segregated; and (ii) the wages of the female-dominated occupation are lower than those of male-dominated occupations in the employer's labor force.31

At the second stage of a disparate treatment case, the burden of production shifts to the defendant to "articulate some legitimate, nondiscriminatory reason" for the acts.32 At this point, the employer need only produce evidence that allows "the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus."33 For example, the defendant may produce objective data concerning the plaintiff's qualifications.34

In the third stage, the plaintiff is afforded an opportunity to prove that the reason offered by the employer was a pretext for discrimination or that there is other proof of intent.35 A plaintiff may, for example, show pretext by proof that a less discriminatory alternative policy would serve the employer's legitimate interests just as well,36 or that the employer's evidence is not credible.37

2. Disparate Impact Under Title VII

Unlike a disparate treatment case, proof of discriminatory motive is not required under a disparate impact theory.38 Disparate impact analysis is available to challenge employment practices that are "fair in form, but discriminatory in operation."39 To establish a *prima facie* case, the plaintiff must show that a policy or practice, although neutral on its face, falls more harshly on a protected group. The burden of persuasion then shifts to the employer to prove that its actions are justified by business necessity.40 The reason for shifting the burden of persuasion (not just of production, as in disparate treatment cases) is that the employer has superior access to relevant evidence concerning its employment policies and practices.41 As in the disparate treatment model, when the employer

32 McDonnell Douglas, 411 U.S. at 802.
33 Burdine, 450 U.S. at 257.
34 Id.
35 Id. at 253; McDonnell Douglas, 411 U.S. at 804.
38 Teamsters, 431 U.S. at 335-36 n.15.
39 Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (employer's requirement that employees have a high school degree or pass an intelligence test, which was not job-related and which had an adverse impact on black employees, was held to violate Title VII under a disparate impact analysis).
40 Id.
establishes a justification, the plaintiff may still prevail by showing that the practice was used as a pretext for discrimination, or that a less discriminatory alternative exists. 42

C. The Bennett Amendment and the Relationship Between the EPA and Title VII

In order to avoid inconsistencies between the EPA and Title VII, Congress adopted language in Title VII that wage differences "authorized" by the EPA would not be considered an unlawful employment practice. 43 A controversy then arose over whether this language, commonly referred to as the Bennett Amendment, meant that all sex-based wage discrimination claims brought under Title VII had to fulfill the "equal work" standard of the EPA or whether the Amendment merely incorporated the EPA's four affirmative defenses. 44

If the Bennett Amendment was intended to limit Title VII in the area of sex-based wage discrimination claims, then female plaintiffs would have to prove they were performing substantially equal work to that of particular males earning higher wages. Under this interpretation, employers would be permitted to discriminate against women even though they could not pursue similar discriminatory practices against others on account of race, religion, or national origin. 45 Thus, sex-based wage discrimination claims would be limited, as in the EPA, to narrow claims of equal pay for equal work.

However, if the Bennett Amendment merely incorporated the EPA's four affirmative defenses, then Title VII could be used to attack wage differentials whenever unlawful discrimination could be proven through a disparate treatment or a disparate impact analysis. 46 Female employees could then use such analyses to prove violations even where

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43 Commonly referred to as the Bennett Amendment, 42 U.S.C. § 2000e-2(h) states in part:

It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of title 29.

45 IUE v. Westinghouse, 631 F.2d at 1100.
46 County of Wash. v. Gunther, 452 U.S. 161 (1981). "Title VII's prohibition of discriminatory employment practices was intended to be broadly inclusive, proscribing 'not only overt discrimination but also practices that are fair in form, but discriminatory in operation.'” Id. at 170 (quoting Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971)). Note, however, that the EPA's fourth defense of "a differential based on any other factor other than sex" might be interpreted to preclude traditional disparate impact analysis if it permits any "neutral" policy to suffice as a defense even without a business necessity. See infra note 166 and text accompanying notes 166-67.
there were no male employees performing substantially equal work for higher wages.

The United States Supreme Court resolved the Bennett Amendment controversy in *County of Washington v. Gunther.* Gunther was a suit by female guards in the female section of the county jail alleging wage discrimination attributable to intentional sex discrimination in violation of Title VII. The female guards were paid substantially less to guard female prisoners than the male guards were paid to guard male prisoners. The plaintiffs argued their case by using a comparable worth study undertaken by the County of Washington that determined that female correctional officers should be paid approximately ninety-five percent as much as male correctional officers. In spite of the results of the study, the county continued to pay female officers just seventy percent of the males' wages.

The District Court found that the male guards supervised more than ten times as many prisoners per guard as did the female guards and that the females devoted much more of their time to less valuable clerical duties. The court held as a matter of law that since the plaintiffs could not satisfy the equal work standard of the EPA (as it thought the Bennett Amendment required), the claim could not be brought under Title VII. The Court of Appeals reversed, and the Supreme Court affirmed.

Writing for the majority, Justice Brennan emphasized that courts should "avoid interpretations of Title VII that deprive victims of discrimination of a remedy." The Court then provided examples of sex-based wage discrimination claims which could not satisfy the equal work standard of the EPA and yet were clearly violations of Title VII. For example, an interpretation of the Bennett Amendment limiting Title VII claims to the equal work standard would result in the following anomalous situations:

In practical terms, this means that a woman who is discriminatorily underpaid could obtain no relief—no matter how egregious the discrimina-

48 Id. at 164.
49 Id. at 164-65.
50 Id. at 180.
51 Id. at 165.
53 County of Wash. v. Gunther, 623 F.2d 1303 (9th Cir. 1980) affg upon petition for rehearing, 602 F.2d 882 (9th Cir. 1980).
55 Brennan, J. delivered the opinion of the Court, in which White, Marshall, Blackmun, and Stevens, JJ., joined. Rehnquist, J., filed a dissenting opinion, in which Burger, C.J., and Stewart and Powell, JJ., joined.
56 Gunther, 452 U.S. at 178. The Court made clear its intention to construe Title VII very broadly. In quoting Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 707 n.13 (1978), the Court stated, "Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." Gunther, 452 U.S. at 180 (emphasis in the original).
57 Id. at 178-79.
tion might be—unless her employer also employed a man in an equal job in the same establishment, at a higher rate of pay. Thus, if an employer hired a woman for a unique position in the company and then admitted that her salary would have been higher had she been male, the woman would be unable to obtain legal redress under petitioners' interpretation. Similarly, if an employer used a transparently sex-based system for wage determination, women holding jobs not equal to those held by men would be denied the right to prove that the system is a pretext for discrimination.

The Court held that the Bennett Amendment does not limit sex-based wage discrimination claims under Title VII to equal work claims. In doing so, the Court opened the door to the use of comparable worth evidence to show sex discrimination. The Court claimed that it was not deciding a case based on the "controversial concept of 'comparable worth,' under which plaintiffs might claim increased compensation on the basis of a comparison of the intrinsic worth or difficulty of their job with that of other jobs in the same organization or community." Rather, the narrow issue decided was whether the Bennett Amendment barred a sex-based wage discrimination claim where the equal work standard could not be satisfied. Nevertheless, in holding as it did on the narrow issue, the Court afforded the plaintiffs an opportunity to prove at trial that they were the victims of unlawful discrimination because, unlike male employees in other jobs, they were paid less than the evaluated worth of their jobs.

Because Gunther did not address the merits of the plaintiffs' claims, the Court left open the question of how to prove sex-based wage discrimination claims under Title VII. The first court to apply Gunther and to find a Title VII violation in wage disparities among a wide variety of "men's" and "women's" jobs was the District Court in American Federation of State, County, & Municipal Employees v. State of Washington.

II. AFSCME v. STATE OF WASHINGTON

In AFSCME, the District Court applied the analysis set forth in Gunther and found rampant sex-based wage discrimination against employees of the State of Washington. The court relied on both disparate treatment and disparate impact analyses to find violations of Title VII in an array of differing jobs that were of comparable value to the

58 Id.
59 Id.
60 Id. at 166.
62 AFSCME, 578 F. Supp. at 864 ("The evidence is overwhelming that there has been historical discrimination against women in employment in the State of Washington, and that discrimination has been, and is manifested by direct, overt and institutionalized discrimination.").
employer. The Ninth Circuit reversed the decision and rejected both theories.

A. Procedural History of the Case

AFSCME and its affiliate, Washington Federation of State Employees (WFSE), filed a class action suit on July 20, 1982, against the State of Washington, on behalf of some 15,500 workers in job categories composed of at least seventy percent females. The plaintiffs alleged that the State unlawfully discriminated in the compensation of workers in those female-dominated job classes in violation of Title VII. The plaintiffs sought declaratory and injunctive relief and an award of back pay.

On December 14, 1983, the District Court found the state liable under Title VII and ordered it to pay $838 million in immediate raises and back pay. On September 4, 1985, the Ninth Circuit reversed, and a petition for rehearing en banc was filed on October 9, 1985.

