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Ellen M. Ryan

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COMPARABLE WORTH — A NECESSARY VEHICLE FOR PAY EQUITY

INTRODUCTION

As the middle part of this decade has arrived, the concept of comparable worth, which many describe as the issue of the 1980s,¹ is still alive and the subject of much heated and unresolved debate.² A comparable worth theory essentially holds that men, women, and minorities should be paid equally for jobs that are of comparable value to the employer.³ A comparable worth claim is based on evidence that workers in “female” jobs earn less than workers in “male” jobs that require comparable skill, effort, and responsibility.⁴ Since the 1980 United States Supreme Court decision which opened the door for potential comparable worth claims,⁵ a mass of articles, commentaries, and books have been written espousing numerous authors’ views on the subject.⁶ More significant to the fate of comparable worth’s existence has been the subsequent decision of a federal dis-

6. See supra note 2.
trict court which sanctioned the theory's use in a wage discrimination action.\textsuperscript{7}

Part I of this Comment reviews the statistics and studies which document the pervasive discrimination experienced by women. It considers key federal legislation aimed at eliminating the discrimination, and the various interpretations of that legislation. Part II examines the threshold cases which have advanced or restricted the evolution of the comparable worth theory. Part III sets forth various types of comparable worth theories concentrating on that theory which relies heavily on the use of job evaluations. It demonstrates the different approaches plaintiffs can take with these evaluations. Part IV argues that job evaluations are essential in establishing a comparable worth claim. It establishes that despite their inherent subjectivity, job evaluations are the most reliable indicator of a job's true value. Part IV demonstrates that the force of the marketplace neither should be incorporated into the study nor used by employers as a defense to a comparable worth action. This part further argues that, if anything, the subjectivity of job evaluations works against women. Part V contends that the potential cost resulting from a successful comparable worth action is no defense for employers. Furthermore, it maintains that the consequences need not be as drastic as often imagined. Various alternatives exist which can pave a smoother path on the road toward employment equality for women.

\section{Wage Discrimination and Remedial Statutes}

\subsection{Wage Discrimination Against Women}

It is well-established that women in the United States earn far less than men. The average white female worker can expect to earn fifty-six percent of her male counterpart's wage.\textsuperscript{8} This is disheartening for those who believe that time will eventually reduce the wage gap, as eighteen years earlier women earned sixty-five percent of what men did.\textsuperscript{9} An argument which tends to ameliorate the impact of these statis-

\textsuperscript{8} See A. GOLD, supra note 1, at 3 (citing Bureau of the Census, U.S. Dep't of Commerce).
tics is that these studies do not take into account the differences in labor-market experiences between the sexes. That is, men have the propensity to permanently remain in the labor force, accumulate more market skills and information than women, and thus, receive a higher wage. Yet, empirical studies have shown that these legally neutral factors explain only forty-two to sixty-seven percent of the pay disparity between men and women.

These statistics are not surprising as working women generally receive less income than men with comparable education and work experience. Furthermore, the dramatic influx of women entering the marketplace brings with it a significant proportion of women in lower paying entry jobs.

Not only do many women enter the labor market to take lower paying jobs, but the type of work they perform is very often work traditionally done by women. This is not to say that women have not increased their numbers in traditionally male-dominated occupations such as law, management, administration, and medicine. That women are making great strides in many professional fields is encouraging. However, most of the forty million working women still remain in jobs traditionally reserved for women. Women tend to become nurses, librarians, school teachers, and bank tell-

