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The Metamorphosis Of Comparable Worth

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The concept of comparable worth[1] has provoked an outpouring of emotional rhetoric[2] and scholarly analysis[3] debating the concept's

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1. Comparable worth has been succinctly defined as a "right to comparable pay for work of comparable value." Weiler, *The Wages of Sex: The Uses and Limits of Comparable Worth*, 99 HARV. L. REV. 1728, 1731 (1986); *see also infra* notes 21-28 and accompanying text. For the seminal article on comparable worth, see Blumrosen, *Wage Discrimination, Job Segregation and Title VII of the Civil Rights Act of 1964*, 12 MICH. J. L. REF. 399 (1979).

2. *See, e.g., Comparable Worth Is 'Loony Idea' Civil Rights Commission Chairman Says,* Daily Lab. Rep. (BNA) No. 223, at A-2 (Nov. 1984) (Clarence Pendleton says "Comparable worth is the looniest idea since Looney Tunes."); *White House Liason Linda Chavez Says Comparable Worth Fervor Has Dimmed,* Daily Lab. Rep. (BNA) No. 236, at A-9 (Dec. 9, 1985) ("we have been able over the past few years to slow down what one person described as a locomotive unable to be stopped, but we have not in fact derailed that locomotive."); *Title VII Called "Wave Of the Future" In Wage Discrimination Litigation,* Daily Lab. Rep. (BNA) No. 157, at A-8 (Aug. 12, 1983) (Dan Leach, former EEOC commissioner, says comparable worth claims are "the wave of the future."); *Comparable Worth's Pros & Cons Debated at Civil Rights Constitution,* Daily Lab. Rep. (BNA) No. 113, at A-1 (June 12, 1984) (Winn Newman, general counsel to AFSCME argues comparable worth claims are "garden variety" discrimination claims under Title VII); Norton, *Pay Equity Is A Bad Idea*, FORTUNE, May 14, 1984, at 133 (comparable worth is "women's issue of Eighties"); Policy Statement of National Council on Employment Policy, Comparable Worth and Equal Employment of Women, *reprinted in* Daily Lab. Rep. (BNA) No. 181, at D-1, D-4 (Sept. 18, 1985) (push toward pay equity is the logical next step in the ongoing efforts to define and promote equality of opportunity).

Comparable worth has generated an odd alignment of supporters and critics. For example, the Equal Employment Opportunity Commission, the federal agency entrusted with principal responsibility for enforcement of federal employment discrimination laws, issued an opinion in 1985 largely rejecting the concept of comparable worth as a viable legal doctrine. EEOC Decision No. 85-8, 53 U.S.L.W. 2633 (June 25, 1985). Similarly, the Justice Department has argued against the idea. Amicus Brief for the United States, American Nurses' Ass'n v. Illinois, 783 F.2d 716 (7th Cir. 1986), *reprinted in* Daily Lab. Rep. (BNA) No. 161, at E-1 (Aug. 20, 1985) [hereinafter Amicus Brief]. The U.S. Civil Rights Commission issued a report rejecting the concept, criticizing the concept of comparable worth as "fundamentally flawed." U.S. COMMISSION ON CIVIL RIGHTS, COMPARABLE WORTH: ISSUE FOR THE 80'S (1984). On the other hand, an editorial published in early 1985 in Business Week, a magazine which generally speaks from the perspective of the business community, stated, "Comparable worth is an extension of women's demand for equal pay for equal work, an idea that is both reasonable and fair as a way of correcting historic wage discrimination against women." Editorial, BUS. WEEK, Jan. 1985, at 140.

3. *E.g.,* Becker, *Comparable Worth in Antidiscrimination Legislation: A Reply to Freed and Polsby*, 51 U. CHI. L. REV. 1112 (1984); Blumrosen, *supra* note 1; Freed & Polsby, *Comparable Worth in the Equal Pay Act*, 51 U. CHI. L. REV. 1078 (1984); Gasaway, *Comparable Worth: A Post-Gunther Overview*, 69 GEO. L.J. 1123 (1981); Nelson, Opton & Wilson, *Wage*

viability and desirability. Rather than add to that debate, this article will trace the evolution of the framework within which comparable worth has developed as a legal doctrine, and identify the unresolved issues and the strategic choices concerning those issues that may determine the future scope of the concept of comparable worth.[4]

Discrimination and the "Comparable Worth" Theory in Perspective, 13 U. MICH. J.L. REF. 231 (1980); Newman & Vonhof, *"Separate But Equal" — Job Segregation and Pay Equity in the Wake of Gunther*, 1981 U. ILL. L. REV. 269; Weiler, *supra* note 1; Comment, *Equal Pay for Comparable Work*, 15 HARV. C.R.-C.L. L. REV. 475 (1980); Comment, *Equal Pay, Comparable Work and Job Evaluation*, 90 YALE L.J. 657 (1981). Two useful bibliographies on the subject of comparable worth are BUREAU OF NATIONAL AFFAIRS, THE COMPARABLE WORTH ISSUE (1981) and TANIMOTO & INABA, WOMEN'S WORK, COLLECTIVE BARGAINING, COMPARABLE WORTH/PAY EQUITY, JOB EVALUATION . . . AND ALL THAT (1985).

4. Although I do not intend to join the debate over whether comparable worth is legally required or desirable as a matter of policy, it nevertheless seems only fair to state my position in support of the concept of comparable worth. Briefly, my reasons are the following. Economists seem to agree that discrimination is in part the cause of the wage gap between the sexes, that the labor market is not neutral or nondiscriminatory, and that employers do not always act objectively or rationally in setting compensation. *See infra* note 24 and accompanying text. If that is the case, such discrimination is actionable under existing discrimination theories. Discrimination by individual employers in the form of setting compensation by deciding the value of particular jobs and then discounting the rate paid to women or to jobs predominantly held by women, can be reached under Title VII disparate treatment theory. Discrimination in the form of payment of market wage rates which undervalue women's work is similarly actionable under disparate impact theory *if* it can be demonstrated that the market rate discriminates. In other words, comparable worth, in my view, clearly fits within the classic disparate treatment/disparate impact theories of discrimination.

Precisely what defenses are applicable to comparable worth claims is less clear, but that is a matter of further unraveling the relationship between the Equal Pay Act and Title VII, *see infra* notes 33-36 and 101-105 and accompanying text. Also, from a remedial perspective, it is not clear what standards the courts would apply for determining appropriate compensation if both the individual employer's compensation structure and the market wage rate are determined to be discriminatory.

Comparable worth is also desirable as a matter of policy, as it promises to resolve or be the impetus for resolution of the wage gap. While vigorous enforcement of nondiscrimination in hiring, promotion, and transfer may assist some women to enter and succeed in higher-paying, traditionally male occupations, it provides no assistance to those women who cannot change occupations, or who can find jobs only in traditionally female-dominated occupations. *See infra* note 16 and accompanying text. For these women, comparable worth is necessary to insure meaningful, real equality. *E.g.* E. WOLGAST, EQUALITY AND THE RIGHTS OF WOMEN, *passim* (1980); Dowd, *Maternity Leave: Taking Sex Differences Into Account*, 54 FORDHAM L. REV. 699, 719 (1986); Law, *Re-thinking Sex and the Constitution*, 132 U. PA. L. REV. 955 *passim* (1984). The only significant argument against this conclusion is that comparable worth may have the counterproductive effect of keeping women in their (current) place. Financially, however, this result would not occur: the effect of implementation of comparable worth would be to increase salaries and insure that individuals in female-dominated occupations were paid their actual worth. Furthermore, if the law of supply and demand really does work, then higher pay in those occupations will attract men, thereby diminishing occupational segregation and encouraging women to enter traditionally male occupations. Finally, the underlying impetus for the concept of comparable worth is not that women dislike the work they do, but rather that they are not paid the true value of the work they do because of their sex.

The article is divided into three sections. First, it examines comparable worth litigation from its emergence in the 1970s through 1986.[5] The article then focuses in detail on three recent opinions and their impact on the current framework of comparable worth litigation:[6] the Ninth Circuit's opinion reversing the landmark *Washington State*[7] case; the Seventh Circuit's opinion granting limited reinstatement of the complaint in the *American Nurses Association*[8] case; and the Supreme Court's opinion analyzing historic wage discrimination in the *Bazemore*[9] case. Finally, the article considers the future of the concept of comparable worth in light of the unresolved issues surrounding the scope of this legal doctrine and the impact of litigation strategy on the resolution of those issues.[10]

I. The Changing Framework: An Overview of Comparable Worth Litigation, 1970-1986

A. *The Concept of Comparable Worth*

The concept of comparable worth has as its factual predicate two typical characteristics of women's employment: occupational concentration or segregation[11] and significantly lower wages compared to those paid to men.[12] What continues to be most troubling about this employment pattern is its stubborn persistence, despite the increased presence of women in the workforce[13] and the existence for

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5. *See infra* text accompanying notes 11-68.

6. *See infra* text accompanying notes 69-147.

7. American Fed. of State, County, & Mun. Employees v. Washington, 770 F.2d 1401 (9th Cir. 1985).

8. American Nurses' Ass'n v. Illinois, 783 F.2d 716 (7th Cir. 1986).

9. Bazemore v. Friday, 106 S. Ct. 3000 (1986).

10. *See infra* text accompanying notes 148-53.

11. *See infra* notes 15-16 and accompanying text.

12. *See infra* notes 17-19 and accompanying text.

13. The increased labor participation rate of women, among other factors, has heightened interest and concern about occupational segregation and the wage gap. Women are entering the workforce in record numbers: in 1980, 52% of women aged 16-64 worked, as compared to 34% in 1950. Consumer Research Center, The Working Woman: A Progress Report 4-5 (1984) [hereinafter Working Woman]. The increase has been especially dramatic among women aged 20-44, and among women with children. *Id.*; *see also* Waldman, *Labor Force Statistics from a Family Perspective*, 106 Monthly Lab. Rev., Dec. 1983, at 16, 17. It is projected that two out of three entrants into the labor market over the next two decades will be women. Women's Bur., U.S. Dep't of Labor, Bull. No. 298, Time of Change: 1983 Handbook on Women Workers 7, 17-22 (1983) [hereinafter Handbook on Women Workers] *see* Working Woman, *supra* at 3-4. Women's increased participation in the workforce is

over two decades of legislation prohibiting sex discrimination in employment.[14]

Occupational concentration or segregation on the basis of sex is pervasive and shows no signs of diminishment. According to the last census, over half of all occupations are more than 80% male or female dominated.[15] Within the occupations in which most women work, which are primarily in the clerical and service sectors, most job classifications are female dominated.[16]

Equally persistent has been the wage gap between women and men. Women on average earn only sixty-one cents for every dollar earned by men.[17] This disparity is expected to continue well into the next century.[18] At least part of the wage gap has been attributed to the lower earning capacity of the occupations where most women work.[19]

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primarily motivated by the same considerations of economic need and economic betterment that motivate men to work. Handbook on Women Workers, *supra* at 17. Increasingly, more women than men must work simply to avoid slipping below the poverty line: one out of every six households is headed by a woman, and one in every three of those households are at the poverty level. Handbook on Woman Workers, *supra* at 15, 99-102. The closing of the wage gap is therefore essential to avoid the increasing feminization of poverty.