B. Factual Background of the Case

The state was first put on notice about the existence of possible sex-based wage discrimination on November 20, 1973, when the Executive Director of WFSE wrote to Governor Daniel J. Evans stating, “the Boards [Department of Personnel and Higher Education Personnel Board] have perpetuated the discrimination against women in salary setting that permeates through the private sector and other governmental units.” Governor Evans responded in a letter of November 28, 1973, to the Directors of the Boards: “If the State's salary schedules reflect a bias in wages paid to women compared to those of men, then we must move to reverse this inequity.”

In response, the Boards conducted a study and issued their results on January 8, 1974. They concluded that “[t]here are clear indications of pay differences between classes predominantly held by men and those predominantly held by women within the State systems. Such differences

63 Id.
64 AFSCME, 770 F.2d at 1406, 1408.
65 AFSCME, 578 F. Supp. at 851. On March 31, 1983, the court certified a class of plaintiffs that included “all male and female employees under the jurisdiction of the state's Department of Personnel (DOP) and the Higher Education Personnel Board (HEPB) who have worked or do work in positions that are or have ever been 70% or more female.” Id. at 851-52.
66 Id. at 851.
67 Id.
68 N.Y. Times, Dec. 2, 1983, at B6, col. 3. The award consisted of a 31 percent immediate increase in salaries, as well as back pay dating back to September, 1979. Id.
69 AFSCME, 770 F.2d at 1408.
70 AFSCME, 578 F. Supp. at 860.
71 Id.
are not due solely to job 'worth.' As a result of those findings, at the recommendation of the Board, Governor Evans contracted with the outside consulting firm of Norman Willis & Associates to study salary differences between female-dominated job classes and male-dominated job classes. Representatives of the two personnel boards selected the jobs to be examined. The 1974 Willis report on the study concluded that women's classes were paid an average of twenty percent less than men's classes, for jobs of comparable worth. Furthermore, the study found that the degree of discrimination increased as the job value increased.

At a December 1974 press conference, Governor Evans revealed the conclusions of the study and announced that "steps ought to be taken to rectify the imbalance which does exist. . . . There are two basic lines. One follows the practice for those positions filled primarily by males. The other by women." The step Governor Evans took was to have the study updated in 1976 for the express purpose of establishing a plan to implement a comparable worth program. In December 1976, at the end of his last term in office, Governor Evans included a $7 million budget appropriation to begin implementation of the program. In 1977, after Governor Dixy Lee Ray was elected to office, she took the appropriation out of the budget, even though the budget contained a surplus. However, in January 1980, Governor Ray stated to the Legislature, "[T]he inequality gap between men's and women's salaries for similar work has now increased. The dollar cost of solution will be high . . . [b]ut, the cost of perpetuating unfairness, within State government itself, is too great to put off any longer . . . ."

Despite that pronouncement, the state did not act to implement comparable worth until after the filing of AFSCME in July 1982. In 1983, the State Legislature passed bills to set aside $1.5 million to implement a comparable worth program over a ten-year period. Such a small appropriation was sorely inadequate to address the discrimination

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72 Id. at 860-61.
73 Id. at 861. The State's representatives chose 70 percent as the cut-off for determination of whether a job classification was 'predominantly' of one sex or the other. Id.
74 Id.
75 Id. The jobs were classified based on four factors: knowledge and skills, mental demands, accountability, and working conditions. The total value of these four components constituted the final point value of the job class. Id. at 862.
76 Id. at 861. "For jobs evaluated at 100 points, men's pay was 125% of women's pay. For jobs evaluated at 450 points, men's pay was 135% of women's pay." Id.
77 Id. At trial, Jim Dolliver, Evans' former Chief of Staff and now state Supreme Court Justice, testified that the studies in the 1970s showed that "sex seemed to be the only" factor in wage disparities. N.Y. Times, Sept. 1, 1983, at A25, col. 1.
78 AFSCME, 578 F. Supp. at 861.
79 Id. at 862.
80 Id.
81 Id.
82 Id. at 862-63.
uncovered by the state's consultants. The union, for example, was asking for $225 million for wage increases over a two-year period, in addition to $275 million in back wages.83

C. The Case in Court

In the district court, the state argued that it had not violated Title VII under either a disparate impact or a disparate treatment analysis. First, it explained that its civil service system required all salary schedules to reflect the prevailing rate in the marketplace.84 It argued that such an employer policy, which "simply deals with the market as a given without making an independent business judgment" is not a practice at which disparate impact analysis may be aimed.85

Second, the state claimed the Evans Administration did not believe there was any intentional sex discrimination because it had found no discrimination between men and women in any specific job classification.86 Although the state acknowledged that the study found a wage differential, no study was ever conducted to determine why there was such a differential.87 Moreover, the state provided an "active, successful affirmative action program" for women in state employment.88

The state maintained that it was a leader in studying "a unique and novel theory of compensating employees—comparable worth," and it should not be punished simply for undertaking the studies.89 It also claimed that because comparable worth theory requires that jobs be evaluated subjectively without regard to factors such as the market rate or unionization, the state regarded it as both undesirable and unrealistic.

83 N.Y. Times, Sept. 1, 1983, at A25, col. 1. After the trial, the district court ordered the State to pay $838 million in immediate raises and back pay.
84 Appellants' Brief at 5, AFSCME v. State of Washington, 770 F.2d 1401 (9th Cir. 1985). Under an initiative adopted in 1960, the Department of Personnel is required to undertake a biennial salary survey, involving approximately 2700 in-state small, medium, and large businesses and eleven other state governments. The two state personnel boards then conduct hearings involving the employee union (WFSE) and the agencies involved, and make recommendations to the State Budget Director. The Budget Director submits the overall cost of implementing the salary survey to the Governor, who then makes a recommendation to the Legislature. The Legislature decides on the final salaries. In the last twelve years, budgetary difficulties and the state prohibition against deficit spending have prevented the state from meeting the prevailing rate salary recommendations. Id. at 5-6. For a brief explanation of the Washington State classification and salary system, see Warren & Boone, AFSCME v. State of Washington: Title VII as a Winning Strategy to End Wage Discrimination, 8 WOMEN'S RIGHTS L. REP. 17, 27 (1984) [hereinafter cited as Warren & Boone, Title VII as a Winning Strategy].
85 Appellants' Brief at 19-20.
86 Id. at 10.
87 Id.
88 Id.
89 Id. According to the N.Y. Times, Dec. 2, 1983, at B6, col. 3, Assistant Attorney General Clark Davis explained, "The State couldn't have envisioned, given the state of the law, that not paying comparable worth constitutes a violation of Title 7. Washington State is being penalized because it didn't bury its head in the sand. That's the irony of this case."
The state concluded that its own objective salary-setting mechanism, namely the market, was more efficient and nondiscriminatory.90

Rejecting the state's arguments, the District Court held the State of Washington liable under both disparate impact and disparate treatment theories of liability. It found that the wage-setting system in the State of Washington had a disparate impact on predominantly female job classifications, and that the state had failed to produce evidence demonstrating a legitimate and overriding business justification.91 The state's perpetuation of its salary-setting system, in the face of studies showing undeniably sex-related wage differentials, resulted in intentional, unfavorable treatment of employees in predominantly female job classifications.92 The court also found other specific evidence of intent to discriminate, such as the fact that the state ran sex-segregated help wanted ads from the 1950s through 1973.93

The Ninth Circuit reversed the District Court on both counts. The court of appeals held that the plaintiffs failed to show disparate treatment because there was insufficient proof of discriminatory intent. Since the state relied on the market, and it did not create the market disparity, the court reasoned, it was not shown to have been motivated by impermissible sex-based considerations.94 Furthermore, it found that the statistical evidence and the "isolated incidents" of historical sex segregation were insufficient to prove discriminatory animus.95 The court also rejected the use of impact analysis to attack a compensation scheme based on the prevailing market rate because such a policy does not constitute a "specific, clearly delineated employment practice."96 Petitioners applied for a rehearing en banc by the Ninth Circuit on October 9, 1985.

III. PROOF OF INTENT IN WAGE DISCRIMINATION CASES

Under the disparate treatment theory of Title VII, a plaintiff must prove that unfavorable treatment by the employer for impermissible reasons is intentional.97 Since the plaintiff has the burden of proof, she must establish a *prima facie* case, by direct or circumstantial evidence, showing facts that create an inference of intent to discriminate.98 The Supreme Court has laid down a formula for establishing a *prima facie*

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90 Appellants' Brief at 37-40.
91 *AFSCME*, 578 F. Supp. at 863.
92 Id.
93 Id. at 860.
94 *AFSCME*, 770 F.2d at 1407.
95 Id. at 1408.
96 Id. at 1406.
97 See supra text accompanying notes 20-37.
98 See supra text accompanying notes 24-28.
case for claims of hiring or promotion discrimination. However, in *Gunther*, the Court specifically declined to state what evidence constitutes a *prima facie* case of compensation discrimination. Thus, the lower courts are slowly establishing what evidence sufficiently proves intentional wage discrimination in particular factual circumstances.