11. Id. at 16.
13. See Bureau of the Census, U.S. Dept. of Commerce, Statistical Abstract of the United States No. 752, at 464 (1978) [hereinafter cited as Statistical Abstract] (showing that in 1977, a full-time male worker who completed one to three years of high school received a median income of $13,120, while a female college graduate was paid a median income for full-time work of $12,656).
14. See Gasaway, supra note 2, at 1125 n.19 (citing Bureau of Labor Statistics, U.S. Dept of Labor, which disclosed that the proportion of women to total labor force increased from eighteen percent in 1900 to fifty percent in 1978).
15. A. Gold, supra note 1, at 6.
16. Job segregation by sex is not a recent phenomenon. Looking back in United States history, one will find that the New England textile mills employed young women in segregated jobs. See Blumrosen I, supra note 2, at 402.
This job segregation is highlighted in a 1984 study which shows that eighty percent of women working outside the home work in jobs where at least seventy percent of the workers are female.\textsuperscript{19} Job segregation by sex would not deserve harsh criticism were it not for the fact that wages in female-dominated jobs are almost always lower than wages in male-dominated jobs.\textsuperscript{20} This fact explains why the major cause of the wage gap between men and women is the differences in their occupational distribution.\textsuperscript{21} Frequently, this pay disparity exists in different but comparable jobs.\textsuperscript{22} This wage discrimination clearly inflicts unfair financial hardships on women.\textsuperscript{23}

Socialization of both men and women also perpetuates gender-based wage discrimination. Society continues to place the primary parenting responsibility on women.\textsuperscript{24} Hence, many women are socialized to forego training or promotions which would increase their earnings,\textsuperscript{25} as there are children at home who need to be tended to. The structure of the labor market hinders many women’s full and equal

\textsuperscript{18} \textit{Id.} Few women have crossed over to male-dominated jobs, and few men have entered jobs historically held by women. \textit{Id.} at col. 2. It is interesting to note that “bank-teller” is now designated a traditional women’s job. Before World War II, it was a highly prestigious position and almost exclusively held by males. As more women and minorities have become tellers, a teller’s status has dropped along with opportunities for promotion to a loan officer. Blumrosen I, \textit{supra} note 2, at 408.


\textsuperscript{20} \textit{See A. Gold,} \textit{supra} note 1, at 7. A 1970 census revealed that each additional percentage point of women in any given occupation resulted in a median compensation drop of forty-two dollars a year for that occupation. \textit{Id.}

\textsuperscript{21} \textit{See} studies published in Fuchs, \textit{Differences in Hourly Earnings Between Men and Women,} 94 \textit{MONTHLY LAB. REV.}, May, 1971, at 9, 14.

\textsuperscript{22} \textit{See Note,} \textit{supra} note 12, at 662 (explaining how wages are determined when jobs are segregated).

\textsuperscript{23} \textit{See Blumrosen I,} \textit{supra} note 2, at 404. Between 1962 and 1972, the number of households headed by women increased by forty-six percent. People in those households were three times as likely to be in poverty than others. \textit{Id.} See also \textit{Pay Equity and Comparable Worth,} \textit{supra} note 19, at 70, which states that one out of six women is the head of a household.


\textsuperscript{25} \textit{See Comment, Equal Pay for Comparable Work,} \textit{supra} note 2, at 477 (1980).
achievement in the work force as it is too inflexible for individuals with major child care responsibilities.26

Thus, discrimination — be it subtle, blatant, innocent, or intentional — does exist. The belief that “men are the breadwinners and thus deserve more” is, unfortunately, still with us.27 Furthermore, many jobs are stereotyped as “women’s work.” Almost always, this label brings with it wages far below those received for comparable men’s work.28 Although admittedly not equal work, the job requirements of a “household worker” and a “janitor” are somewhat similar as far as skill, effort, stress, and responsibility. However, the former category (95 percent female) receives $5,600 a year, while the latter category (85 percent male) earns $11,400.29 Any differences between the two jobs surely do not warrant an approximate 100 percent disparity in the pay scale. The structure for compensation for these jobs was established at a time when employers could intentionally pay different wages to men and women for the same job.30 Because of the commonly held notion that women worked only for “pin money,”31 employers felt that women did not need to earn the same wage as men. It is difficult to imagine that this belief was instantaneously discarded the moment the wage discrimination statutes were enacted. Accordingly, employers had no reason to increase low wages in predominantly women-held jobs if the equal employment statutes did not mandate the action. Hence, women’s wages still remain significantly depressed.