14. The Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1982); Civil Rights Act of 1964, tit. VII, 42 U.S.C. § 2000e - 2000e-17 (1982).

15. Among the 503 occupations listed in the 1980 U.S. Census, 275 occupations were more than 80% male- or female-dominated. N.Y. Times, Dec. 12, 1985, at A20, col. 1. It has been estimated that in order for an equal proportion of men and women to be doing the same work, two-thirds to three-quarters of all employees would have to change jobs. Blumrosen, *supra* note 1, at 405.

Although there has been some breakdown of women's occupational concentration over the past thirty years, the dominant trend has been the continuing trend of entry into female-dominated occupations. Blumrosen, *supra* note 1, at 405. In addition, it has been projected that this trend is likely to persist, given the expectation that the occupations in which women are concentrated, particularly service occupations, are expected to expand in the next 20 years. NATIONAL RESEARCH COUNCIL, WOMEN'S WORK, MEN'S WORK: SEX SEGREGATION ON THE JOB *passim* (1985).

16. Women are concentrated in clerical and service occupations: 42.5% of working women work in sales, clerical or administrative occupations; and 25% of working women work in service occupations. Handbook on Women Workers, *supra* note 13, at 51-62, 87-96; *see also* Mellar, *Investigating the Differences in Weekly Earnings of Women and Men,* 106 MONTHLY LAB. REV., Dec. 1983, at 17-19. Eighty-one percent of all clerical occupations and 61% of service occupations are filled by women. Handbook on Women Workers, *supra* note 13, at 51-62. Thus, the majority of working women work in occupations that are 70-95% female-dominated. Handbook on Women Workers, *supra* note 13, at 51-62.

17. WORKING WOMAN, *supra* note 13, at 6-7; *see also* Shack-Marquez, *Earnings Difference Between Men and Women: An Introductory Note,* 106 MONTHLY LAB. REV., Dec. 1983, at 15.

18. J. SMITH & M. WARD, WOMEN'S WAGES AND WORK IN THE TWENTIETH CENTURY *passim* (1984).

19. *E.g.*, M. GOLD, A DIALOGUE ON COMPARABLE WORTH 6-7 (1983); E. DUNCAN, YEARS OF POVERTY, YEARS OF PLENTY 153 (1984), Blumrosen, *supra* note 1, at 415-16.

Advocates of comparable worth argue that there is a connection between the wage gap and women's occupational concentration or segregation: the gap is due in part to the depression of wages for "women's work."[20] "Women's work" is paid less not because it has less value to employers, but rather because women, or predominantly women, perform the work.[21] In other words, even though work which women perform is of equal or greater value to an employer than work performed predominantly by men, it is not paid its full value because it is performed by women.[22] This undervaluation is incorporated into employers' compensation schemes by various means, including the use of discriminatory job evaluation analyses to construct an employer's compensation structure.[23] Discriminatory undervaluation of "women's work" is further magnified and perpetuated by the incorporation of individual employers' wage discrimination into the market wage rate.[24]

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20. *Supra* notes 3, 19.

21. Studies have shown that when a particular job changes from being predominantly male to predominantly female, the wages decline and the job becomes more of a "dead end" position. For example, the job of bank teller was traditionally held by men and was an entry level position. After World War II, women were hired as bank tellers, and the job gradually "turned" to one predominantly held by women. The job then changed to a dead end position, and compensation for the position dropped from its previous relative level. Blumrosen, *supra* note 1, at 408; *see also* TREIMAN & HARTMANN, WOMEN, WORK AND WAGES 28-30, 38 (1981).

22. Historically, women were viewed as not "worth" as much as men because it was assumed that their earnings were nonessential wages or merely "pin money," or that they would leave the workforce as soon as they became married and assumed their proper roles as wives and mothers. M. MEYER, WOMEN AND EMPLOYEE BENEFITS 2-4 (1978). To the contrary, however, women have worked, historically and currently, to provide essential income and maintenance for themselves and their families. J. BAUER, THE CHAINS OF PROTECTION: JUDICIAL RESPONSE TO WOMEN'S LABOR LEGISLATION 21-22 (1978). According to 1980 census figures, working wives' salaries constituted 27% of family income. Women who work full time contributed an even larger percentage to family income (38%), as did women in lower income families (68%). Handbook on Women Workers, *supra* note 13, at 17. Furthermore, almost 16% of all families are maintained by a single female, over five times the number of families maintained by single males. Handbook on Women Workers, *supra* note 13, at 15.

To assume that these attitudes have died with the enactment of legislation that prohibits sex discrimination in employment is belied by the persistence of such attitudes and related assumptions about women's role. *See* Dayton Christian Schools v. Ohio Civil Rights Comm'n, 106 S. Ct. 2718 (1986) (fundamentalist religious school advised pregnant teacher that according to its religious beliefs, young mothers should stay home with pre-school age children; teacher was discharged after complaining to state civil rights agency).

23. Blumrosen, *supra* note 1, at 428-41. The process of job evaluation has been at the core of the comparable worth issue. *E.g.*, R. HENDERSON, COMPENSATION MANAGEMENT (1976); NATIONAL RESEARCH COUNCIL/NATIONAL ACADEMY OF SCIENCES, JOB EVALUATION: AN ANALYTIC REVIEW (INTERIM REPORT TO THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION) (1979); Schwab, *Job Evaluation and Pay Setting: Concepts and Practices,* in COMPARABLE WORTH: ISSUES AND ANSWERS; 549-77 (E. Livernash ed. 1984).

24. Blumrosen, *supra* note 1, at 441-57. At least on this point, Professor Blumrosen and

Translated into the primary legal theories recognized under employment discrimination law, the gist of a comparable worth claim is that discrimination exists when workers in a job classification dominated by one sex are paid less than workers in a classification dominated by the opposite sex, where both job classifications are of equal value or worth to the employer, or the underpaid classification is of greater value to the employer.[25] The concept includes both intentional or disparate treatment discrimination,[26] such as the continuation of historic overtly discriminatory wage and hiring practices, as well as the discriminatory effects or disparate impact[27] of facially neutral practices, such as the use of purportedly neutral job evaluations or the market wage rate to establish compensation.

Although both disparate treatment and disparate impact theories are theoretically applicable to a comparable worth claim, disparate impact theory clearly constitutes the more radical and potentially far reaching cause of action. By removing the issue of intent or motivation and focusing on the effect of facially neutral employment practices, disparate impact theory encourages the analysis of the structure and impact of job assignment and compensation systems, and the ex-

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her critics appears to be in agreement. *See* Nelson, Opton, Jr., & Wilson, *Wage Discrimination and the "Comparable Worth" Theory in Perspective,* 13 U. MICH. J. L. REF. 233, 239-41, 247-48 (1980) (undervaluation reflection of wage discrimination).

25. This assumes, of course, that claims comparing dissimilar work by comparing the value or worth of those jobs are cognizable under Title VII, an issue that has yet to be definitively resolved. *See infra* note 41. According to the concept of comparable worth, the "worth" or value of a job is generally defined by the skill, effort, responsibility, and working conditions of the job. These are factors utilized in the Equal Pay Act to determine the comparability of particular jobs. 29 U.S.C. § 206(d) (1982). The Act's factors were in turn derived from factors long used in the business of job evaluation for the purpose of establishing compensation systems. Corning Glass Works v. Brennan, 417 U.S. at 188, 199. The worth or value of a particular job is measured according to these factors and computed on a point system. *Id.* Once the evaluated worth of a female-dominated job classification is established, it may then be compared to the benchmark of a male-dominated job classification of equal or lesser worth in the particular employer's workforce. Blumrosen, *supra* note 1, at 428-41. The theory therefore permits comparison of dissimilar jobs of equal value to the employer, as well as comparison of dissimilar jobs of unequal value where one of the jobs is not being paid its evaluated worth. Blumrosen, *supra* note 1, at 428-41.

26. Under disparate treatment analysis, the plaintiff must demonstrate, by direct or circumstantial evidence, that the employer's conduct which resulted in adverse employment consequences for the plaintiff was motivated by impermissible consideration of race, sex, national origin, or religion. McDonnell Douglass Corp. v. Green, 411 U.S. 792, 802 (1973).

27. Under disparate impact analysis, an employment policy that has a disproportionate impact on the basis of race, sex, religion, or national origin which cannot be justified on the grounds of business necessity constitutes prohibited discrimination. Griggs v. Duke Power Co., 401 U.S. 424, 430-31 (1971).

amination of the unintended, but deliberate, incorporation of societal discrimination into the employment structure.

Whether comparable worth will be incorporated within this broader framework of discrimination analysis remains an open question. It is clearly one of the critical issues that will determine the scope of the legal doctrine of comparable worth. That it remains an unresolved issue is indicative of the fact that comparable worth as a legal doctrine is in a very early stage of development.[28] Comparable worth first emerged as a legal issue in the 1970s, but it has only been since 1981, with the Supreme Court's decision in *Gunther*,[29] that the door has been open to the development of comparable worth as a legal doctrine.[30] The evolution of the concept is critical to understanding the current framework of comparable worth doctrine.

B. Phases of Comparable Worth Litigation

1. 1970-1981

When claims of comparable worth discrimination first were asserted in the 1970s, the primary issue was whether *any* claim of comparable worth discrimination, under *any* theory, was cognizable under Title VII.[31] The focus was on the technical issue of whether discrimination was actionable where the basis for comparison to determine the existence of discrimination was not identical or nearly identical jobs, the paradigm of an Equal Pay Act (EPA) case.[32] This necessitated

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28. This reflects a pattern not uncommon where the courts venture into the unknown in the development of legal doctrine. As an area of law evolves, it is both boundary and trailblaze, the limit of what is as well as the suggestion of what yet can be. Early in the development of new doctrine, the stakes are particularly high — either a path of development may be opened or it may be permanently blocked. Furthermore, even if an opening is given, there is the effort to limit it to its terms, as opposed to viewing it as only a beginning of a broad new development. Compare the development of the interpretation of the seniority section under Title VII, as discussed in the scholarship cited in Note, *Title VII v. Seniority: Ensuring Rights or Denying Rights*, 26 How. L.J. 1486 n.3 (1983).

29. County of Wash. v. Gunther, 452 U.S. 161 (1981).

30. *See infra* notes 31-43.

31. 42 U.S.C. § 2000e - 2000e-17 (1982). Title VII prohibits sex discrimination in the terms and conditions of employment. The Bennett Amendment to Title VII, contained in section 703(h), provides that any defense to an Equal Pay Act claim will also serve as a defense to a Title VII sex-based wage discrimination claim.