A. Job Evaluations

In *Gunther*, the Court held that the plaintiffs were permitted to prove at trial, by direct evidence, their claim of intentional wage discrimination. In its decision, the Court mentioned specific examples of what it would consider intentional discrimination, such as a woman in a unique position who would have been paid more if she were a man or an employer’s transparently sex-biased system for wage determination. The evidence in *Gunther* showed that the county paid its female guards seventy percent of male guards’ wages, even though the county’s own job evaluation survey determined that the women’s jobs were worth ninety-five percent of the men’s. Therefore, it has been widely accepted that intentional discrimination may be proven where the employer’s own study shows that men, but not women, are being paid their value to the employer, and the employer refuses to remedy the disparity.

In *AFSCME*, the plaintiffs relied heavily on the “outside, independent comprehensive study of state government salaries” that was commissioned by the defendant to investigate “discriminatory pay scales.” The defendant’s study found an overall twenty percent disparity between men’s and women’s jobs, and state officials acknowledged that the dispar-

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99 See supra text accompanying notes 29-31 for suggested formulae for establishing a *prima facie* case in wage discrimination claims.

100 452 U.S. at 171 (1981).

101 452 U.S. at 164.

102 See supra text accompanying note 58. See also Scott v. Océ Indus., Inc., 536 F. Supp. 141 (N.D. Ill. 1982) (basing finding on predecessor’s salary, the court found a Title VII violation where the plaintiff was in a unique position, but would have been paid more if she had been male).

103 452 U.S. at 179.

104 *AFSCME*, 578 F. Supp. 846 (W.D. Wash. 1983); Statthos v. Bowden, 728 F.2d 15 (1st Cir. 1984); Heagney v. University of Wash., 642 F.2d 1157, 1160 (9th Cir. 1981) (“In relation to the salary curve, the University paid 39.2 percent of the female exempt employees below what the report [by an outside consulting firm hired by the University] established as a minimum salary. The comparable figure for male employees was 19.8 percent. The table shows that the University overpaid 14.5 percent of its exempt male employees, while it overpaid only 4.6 percent of its female employees.”); Connecticut State Employees Ass’n v. Connecticut, 31 Fair Empl. Prac. Cas. (BNA) 191 (D. Conn. 1983) (“[I]f the defendants did in fact determine that dissimilar jobs were of equal value, but did not provide equal pay because of the sex of the employees, then this would be evidence of intentional discrimination”); Wilkins v. University of Houston, 654 F.2d 388 (5th Cir. 1981), cert. denied, 456 U.S. 2855 (1982). See also Johnson, *The Prima Facie Case of Comparable Worth*, 11 OHIO N. U. L. REV. 37 (1984); Note, *Comparable Worth—Its Status in the Nation and Minnesota*, 10 WM. MITCHELL L. REV. 559, 580 (1984).

105 *AFSCME*, 578 F. Supp. at 861.
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106 See supra text accompanying notes 70-81.
107 AFSCME, 578 F. Supp. at 862. One of the primary objections to the "comparable worth
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108 AFSCME, 770 F.2d at 1406-08.
109 Id.
110 Id.
commissioned a study: (i) failure to evaluate as proof of intent; (ii) plaintiff’s own study; and (iii) use of employer’s own implicit job evaluations and criteria.

First, if an employer refuses to undertake its own study of job worth, a court may find the refusal to be probative of the employer’s intent to discriminate. In Taylor v. Charley Brothers Co., the employer sex-segregated warehouse employees who all performed similar work and paid the women less than the men. Charley Brothers Co. did not commission a survey of job worth. The court ruled that the intent to discriminate may be “inferred from the fact that it had not undertaken any evaluation which would have indicated the [equivalent] value of the jobs held by either men or women.” Additionally, when the employer has not commissioned its own job evaluation, a court may look to studies done by other employers in the same industry. If those studies reveal the existence of sex-based wage disparities, the question is whether a court will take judicial notice that a study of the defendant employer’s workforce would also have revealed a disparity.

Second, the plaintiff herself may commission an independent consulting firm to undertake a job evaluation study of her employer’s workforce. Of course, that may be an unwieldy and expensive burden for the plaintiff. In addition, evaluators may find it difficult to be thorough without the cooperation of the employer in determining job duties and responsibilities. Nevertheless, if an independent study is completed, it should not matter which side originally commissioned the report. However, the court may, without making subjective determinations about the comparable worth of specific jobs, examine the validity of the assumptions underlying the ultimate findings of the report. If those assumptions are legitimate, the court should accept the evaluators’ determinations of job value.

Third, even when the employer has not had an explicit job evalu-

112 Id. at 614.
114 In Spaulding v. University of Wash., 740 F.2d 686 (9th Cir.), cert. denied, 105 S. Ct. 511 (1984), the court rejected the plaintiffs’ evaluation that their work on the nursing faculty was comparable to that of other faculty members. The court decided that the selection of comparable faculty in other departments unrealistically assumed the equality of all master’s degrees, ignored job experience prior to University employment, and ignored detailed analysis of day-to-day responsibilities. Id. at 697-99. See also, Cox, Equal Work, Comparable Worth and Disparate Treatment: An Argument for Narrowly Construing County of Washington v. Gunther, 22 DUQ. L. REV. 65, 116 (1983) (plaintiff’s independent job evaluation study showing different compensation for dissimilar work does not show “illicit motive.” “It suggests, . . . instead, that the employer has acted with respect to compensation in a manner inconsistent with the presuppositions of the plaintiff’s job evaluation.”); Golper, Current Legal Status of “Comparable Work” in the Federal Courts, 34 LAB. L.J. 563 (1983) (argues that only an employer’s job evaluation can be used to show intentional discrimination, not an independent evaluation).
tion study done by an outside firm, it may have, as most employers do, some internal mechanism for valuing jobs to determine their corresponding salaries. Thus, a plaintiff may be able to compare specific characteristics and qualifications required for the jobs, as well as the education, experience, and skills of the job holders, and determine (perhaps by statistical methods, such as regression analysis) if wage disparities are sex-based—using the employer’s own criteria for job worth.

B. Other Evidence of Intentional Discrimination

Other evidence from which courts have traditionally inferred discriminatory intent is exemplified by overt disparate treatment, especially sex-segregation for similar jobs. Courts are most likely to infer that wage discrimination is currently based on sex-segregation when the employer itself has contributed to the segregation either through ads or some sort of “channeling” practice. In AFSCME, for example, the District Court inferred intent from the fact that the employer deliberately ran help wanted ads in the “male” and “female” columns of newspapers from the 1950s through 1973. The Ninth Circuit, however, found that the plaintiffs offered only proof of “isolated incidents” of sex segregation because the ads were mostly discontinued when Title VII became applicable to the states in 1972. In a number of cases, courts have also found that employers “channeled” applicants into specific job classifications based on sex, or that historically, employers have refused to allow members of one sex to apply for jobs reserved for the other. If the

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116 Spaulding, 740 F.2d at 704 (“The more sophisticated the method of algebraic adjustment that is used, such as multivariate regression analysis, the more likely an illicit discriminatory factor can be ferreted out.”), cert. denied, 105 S. Ct. 511 (1984).
119 AFSCME, 578 F. Supp. at 860. For a description of other evidence of the State’s history of discrimination that was admitted at trial, see Warren & Boone, Title VII as a Winning Strategy, supra note 84, at 30.
120 AFSCME, 770 F.2d at 1407-08.
121 Marsh v. Eaton Corp., 639 F.2d 328, 329 (6th Cir. 1981) (plaintiffs made out a prima facie case of sex-based wage discrimination by showing that (i) pre-1965, jobs were classified as “male” and “female,” and the defendant maintained separate seniority lists; (ii) statistics showed a heavy concentration of women in the lowest paying jobs; and (iii) when hiring inexperienced workers, the employer placed the women in the lowest paying jobs but half of the men in higher paying jobs); Cox v. American Cast Iron Pipe Co., 585 F. Supp. 1143, 1150, 1155 (N.D. Ala. 1984) (although rejecting “comparable worth theory” as a whole, the court held that one plaintiff made out a Title VII claim since she was orally discouraged from applying for a similar “men’s” job that paid more: “Their obstructionism was sometimes blunt and sometimes subtle, but undoubtedly it was patronizing and was tinged with a sexual bias, even if a friendly one.” Thus, the plaintiff was entitled to the wages she would have earned at the “men’s” job); Blowers v. Lawyers Coop. Publ. Co., 25 Fair Empl. Prac. Cas. (BNA) 1425,
employers contribute—however subtly—to the segregation, continue to maintain it, and pay the women's jobs at the lowest end of their pay scale, then they may be held to be intentionally discriminating in compensation.