26. See Frug, supra note 24. “The labor force is organized as if workers do not have family responsibilities. The traditional work schedule is too inflexible and too long for a parent with primary child care responsibility.” Id. at 56.

27. See Symposium, supra note 10, at 59. See also Lanegan-Grimm v. Library Ass’n, 560 F. Supp. 486 (D. Ore. 1983) (intentional sex discrimination found where a supervisor told a female bookmobile driver that a male truck driver was paid more because he was a man and the head of a household).

28. See Comment, Equal Pay, supra note 2, at 478, in which the author posited that the position of women’s “jobs in the hierarchy of wages among occupations [was] established at a time when employers could lawfully base pay differentials upon sex even for men and women in the same job.”


30. Before the Equal Pay Act and Title VII, there was nothing that forced employers to pay women and minorities the same wage as was paid to white males.

31. See Blumrosen I, supra note 2, at 421.
B. Equal Pay Act, Title VII, and the Bennett Amendment

The Equal Pay Act of 1963\(^\text{32}\) forbids discriminatory compensation between employees of different gender who perform work of "equal skill, effort, and responsibility."\(^\text{33}\) Unequal pay for equal work is permitted if the employer can establish that the unequal pay is the result of one of the Act's four defenses — (1) a seniority system; (2) a merit system; (3) a system measuring earnings by quantity or quality of production; or (4) a differential based on any factor other than sex.\(^\text{34}\)

While the statute does not expressly state that it does not encompass equal pay for comparable work claims, both its legislative history\(^\text{35}\) and subsequent interpretations\(^\text{36}\) seem to foreclose the idea. Despite this interpretation, the Equal Pay Act was and continues to be an extremely vital and necessary vehicle by which women have successfully challenged discriminatory pay wages. Though this legislation is to be

\(^{33}\) Id. The Act reads in part:

No employer . . . shall discriminate . . . on the basis of sex by paying wages to employees . . . at a rate less than the rate at which he [or she] pays wages to employees of the opposite sex . . . for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor than sex . . . .

\(^{34}\) Id.

\(^{35}\) It should be noted that the Equal Pay Act was enacted as an amendment to the Fair Labor Standards Act (FLSA), Pub. L. No. 75-718, 52 Stat. 1060 (1938) (codified at 29 U.S.C. §§ 201-19 (1982)). Thus, it is subject to the FLSA’s limitations and does not apply to certain employers engaged in fishing, agriculture, retail sales, and newspaper publishing. See, e.g., 29 U.S.C. § 213(a) (1982).

\(^{36}\) Legislative history reveals that Congress considered the word “comparable” instead of “equal.” In 1962, the word “comparable” was replaced by the word “equal” in H.R. 11677, 87th Cong., 2d Sess. (1962), by a floor amendment. See 108 Cong. Rec. 14771 (1962). In a 1963 House debate, Representative Goodell stated that by using the word “equal,” the jobs effected “should be virtually identical, that is, they would be very much alike or closely related to each other.” 109 Cong. Rec. 9197 (1963).

applauded, it alone is not broad enough to ameliorate the tremendous wage disparity between the sexes. Furthermore, employers can subtly violate the Equal Pay Act by assigning different job titles to predominantly female jobs and predominantly male jobs, and paying the men more than the women, despite the jobs' virtual identity. For example, in Wisconsin, the American Federation of State, County and Municipal Employes (AFSCME) has filed charges with the Equal Employment Opportunity Commission, alleging that bakers, who are almost all men, earn $1800 a year more than cooks, who are almost all women. Simultaneously, it asserts that predominantly male upholsterers earn $2300 more than predominantly female seamstresses.\footnote{37}