32. 29 U.S.C. § 206(d) (1982). The EPA requires equal pay for equal work by prohibiting wage differentiation on the basis of sex where equal work is performed, unless such differentiation is based on seniority, merit, quality or quantity of production, or any other factor other than sex. *Id.* Equal work is defined as work of equal skill, effort, and responsibility

resolution of issues of statutory construction and legislative history to determine the relationship between Title VII and the EPA before questions of legal theory or the scope of comparable worth claims could be addressed.[33]

The courts during this period almost uniformly were hostile to comparable worth claims.[34] Some courts simply resolved the technical statutory issue in favor of a narrow construction of the scope of sex-based wage discrimination claims, holding that Congress intended to limit such claims to the failure to provide equal pay for equal work.[35] Others indicated that even if Title VII was not so limited, proof of a comparable worth claim would be difficult, if not im-

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performed under similar working conditions. *Id.* Under the EPA, wage discrimination on the basis of sex is actionable only if the work at issue is equal or substantially equal. Schultz v. Wheaton Glass Co., 421 F.2d 259, 265 (3d Cir.), *cert. denied*, 398 U.S. 905 (1970); *see also* Usery v. Columbia Univ., 568 F.2d 953, 958-59 (2d Cir. 1977); Ridgway v. United Hospitals-Miller Div., 563 F.2d 923, 926 (8th Cir. 1977); Hodgson v. Golden Isles Convalescent Homes, Inc., 468 F.2d 1256, 1258 (5th Cir. 1972) (per curiam).

33. The issue to be resolved was whether the Bennett Amendment, *see supra* note 31, was intended to limit Title VII wage discrimination claims to the restrictions imposed on Equal Pay Act claims, most importantly that such claims involve equal work, or whether it was only intended to permit employers to raise Equal Pay Act defenses in Title VII cases. County of Wash. v. Gunther, 452 U.S. 161, 163, 167-68 (1981).

34. *See* Lemons v. City & County of Denver, 620 F.2d 228, 229-30 (10th Cir. 1980) (rejecting comparable worth claim as beyond the scope of relief authorized by Title VII in class action to enjoin city from adopting market-based compensation scheme that plaintiffs contended perpetuated historic depression of wages on basis of sex); Christensen v. Iowa, 563 F.2d 353, 355-57 (8th Cir. 1977) (payment of market wages complete defense to comparable worth claim, assuming one could be established); Orr v. MacNeill & Son, Inc., 511 F.2d 166, 171 (5th Cir.) (reversing district court's finding in favor of plaintiff's comparable worth claim), *cert. denied,* 423 U.S. 865 (1975); Ammons v. Zia Co., 448 F.2d 117, 121 (10th Cir. 1971) (affirming district court's denial of relief); Vuyanich v. Republic Nat'l Bank of Dallas, 505 F. Supp. 224, 284-85 (N.D. Tex. 1980) (courts cannot perform evaluations of job worth as that is matter beyond judicial competence; therefore, in order to present comparable worth claim, plaintiff must establish worth as part of prima facie case); Gerlach v. Michigan Bell, 501 F. Supp. 1300, 1320-21 (E.D. Mich. 1980) (comparable worth claims under Title VII limited to *Gunther* model of disparate treatment claim).

Not surprisingly, most plaintiffs tried to fit their cases into an EPA equal work or substantially equal work claim. *See, e.g.,* International Union of Elec. Radio and Machine Workers v. Westinghouse, 631 F.2d 1094, 1097-98, 1107-08 (3d Cir. 1980) (employer violated Title VII where explicit sex segregation of jobs and underpayment of women on basis of sex continued after passage of Title VII, albeit in more subtle form), *cert. denied*, 452 U.S. 967 (1981); Fitzgerald v. Sirloin Stockage, Inc., 624 F.2d 945, 950, 958 (10th Cir. 1980) (woman who took over most but not all of duties of male advertising director was subjected to unlawful discrimination when employer failed to award her wage increase to reflect additional responsibilities).

35. Lemons v. City & County of Denver, 620 F.2d 228, 229 (10th Cir. 1980); Gerlach v. Michigan Bell, 501 F. Supp. 1300, 1321 (E.D. Mich. 1980).

possible, and in any case an employer would have a complete defense if it paid market wage rates.[36]

In 1981 the Supreme Court resolved the statutory construction issue in *County of Washington v. Gunther*.[37] In *Gunther*, the plaintiffs claimed that the defendant had deliberately failed to follow the results of a wage evaluation study when it set compensation for its female employees, although it had fully implemented the results of the study for its male employees.[38] The defendant contended that the claim simply was not cognizable under Title VII because the female plaintiffs performed work comparable to, but not sufficiently similar to, that of the male classification to fall within the equal work standard of the EPA, and Title VII went no further than the EPA.[39] To the contrary, however, the Court decided that Title VII was not limited to the scope of the EPA, and held that the plaintiffs' claim stated a valid cause of action under Title VII.[40]

Gunther opened the door to judicial recognition of comparable worth claims without resolving the question of the scope of the comparable worth doctrine.[41] During the next phase of comparable worth litigation, from 1981 until 1985, courts focused on discerning what the Supreme Court *really* meant in *Gunther*: to limit wage discrimination claims to the *Gunther* model, or to invite further development of wage discrimination claims, including the comparable worth theory.[42] The legal issues left unresolved by *Gunther* included

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36. Christensen v. Iowa, 563 F.2d 353, 356-57 (8th Cir. 1977); Vuyanich v. Republic Nat'l Bank of Dallas, 505 F. Supp. 224, 284 (N.D. Tex. 1980).

37. 452 U.S. 161 (1981).

38. *Id.* at 180-81. The defendant had evaluated the value of its job classifications as a prelude to determining wages. *Id.* The female guard classification was evaluated as worth 95% of the male guard classification. *Id.* at 180. The male guard classification was paid 100% of its evaluated worth; the female classification was paid only 70% of the wage rate for the male classification. *Id.* at 180-81.

39. *Id.* at 164-65, 177-78. Furthermore, at the time suit was filed, the plaintiffs could not bring a cause of action under the Equal Pay Act because the EPA was not yet applicable to municipal employees. County of Wash. v. Gunther, 452 U.S. at 164, n.3.

40. *Id.* at 181.

41. In its usual inscrutable fashion, the Supreme Court expressly declined to decide whether such a claim would constitute discrimination under Title VII. *Id.* at 166 & n.6.

42. *See infra* text accompanying notes 44-45. The *Gunther* decision generated considerable scholarly debate. *See, e.g.*, Bellace, *Comparable Worth: Proving Sex-Based Wage Discrimination*, 69 IOWA L. REV. 655, 656 (1984) (discussing uncertainty about holding in *Gunther*); Cox, *Equal Work, Comparable Worth and Disparate Treatment: An Argument for Narrowly Construing County of Washington v. Gunther*, 22 DUQ. L. REV. 65, 68 (1983) (*Gunther* should be narrowly construed); Newman & Vonhof, *"Separate But Equal"—Job Segregation and Pay Equity in the Wake of Gunther*, 1981 U. ILL. L. REV. 269, 282-83 (*Gunther* breaks new legal ground, opening door to wide variety of discrimination suits).

whether wage discrimination claims were limited to those involving comparable *work* or could include claims of comparable *worth*, and whether the disparate treatment theory that was the basis of the plaintiffs' claim in *Gunther* was coincidental or essential. If wage discrimination claims could be established under disparate impact theory, as well as disparate treatment theory, that would obviate the necessity of proof of intentional discrimination.[43] Finally, the *Gunther* decision left unclear what defenses could be raised against a wage discrimination claim that falls outside the parameters of the Equal Pay Act.

2. 1981-85

What is noteworthy about the post-*Gunther* period is its similarity to the pre-*Gunther* era: the courts continued to be hostile toward the concept of comparable worth, and almost uniformly took the position that *Gunther* represented the outer limit of wage discrimination claims under Title VII.[44] Wage discrimination was cognizable, therefore, only if it involved the comparison of comparable *work* and alleged intentional discrimination under disparate treatment theory.[45]

The courts' rejection of a broader view of the concept of comparable worth was largely grounded in institutional and evidentiary concerns, rather than theoretical or analytical objections. First, the courts questioned the propriety of judicial interference with the labor market and employers' compensation systems.[46] Courts viewed comparable worth as sanctioning a potentially radical intrusion into the economy, an area in which the courts were reluctant to venture absent clear direction from Congress to do so.

Second, the courts questioned their ability to make the determinations essential to a finding of discrimination under the concept

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43. *See supra* note 27.

44. *See, e.g.,* Spaulding v. University of Wash., 740 F.2d 686, 706-07 (9th Cir. 1984) (wage disparity claims go no further than *Gunther* model); Plemer v. Parsons-Gilbane, 713 F.2d 1127, 1133 (5th Cir. 1983) (*Gunther* sets limits upon sex-based wage discrimination claims); Wilkins v. University of Houston, 654 F.2d 388, 405-07 (5th Cir. 1981) (holding plaintiff's claim limited to *Gunther* model), *vacated & remanded*, 103 S. Ct. 34 (1982), *aff'd on remand*, 695 F.2d 134 (5th Cir. 1983).

45. *See supra* notes 37-40 and accompanying text.

46. *See, e.g.,* Power v. Barry County, 539 F. Supp. 721, 726-27 (W.D. Mich. 1982) (court precluded from evaluating different jobs to determine their worth); Waterman v. New York Tel. Co., 36 Fair Empl. Prac. Cas. (BNA) 41, 45 (S.D.N.Y. 1984) (Congress did not intend to put courts in business of evaluating jobs (citing Hodgson v. Corning Glass, 474 F.2d 226, 231 (2d Cir. 1973))).

of comparable worth. The courts balked at the idea that they would be asked to determine the value or worth of particular jobs, a task which they viewed as beyond the ken of judges and inherently suspect due to the unavoidable subjectivity of the process.[47] Even if the parties agreed to or admitted the valuation of jobs, the courts were clearly skeptical of their ability to evaluate such evidence.

Third, even if the problem of determining the worth of jobs could be resolved, as, for example, if the parties stipulated to the results of an evaluation or if an employer had adopted the results of an evaluation, the courts viewed the payment of different wages to jobs of equal worth to be entirely justified if the wage rate was based on the market rate.[48] Courts viewed use of the market rate as an unquestionably objective and nondiscriminatory practice merely reflective of the law of supply and demand. Payment of market wage rates consequently afforded employers a complete defense to claims of comparable worth.

The courts' critique of the concept of comparable worth during this period pointed to serious evidentiary issues that plaintiffs would have to overcome in order to present a convincing case of wage discrimination. On the other hand, the critique was often less than fair as virtually all of the cases decided during this period had initially been filed and often had been tried prior to the *Gunther* decision and, therefore, had proceeded on a more limited theory of wage discrimination.[49]

In December of 1983, however, a decision was rendered in the first post-*Gunther* case in which a fully developed claim of comparable worth was presented, the massive *Washington State* case.[50] In that

47. *See, e.g.*, Plemer v. Parsons-Gilbane, 713 F.2d 1127, 1134 (5th Cir. 1983) (court refuses to engage in subjective assessment of different jobs); Penk v. Oregon Bd. of Higher Educ., No. 80-436, slip. op. at ____(D. Ore. Feb. 15, 1985) (subjective evaluations of faculty members is permissible and necessary and courts should be deferential to those subjective decisions). EEOC v. Affiliated Foods, Inc., 34 Fair Empl. Prac. Cas. (BNA) 943, 959 (W.D. Mo. 1984) (proof of comparable worth of particular jobs must allow court to conclude with confidence that jobs are equally valuable).