*International Union of Electrical, Radio & Machine Workers v. Westinghouse*\(^{122}\) was one of the first cases to accept as cognizable under Title VII a claim that would require implementation of comparable worth. The court relied heavily on the fact that Westinghouse, prior to 1965, had maintained separate wage scales for "men's" jobs and "women's" jobs, with "women's" jobs being paid less.\(^{123}\) In 1965, new wages scales were created by merging the two sex-specific ones. However, all the prior "women's" jobs were given low grades in the new scale. Therefore, the Court of Appeals for the Third Circuit held, current discriminatory intent could be inferred *even though* all job classifications had since been opened up to both sexes.\(^{124}\) It was the fact that the employer based its new wage scale on the previous identity of the jobs as "men's" or "women's," rather than on any determination of actual value of the jobs, that made the employer's action discriminatory. Unlike *AFSCME*, the court found the employer could be held liable for perpetuating a discriminatory pay scale, instead of compensating employees for their worth.

In *Taylor v. Charley Brothers Co.*,\(^{125}\) the employer owned several different warehouses, each of which hired employees of just one sex. Inexperienced, newly hired employees were automatically placed in an appropriate warehouse and not informed of the possibility of any other job. The court attributed the substantial wage differential between the employees of the different warehouses to "intentional sex discrimination, as evidenced by the [defendant's] long-standing policy of segregating women from men in the workforce. . . . Women were assigned lower wages because they were women and not because of any evaluation of the worth of their job's content."\(^{126}\)

The state of mind and attitude of employers towards existing wage disparities can also be a crucial element in finding intent. For example,
the court in *Stathos v. Bowden* noted that the employer stated that the "girls" were asking for too much money.\textsuperscript{127} In *Lanegan-Grimm*, the court relied on, as evidence of discriminatory intent, the fact that the plaintiff's supervisor told her she was paid less than a man in a comparable position because he was a man and head of a household.\textsuperscript{128}

The Ninth Circuit acknowledged in *AFSCME* that disparate treatment may be inferred from specific incidents of discrimination.\textsuperscript{129} Both Governors Evans and Ray of Washington had made statements acknowledging that wage disparities were due to sex and that such "unfairness" should not be perpetuated.\textsuperscript{130} The District Court agreed and held that intentional perpetuation of an acknowledged discriminatory pay scale is itself intentional discrimination.\textsuperscript{131} However, whereas the District Court used these official statements as admissions, the Ninth Circuit disregarded them.

Finally, discriminatory intent may be established by statistical evidence. Courts have often held that gross statistical disparities may constitute \textit{prima facie} proof of intentional discrimination.\textsuperscript{132} For example, the court in *Melani v. Board of Higher Education*\textsuperscript{133} found a Title VII violation where gross statistical disparities showed women underrepresented in higher ranks and overrepresented in lower ranks. In another case, *Fitzgerald v. Sirloin Stockade, Inc.*,\textsuperscript{134} the court allowed as part of the plaintiff's \textit{prima facie} case statistics which showed the percentage of women receiving executive compensation from the defendant in relation to the total percentage of women in the area's workforce who were employed as managers, administrators, and professional technical persons.

In *AFSCME*, the Ninth Circuit recognized that discriminatory intent may be inferred from statistical evidence, although only to a lim-
That is, the "comparability of wage rates in dissimilar jobs may be relevant to a determination of discriminatory animus," although those statistics alone are insufficient to establish the requisite intent under a disparate treatment theory. The plaintiffs in AFSCME demonstrated the high inverse correlation between the percentage of women in a classification and the salary for the classification. Nevertheless, since the Court of Appeals rejected the plaintiffs' independent corroborating evidence, as discussed above, it held that the statistical evidence alone was insufficient to prove disparate treatment.

IV. Why AFSCME's Proof of Intentional Discrimination Should Have Been Upheld

AFSCME brought suit against the State of Washington because the State did not pay equal wages to men and women performing jobs of comparable value—a comparable worth theory. A number of courts have held that "comparable worth"—based on a statistical analysis of wage differentials between jobs performed predominantly by one sex as opposed to jobs performed predominantly by the other sex—is not a cognizable claim under Title VII. However, even those courts rejecting "comparable worth" as a doctrine recognize that, under Gunther, where the plaintiff can prove that those wage differentials result from intentional discrimination, there is a violation of Title VII. Thus, AFSCME's first step towards remedying the discriminatory situation was to prove its case within the bounds of traditional Title VII law, by showing disparate treatment.

Proving disparate treatment in the Ninth Circuit has been a difficult task. In Spaulding v. University of Washington, its first comparable worth case since Gunther, the Ninth Circuit held that the plaintiffs did not establish the requisite discriminatory intent to prove their case of disparate treatment. Spaulding was brought by past and present mem-

135 AFSCME, 770 F.2d at 1407.
136 Id.
bers of the faculty of the University of Washington School of Nursing, alleging sex-based wage discrimination, under both Title VII and the Equal Pay Act.\textsuperscript{141} Plaintiffs showed a wage disparity between the average salary among the nursing faculty, which is female-dominated, and the average salary among faculties in male-dominated disciplines.\textsuperscript{142} The nursing faculty also showed the similarity between the jobs performed based on preparation and teaching of courses, research and publication requirements, committee work, advising of students, and community service.\textsuperscript{143} Finally, plaintiffs introduced comparative salary statistics based on degrees held, experience, and merit.\textsuperscript{144}

The Ninth Circuit held that the Title VII claim under disparate treatment failed for the same reason it held the Equal Pay Act claim failed: lack of substantial equality of the compared jobs.\textsuperscript{145} The nurses had tried to prove comparability of their positions to that of faculty in other professional schools. However, the court stated that although comparability of the jobs "can be relevant to determining whether we can infer discriminatory animus," a "comparable work standard cannot be substituted for an equal work standard."\textsuperscript{146} The court also concluded that proof of wage disparities between similar jobs does not provide the requisite intent to prove disparate treatment.\textsuperscript{147}

The Ninth Circuit in AFSCME followed the Spaulding reasoning and refused to infer that wage disparities among similar but sex-segregated jobs were the result of intentional discrimination. However, AFSCME was distinguishable from Spaulding in at least three ways and should have been affirmed despite the Spaulding precedent.

First, the method of proof in AFSCME was more focused and narrowly tailored to a comparable worth theory under Title VII. Spaulding, on the other hand, was tried before Gunther was decided; therefore, plaintiffs concentrated their efforts on trying to prove the substantial equality of the jobs themselves under an Equal Pay Act standard. Since the plaintiffs did not introduce evidence on the comparable value or worth of the jobs, the court was free to reject their claim because they could not prove substantial equality.\textsuperscript{148} Because of their focus on the equal work standard, the plaintiffs did not seek to demonstrate the dis-

\textsuperscript{141} Id. at 691.
\textsuperscript{142} Id. at 692.
\textsuperscript{143} Id. at 697.
\textsuperscript{144} Id.
\textsuperscript{145} Id. at 700.
\textsuperscript{146} Id. at 700-01.
\textsuperscript{147} Id. at 700.
\textsuperscript{148} In her concurrence, Judge Schroeder noted, "The plaintiffs' fate in this appeal is more a product of history than of any demonstrated unworthiness of their cause. . . . Thus, it is no surprise that this case, like most cases of its vintage, was tried only on the theory that the nurses' work was substantially equal or, as plaintiff phrased it, sufficiently comparable, to establish wage discrimination on the basis of sex. . . . The only comparisons were of 'work'—not 'worth.'" Spaulding, 740 F.2d at 710, cert. denied, 105 S. Ct. 511 (1984).
criminatory animus of the defendant, as required under traditional Title VII disparate treatment analysis. Therefore, it is not surprising that the court in Spaulding found "no showing of discriminatory intent or motive and that whatever disparities in pay existed were not due to sex-based treatment." However, the AFSCME litigation was commenced after the Supreme Court decided Gunther. The plaintiffs, therefore, proved that the employer paid lower wages to female-dominated jobs despite their comparable value to higher-paid male-dominated jobs. Under Gunther, such a showing of comparable value, rather than substantial equality, should have been sufficient for the court to infer intentional discrimination.

Second, Spaulding involved plaintiffs in high level, professional jobs. Courts have traditionally been reluctant to enforce Title VII, even in hiring and promotion cases, in cases involving "upper level" jobs. Accordingly, the court in Spaulding gave great deference to the University's judgment as to the comparative value of the academic qualifications of its employees. However, the court should not have given such deference to the State of Washington in determining whether there has been discrimination in a wide variety of job categories that primarily involve blue collar, clerical, and middle management positions.

Finally, in AFSCME, unlike in Spaulding, the long litany of the defendant's discriminatory conduct should have convinced the Court of Appeals that the State of Washington intentionally discriminated against women in the setting of salaries, despite the Ninth Circuit's hostility to the theory of comparable worth. In Spaulding, the court attacked the plaintiffs' theory of comparability because they had undertaken the job evaluation themselves, and the court disagreed with the underlying assumptions on which the study was based. The court criticized the study by claiming it "unrealistically assumed the equality of all master's degrees, ignored job experience prior to University employment and ignored detailed analysis of day-to-day responsibilities." In contrast, the defendant in AFSCME undertook its own study and determined for itself the relative worth of job classifications it chose to evaluate. It was the defendant's study that showed wage disparities between the sexes which were not due to job worth. Most importantly, State officials acknowledged that the differentials were sex-based, and not based on the differing value of jobs, yet they failed to remedy the wage disparities found by their own consultants.