Another statute which effectively addresses sex discrimination is Title VII.\footnote{38} It also expressly forbids a wide variety of gender-based discriminatory employment practices. Its purview is far more extensive than that of the Equal Pay Act as Title VII forbids employment discrimination on the basis of race, color, religion, sex, or national origin.\footnote{39} Shortly before Title VII became law, the Bennett Amendment\footnote{40} was added to it. As the Equal Pay Act had already focused on various methods of sex-based wage discrimination, this Amendment was proposed as a means to harmonize the two statutes. In the event of conflict between the two statutes, the Bennett Amendment directed that the provisions of the Equal Pay Act would not be nullified.\footnote{41} The Amendment

\footnote{37. Telephone interview with Diane Rock, Director of the Women's Rights Program of the International AFSCME (Sept. 7, 1984). \textit{See also} Milwaukee J., Dec. 25, 1983, at 2, cols. 2-3.}
\footnote{38. 42 U.S.C. §§ 2000e to 2000e-17 (1982).}
\footnote{39. Title VII provides in part:

It shall be an unlawful employment practice for an employer — (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his [or her] compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify his [or her] employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his [or her] status as an employee, because of such individual's race, color, religion, sex, or national origin. \textit{Id.} § 2000e-2(a) (1982).}
\footnote{40. 42 U.S.C. § 2000e-2(h) (1982).}
\footnote{41. \textit{See} 110 Cong. Rec. 13,647 (1964).}
states that "[i]t shall not be an unlawful employment practice to differentiate on the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of [the Equal Pay Act]."

In addition to creating a link between the Equal Pay Act and Title VII, the Bennett Amendment has also been the source of much controversy and heated debate. Its language "if such differentiation is authorized by the Equal Pay Act" lends itself to two different interpretations. How that language is construed determines the scope of Title VII's breadth as it applies to sex-based wage discrimination. What seems to be a minor analytical difference produces drastically different results. Those opposed to the comparable worth theory would urge a broad construction of the Amendment. This construction would mean that all pay differentials not addressed by the Equal Pay Act are, in effect, not prohibited. As the Equal Pay Act does not address equal pay for comparable work, it would logically follow that unequal pay for comparable work is permitted. If the Bennett Amendment limits Title VII to the confines of the Equal Pay Act, any claim that does not allege "equal pay for equal or substantially equal work" has no merit under Title VII.

On the other hand, proponents of comparable worth contend that the only pay differentiations authorized by the Equal Pay Act are those justified by the four defenses available to employers — merit, seniority, productivity, or any factor other than sex. This narrow construction of the Bennett Amendment mandates that the only situations that Title VII cannot address are those where the wage disparities are due to these four exceptions. Hence, there would be nothing

43. See supra note 2 for commentary on the topic.
45. See infra notes 46-61 and accompanying text.
to preclude a Title VII comparable worth action since it does not fall within the four exceptions.

Various courts have also interpreted the Bennett Amendment in these two alternative fashions. The former construction was adopted in *Lemons v. City of Denver.* There, the Court of Appeals for the Tenth Circuit broadly construed the Amendment and held that a Title VII claim does not require an employer to compare unequal work for the purpose of setting wages. Thus, city nurses who wanted their wages compared with wages in non-nursing positions had no cause of action under Title VII because the Equal Pay Act required equal work. The Tenth Circuit is not alone in its method of construing the Bennett Amendment. Several other courts have ruled that if a claim does not violate the Equal Pay Act, it cannot be brought under Title VII.

II. THE LEADING CASES

A. County of Washington v. Gunther

However, other courts, most significantly the United States Supreme Court, have adopted a narrow construction of the Amendment. This construction has opened the door for potential comparable worth claims since unequal pay for comparable work is not one of the defenses authorized by the Equal Pay Act.