48. *See, e.g.*, Spaulding v. University of Wash., 740 F.2d 686, 706-07 (9th Cir. 1984) (wages based on market rate not affected by Title VII); Cox v. American Cast Iron Pipe, 585 F. Supp. 1143, 1152 (N.D. Ala. 1984) (impractical and violative of market conditions to try to address all wage disparities under Title VII); Briggs v. City of Madison, 536 F. Supp. 435, 447 (W.D. Wis. 1982) (employer not liable under Title VII for following existing market rates).

49. Spaulding v. University of Wash., 740 F.2d 686, 709 (9th Cir. 1984) (Schroeder, J., concurring).

50. American Fed. of State, County & Mun. Employees v. Washington, 578 F. Supp. 846 (W.D. Wash. 1983), *rev'd*, 770 F.2d 1401 (9th Cir. 1985).

case, a comparable worth claim was made on behalf of 15,000 state employees in female-dominated[51] job classifications who, according to several studies commissioned by the state, were paid an average of 20% less than employees in male-dominated classifications of comparable worth.[52] In 1983, the federal district court issued an opinion finding that the state had violated Title VII under both disparate treatment and disparate impact theories and ordered immediate relief that would cost the state an estimated $1 billion.[53]

The district court's decision in *Washington State* avoided the issue of determining the value or worth of particular job classifications by finding that the state had accepted the valuations in the studies that the state had commissioned.[54] The court read the *Gunther* decision as permitting the use of both disparate treatment and disparate impact theories in presenting wage discrimination claims.[55] The court found proof of disparate treatment, and evidence of intentional discrimination, particularly in the state's failure to remedy pay disparities once they were revealed by the job evaluation process.[56] The court based its alternative finding of disparate impact discrimination on the finding that the state's compensation system had a disparate impact upon employees in predominantly female job classifications.[57] There was no real discussion of whether the state had merely paid

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51. "Female-dominated" was defined as employees in positions occupied 70% or more by females. *Id.* at 851.

52. 770 F.2d at 1403. The state had conducted three studies of its compensation system, in 1974, 1976 and 1980. *Id.* The studies evaluated jobs on the basis of skill, effort, responsibility, and working conditions, and found that female dominated jobs on average were compensated 20% less than male-dominated jobs of comparable value. *Id.* In December, 1976, Governor Evans included a $7 million appropriation in the budget for pay adjustments in light of these studies. 578 F. Supp. at 862. In 1977, however, the new governor, Dixie Lee Ray, deleted this appropriation, although there was a sufficient budget surplus that would have covered the appropriation. *Id.* After suit was filed, the legislature, in 1983, appropriated $1.5 million for pay equity adjustments effective in 1984. *Id.* at 862-67. When the suit was finally settled, under the terms of the settlement the legislature appropriated $41.4 million for fiscal year 1986, with successive $10 million annual increases, for a total cost of $482.4 million. *See infra* note 63.

53. 578 F. Supp. 846, 864-65. The high cost of the judgment was due to the combination of immediate backpay awards, estimated at $300 million, immediate pay raises, estimated at $75 million, plus the continued cost of those pay raises. *Court Order Pay Raises and Back Pay For Female State Employees In Washington*, Daily Lab. Rep. (BNA) No. 242, at AA-1, AA-3 (Dec. 15, 1983).

54. 578 F. Supp. at 862.

55. *Id.* at 855-56, 864-65.

56. *Id.* at 864-65.

57. *Id.* at 864.

market rates, and if so, whether that practice could nevertheless be discriminatory.[58]

Reaction to the district court's decision was swift and intense. Advocates of comparable worth hailed the opinion and used it as a potent weapon to threaten or settle lawsuits,[59] to negotiate pay equity in collective bargaining,[60] and to lobby for legislation to achieve

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58. *Id.*

59. For cases filed or settled after the opinion, see California State Employees Assoc. v. California, No. C-84-7275-MHP (N.D. Cal. Sept. 13, 1985) (LEXIS, Genfed Library, Dist. file) (suit filed on behalf of 37,000 current state employees, with a potential class of 100,000 past and future employees, focusing on 400 job classifications, 170 of which are totally female, the balance of which are two-thirds or more female-dominated; suit alleges that the state Department of Personnel acknowledges the existence of pay inequities, despite 1981 amendment of state civil service law to require salaries for female dominated jobs to be set on the basis of comparability of the value of the work performed); AFSCME v. County of Nassau, 609 F. Supp. 695, 698 (E.D.N.Y. 1985) (suit filed on behalf of 10,000 employees in 200 job classifications); St. Louis Newspaper Guild Local 47 v. Pulitzer Publishing Co., 618 F. Supp. 1468 1469 (E.D. Mo. 1985) (suit filed seeking wage adjustments in inside sales jobs held predominantly by women, comparing those jobs to outside sales jobs held predominantly by men); Hawaii Gov't Employees Assoc. v. Hawaii, No. 84-1314 (D. Hawaii Aug. 12, 1985) (LEXIS, Genfed Library, Dist. File) (alleging wage discrimination against employees of state, its local subdivisions, colleges and universities, and support staff of state judiciary); Michigan State Employee's Assoc. v. EEOC and Michigan Dept. of Civil Rights, No. 84-CV-4058DT (E.D. Mich. Aug. 31, 1984) (LEXIS, Genfed Library, Dist. File) (suit filed September 1984 on behalf of 15,000 employees requesting the court to order the state and federal agencies to investigate charges of sex discrimination in the state's compensation system based on charges filed with the agencies in August 1981).

Administrative charges were filed as a prelude to litigation in several cases. *See Pennsylvania Nurses, File EEOC Charges Alleging Sex Based Wage Discrimination,* Daily Lab. Rep. (BNA) No. 115, at A-11-A-12 (June 14, 1985) (charge filed June 1985 on behalf of nurses and other female state employees alleging 84% of state classifications are 70% or more dominated by one sex, and 50% of all job classifications have no women in the classification).

60. The use of the Washington State case as a lever in collective bargaining was apparent in a number of settlements. In 1985, the city of Los Angeles signed an agreement to implement a $12 million pay equity adjustment for 3900 city employees, to be phased in over a three year period, in exchange for settlement of a federal suit filed against the city. *Los Angeles and AFSCME Settle on Three-Year Pay Equity Pact,* Daily Lab. Rep. (BNA) No. 91, at A-2-A-3 (May 10, 1985). This agreement translated into a 10 to 15% salary increase for designated female-dominated job classifications. *Id.* After a ten week strike, Yale University agreed to a three year contract covering 2700 clerical and technical employees which provided across the board increases of 20-25% and established a new step progression. *Yale University's White Collar Workers Overwhelmingly Ratify Contract Terms,* Daily Lab. Rep. (BNA) No. 16, at A-7, A-8-A-9 (Jan. 24, 1985). Under the agreement, signed in January, 1985, two thirds of unit employees would move up in the new progression, resulting in a 35% increase for some employees over the term of the contract. *Id.* New York State agreed to perform a pay equity study, and the study indicated that 77,000 women and minorities in the state were underpaid. *Pay Equity Studies Find 77,000 N.Y. Women, Minorities Underpaid,* Daily Lab. Rep. (BNA) No. 224, at A-3 (Nov. 20, 1985). The state has committed $74 million over the next 2 years to implement the recommendations of the study: $64 million to be negotiated in the 1985-88 contracts with the three state employees' unions and $10 million for adjustments for management and confidential employees. *Id.*

comparable worth.[61] Critics vehemently attacked the opinion, and while an appeal of the decision was pending before the Ninth Circuit, the United States Civil Rights Commission, the Equal Employment Opportunity Commission, and the Justice Department all formally took positions against recognizing a broad concept of comparable worth.[62] In September, 1985, the Ninth Circuit issued an opinion reversing the district court opinion, essentially finding *Gunther* to represent the limit of wage discrimination claims under Title VII and rejecting the finding of discrimination under either disparate impact or disparate treatment theories.[63]

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61. A survey by the Council of State Governments in January, 1985, indicated that most state governments were expected to consider comparable worth legislation in the next two to three years. *Most States Will Consider Bills on Comparable Worth In Next Three Years*, Daily Lab. Rep. (BNA), No. 8, at A-9 (Jan. 11, 1985). Between 1983 and 1985, four states enacted legislation to upgrade predominantly female jobs according to their comparable value: Minnesota, New Mexico, Iowa, and Washington. *Id.; see* Dean, Roberts & Boone, *Comparable Worth Under Various Federal and State Laws*, in COMPARABLE WORTH AND WAGE DISCRIMINATION, 238 (H. Remick ed. 1984).

Most other states have sponsored studies concerning the concept of comparable worth and their compensation systems, or are monitoring developments in other states. *BNA Publishes Report on Pay Equity*, 22 Gov't Empl. Rel. Rep. (BNA) No. 1076, at 1619 (Aug. 20, 1984). Not surprisingly, considering the views of the Reagan administration, no federal legislation has been enacted. *See supra* note 2.

62. *See supra* note 2. According to the Civil Rights Commission, the valuation of jobs is inherently subjective, and therefore there is no meaningful way to measure the worth of particular jobs. *Findings and Recommendations of U.S. Civil Rights Commission Report on Comparable Worth, reprinted in* Daily Lab. Rep. (BNA) No. 71, at E-1 (Apr. 12, 1985) (adopted April 11, 1985). The Commission also concluded the wage gap is largely due to factors other than discrimination. *Id.* The General Accounting Office reviewed the Commission's report in June, 1985 and criticized it as flawed and containing numerous inconsistencies and errors. *GAO Faults Civil Rights Commission Study Rejecting Comparable Worth*, Daily Lab. Rep. (BNA) No. 121, at A-12 (June 24, 1985).

The Equal Employment Opportunity Commission rejected the "pure" comparable worth theory, defined as indicating the existence of discrimination by establishing the predominance of one sex in a job classification and unequal pay in comparison to a job classification dominated by men of equal value. EEOC Decision No. 858, 53 U.S.L.W. 2633, 2633 (June 25, 1985). If, however, an employer admits that jobs are of equal value as a result of the adoption of the results of a job evaluation study and refuses to pay the evaluated value, then a cognizable claim exists under Title VII. *Id.* At the time the EEOC issued its decision, approximately 250 comparable worth claims were pending at the Commission, most involving public sector employers. *Report by House Committee on Government Operations On EEOC's Handling of Sex-Based Wage Discrimination, reprinted in* Daily Lab. Rep. (BNA) No. 102, at D-1, D-3 (May 25, 1984).

In August, 1985, the Justice Department filed an amicus brief in the Seventh Circuit arguing against recognition of the concept of comparable worth in American Nurses' Assoc. v. Illinois, 783 F.2d 716 (7th Cir. 1986), urging affirmance of the district court's dismissal of that case on the ground that Title VII does not encompass the theory of comparable worth. Amicus Brief, *supra* note 2, at E-1, E-3.