149 Id. at 701.
150 See Bartholet, Application of Title VII to Jobs in High Places, 95 HARV. L. REV. 945 (1982).
151 Spaulding, 740 F.2d at 702 (9th Cir.), cert. denied, 105 S. Ct. 511 (1984) (quoting Lynn v. Regents of the Univ. of California, 656 F.2d 1337, 1343 (9th Cir. 1981), cert. denied, 459 U.S. 823 (1982)) ("[W]e [reaffirm] our sensitivity to 'the need for courts to refrain from substituting their judgment for that of educators in areas affecting the content of curricula'.").
Despite the strong evidence of intentional discrimination, the Ninth Circuit rejected the disparate treatment theory. The AFSCME court apparently disregarded Gunther, which held that failure to rectify acknowledged discrepancies between value and compensation is evidence of discriminatory intent. Instead of focusing on the traditionally used evidence of intent, as discussed above, the court primarily concentrated on the fact that the state used the free market to determine its compensation scheme. The court reasoned that since the state did not create the market disparity, it was not "culpable" and therefore could not have the requisite discriminatory intent.\textsuperscript{153}

However, the plaintiffs were not trying to show that the state was responsible for the market disparity but merely that the policy choice of using the market was discriminatory. The Ninth Circuit announced in its decision that the law does not "deem[ ] the free market system a suspect enterprise."\textsuperscript{54} But, the choice to use the system to determine compensation should not be free of suspicion. The other evidence of intentional discrimination in AFSCME cast doubt on the neutrality of that policy choice, and the failure to rectify acknowledged disparities should have been regarded as proof of disparate treatment.

V. \textbf{IN DEFENSE OF DISPARATE IMPACT ANALYSIS IN COMPARABLE WORTH CASES}

Disparate impact analysis does not require proof of intent but rather focuses on the effects of a policy or practice. If accepted by the courts, it would be a very powerful tool in sex-based wage discrimination cases. While it may be difficult to prove the discriminatory animus of an employer, it is much easier to show that an employer's compensation system has an adverse impact on job classifications that are predominately female. An additional advantage of disparate impact analysis is that at trial, the burden of persuasion, not merely the burden of production, switches to the employer after the plaintiff presents her \textit{prima facie} case.\textsuperscript{155}

The District Court in AFSCME was the first to hold that a sex-based wage discrimination claim was cognizable under a disparate impact theory.\textsuperscript{156} Using that theory, the court found that the defendant's system of compensation was an objective, facially neutral practice that was discriminatory in operation.\textsuperscript{157} Having found that Washington's compensation system had a disparate impact on employees in predominantly female job classifications, and since the defendant did not demonstrate an

\textsuperscript{153} AFSCME, 770 F.2d at 1406-07.
\textsuperscript{154} Id. at 1407.
\textsuperscript{155} See supra text accompanying notes 32-35.
\textsuperscript{156} This is an alternative holding, not dicta.
\textsuperscript{157} AFSCME, 578 F. Supp. at 864.
overriding business justification for the practice, the District Court held that the practice violated Title VII.\textsuperscript{158}

The Ninth Circuit reversed in a broad holding that disparate impact is not applicable where an employer bases compensation on the competitive market. In so holding, the court adopted a position similar to other courts that have considered the issue. Nevertheless, the arguments made to defeat the use of disparate impact theory are not persuasive and should be rejected in the future.

A. Obstacles to the Use of Disparate Impact Analysis in Wage Discrimination Cases

There are four specific obstacles that courts and commentators have used to try to limit the use of impact analysis in sex-based wage discrimination cases: (i) interpretation of Gunther; (ii) § 703(a)(1) analysis versus § 703(a)(2) analysis of Title VII; (iii) isolation of specific practice versus attack on cumulative effect of practices; and (iv) market rate defense.\textsuperscript{159}

First, some courts have interpreted Gunther as authorizing the use of disparate treatment analysis only in compensation cases. In Gunther, the plaintiffs complained only of intentional sex discrimination, and the court stated that the plaintiffs "seek to prove, by direct evidence, that their wages were depressed because of intentional sex discrimination."\textsuperscript{160} The Court in Gunther did note that in general Title VII is to be broadly construed and proscribes "not only overt discrimination but also practices that are fair in form but discriminatory in operation."\textsuperscript{161} Nevertheless, several courts have interpreted Gunther as being limited to intentional discrimination claims.\textsuperscript{162} For example, in Power v. Barry County,\textsuperscript{163} the court stated, "the Supreme Court's recognition of intentional discrimination may well signal the outer limit of the legal theories cognizable under Title VII."\textsuperscript{164}

The Supreme Court has not decided whether disparate impact analysis is available in challenging a discriminatory compensation system. The Court in Gunther indicated that the incorporation of the fourth EPA defense might require a variation in traditional Title VII analyses with

\begin{itemize}
  \item \textsuperscript{158} Id.
  \item \textsuperscript{159} Only the last two obstacles were discussed in the Ninth Circuit's AFSCME opinion and will be emphasized in this Article.
  \item \textsuperscript{160} 452 U.S. at 164.
  \item \textsuperscript{161} Id. at 170, quoting, Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).
  \item \textsuperscript{162} Plemer v. Parsons-Gilbane, 713 F.2d 1127, 1133 (5th Cir. 1983) (Gunther was concerned only with "blatant cases of sex discrimination"); Connecticut State Employees Ass'n v. Connecticut, 31 Fair Empl. Prac. Cas. (BNA) 191 (D. Conn. 1983) (plaintiffs may state a claim for intentional sex-based wage discrimination but no cause of action based exclusively on a theory of comparable worth); Power v. Barry County, 539 F. Supp. 721 (W.D. Mich. 1982).
  \item \textsuperscript{163} 539 F. Supp. at 721 (W.D. Mich. 1982).
  \item \textsuperscript{164} Id. at 726.
\end{itemize}
COMPARABLE WORTH

respects to wage discrimination claims. Although the fourth defense allows differentials based on "factors other than sex," the question is open whether disparate impact analysis would be permitted to show that the employer has no business justification for using such a factor, or that it is merely a pretext for discrimination. If impact analysis were not available, employers could claim to be using a neutral factor other than sex, when the underlying explanation for the use of the factor is that it serves as a proxy for sex. The Court in Gunther refrained from deciding the ultimate issue of how sex-based wage discrimination litigation under Title VII should accommodate the fourth EPA defense. The unavailability of disparate impact analysis would leave a gap in compensation discrimination law that does not exist in the other areas of employment discrimination law.

The second obstacle arises in the issue of whether impact analysis applies in cases under § 703(a)(1) of Title VII. Those cases involved discrimination with respect to "compensation, terms, conditions, or privileges of employment." The Supreme Court originally developed disparate impact theory in § 703(a)(2) cases, which involve discrimination with respect to "employment opportunities or . . . status as an employee." The Court has, however, found violations of § 703(a)(1) using a disparate impact analysis in two cases involving sex discrimination in retirement benefit plans.

165 452 U.S. at 170-71; More importantly, incorporation of the fourth affirmative defense could have significant consequences for Title VII litigation. Title VII's prohibition of discriminatory employment practices was intended to be broadly inclusive, proscribing 'not only overt discrimination but also practices that are fair in form, but discriminatory in operation.' [citation omitted]. The structure of Title VII litigation, including presumptions, burdens of proof, and defenses, has been designed to reflect this approach. The fourth affirmative defense of the Equal Pay Act, however, was designed differently, to confine the application of the Act to wage differentials attributable to sex discrimination. [citation omitted]. Equal Pay Act litigation, therefore, has been structured to permit employers to defend against charges of discrimination where their pay differentials are based on a bona fide use of 'other factors other than sex.' [ ... ] 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.

166 For example, if disparate impact analysis were unavailable in promotion cases of race discrimination, employers might be able to claim that their use of "neutral" qualifying tests is a "factor other than race." However, where those tests are not validated as a business necessity, impact analysis has allowed plaintiffs to show that the tests are really illicit substitutes for basing promotion decisions on race.