48. 620 F.2d 228 (10th Cir.), cert. denied, 449 U.S. 888 (1980).
49. *See id.* at 229-30.
50. The city determined the nurses' compensation by comparing their wages with those of other nurses in the community. The nurses asserted that all nurses have historically been underpaid because their work has never been properly recognized and because the profession has traditionally been dominated by women. Therefore, the nurses argued that the city should not mirror the unfair condition and should instead compare their positions with non-nursing positions. The court held, however, that Title VII does not mandate comparing two different occupations. *Id.*
51. *See, e.g.,* Di Salvo v. Chamber of Commerce, 568 F.2d 593 (8th Cir. 1978); Christensen v. Iowa, 563 F.2d 353 (8th Cir. 1977) (Miller, J., concurring); Orr v. Frank R. MacNeill & Son, Inc., 511 F.2d 166 (5th Cir.), cert. denied, 423 U.S. 865 (1975).
54. This appears to be the more logical interpretation of the Bennett Amendment. The term "authorized" connotes an affirmative giving of a legal right. That is,
In *County of Washington v. Gunther*\(^{55}\) female jail guards challenged a county pay scheme which paid them only seventy percent of what the male guards received.\(^{56}\) This disparity existed even though the county's job evaluation survey determined that the women's positions were worth ninety-five percent of those of the male guards.\(^{57}\) The women argued that the county violated the Equal Pay Act as their work was substantially equal to that of the male guards. In the alternative, they alleged a violation of Title VII because the pay differential was, in part, due to intentional sex discrimination.\(^{58}\) The county maintained that Title VII was not applicable as the women's work was not substantially equal to that of the men. The United States Supreme Court affirmed the Ninth Circuit's holding that the Bennett Amendment was created solely to include the Equal Pay Act's affirmative defenses in Title VII.\(^{59}\) Therefore, the Court maintained that a pay disparity claim could be brought under Title VII even if the person of the opposite sex does not hold an equal but higher paying job, as long as the challenged pay is not justified by one of the Equal Pay Act's affirmative defenses.\(^{60}\)

the Amendment gives official approval and empowers employers to assert only the defenses explicitly set forth and authorized by the Equal Pay Act. Had the proponents of the amendment wished to confer greater latitude to defendants in a Title VII gender-based discrimination suit, it seems a word such as "permitted" would have been substituted for "authorized." The word "permitted" implies that defendants can use the four defenses of the Equal Pay Act, but they are not estopped to assert other defenses not set forth in the EPA.


\(^{56}\) *Id.* at 180.

\(^{57}\) *Id.*

\(^{58}\) *Id.* at 164.

\(^{59}\) *See id.* at 168. *See also International Union of Electrical, Radio & Machine Workers v. Westinghouse Elec. Corp., 631 F.2d 1094, 1101 (3d Cir. 1980), in which the court also stated that the plain language of Title VII suggested that the four exceptions of the Equal Pay Act were the only affirmative defenses available in a Title VII case. The *International Union* court held, therefore, that sex-based wage discrimination is illegal even if the jobs compared are completely different. *See id.* at 1097.

\(^{60}\) 452 U.S. at 168. The Court stated that if the county's interpretation of the Bennett Amendment were adopted, "discriminatory compensation by employers not covered by the Fair Labor Standards Act [would be] 'authorized' — since not prohibited — by the Equal Pay Act. Thus, it would deny Title VII protection against sex-based wage discrimination by those employers not subject to the Fair Labor Standards Act but covered by Title VII." *Id.* at 179.
The obvious consequence of this ruling was that Title VII plaintiffs no longer had to prove that their work was equal or substantially equal in skill, effort, and responsibility to that of members of the opposite sex. The equal work language of the Equal Pay Act would no longer bar a comparable worth claim. Although the Court was quick to assert at the outset that the plaintiffs' "claim is not based on the controversial concept of 'comparable worth,'" the decision's impact cannot be denied.