63. American Fed'n. of State, County, & Mun. Employees v. Washington, 770 F.2d 1401,

The Ninth Circuit's opinion initiated a new phase in comparable worth litigation. As the first opinion from a federal appellate court on the theory of comparable worth in a case where the theory was fully litigated, it had enormous impact. Although the opinion had little effect on the number of cases being filed, it significantly influenced the theory of those cases.[64] This trend was reinforced by *American Nurses' Association v. Illinois*[65] (*ANA*), a Seventh Circuit decision issued in February, 1986, which similarly limited comparable worth claims to disparate impact theory.[66] The net effect of the *Washington State* and *ANA* opinions was to confine the development of comparable worth to an extremely conservative, limited framework. On the other hand, in June, 1986, the Supreme Court issued an opinion in a race-based wage discrimination case, *Bazemore v. Friday*,[67] which took a far more liberal view of the evidence and theory of proof of wage discrimination, suggesting a counterbalance to the *Washington State/ANA* model.[68] These three cases are clearly the current guideposts in comparable worth litigation and merit close analysis to define the evolving framework of comparable worth doctrine.

II. The Current Framework of Comparable Worth: *Washington State, ANA*, and *Bazemore*

A. Washington State

The Ninth Circuit's *Washington State* decision rejected the lower court's judgment of discrimination under both disparate treatment

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1405, 1408 (9th Cir. 1985). Although the plaintiffs initially petitioned for rehearing en banc and vowed to appeal the case to the Supreme Court, the parties agreed to settle the case, and the settlement was subsequently approved by the state legislature on January 31, 1986. *Washington State Pay Equity Settlement Ratified By Legislature, Court Review Next*, Daily Lab. Rep. (BNA) No. 25, at A-3 (Feb. 6, 1986). The terms of the settlement provided for: (1) pay raises to be given over a seven year period to 35,000 employees in female-dominated job classifications; (2) $41.4 million to be available for pay adjustments on April 1, 1986 (the 1985 legislature appropriated $41.4 million for settlement of the case or implementation of its 1983 pay equity law), followed by $10 million annually through June 30, 1992, which adds up to a total cost of $482.4 million; and (3) no concession by AFSCME that the Ninth Circuit decision is correct, and no admission by the state that it discriminated in any respect. Daily Lab. Rep. (BNA) No. 2, at A-9 to A-10 (Jan. 3, 1986).

64. *See infra* notes 114-16 and accompanying text.

65. 783 F.2d 716 (7th Cir. 1986).

66. *Id.* at 721.

67. 106 S. Ct. 3000 (1986).

68. *See infra* notes 99-103 and accompanying text.

and disparate impact theories.[69] The court's reversal of the disparate treatment claim was based upon the purported failure of the plaintiffs to prove intent to discriminate, a necessary element to establish a right to relief under that theory of discrimination.[70] According to the court, the state's failure to correct the inequities uncovered by the state-initiated studies of its compensation system did not raise the inference of intent to discriminate on the basis of sex.[71] To the contrary, the court found that the state retained the discretion to act or not to act in response to the findings of the job evaluation studies.[72] To conclude otherwise, the court reasoned, would discourage the very analysis necessary for the correction of pay inequities.[73]

The court also found that there could be no finding of discrimination when the employer had merely paid market wage rates.[74] The court suggested that even if the employer had knowledge that the market was discriminatory, the employer was still entitled to utilize market wage rates without fear of legal liability for discrimination.[75] Title VII was not designed to interfere with the law of supply and demand, according to the court, and employers cannot be required to pay wages on the basis of the job's value irrespective of external market wage rates.[76]

In contrast to its rejection of the disparate treatment claim on the basis of insufficient proof of discriminatory intent, the court reversed the disparate impact finding on the ground that this theory of discrimination simply could not encompass the concept of comparable worth.[77] According to the court, disparate impact theory is

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69. American Fed'n. of State, County & Mun. Employees v. Washington, 770 F.2d at 1405-08.

70. *Id.* at 1406; *see also* Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981) (plaintiff bears ultimate burden of proving defendant intentionally discriminated); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (complainant bears burden of establishing four part prima facie case of discrimination).

71. American Fed'n. of State, County & Mun. Employees v. Washington, 770 F.2d at 1408.

72. *Id.* at 1407.

73. *Id.* at 1408.

74. *Id.* at 1406-07.

75. *Id.* at 1406. The court noted that "the state did not create the market disparity" *Id.*

76. *Id.* at 1407. The court stated: "We find nothing in the language of Title VII or its legislative history to indicate Congress intended to abrogate fundamental principles such as the laws of supply and demand or to prevent employers from competing in the labor market." *Id.*

77. *Id.* at 1405-06. The court noted, "The instant case does not involve an employment practice that yields to disparate impact analysis." *Id.* at 1406.

limited to analyzing specific, clearly delineated employer practices as they affect a single point in the employment relationship, usually the employee selection process.[78] Disparate impact analysis is, therefore, inapplicable to the complexities of an employer's compensation system.[79]

The net result of the court's opinion is to limit claims of comparable worth to the *Gunther* framework of disparate treatment analysis. Furthermore, the opinion requires that the plaintiff establish the employer's specific intent to discriminate in order to establish a disparate treatment claim.[80] It would not be sufficient, for example, for the plaintiff to eliminate all other justifiable reasons for adopting or maintaining a particular compensation system, leaving the inference of sex discrimination as the sole remaining motivation. Rather, the court's opinion seems to require that a plaintiff present proof that the compensation system was adopted or maintained *because* it would discriminate against women, not merely in spite of that effect. This raises the plaintiff's burden of proof of discriminatory intent in a disparate treatment case to a constitutional level of proof,[81] a standard which has never been imposed on Title VII plaintiffs.[82] This standard

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78. *Id.*

79. *Id.* at 1406.

80. Or, as the court puts it, there must be proof of culpability. *Id.* at 1407. In other words, one can use a discriminatory practice as long as there is no motive to discriminate. This is contrary to the tort concept of intent, which presumes that one intends the consequences of one's voluntary acts, see W. PROSSER, THE LAW OF TORTS 31 (4th ed. 1971), and is closer to the criminal law concept of intent or *mens rea*, see W. LAFAVE & A. SCOTT, HANDBOOK ON CRIMINAL LAW 195-208 (1972). *See generally* Brodin, *The Role of Fault and Motive in Defining Discrimination: The Seniority Question Under Title VII,* 62 N.C.L. REV. 943, 975-85 (1984) (discussing proof of culpability).

81. The Supreme Court outlined what is required in order to establish the requisite element of discriminatory intent in sex discrimination cases brought under the equal protection clause in Personnel Adm'r v. Feeney, 442 U.S. 256 (1979). The Court stated that "[d]iscriminatory purpose, . . . implies more than intent as volition or intent as awareness of consequences." *Id.* (citation omitted). According to the Court, "It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Id.* at 279 (footnotes omitted). For two critiques of the Supreme Court's standard, see Blumberg, *De Facto and De Jure Sex Discrimination under the Equal Protection Clause: A Reconsideration of the Veterans' Preference in Public Employment,* 26 BUFFALO L. REV. 1 (1976); Weinzweig, *Discriminatory Impact and Intent Under the Equal Protection Clause: The Supreme Court and the Mind-Body Problem,* 1 J. OF L. & INEQUALITY 277 (1983).

82. In *Washington v. Davis*, the Supreme Court stated: "We have never held that the constitutional standard for adjudicating claims of invidious racial discrimination is identical to the standards applicable under Title VII, and we decline to do so today . . . . [O]ur cases have not embraced the proposition that a law or other official act, without regard to whether

would make proof of discriminatory intent all but impossible except in rare cases.[83]

The court's opinion in *Washington State* also eliminates the use of the disparate impact theory for proving comparable worth claims as a matter of law. The court's rejection of disparate impact theory is based upon its application of a complexity limitation that has no basis in doctrine or precedent. To the contrary, the theory has been applied in quite complicated selection, promotion, and transfer cases.[84] Moreover, there is no indication in any of the Supreme Court's pronouncements on the theory of disparate impact or in Congress' express approval of the doctrine that any such limitation exists.[85] This unsatisfactory rationale for refusing to apply disparate impact

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it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact. . . ." Washington v. Davis, 426 U.S. 229, 238-39 (1976). Although the constitutional and statutory standards are quite similar, they arguably differ, principally because the statutory standard recognizes the difficulty of proving intent and supports inferring intent from circumstantial evidence. As the Court has noted: "[t]here will seldom be 'eyewitness' testimony as to the employer's mental processes [in discrimination cases]." United States Bd. of Gov. v. Aikens, 460 U.S. 711, 716 (1983); *see also* Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977) (under disparate treatment theory "[p]roof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment"). *See generally* Brodin, *supra* note 80, at 979 n.164, 983 n.183.

83. *See* Gates v. Georgia-Pacific Corp., 326 F. Supp. 397, 399 (D. Ore. 1970) (direct evidence of discriminatory intent is rare, therefore, intent most often proved by circumstantial evidence), *aff'd*, 492 F.2d 292 (9th Cir. 1974). As the Supreme Court stated in Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981): "[t]he prima facie case serves an important function in the litigation: it eliminates the most common nondiscriminatory reasons for the plaintiff's rejection." *Id.* at 253-54. As the Court had previously explained in Furnco Constr. Co. v. Waters, 438 U.S. 567, (1978), the prima facie case "raises an inference of discrimination only because we presume these acts, if otherwise unexplained, are more likely than not based on the consideration of impermissible factors." *Id.* at 577.

84. *See, e.g.*, Guardians Ass'n v. Civil Serv. Comm'n, 103 S. Ct. 3221, 3227 (1983) (disparate impact theory available in case involving selection of officers to be laid off); Connecticut v. Teal, 457 U.S. 440, 447 (1982) (disparate impact theory applied in case involving promotion); International Bhd. of Teamsters v. United States, 431 U.S. 324, 367-68 (1977) (disparate impact on minority employees addressed in transfer case).

85. *E.g.*, International Bhd. of Teamsters v. United States, 431 U.S. 324 (1977); Griggs v. Duke Power Co., 401 U.S. 424 (1971). Congress indicated its approval of the *Griggs* standard when amending Title VII in 1972. H.R. Rep. No. 92-238, 92d Cong., 2d Sess. *reprinted in* 1972 U.S. CODE CONG. & ADMIN. NEWS 2144.