The Ninth Circuit also upheld the use of disparate impact analysis in a § 703(a)(1) claim in Wambheim v. J.C. Penny Co., Inc.\(^{171}\) At issue in Wambheim was a medical and dental insurance plan which offered employees coverage for dependents only if the employee was a head-of-household. Head-of-household was defined as a spouse who earned more than half of the couple's combined income.\(^{172}\) Under this program, only thirty-seven percent of the female employees, but ninety-five percent of the males, obtained coverage for dependent care.\(^{173}\) The court found that a *prima facie* case of disparate impact was established, but that the defendant demonstrated "legitimate and overriding business justifications" for its rule.\(^{174}\) Since the plaintiffs did not prove the justifications were pretextual, the benefit plan was upheld.\(^{175}\)

The third obstacle presented to compensation discrimination litigants seeking to use disparate impact analysis, and one that is emphasized in the AFSCME opinion, is the question of whether disparate impact analysis is available to challenge an entire compensation scheme, rather than a limited practice. Spaulding asserts that the Wambheim analysis is available only to attack a specific employer policy, and not to make a "full-scale assault on the employer's salary practices."\(^{176}\) AFSCME then states that a compensation scheme based on the free market is not a "specific, clearly delineated employment policy" but rather the result of "a complex of market forces."\(^{177}\)

In stating that impact analysis should be applied only where a single, neutral policy can be isolated, rather than applying the analysis to the cumulative effect of the employer's policies, the Ninth Circuit joined a debate among the courts of appeals.\(^{178}\) The AFSCME court relied on the Fifth Circuit view in Pouncy v. Prudential Insurance Co.,\(^{179}\) ruling that a plaintiff must isolate the specific practice that is responsible for the claimed disparity "so that the employer can respond by offering proof of its legitimacy."\(^{180}\) However, Pouncy has been under attack even in the


\(^{172}\) Id. at 1493.

\(^{173}\) Id. at 1493-94.

\(^{174}\) Id. at 1495.

\(^{175}\) Id. at 1495-96.

\(^{176}\) Spaulding, 740 F.2d at 708 (9th Cir.), cert. denied, 105 S. Ct. 511 (1984).

\(^{177}\) AFSCME, 770 F.2d at 1406.

\(^{178}\) See, e.g., Pouncy v. Prudential Ins. Co. of Am., 668 F.2d 795, 800 (5th Cir. 1982) ("Although some courts have used the disparate impact model of proof to challenge multiple employment practices simultaneously ... this is an incorrect use of the model.")

\(^{179}\) Cf. Segar v. Smith, 738 F.2d 1249, 1266 (D.C. Cir. 1984) ("[P]laintiffs' pattern or practice disparate treatment challenge to the employment system as a whole may also implicate disparate impact analysis. A pattern or practice disparate treatment case shares with a typical disparate impact suit the allegation that an employer's practices have had a systematic adverse effect on members of the plaintiff class.").

\(^{180}\) 668 F.2d 795 (5th Cir. 1982).
Fifth Circuit where it originated. One panel\textsuperscript{181} indicated its dissatisfaction with \textit{Pouncy}, but followed it; another panel\textsuperscript{182} decided to apply disparate impact analysis to a claim of discrimination based on the subjective recommendations of supervisors.\textsuperscript{183}

On the other hand, in the debate between specific practice or broad attack, the Court of Appeals for the District of Columbia Circuit holds the opposing view. The D.C. Circuit held in \textit{Segar v. Smith}\textsuperscript{184} that impact analysis may be applied where the plaintiff shows a classwide statistical disparity, and the employer defends itself by relying on a specific employment practice as its explanation. The court noted that a plaintiff cannot always "pinpoint at the outset the employment practices that cause an observed disparity between those who appear to be comparably qualified."\textsuperscript{185} Under the \textit{Segar} rule, women could claim they are underpaid because of their sex by establishing a statistical disparity between men and women in comparable jobs, and then the employer would have to show that the disparity resulted from a practice that was justified by legitimate and overriding business reasons.

Although the Ninth Circuit asserts in \textit{AFSCME} that a compensation scheme is not an "employment practice applied at a single point in the job selection process,"\textsuperscript{186} disparate impact has already been applied in some wage discrimination claims. In \textit{Liberles v. County of Cook},\textsuperscript{187} black "case aides" were paid less than white "caseworkers" for performing similar jobs. The court held that the disparate impact analysis was proper in determining the legality of an employer's facially neutral assignment and compensation policy.\textsuperscript{188} In \textit{Kouba v. Allstate Insurance Co.},\textsuperscript{189} the District Court found wage discrimination under a disparate impact analysis. It held that "the mere phrasing of a factor in neutral terms will not save a pay schedule which perpetuates discriminatory pay practices."\textsuperscript{190}

Nevertheless, in \textit{AFSCME}, as in \textit{Spaulding}, the court states that the practice of relying on the market to set wages is "too multifaceted to be appropriate for disparate impact analysis."\textsuperscript{191} This conclusion is fallacious: the court failed to offer any reason why reliance on the market is

\textsuperscript{181}Carpenter v. Stephen F. Austin State Univ., 706 F.2d 608 (5th Cir. 1983).
\textsuperscript{182}Page v. U.S. Indus., Inc., 726 F.2d 1038 (5th Cir. 1984).
\textsuperscript{183}Under \textit{Pouncy}, the challenged practice should also be objective, rather than subjective to come within disparate impact analysis. If an employer practice is subjective, the plaintiff must prove discriminatory motive. 668 F.2d at 802.
\textsuperscript{184}738 F.2d 1249 (D.C. Cir. 1984).
\textsuperscript{185}Id. at 1271.
\textsuperscript{186}\textit{AFSCME}, 770 F.2d at 1405.
\textsuperscript{187}709 F.2d 1122 (7th Cir. 1983).
\textsuperscript{188}Id. at 1133.
\textsuperscript{189}523 F. Supp. 148 (E.D. Cal. 1981), rev'd and remanded on other grounds, 691 F.2d 873 (9th Cir. 1982).
\textsuperscript{190}Id. at 161.
\textsuperscript{191}\textit{AFSCME}, 770 F.2d at 1406.
not a policy for purposes of disparate impact analysis. The *AFSCME* court claims employers deal with the market as a given and do not make a "policy" about it. In reality, the "policy" complained of in *AFSCME*, as in *Spaulding*, is exactly that the state chose to treat the market as a given and to set salary schedules based on the prevailing market rate.

As the court recognizes, the Washington Legislature set a very specific policy for assessing wage rates, based on the use of surveys, agency hearings, administrative recommendations, and budget proposals. It also chose how to determine the "prevailing market rate" for job categories that are unique to state government. Therefore, even if the Ninth Circuit requires disparate impact cases to challenge a specific employment practice, it should not have automatically rejected its application in *AFSCME*. The plaintiffs did not attack how wages are set in the market, which would surely be a far-ranging attack. Rather, the plaintiffs complained that the state chose as its own policy the setting of salaries based on the prevailing market rate.

The fourth obstacle courts have used to block disparate impact analysis in wage discrimination cases is the employer's argument that business necessity requires reliance on the market to set wages. Since *Gunther* decided that the Bennett Amendment incorporated the Equal Pay Act's four affirmative defenses into Title VII, one defense available to employers is that compensation discrimination results from a "factor other than sex." Employers argue, and some courts have agreed, that reliance on market rates in setting wages is not sex-based and thus is an acceptable defense to a Title VII claim.

### B. The Discriminatory Impact of Reliance on the Market

*Gunther* rejected the use of the prevailing market rate where the defendant determined that the prevailing rate did not fully compensate female employees for the value of their work. Nevertheless, *AFSCME*

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192 Id. at 1406-07.
193 Id. at 1403.
194 Appellants' Brief at 5-6.
195 See supra text accompanying notes 43-60.
196 Christensen v. Iowa, 563 F.2d 353 (8th Cir. 1977); Lemons v. City & County of Denver, 620 F.2d 228 (10th Cir.), cert. denied, 449 U.S. 888 (1980); Briggs v. City of Madison, 536 F. Supp. 435 (W.D. Wisc. 1982); Walter v. KFGO Radio, 518 F. Supp. 1309 (D.N.D. 1981). See also Cox, supra note 114 (the market phenomenon is merely "correlated" to gender, and market rate decisions are external to an employer); Note, *Sex-based Wage Discrimination Under the Title VII Disparate Impact Doctrine*, 34 STAN. L. REV. 1083 (1982).
197 *AFSCME*, 770 F.2d at 1407.
relied on two of the earliest comparable worth cases, *Christensen v. Iowa* and *Lemons v. City & County of Denver*, both of which were decided before *Gunther*, to hold that a market rate defense is legitimate under Title VII. In *Christensen v. Iowa*, female clerical employees at the University of Northern Iowa sued the state for paying clerical workers (an exclusively female class) less than physical plant workers (a predominantly male class) for jobs of equal value to the University. The state had instituted a pay scheme based on its own objective evaluation of the worth of jobs and found the work performed by physical plant workers and clerical workers to be of equal value. In *Gunther*, the Supreme Court implied that in a sex-segregated labor force, once the employer's own evaluation determined jobs to be of comparable value, those jobs must be paid comparably. However, in this pre-*Gunther* case, the court allowed the University to modify its internal pay scheme to reflect outside market rates. The court found that reliance on prevailing market wages was a legitimate factor in setting salaries because of "economic realities":

We find nothing in the text and history of Title VII suggesting that Congress intended to abrogate the laws of supply and 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.