As would be expected, the Gunther decision prompted scores of advocates and critics of the decision to respectively praise and denounce the ruling. Proponents of comparable worth lauded the fact that the Gunther decision eliminated the major statutory obstacle to sex-based wage discrimination claims that do not allege equal work. They perceived the ruling as a significant step forward, as unequal pay for equal work is but a very small slice of the sex-discrimination pie. A comparable worth claim would finally now be plausible. However, opponents of the decision decried any suggestion that the Gunther ruling removed all barriers to a comparable worth claim. Rather, they have focused their criticism on the implausibility, impracticability, and danger of implementing a comparable worth system. Though commentaries, books, and articles were written, no federal court or federal legislation dealt with the issue until the end of 1983.
B. AFSCME v. State of Washington

Once *Gunther* was decided, several federal courts of appeal, when presented with a Title VII discrimination claim not within the ambit of the Equal Pay Act, ruled in favor of the plaintiffs.67 The first federal court opinion which actually addressed the issue and granted a comparable worth victory to the plaintiffs was *AFSCME v. State of Washington*.68 The plaintiffs were State of Washington employees in job positions which were seventy percent or more female. The defendant was the State of Washington.69

Prompted by reports that they "perpetuated the discrimination against women in salary setting,"70 the state's two civil service systems conducted a study of the salary schedules. The study's results revealed pay differences "not due solely to the 'job' worth."71 On the heels of the study, the Governor hired an independent consulting firm. It was to conduct an outside comprehensive study of the government salaries to investigate the discriminatory pay scale reports. The inquiry focused on job contents of 121 classifications. All classifications were either predominantly male or fe-

67. See, e.g., Gerdom v. Continental Airlines, Inc., 692 F.2d 602 (9th Cir. 1982), cert. denied, 103 S. Ct. 1534 (1983). "Flight hostesses," who occupied a position held only by women, brought a Title VII sex discrimination claim against their employer. The women asserted that the airline's weight requirement for the hostesses was discriminatory as there was no similar requirement for directors of passenger services, an all-male position. *Id.* at 603-04. The court rejected the defendant's argument that since no men were flight hostesses, it had "immunized itself against claims of discriminatory treatment." *Id.* at 607-08. Relying on the *Gunther* decision, the court stated that the "plaintiffs here need not prove that men exempt from these rules performed the same service." *Id.* at 607. See also McKee v. McDonnell Douglas Technical Servs. Co., 700 F.2d 260 (5th Cir. 1983) (though plaintiffs' wage discrimination claim did not support a claim under the EPA, this deficiency did not bar a claim under Title VII).

69. *Id.* at 859-60.
70. *Id.* at 860. These reports probably stemmed from the fact that, as late as 1973, the defendant placed help-wanted ads in the female and male columns of the newspapers in the state. This placement was done despite the fact that no evidence was offered "that sex was a bona fide occupational qualification for the jobs advertised . . . ." It was also done regardless of the fact that in 1971 the Governor of Washington signed into law an amendment prohibiting sex discrimination. The court record was replete with information evincing state knowledge of the sex discrimination. *Id.*
71. *Id.* at 860-61. The study indicated clear pay differences between job classifications predominantly held by women and those held by men. *Id.* at 860.
The 1974 report concluded that based on the measured job content of all classifications, women tended to be paid twenty percent less than men for comparable work.

In 1976, the defendant retained the same firm to update the study and to establish a method to implement the comparable worth study completed in 1974. The study's methodology attempted to value each job classification on the basis of four criteria: knowledge and skills, mental demands, accountability, and working conditions. Seven years after the wage study, the State had not yet actually appropriated funds to eliminate the salary dissimilarities. The plaintiffs filed charges with the Equal Employment Opportunity Commission (EEOC), and when the Commission took no action, the United States Department of Justice informed the plaintiffs of their right to sue the State of Washington. The plaintiffs charged, under Title VII, that the State discriminatorily paid lower salaries to individuals in predominantly female job classifications than to individuals in predominantly male job classifications that required equal or less skill, effort, and responsibility.

In its 1983 decision, the Western District Court of Washington focused on whether the plaintiffs' claim fell within Title VII and, if it did, what burdens of proof the plaintiffs and defendants had to carry to convince the trier of fact of their positions. In doing so, the court set forth and relied on case and statutory precedent. Asserting that Title VII prohibits two types of employment discrimination — disparate treatment and disparate impact — the court addressed both to reach its decision.