The court's attempt to limit the disparate impact theory is not unique. Pouncy v. Prudential Ins. Co., 668 F.2d 795, 800 (5th Cir. 1982). In addition to the attempt to limit the doctrine to single, discrete employment criteria, some courts have limited disparate impact theory to neutral criteria, as opposed to subjective criteria. *E.g.*, Pegues v. Mississippi State Employment Serv., 699 F.2d 760, 765 (5th Cir.), cert. denied, 464 U.S. 991 (1983); Harris v. Ford Motor Co., 651 F.2d 609, 611 (8th Cir. 1981) *contra* Regner v. City of Chicago, 789 F.2d. 534 (7th Cir. 1986); Griffin v. Carlin, 755 F.2d 1516, 1524 (11th Cir. 1985); Bauer v. Bailar, 647 F.2d 1037, 1043 (10th Cir. 1981).

theory to comparable worth claims leaves the distinct impression that the court's conclusion actually was premised upon institutional and economic concerns. The utilization of disparate impact theory to litigate comparable worth claims would permit what the court views as unacceptable and costly judicial intrusion into the labor market. By limiting comparable worth to disparate treatment analysis, the court limits liability to instances where the discriminator can be identified and the motive to discriminate can be established, rather than imposing liability for the choice, for whatever reasons, of neutral means that discriminate.[86]

The *Washington State* opinion is also significant for the issues that it does not discuss. The questions of how the worth or value of a job can be proved, the role of the fact finder, and analysis of job evaluation studies, issues which have consistently troubled the courts with respect to comparable worth claims,[87] are not examined in detail in the opinion. Although the court would permit evaluation studies to be offered as relevant evidence, it is clear that it views such evidence as having limited value.[88]

The court also provides no extended analysis of the operation of labor market wage rates.[89] The court appears to accept the concept that either the market is non-discriminatory,[90] or that if it is dis-

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86. This parallels the Reagan administration's attempts in the affirmative action area to limit remedies for discrimination to victim-specific relief after the decision in Firefighters Local Union No. 1784 v. Stotts, 467 U.S. 561 (1984). *See* Remarks of Assistant Attorney General Reynolds on Memphis Case *reprinted in* Daily Lab. Rep. (BNA) No. 116, at E-1 (June 15, 1984) (*Stotts* limits Title VII remedies to make whole relief only for actual victims of discrimination). This interpretation has been resoundingly rejected by the Supreme Court. Johnson v. Transp. Agency, Santa Clara County, 55 U.S.L.W. 4379, 4383 n.8 (1987); Local 28 of Sheet Metal Workers' Int'l Ass'n. v. EEOC, 106 S. Ct. 3019, 3049 (1986); Local No. 93, Int'l Ass'n of Firefighters v. City of Cleveland, 106 S. Ct. 3063, 3072 (1986).

87. *See supra* notes 36, 46 and accompanying text.

88. 770 F.2d 1401, 1406, 1408 American Fed'n of State, County, & Mun. Employees v. Washington, (9th Cir. 1986). According to the court, the value of a job is only one factor in determining compensation, therefore, even if value were proved, it would not be sufficient to show comparable value. *Id.* at 1407. In other words, it only constitutes a subtotal of what a job is worth, not the bottom line. Furthermore, the court indicated that comparable worth may not be a feasible approach to employee compensation. *Id.* at 1408.

89. Even the critics of comparable worth seem to agree that there is discrimination in the market. *See supra* note 24 and accompanying text. In other words, employers do not appear to act solely as economic animals, and to assume that they do so in order to provide them with a defense to a discrimination claim, while admitting that the market is not nondiscriminatory, is a legalistic Catch 22.

90. American Fed'n for State, County, & Mun. Employees v. Washington, 770 F.2d at 1407 ("Neither law nor logic deems the free market system a suspect enterprise").

criminatory, an employer nevertheless may pay market rates.[91] It is unclear whether a plaintiff could ever establish a case of discrimination if the defendant employer simply paid market rates, by showing, for example, that the market is discriminatory and that the employer had specific intent to discriminate, or whether payment of market wage rates is *per se* a nondiscriminatory practice. If the court's position is the latter, it appears to conflict with decisions under the Equal Pay Act holding that the existence of discriminatory practices in the labor market is not a justification for an individual employer to discriminate by adopting those practices.[92]

B. American Nurses' Association

The narrow framework imposed on the concept of comparable worth by the *Washington State* opinion was reinforced by the opinion rendered six months later by the Seventh Circuit in the *American Nurses' Association* (*ANA*) case.[93] Although reversing the district court's outright dismissal of the plaintiffs' comparable worth claims, the opinion reinstated the case only to the extent of a *Gunther*-type disparate treatment claim.[94] Paralleling the reasoning of the Ninth Circuit, the court noted that in order to prove their case, the plaintiffs would have to show that the compensation system was adopted or maintained *because* it would discriminate on the basis of sex, not merely in spite of its discriminatory effect.[95] In other words, the plaintiffs would have to show specific intent to discriminate: it would not suffice to show that the state failed to act in response to an evaluation study which demonstrated sex-based wage disparities, or that the state paid market wage rates, despite the knowledge that this would have a disparate impact on the basis of sex.[96]

Although the court was not required to decide whether disparate treatment was the sole legal theory available to the plaintiffs, it nevertheless strongly suggested, in dicta, that the limitation of com-

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91. *See id.* at 1406 (state not responsible for creating market rates).

92. *See* Corning Glass Works v. Brennan, 417 U.S. 188, 205 (1974) (company practice of taking advantage of job market where women are paid less is illegal under Equal Pay Act).

93. American Nurses' Ass'n. v. Illinois, 783 F.2d 716 (7th Cir. 1986); *see also* EEOC v. Madison Community Unit School Dist. No. 12, 818 F.2d 577 (7th Cir. 1987).

94. *Id.* at 727.

95. *Id.* at 720-22 ("[there must be] evidence that the . . . [defendant] decided not to raise the wages of particular workers *because* most of those workers were female") (emphasis in original).

96. *Id.*

parable worth claims to disparate treatment analysis may be required by the *Gunther* decision or by constitutional equal protection doctrine.[97] The court pointed out that the *Gunther* decision implies that the interrelationship between the Equal Pay Act and Title VII permits Equal Pay Act defenses to be raised in all wage discrimination cases brought under Title VII, not just those that would mirror a cause of action under the Equal Pay Act.[98] If this is true, then one of the Equal Pay Act defenses available to an employer is to pay wage differentials based upon a factor other than sex even if this results in a disparate impact on the basis of sex.[99] This defense would eliminate disparate impact wage discrimination claims, the court reasoned, and confine Title VII wage discrimination claims to cases of intentional discrimination, or, in other words, disparate treatment theory.[100]

Although this reasoning would neatly encapsulate comparable worth within the *Gunther* framework, there are two flaws in the court's analysis. First, as the court itself concedes, the Supreme Court in *Gunther* simply did not decide, nor did the Court discuss in dicta, whether EPA defenses could be raised in all Title VII wage discrimination claims.[101] Certainly there is ample basis to argue that EPA defenses should be limited to EPA claims, whether brought directly under the EPA or under Title VII.[102] Second, the opinion seems to assume *sub silento* that payment of market wage rates would always be a defense under the Equal Pay Act—a conclusion which directly conflicts with the Supreme Court's position that payment of a *discriminatory* market wage rate is not a "factor other than sex" that constitutes a defense under the Equal Pay Act.[103]

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97. *Id.* at 720-21. The plaintiffs, perhaps in reaction to the *Washington State* decision, argued on appeal that their complaint solely alleged disparate treatment theory. *Id.*

98. *Id.* at 723.

99. 29 U.S.C. § 206(d)(1)(iv) (1976).

100. American Nurses' Ass'n v. Illinois, 783 F.2d at 723.

101. *Id.*

102. Concededly, the Court uses broad language in *Gunther* that could be construed to permit EPA defenses to be raised in *all* Title VII wage discrimination claims. County of Wash. v. Gunther, 452 U.S. 161, 175, (1981). As the Court pointed out in *Gunther*, however, the Bennett Amendment was intended to be a technical amendment to prevent an employer from being held liable under Title VII for those practices permitted by the Equal Pay Act. *Id.* at 174-75. What is authorized or permitted under the EPA, however, exists only in relation to the equal work factual setting that is the concern of the EPA. *Id.* at 168-69. It is reasonable, therefore, to apply EPA defenses only to equal work claims (as defined under the EPA), but otherwise subject other types of wage discrimination claims to Title VII defenses.

103. Corning Glass Works v. Brennan, 417 U.S. 188, 205 (1974). As the Court noted:

In the alternative, the court asserts that the equal protection clause may require disparate treatment analysis and, therefore, proof of intentional discrimination.[104] The court's rationale for this argument is grounded on its analysis of the perceived interrelation between constitutional and statutory discrimination analysis. The equal protection clause is not violated when a law or practice simply has a differential impact; there must be proof of intentional discrimination.[105] Therefore, if all that is alleged in this case is that the state utilized a compensation scheme which disproportionately and adversely impacted on women, that does not satisfy the constitutional requirement of discriminatory intent.[106]

The *ANA* court points out that this requirement of discriminatory intent is also an essential element of Title VII disparate treatment theory,[107] that is, the statutory and constitutional intent standards are the same. The court notes that the statutory standard is different only if disparate impact theory applies to the claim.[108] The court then states that in the "usual" disparate impact case, the plaintiff challenges an *exclusionary* practice, and "[i]t is not apparent what the analogy to an exclusionary job qualification would be in this case."[109] It is from this line of reasoning that the court apparently reaches the conclusion that its rejection of the disparate impact theory may be constitutionally compelled.

Unexplained by the *ANA* court is its leap from the description of the "usual" disparate impact claim to the conclusion that the limitation of comparable worth claims to disparate treatment theory is constitutionally compelled. The unspoken step in the court's analysis appears to be that because a comparable worth claim does not resemble the "usual" impact case, it cannot be proved under that theory; such a claim can only be proved under disparate treatment

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> The differential [in wages] arose simply because men would not work at the low rate paid women inspectors, and it reflected a job market in which Corning could pay women less than men for the same work. That the company took advantage of such a situation may be understandable as a matter of economics, but its differential nevertheless became illegal once Congress enacted into law the principle of equal pay for equal work.

Id.

104. American Nurses' Ass'n v. Illinois, 783 F.2d 716, 722-23.

105. *Id.* at 722.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* at 723.

theory, and under that theory discriminatory intent must be established, which is equivalent to the constitutional standard of intent. If this is the court's implicit reasoning, the conclusion that the legal theory applicable to comparable worth claims is constitutionally compelled hangs on a slender thread: the court's description of disparate impact cases must be transformed into a prescribed limitation on the use of disparate impact theory. Otherwise, the court's conclusion flies in the face of the rule that what is constitutionally permitted is not a limitation on what may be prohibited by Title VII.[110]

By making the argument that disparate treatment is the only legal theory that could be used to prove a comparable worth claim, the court attempts to avoid the question of whether the concept of comparable worth could analytically fit within disparate impact theory. The court makes it clear, however, that it strongly disapproves of the inclusion of comparable worth claims within disparate impact theory. According to the court, the complexity of compensation systems and, more importantly, the disruption of the labor market if this theory were adopted, militates against the use of this legal theory.[111] In other words, the court opposes the use of disparate impact theory because of its results. The depth of the court's hostility to the concept of comparable worth is suggested by its belittling characterization of the plaintiffs' claim as "intentional discrimination that consists of overpaying workers in predominantly male jobs because most of those workers are male."[112]

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110. *See* General Bldg. Contractors Ass'n v. Pennsylvania, 458 U.S. 375, 383 n.8, 391 (1982) (district court erred in equating Title VII with § 1981 which incorporates constitutional standard of proof of discrimination); Washington v. Davis, 426 U.S. 229, 246-48 (1976) (differentiating Title VII and constitutional standards of discrimination).

111. American Nurses' Ass'n v. Illinois, 783 F.2d 716, 719-20. This is particularly intriguing because the author of the opinion, Judge Posner, is known for his advocacy of the use of economic theory and analysis in resolving legal issues. *E.g.*, R. POSNER, ECONOMIC ANALYSIS OF LAW (2d ed. 1977); R. POSNER, THE ECONOMICS OF JUSTICE (1981); Posner, *Free Speech in an Economic Perspective*, 20 SUFFOLK U.L. REV. 1 (1986). Judge Posner's opinion for the court is even more disappointing because rather than dealing with this issue by citation to academic authority, it proclaims certain conclusions as presumed. American Nurses' Ass'n v. Illinois, 783 F.2d at 719-20.