In *Lemons v. City & County of Denver*, city nurses complained that their wages followed a community scale in which nurses historically had been underpaid. The nurses argued they should be compensated based on the salaries of other city jobs of comparable worth in order to avoid incorporating community discrimination into the city's pay plan. The court rejected the plaintiffs' argument and relied on the *Christensen* analysis that an employer need not disregard community wage rates. The court did not address the issue, later raised in *Gunther*, whether the system for wage determination itself is a "transparently sex-biased system... a pretext for discrimination." Thus, the courts in *Christensen* and *Lemons*, in upholding the market rate defense, assumed the neutrality of the market and did not get to the point of asking whether reliance on a discriminatory market itself is a violation of

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198 563 F.2d 353 (8th Cir. 1977).
199 620 F.2d 228 (10th Cir.), cert. denied, 449 U.S. 888 (1980).
200 *AFSCME*, 770 F.2d at 1407.
201 563 F.2d at 354 (8th Cir. 1977).
202 *Id.*
203 *Id.*
204 *Id.* at 356.
205 *Id.* But see infra text accompanying notes 211-238.
207 *Id.*
208 *Id.*
Title VII.\textsuperscript{210}

A close look at the case law and purposes and policy of Title VII indicates that reliance on prevailing market wages, as in \textit{Christensen} and \textit{Lemons}, is not a sufficient defense to a Title VII claim of compensation discrimination. Even if reliance on a “neutral” market is a sufficient defense to the charge of intentional discrimination, under the impact analysis, the defendant has the burden of proving that its reliance on the market is a legitimate business necessity. Moreover, plaintiffs also have an opportunity to show that the reliance is a pretext for discrimination.

Under the Equal Pay Act, reliance on prevailing market rates as a “factor other than sex” is not a legitimate defense to wage discrimination claims.\textsuperscript{211} The Supreme Court explicitly recognized in \textit{Corning Glass Works v. Brennan}\textsuperscript{212} that employment discrimination law may necessarily conflict with “economic realities.” Where a pay differential arose because men would not work at the low rates paid to women, the Court stated, “[t]hat 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.”\textsuperscript{213}

The Supreme Court applied the same Equal Pay Act reasoning in \textit{Arizona Governing Committee v. Norris},\textsuperscript{214} a Title VII case. In Norris, the Supreme Court found a Title VII violation where the employer had relied on the market rate for determining its retirement benefit plan and reliance on the market produced a discriminatory result. The Court allowed tinkering in the private economy because both Title VII and the Equal Pay Act concern equity, not economic efficiency. The Court rea-

\textsuperscript{210} The Equal Employment Opportunity Commission (EEOC) recently relied on \textit{Christensen} and \textit{Lemons} for a holding that a violation of Title VII may not be shown by comparing the value of the work performed by the charging parties to the value of dissimilar jobs which commanded a different wage in the market. The suit was brought by members of the predominantly (85 percent) female administrative staff of a municipal housing authority, challenging their employer’s practice of paying its predominantly (88 percent) male maintenance staff more than the administrative staff were paid. Decision of the EEOC No. 85-8, 2 Empl. Prac. Guide (CCH) ¶ 6849 (June 17, 1985). The respondent housing authority, as a recipient of funds from the federal Department of Housing and Urban Development, was required to base its wage scales on local prevailing rates for administrative and maintenance work, although the actual wages paid were the product of collective bargaining. \textit{Id.} at 7045. The EEOC held that the respondent’s reliance on the market was not discriminatory within the meaning of Title VII, based on its belief that “Congress never consented to wholesale governmental restructuring of the valuations of jobs established by the non-sex-based decisions of employers, the collective bargaining process, or by the mechanisms of the market place.” \textit{Id.} at 7048. The EEOC, like the \textit{Christensen} and \textit{Lemons} courts, did not consider whether reliance on the market perpetuated the discrimination that Title VII was designed to eradicate. Moreover, the EEOC decision does not have legal precedential effect but is rather a decision by political appointees who are ideologically opposed to comparable worth theory.


\textsuperscript{212} 417 U.S. 188 (1974).

\textsuperscript{213} \textit{Id.} at 205.

\textsuperscript{214} 103 S. Ct. 3492 (1983).
soned that interference in supposedly free market forces is often required to achieve the goal of redressing discrimination because market rates reflect societal discrimination.\textsuperscript{215} This point was well illustrated in another Equal Pay Act case, \textit{Hodgson v. Brookhaven General Hospital}.\textsuperscript{216} Female nurse's aides and male orderlies were not paid equally, although they performed substantially equal work.\textsuperscript{217} In contrast to the Title VII cases holding that disparities would be acceptable if the employer showed it "needed" to offer higher salaries to certain employees, the court explained:

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.\textsuperscript{218}

Finally, the District Court in \textit{Kouba v. Allstate Insurance Co.}\textsuperscript{219} recognized that the market rate reflected historical discrimination. The court ruled that the employer could not base its new employees' salaries on their prior salaries, unless it could prove that the prior salaries were based on factors other than sex. These cases condemning employer exploitation of market conditions recognize that the market itself is not "neutral." Therefore, reliance on the market perpetuates discrimination, for which no one could be held accountable and which could never be remedied if a market rate defense were acceptable.\textsuperscript{220}

The \textit{AFSCME} court's assertion that Title VII was not intended "to abrogate fundamental economic principles such as the laws of supply and demand"\textsuperscript{221} flies in the face of recent Supreme Court decisions, as well as analogous Equal Pay Act cases. In fact, Title VII was designed to prohibit employers from exercising their free market "taste for discrimination,"\textsuperscript{222} regardless of their reason for discriminating. Many employers

\begin{itemize}
\item \textsuperscript{215} See Note, \textit{Proving Title VII Sex-Based Wage Discrimination}, supra note 6, at 321-22 ("It seems quite anomalous to reject market forces as a defense under the Equal Pay Act, which does not permit courts 'to substitute their judgment for the judgment of the employer,' but to allow the market defense under title VII [sic], which does not place such a restriction on the judiciary and which, in fact, depends upon judicial intervention for its enforcement.").
\item \textsuperscript{216} 436 F.2d 719 (5th Cir. 1970).
\item \textsuperscript{217} The Fifth Circuit thought that the tasks performed by aides and orderlies were substantially the same, 436 F.2d at 724-25, but it remanded for further findings of fact in order to determine whether the two jobs required "equality of effort," the Fifth Circuit's criterion for assessing whether there was a violation of the Equal Pay Act. 436 F.2d at 725.
\item \textsuperscript{218} Id. at 726.
\item \textsuperscript{219} 523 F. Supp. 148 (N.D. Cal. 1981), rev'd and remanded on other grounds, 691 F.2d 873 (9th Cir. 1982).
\item \textsuperscript{220} As the court in \textit{AFSCME} points out, "[t]he state did not create the market disparity." \textit{AFSCME}, 770 F.2d at 1406.
\item \textsuperscript{221} Id. at 1407.
\item \textsuperscript{222} Blumrosen, supra note 6, at 446-47 ("Beginning in the late 1950's, economists began to recognize that discrimination may affect wage structures and to develop theories to explain such discrimination. According to one economist of the neoclassical school of pure competition, employers and employees have a 'taste for discrimination' which enters into their calculations of what jobs are worth. . . . The community wage in this view is more than an index of job
might choose to discriminate because of their own preferences, whether or not it is economically efficient. For example, in both *Charley Brothers Co.* and *Westinghouse*, conventional economic theory would indicate that unskilled industrial workers of both sexes should have been paid the same wages. However, the employers arbitrarily classified certain jobs as male or female and then set the female wage rates below their actual worth to the employer. The theory of a neutral market often fails to explain such wage differences between women and men. Eleanor Holmes Norton, a former Chair of the Equal Employment Opportunity Council, explained:

A state pays librarians with masters degrees, whose jobs involve a fair amount of skill, effort, and responsibility decidedly less than State liquor-store clerks, who essentially make change. . . . [S]tate librarians are almost always women, and liquor-store clerks are almost always men. One would want to inquire what there is about the librarian's job that makes it worth several thousand dollars less than the State liquor-store clerk's job. I don't think market forces will explain it! I think it is easier to find liquor-store clerks than librarians.

Free market assumptions fail to describe reality adequately because women in the labor market present a special situation. Neoclassical economics assumes that wages for jobs requiring equal skills, education, and experience will be equal because employees would otherwise naturally flock to the higher paying jobs. This assumption requires that employers view employees as interchangeable. If the sex of an employee is given significance by the employer, then the ideal model of neoclassical economics does not reflect reality. Instead, wage rates may be artificially depressed because the employer values male workers more, because only lower wages will offset the employer's distaste for hiring women, or because employers believe women are less productive or have higher turnover rates; therefore, the employer decides to pay males higher wages values based on productivity, the supply of labor, and demand for the product. It is also a reflection of the price of popular prejudices and ill will toward disfavored groups and a mechanism for their perpetuation.