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72. *Id.* at 852. "Predominantly" meant at least seventy percent of the same sex. *Id.* at 861.

73. *Id.* The report also discovered that the degree of wage discrimination increased as the job values did. *Id.*

74. *Id.* at 862.

75. *Id.* at 863. In 1976, the Governor included seven million dollars in the state budget to begin increasing many of the women's salaries. In 1977, the subsequent Governor withdrew the appropriation from the budget. In 1980, the Governor told the legislature that a further update of the study indicated increased inequality and that the state could no longer perpetuate unfairness. *Id.* at 862.

76. *Id.* at 860.

77. *Id.* at 853.

78. See *id.* at 856.
The district court explained that disparate treatment is intentional and unfavorable treatment of some employees based on impermissible criteria. In setting forth the necessary elements of a Title VII disparate treatment case, the court used the allocation of burdens and order of presentation of proof formulated in *Texas Department of Community Affairs v. Burdine.*

The plaintiffs first must prove, by a preponderance of the evidence, a prima facie case of discrimination. If the plaintiff proves the prima facie case, the burden of production shifts to the defendant “to articulate some legitimate, nondiscriminatory reason” for the alleged discriminatory treatment. If the defendant carries this burden, the plaintiff has an opportunity “to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.”

Disparate impact, on the other hand, usually involves class actions rather than individual claims. This type of claim alleges practices which are neutral on their face, but have a discriminatory impact and are not justified by business necessity. The court stated that to establish a prima facie case of disparate impact, plaintiffs must prove, by a preponderance of the evidence, that the defendant’s wage compensation system has a significantly discriminatory impact. That is, though the system appears facially neutral, its

79. See *id.* See also *Teamsters v. United States,* 431 U.S. 324, 335 n.15 (1977) (stating disparate treatment occurs where “[t]he employer simply treats some people less favorably than others because of their race, color, religion, sex or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment.”).
82. Id.
83. Id. (citation omitted). See, e.g., *Grove v. Frostburg Nat'l Bank,* 549 F. Supp. 922 (D. Md. 1982) (employer found liable when explanations of wage difference proved to be pretextual).
84. See Nelson, supra note 2, at 281 (disparate impact analysis evolved from large scale class actions in which plaintiffs alleged that particular employment selection criteria had a detrimental impact on a class of persons protected by Title VII).
85. *AFSCME,* 578 F. Supp. at 856. See *Griggs v. Duke Power Co.,* 401 U.S. 424 (1971), which was the first case in which the Supreme Court articulated the “disparate impact” doctrine. The Court ruled that an employment test, though neutral on its face, disqualified a greater percentage of black job applicants than white job applicants. The test was, therefore, violative of Title VII.
impact is indeed discriminatory. Unlike disparate treatment, the plaintiffs need not show discriminatory intent.\textsuperscript{86} The second step is similar to that of a disparate treatment claim, as the burden of production shifts to the defendant. The court adopted specific language from a previous case and stated that in employment compensation cases, the defendant must "demonstrate that legitimate and overriding business considerations provide justification."\textsuperscript{87} The final stage in a disparate impact case is identical to that of a disparate treatment case whereby the plaintiff will prevail if the "pretext" requirement is proved.\textsuperscript{88}

Having examined the preceding claims and having laid out methods to analyze them, the court set forth its threshold question: Did the defendant's failure to pay the plaintiffs that amount of money which the comparable worth studies indicated was forthcoming constitute a violation of Title VII?\textsuperscript{89}

The district court explicitly acknowledged that the case was one of "first impression" as it concerned the implementation of a comparable worth claim.\textsuperscript{90} However, in the same breath, the court stated that it was more accurately a "failure to pay" case.\textsuperscript{91} Regardless of the "type" of case the court deemed it to be, the judge found wage discrimination under both the disparate treatment and disparate impact allegations. The plaintiffs presented convincing evidence for their disparate treatment allegation. The court held that the "[d]efendant's implementation and perpetuation of the present system of compensation is intentional and results in un-

\textsuperscript{86} 578 F. Supp. at 857 (citation omitted). A disparate impact claim can be established by reviewing job applicants or employees affected. See Griggs v. Duke Power Co., 401 U.S. 424, 430 n.6 (1971) (tests used by Duke Power in screening its job applicants resulted in a passing score for fifty-eight percent of the white applicants but only six percent for the black applicants).