112. *Id.* at 730. This blatent mischaracterization of the plaintiffs' claims and the essential nature of the concept of comparable worth is either a classic Freudian slip or suggests a subconscious fear that predominantly male judges are next in line for salary reduction at the hands of the proponents of comparable worth. The tone of the opinion throughout is that the position of advocates of comparable worth is simply too incredible to be given credence. For example:

> An employer . . . that simply pays the going wage . . . and makes no effort to discourage

In sum, *ANA*, like *Washington State*, limits comparable worth to the *Gunther* paradigm, with the exception that the decisions appear to accept the concept that jobs can be compared on the basis of their value or worth to the employer to determine whether there is wage discrimination. To that extent, both *Washington State* and *ANA* go beyond the *Gunther* model and appear to resolve an issue that has troubled many courts.[113] On the other hand, both cases nevertheless limit comparable worth claims to disparate treatment theory, and indicate that strong proof of discriminatory intent will be necessary in order to prevail even on that theory. Thus, the decisions create a new hoop for plaintiffs to jump through, an extremely narrow one.

The limited framework for comparable worth litigation which these two cases have erected has already begun to shape strategy in wage discrimination cases. At the time these two decisions were issued, a sizable number of comparable worth cases were pending in various pre-trial stages.[114] The opinions generated a flood of motions to dismiss the cases, on the basis that they simply raised disparate impact claims, a legal theory which had now been rejected for comparable

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> women from applying for particular jobs or to steer them toward particular jobs, would be justifiably surprised to discover that it may be violating federal law because each wage rate and therefore the ratio between them has been found to be determined by cultural or psychological factors attributable to the history of male domination of society; that it has to hire a consultant to find out how it must, regardless of market conditions, change the wages it pays, in order to achieve equity between traditionally male and traditionally female jobs; and that it must pay backpay, to boot.

Id. at 720; *see also* Bohen v. City of E. Chicago, 41 Fair Empl. Prac. Cas. (BNA) 1108, 1116 (7th Cir. 1986) ("conceivably sexual harassment may differ sufficiently from other forms of employee misconduct to justify fewer preventive efforts by the employer. It is difficult to police . . . and probably can never be completely extirpated from the workplace. A reasonable effort to limit it is all that Title VII requires"). As one commentary has noted:

> By and large the performance of American judges in the area of sex discrimination can be succinctly described as ranging from poor to abominable. With some notable exceptions, they have failed to bring to sex discrimination cases those judicial virtues of detachment, reflection and critical analysis which have served them so well with respect to other sensitive social issues. Particularly striking, . . . , is the contrast between judicial attitudes toward sex and race discrimination. Judges have largely freed themselves from patterns of thought that can be stigmatized as racist. . . . With respect to *sex* discrimination, however, the story is different. "Sexism" . . . is as easily discernible in contemporary judicial opinions as racism ever was. (emphasis in original).

Johnston & Knapp, *Sex Discrimination by Law: A Study in Judicial Perspective*, 46 N.Y.U. L. REV. 675, 676 (1971).

113. *See supra* notes 45-47 and accompanying text.

114. *See supra* note 59.

worth claims.[115] Virtually none of those motions were successful, but only because it was clear from the complaint, or was argued by plaintiffs when those motions were heard, that the cases also alleged *Gunther*-type claims of intentional, disparate treatment-type discrimination.[116] Thus, the cases survived dismissal only at the cost of the most powerful legal theory for the plaintiffs.

The very weakness and unpersuasiveness of the *Washington State* and *ANA* disparate impact analyses provides some hope that the framework of comparable worth claims may yet expand to the full range of Title VII discrimination theory. Equally important as this theoretical issue to the development of comparable worth as a legal doctrine is the resolution of evidentiary issues necessary for the proof of such claims and the implementation of appropriate remedies. The availability of disparate impact theory will be meaningless if the courts continue to conclude that comparable worth claims are incapable of proof or that courts are unable to assess the kinds of evidence offered to prove such claims. In particular, the use and analysis of job evaluation studies and market wage rates is critical.

The Supreme Court's most recent wage discrimination decision, *Bazemore v. Friday*,[117] indicates that courts can and must evaulate precisely this kind of evidence in wage discrimination cases. The decision also suggests a broad view of the scope of wage discrimination

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115. *See, e.g.*, Foster v. Arcata Ass'n, Inc., 772 F.2d 1453, 1465-66 (9th Cir. 1985) (opinion amended October 25, 1985) (plaintiffs must come within *Gunther* framework in order to prevail in Title VII wage discrimination case, citing the *Washington State* opinion); California State Employees Ass'n v. California, No. C-84-7275-MHP (N.D. Cal. Sept. 13, 1985) (LEXIS, Genfed Library, Dist. File) (court denied motion to dismiss on basis that plaintiffs alleged they intended to prove intentional discrimination); St. Louis Newspaper Guild v. Pulitzer Publishing Co., 618 F. Supp. 1468, 1469 (E.D. Mo. 1985) (motion to dismiss denied on basis plaintiffs alleged *Gunther*-type claim of intentional discrimination; case settled February 25, 1986).

One other interesting development that appears to be in reaction to the *Washington State/ ANA* opinions is an effort to pursue comparable worth claims under state discrimination laws. On June 13, 1986, three locals of the Service Employees International Union (SEIU) filed a complaint in California under state law alleging intentional wage discrimination on the basis of sex, race, and national origin, in addition to promotion claims. SEIU v. County of Los Angeles, Los Angeles Superior Court, No. 000985 (June 13, 1986) (LEXIS, State Library, California File). The suit was brought on behalf of approximately 30,000 of the county's 60,000 full time employees and alleges job segregation, denial of equal opportunity to transfer or promotion to higher paid positions, and undercompensation. *Id.* The suit was filed after the county failed to respond to a 1984 SEIU report which allegedly showed severe occupational concentration by sex and race, and underpayment of women and minorities by $6,000 to $7,000 annually in comparison to similarly situated white males. *Id.*

116. *Supra* note 115 and accompanying text.

117. 106 S. Ct. 3000 (1986).

claims under Title VII. *Bazemore* thereby serves as a strong counterweight to the limited framework of wage discrimination claims set forth in the *Washington State/ANA* cases.

C. *Bazemore*

In *Bazemore v. Friday,* the Supreme Court considered whether the failure to correct historic race-based pay inequities after the effective date of Title VII constitutes actionable discrimination as a present violation of the statute.[118] Prior to 1965, the North Carolina Agricultural Extension Service was divided into a "white branch" and a "Negro branch," and paid lower salaries to its agents in the Negro branch.[119] In 1965, the branches were merged in response to the enactment of Title VII, but the salary disparities were never totally eliminated.[120]

The Court held that regardless of when the pattern of discrimination began, wage discrimination occurs each time a black employee is issued a paycheck which contains less than that paid to a similarly situated white employee.[121] The Court viewed the resolution of this issue as a simple matter, "too obvious to warrant extended discussion."[122] Conduct or practices that would have been a violation of the statute, but for the fact that the statute was not yet effective became violations once the statute became effective, and continue to be violations if the employer continues to engage in them.[123] The Court indicated in a footnote that this case is clearly distinguishable from prior Title VII cases where it had held that the perpetuation of the effects of pre-Act or time-barred discrimination does not constitute actionable discrimination: the critical difference, the Court noted, is that in *Bazemore* the salary structure itself illegally discriminates because "it is a mere continuation of the pre-[Act] discriminatory pay structure."[124] The present salary structure could, therefore, potentially discriminate against two groups of employees: those hired prior to the merger of the two branches, and those hired after the merger.[125] For those hired when the branches were segregated,

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118. *Id.* at 3002.

119. *Id.* at 3004.

120. *Id.* It is interesting that the case hints at sex-based wage discrimination as well in the county's compensation system and failure to rectify that pay disparity. *Id.* at 3010 n.12.

121. *Id.* at 3006.

122. *Id.*

123. *Id.*

124. *Id.* at 3007 n.6; *see also id.* at 3007 n.8.

125. *Id.* at 3007 n.8.

the failure to eliminate the historic pay disparity in the compensation structure would constitute discrimination; for those hired after the branches were integrated, any continued incorporation of pay disparities would constitute discrimination.[126]

The Court devoted the bulk of its opinion to the evidentiary issues raised by the case. The district court had refused to admit the plaintiffs' multiple regression analysis as proof of discrimination.[127] To test the hypothesis that the salary structure discriminated on the basis of race the regression analysis had used four variables: race, education, tenure, and job title. Those factors were chosen as the result of discovery testimony that four factors were the basis for salary determination: education, tenure, job title, and job performance.[128] The trial court rejected this evidence on the basis that the analysis had not included sufficient factors.[129] That concern, the Court stated, is not a basis to deny admission of the evidence, but rather goes to the weight of the evidence.[130] More importantly, however, the Court emphasized that the trial court was imposing an overly difficult (perhaps impossible) burden of proof on the plaintiffs.[131] The plaintiffs need not, the Court stated, prove discrimination with scientific certainty; rather, the plaintiffs' burden is only to establish discrimination by a preponderance of the evidence.[132] That burden has been satisfied if the trial court "may fairly conclude, in light of all the evidence, that it is more likely than not that impermissible discrimination exists."[133]

The Court clearly indicated that the lower courts had erred in not properly evaluating the evidence of discrimination in this case.[134] The Court suggested that the plaintiffs' multiple regression analysis was persuasive evidence, perhaps even sufficient evidence to establish discrimination.[135] In addition to this analysis, however, the plaintiffs presented what the Court termed an "impressive array" of additional

126. *Id.*
127. *Id.* at 3009.
128. *Id.* at 3008.
129. *Id.* at 3009.
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.*. The Court clearly implied that it felt that the plaintiffs were entitled to prevail in light of the evidence presented in addition to the multiple regression analysis. *Id.* at 3009-10.
134. *Id.* at 3009.
135. *Id.*

evidence to support their claim of wage discrimination.[136] Included in that array was the defendant's own regression analysis of its compensation system, which indicated results similar to those in the plaintiffs' analysis, and evidence concerning the defendant's knowledge of the wage disparity and its failure to correct the disparity.[137]

Although *Bazemore* is a race-based wage discrimination case, it has enormous theoretical and evidentiary significance for sex-based wage discrimination claims and the concept of comparable worth.[138] Theoretically, the decision signals the rejection of arguments that the "mere" perpetuation of historic intentional wage discrimination is not a current violation of Title VII. Historic patterns of sex-based wage discrimination, therefore, would similarly be actionable if perpetuated in compensation systems. There is no reason to limit this prohibition to the facts of *Bazemore*, which in a sex discrimination context would constitute a claim for failure to pay equal salaries for equal work regardless of sex. Rather, it should also apply to the failure of the employer to reevaluate its compensation structure to eliminate sex or sex stereotypes from the determination of compensation for jobs predominantly held by women and to pay salaries proportionate to the relative value of work regardless of sex.