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224 Note, Proving Title VII Sex-Based Wage Discrimination, supra note 6, at 321; see also, Pauley, The Exception Swallows the Rule: Market Conditions as a "Factor Other Than Sex" in Title VII Disparate Impact Litigation, 86 W. VA. L. REV. 165 (1983).

225 It is beyond the scope of this Article to offer a complete critique of neoclassical economics. However, it is sufficient to point out that some of the assumptions underlying economic principles, on which employers base their arguments that reliance on the market is legitimate, are not necessarily accurate as to women in the labor force. See, e.g., D. TREIMAN & H. HART-MANN, supra note 6, at 62-68; Phelps, The Statistical Theory of Racism and Sexism in THE ECONOMICS OF WOMEN AND WORK (A. Amsden ed. 1980).

226 In theory, if jobs A and B require equal skill levels, and job A pays more, workers will line up for job A work. As the supply of workers willing to do job A increases, the wage rate falls. At the same time, as the supply of workers willing to do job B decreases, the wage rate rises. In the long run, the wage rate for jobs A and B should stabilize at the same level, where workers will be indifferent as to which job they will do. Thus, the supply of workers available for both jobs would be the same. See generally, P. SAMUELSON, ECONOMICS 547-58 (8th ed. 1970).
COMPARABLE WORTH

If neoclassical assumptions about the interchangeability of workers do not hold because of employer stereotyping of women, the result is that employers can keep women’s wages artificially low. The Supreme Court in Gunther declared that Title VII was directed at remedying the discriminatory effects resulting from sex stereotyping. In Albemarle Paper Co. v. Moody, the Court stated that district courts have “not merely the power but the duty to . . . eliminate the discriminatory effects of the past as well as bar discrimination in the future.”

These recent Supreme Court decisions indicate that Christensen and Lemons are no longer good law. Blind acceptance of the market as a neutral factor other than sex, as in the AFSCME decision, is inconsistent with the Gunther mandate to eliminate the “entire spectrum” of sex discrimination. Gunther specifically suggested that an employer would be in violation of Title VII for paying a rate of compensation to female employees if the rate would be higher if men were performing the job. In recognizing that one result of a sex-segregated market may be discrimination in the rates paid to women, the Court implicitly rejected an employer’s defense that because its jobs are actually open to both men and women, its use of the market to set wages is non-discriminatory. The reasons for reliance on the market and the effect of relying on the market would have to be explored in order to determine whether an employer passed the Gunther test. The Ninth Circuit failed to make such an analysis and unthinkingly accepted the market rate defense as legitimate.

Moreover, Title VII, by its nature, interferes with the private economy, and an employer should have to prove an overriding business necessity for relying on the market rate. A mere showing of inefficiency should be insufficient. In Briggs v. City of Madison, the court found the plaintiffs proved their prima facie case of compensation discrimination, but the employer rebutted it by showing the necessity of raising the salary of certain male-dominated positions in order to attract employees. However, the desire for larger profits cannot be a sufficient justifi-

227 See D. Treiman & H. Hartmann, supra note 6, at 63-64.
228 452 U.S. at 180. See supra note 56.
229 422 U.S. 405 (1975).
230 Id. at 418 (quoting Louisiana v. United States, 380 U.S. 145, 154 (1965)).
231 Christensen v. Iowa, 563 F.2d 353 (8th Cir. 1977).
233 See supra notes 211-215 and accompanying text.
234 452 U.S. at 178.
236 536 F. Supp. 435 (W.D. Wis. 1982).
237 Id. at 447. See also, Barnett, Comparable Worth and the Equal Pay Act—Proving Sex-Based Wage Discrimination Claims After County of Washington v. Gunther, 28 Wayne L. Rev.
cation for discrimination. As in the Equal Pay Act cases, employers should not be able to pay female employees less simply because they are willing to work for less and their services are devalued in the marketplace. Otherwise, a tremendous gap will be left open between the purpose and effect of Title VII, as employers blame wage inequities on "neutral" market forces in a purportedly profit-maximizing economy.

In fact, the court in *AFSCME* asserted that considerations other than the prevailing rate, such as availability of workers and the effectiveness of collective bargaining, may influence wage rates. However, unlike *Briggs*, the defendant did not prove any special circumstances which required it to perpetuate the wage disparities. Rather, the state merely wanted to pay the least for which it could hire workers, even at an artificially depressed wage.

The disparate impact model was designed especially to address inequalities that result from facially neutral policies. In *Gunther*, the Supreme Court acknowledged that in order to remedy all forms of discrimination, courts must attack schemes where men are paid in accordance with the full worth of their jobs but women are not, even where they hold different jobs. Where the market discriminates against women by setting their wages at disproportionately less of their value than men earn, often only a disparate impact analysis can ferret out this form of illegal discrimination.

**CONCLUSION**

Over the past two decades, it has become clear that if women are to achieve pay equity with men, they cannot rely only on the painstakingly slow process of integration of the labor force. Because of societal expectations and cultural norms, women continue to cluster in a small number of low-paying, low prestige jobs. Many of those jobs are low-paying because they are filled by women. The solution to pay equity lies in determining the proper compensation based on the job, not on the sex of the job holder. That is the goal of comparable worth proponents—to pay employees according to the value of their work to the employer.

It is only since the Supreme Court decided *Gunther* in 1981 that women have been able to argue successfully that they face wage discrimination under Title VII even in situations where no man is working at the same job. The Supreme Court has since remained silent on what constitutes intentional discrimination in a sex-based wage discrimination case.

1669, 1698-99 (1982) (argument that *Briggs* court accepted a loose defense by the defendants and ignored plaintiff's evidence that the defense was pretextual); Walter v. KFGO Radio, 518 F. Supp. 1309, 1318 (D. N.D. 1981) ("Where defendant demonstrates that a higher salary is necessary to hire the person best able to do the job, that consideration is a valid differential.").

238 *AFSCME*, 770 F.2d at 1407.
Nevertheless, *Gunther* made it clear that failure to rectify wage disparities based on sex—as shown in job evaluation studies—is evidence of intentional discrimination.

The Ninth Circuit in *AFSCME* failed to account for the *Gunther* opinion when it discussed the defendant's own job evaluation study. Under *Gunther*, any reasonable method that results in finding that only men are paid in accordance to the value to their employer of the work they perform is evidence of an employer's discriminatory motive. In *AFSCME*, the state's survey found a twenty percent disparity in wages due to the sex of the job holders. Moreover, the District Court found other evidence of discriminatory intent, including past practices of sex-segregation, employer attitudes, and statistics, all of which the Ninth Circuit belittled or ignored.239

Although the Ninth Circuit also denied the plaintiffs relief in *Spaulding* based on disparate treatment,240 the same result in *AFSCME* should not have followed. The evidence in *AFSCME* was more persuasive than the evidence in *Spaulding*, and was based in large part on the defendant's admissions and actions, which the Ninth Circuit failed to acknowledge. The plaintiffs in *Spaulding*, as noted in Judge Schroeder's concurrence, focused too much on the pre-*Gunther* standard of comparability of jobs, not worth. *AFSCME*, on the other hand, presented precisely the proof required by *Gunther*—a wage disparity based on the sex of the job holder rather than the value of the job. Such evidence under *Gunther* makes out a case of disparate treatment.

The *AFSCME* court also rejected the District Court's finding of liability under a disparate impact analysis. Disparate impact is a powerful tool in comparable worth cases because the plaintiff need not prove the defendant's discriminatory intent. As employers become more attuned to what courts will construe as discriminatory intent, they may, for example, refuse to undertake job evaluation studies. Until courts recognize that failure to undertake a study may be evidence of discriminatory intent, plaintiffs who must rely on a disparate treatment theory would be unable to prove the requisite intent. Therefore, disparate impact is a crucial instrument in proving that wages for "women's" jobs are discriminatorily depressed.

Many employers claim that they should not be held liable for discrimination because their compensation systems are based on a neutral, external market rate. However, it is just this sort of reliance on a neutral mechanism that the disparate impact model was designed to expose as a pretext for discrimination. If those employers are not held liable for the discriminatory effects of their choice of a "neutral" policy, as the Ninth

239 *Id.* at 1405, 1407-08.
Circuit incorrectly describes it, then no one will be held responsible, and the discrimination will persist.

The Ninth Circuit rejected the disparate impact theory in AFSCME because it feared undue interference with the "free market." Yet, Equal Pay Act interpretation and Title VII precedents had already established that anti-discrimination laws are concerned with equity, not efficiency. Employers who adhere to discriminatory market conditions violate Title VII when they pay unequal wages for work of comparable value, just as they violate the Equal Pay Act when they pay unequal wages for substantially equal work.

The compensation system of the State of Washington discriminated against women because workers in female-dominated job classifications were paid disproportionately less of the evaluated worth of their jobs than workers in male-dominated job classifications were paid. The State should be required to remedy its discrimination by paying all employees the same relative value of their jobs—that is, by instituting "comparable worth."

241 AFSCME, 770 F.2d 1407-08.