The Court's treatment of historic wage discrimination does not, of course, resolve the most important theoretical issue concerning comparable worth, whether disparate impact theory can be used to prove and analyze a comparable worth claim. Nevertheless, the Court's recognition of historic practices as a source of continuing wage discrimination may suggest that the Court would not necessarily limit wage discrimination claims to a single model, such as the fortuitous factual setting of the *Gunther* case.[139] Alternatively, it may suggest that the Court is more sensitive to the inequity of the continuation of clearly discriminatory (particularly intentionally discriminatory) practices. Hopefully, it does not indicate that the Court would analyze sex-based wage discrimination claims any differently than race-based wage discrimination claims.[140]

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136. *Id.*

137. *Id.* at 3009-10.

138. At least one court has agreed, remanding a sex-based wage discrimination claim in light of *Bazemore*. Sobel v. Yeshiva Univ., 41 Fair Empl. Prac. Cas. (BNA) 1003, 1004 (2d Cir. 1986).

139. *Cf.* Corning Glass Works v. Brennan, 417 U.S. 188, 208 (1974) (Equal Pay Act is broadly remedial and should be applied to fulfill underlying purpose which Congress sought to achieve).

140. *But see* Kay, *Models of Equality*, 1985 U. ILL. L. REV. 39, 44-47 (discussing Supreme

The Court's treatment of the evidentiary issues in *Bazemore* has more unambiguous significance for the concept of comparable worth. The opinion clearly indicates that wage discrimination claims are capable of proof and of evaluation by the courts. The opinion, therefore, implicitly rejects two of the common concerns of the courts in comparable worth cases: that such claims cannot be proved to a sufficient level of certainty, or that the courts are not equipped to evaluate such claims. As *Bazemore* reaffirms, the burden of proof in a discrimination claim is not proof beyond a reasonable doubt, but rather is proof by a preponderance of the evidence that it is more likely than not that discrimination exists. The proper evaluation of such claims does not require that proof of discrimination be absolute, or that all other possible explanations be eliminated. Rather, there must be sufficient evidence from which the conclusion of discrimination can be inferred which stands unrebutted by evidence supporting an alternative explanation or an affirmative defense.

The opinion also indicates what types of evidence would be sufficient to support a finding of wage discrimination. Multiple regression analysis, or some statistical means by which the variety of factors which determine compensation can be analyzed, is critical in such cases.[141] It appears to be at least sufficient if the factors included in the regression are based upon discovery information regarding the employer's articulated component factors for determining compensation.[142] Conversely, if a prima facie case of discrimination is established, it will not be rebutted simply by claiming that "many factors go into making up an individual employee's salary."[143] The employer must order those factors and demonstrate that indeed these nondiscriminatory factors account for differences in compensation.[144]

Furthermore, an employer's study of its compensation system which indicates the existence of illegal wage disparities is considered strong evidence of discrimination. The inference of discrimination that the Court draws from such evidence directly contradicts the treatment

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Court's differential treatment of race and sex). *See generally* Wasserstrom, *Racism, Sexism, and Preferential Treatment: An Approach to the Topics,* 24 UCLA L. REV. 581, 584-93 (1977).

141. This does not address the issue of whether multiple regression analysis is transferable to comparable worth claims. *See generally* Campbell, *Regression Analysis in Title VII Cases: Minimum Standards, Comparable Worth, and Other Issues Where Law and Statistics Meet,* 36 STAN. L. REV. 1299 (1984).

142. Bazemore v. Friday, 106 S. Ct. at 3009.

143. *Id.* at 3010-11 n.14.

144. *Id.*

of such studies in the *Washington State/ANA* decisions, which view them as evidence of a good faith effort to identify discrimination which should not have the consequence of creating legal liability.[145] Furthermore, according to *Bazemore*, knowledge of the conclusions of a study indicating discriminatory disparities in the compensation system, or actions taken to reduce, but not to eliminate, discriminatory disparities also constitute evidence of discrimination.[146] In other words, once there is knowledge of discrimination, there is an obligation to correct it. Again, the inference from such evidence is exactly opposite to the *Washington State/ANA* framework, which rejects the position that such evidence indicates the intent to discriminate *because* of sex, and views it only as awareness of discriminatory consequences in spite of inaction by the employer.[147]

Bazemore, then, suggests a wholly different approach to wage discrimination claims from the narrow framework of the *Washington State/ANA* opinions. Factually, it presents another category of discrimination, the perpetuation of historic discriminatory practices as analyzed under pattern and practice theory, suggesting that the phenomenon of wage discrimination is sufficiently complex that it cannot be encompassed by a single discrimination theory or general category of causation. The court's treatment of evidentiary issues implicitly rejects the institutional arguments concerning the capability of plaintiffs to prove and courts to evaluate evidence of wage discrimination, and suggests the kinds of evidence sufficient to prove wage discrimination claims. The decision, therefore, stands as a significant counterweight to the limiting trend of the *Washington State/ANA* opinions, suggesting that those cases have not determined the shape of the legal doctrine of comparable worth.

III. The Future of Comparable Worth

Viewed from the conflicting perspectives of the *Washington State/ANA* opinions and the *Bazemore* case, the doctrine of comparable worth remains in considerable flux. It is well to remember that only six years have passed since *Gunther* was decided, and cases are just beginning to be litigated where comparable worth claims are fully developed and presented. While the next phase of litigation is, therefore, important to doctrinal development, the significance of the

145. *See supra* notes 71-73 and accompanying text.
146. Bazemore v. Friday, 106 S. Ct. at 3009.
147. *See supra* notes 71-73 and accompanying text.

current framework must be carefully assessed. To conclude that comparable worth is dead as a legal theory because of the *Washington State* and *ANA* opinions overstates their persuasiveness and long term impact, particularly in light of the indications from *Bazemore* that the Supreme Court may be open to a broader concept of wage discrimination.

Whether a broader concept ultimately prevails in large part depends upon whether disparate impact theory can be used as a basis for comparable worth claims. Without the benefit of this theory, it is doubtful that comparable worth will be an effective tool to achieve meaningful equality or closure of the wage gap. The immediate difficulty is whether the disparate impact issue will be presented or preserved in cases currently being litigated.[148] The *Washington State* and *ANA* opinions have provided overburdened trial courts with the means to limit the scope of comparable worth cases, with the result that in the short run, litigants will try to fit within the *Gunther* disparate treatment paradigm dictated by the *Washington State* and *ANA* cases. The disparate impact issue may not be resolved, therefore, because it simply will not be raised.[149]

If the issue is raised, the plethora of cases involving complex and sophisticated employment practices analyzed under disparate impact theory should be sufficient to rebut the view that the theory is subject to a complexity limitation.[150] In addition, the broad remedial goal of Title VII[151] supports an expansive application of disparate impact theory, particularly in light of the persistence of discriminatory practices.[152] On the other hand, the attempt to limit disparate impact theory to "simple" cases of discrimination may indicate a need to

148. It is likely that the analysis of this issue will not come from the *Washington State* or *ANA* cases, as *Washington State* has settled, see *supra* note 63, and the *ANA* decision has not been appealed.

149. One alternative to this may be to present evidence to support such a claim and preserve the theoretical issue for appeal.

150. *See supra* note 84.

151. *See* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) ("What is required by Congress is the removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification"); *see also* Meritor Sav. Bank v. Vinson, 106 S. Ct. 2399, 2404 (1986) ("the language of Title VII is not limited to 'economic' or 'tangible' discrimination. The phrase 'terms, conditions or privileges of employment' evinces a congressional intent 'to strike at the entire spectrum of disparate treatment . . .'").

152. *See generally* U.S. CIVIL RIGHTS COMMISSION, STATUS OF CIVIL RIGHTS 1957-1983; Calmore, *Exploring the Significance of Race and Class in Representing the Black Poor*, 61 OR. L. REV. 201, 208-09 (1982).

rethink our legal definition of discrimination rather than be confined to defending accepted analysis. What may be needed, in other words, is to articulate a new theory or analysis of discrimination. Certainly there is nothing in Title VII jurisprudence to indicate that the disparate treatment and disparate impact theories are intended to demarcate the limit of legal analysis of discrimination. The limitation of theory is a matter of accepted practice, not of doctrine.[153]

To the extent disparate treatment theory remains the framework of analysis of comparable worth claims, the theory and proof of discriminatory intent will be the key to the outcome of current cases. If the courts continue to require proof of specific intent as suggested by *Washington State/ANA*, even disparate treatment theory will be largely useless as a means to establish comparable worth claims. Plaintiffs may be forced, therefore, to challenge this interpretation of the intent requirement of Title VII disparate treatment analysis.

Of equal or greater importance will be the effective presentation of evidence to support a broad comparable worth claim. The most difficult obstacle to surmount in order to establish liability under a broad concept of comparable worth is the problem of proof. The courts have grudgingly accepted the idea that theoretically one can establish the worth or value of a job. Since *Bazemore*, the argument can be made that the assessment of job evaluation evidence is a task which the courts *must* perform. The thoroughness and sophistication of the courts' analysis of such evidence will depend upon the degree of assistance that plaintiffs provide to the courts by the presentation of useful expert testimony.

Plaintiffs will also have to confront the equally significant evidentiary problem of the analysis of market wage rates. Currently, the practice of using market wage rates is treated as a *per se* defense for employers. Courts are convinced the market is objective and nondiscriminatory, or that if it is not, employers cannot be held accountable for its deficiencies. Comparable worth claimants must present evidence of discrimination in the market to eliminate the concern that individual employers are being made sacrificial lambs and replace it with the view that it is not a defense to discrimination that everyone else is doing it.

The courts' acceptance of certain aspects of the concept of comparable worth indicates that judges may be more receptive to litigation

153. Such a reexamination must confront the perception that comparable worth claims arbitrarily require "innocent" employers to shoulder liability for societal discrimination. *See generally* Brodin, *supra* note 80, at 993.

of component parts of the concept. It may be more fruitful, therefore, to break down the claim of wage discrimination into specific practices which affect the compensation structure. Courts seem to be particularly concerned about allegations of occupational segregation.[154] Proof of the explicit or more subtle means by which occupational segregation has been accomplished, and continues to occur, is critical to establishing both the existence of such practices and their effect on compensation. The courts similarly may be more comfortable determining whether certain job evaluation schemes discriminate than attempting to evaluate and compare the worth of particular jobs.

Perhaps the most important factor in the development of comparable worth doctrine will be the continued existence of the conditions which gave rise to the legal theory. According to most studies, if current trends persist, occupational concentration and the wage gap will exist well into the next century, while an increasing proportion of women will enter the workplace. This combination of factors will provide the raw material for continued pressure to implement the concept of comparable worth. The metamorphosis of the legal doctrine will determine whether it will become an effective tool to resolve this unavoidable issue. Without that tool, the underlying issues will nevertheless remain as a labor relations issue that employers eventually will be forced to address.

154. Indeed, even Judge Posner, the author of the *ANA* opinion, evidences concern for job "steering" and embraces the use of both disparate treatment and disparate impact analyses to examine such practices in an opinion issued shortly before this article went to press. EEOC v. Madison Community Unit School Dist. No. 12, 818 F.2d 577, 588 (7th Cir. 1987).