\textsuperscript{87} 578 F. Supp. at 857 (citing Bonilla v. Oakland Scavenger Co., 697 F.2d 1297, 1303 (9th Cir. 1982)).

\textsuperscript{88} 578 F. Supp. at 857. The court noted that plaintiffs may prove "pretext" with "proof of past intentional discrimination, or proof that an alternative practice would serve the Defendant's legitimate interests with less disparate impact." \textit{Id.} (citation omitted).

\textsuperscript{89} \textit{Id.} at 866.

\textsuperscript{90} \textit{Id.} at 865.

\textsuperscript{91} \textit{Id.} This contention is obviously based on the fact that the study's results were known in 1974 and that, as late as 1981, the state had failed to remedy the problem.
favorable treatment of employees in predominantly female job classifications,"^{92} in violation of Title VII. Because the defendant failed to rebut the plaintiffs' showing of disparate treatment with a legitimate, nondiscriminatory reason for the pay system, the plaintiffs prevailed on this claim.\textsuperscript{93} The court likewise handled the disparate impact claim quite easily. The defendant's system of compensation, while facially neutral, had the disparate impact of paying a twenty percent lower wage for predominantly female jobs than for predominantly male jobs.\textsuperscript{94} As with the disparate treatment charge, the defendant's presentation of evidence fell short of rebutting the plaintiffs' prima facie case.

Satisfying the requirements for their disparate treatment and impact claims, the plaintiffs prevailed in their Title VII discrimination case against the government. The court stressed the importance of eradicating employment practices violative of Title VII and, in doing so, looked to the earlier case of \textit{Griggs v. Duke Power Co.}\textsuperscript{95} Relying on language from \textit{Griggs}, the district court stated that the defendant's employment practices, though "'neutral on their face . . . cannot be maintained if they operate to freeze the status quo of prior discriminatory employment practices.'"\textsuperscript{96} The court granted the plaintiffs' request for both a declaratory judgment and injunctive relief to provide enforcement of a non-discriminatory compensation system. It ordered that any job classification which was seventy percent or more female was entitled to the remedy of injunctive relief and backpay.\textsuperscript{97}

In fashioning this remedy, the court asserted that the main purpose of Title VII is "to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of . . . employees over other employees."\textsuperscript{98} Thus, the court posited that, at the

\begin{footnotes}
\item[92.] \textit{Id.} at 864.
\item[93.] \textit{Id.} at 864-65. The court asserted that the defendant did not produce credible, admissible evidence which would raise a genuine issue of fact as to whether it discriminated against the plaintiff. \textit{Id.} at 865.
\item[94.] \textit{Id.} at 863.
\item[95.] 401 U.S. 424 (1971).
\item[96.] \textit{AFSCME}, 578 F. Supp. at 866 (quoting \textit{Griggs}, 401 U.S. at 430).
\item[97.] 578 F. Supp. at 871.
\item[98.] \textit{Id.} at 867 (citation omitted).
\end{footnotes}
very least, removal of the discriminatory barriers mandated injunctive relief. In ordering the injunctive relief, the court rejected the defendant's seven arguments\(^9^9\) for a contrary result. The fact that the court neither questioned the evaluation's credibility nor seriously entertained the defendant's "cost-justification"\(^1^0^0\) argument is important as the latter part of this Comment will demonstrate.\(^1^0^1\)

Following plaintiffs' resounding victory in *AFSCME*, the Court of Appeals for the Ninth Circuit came out with an unfavorable decision for comparable worth plaintiffs. The court in *Spaulding v. University of Washington*\(^1^0^2\) ruled that in a comparable worth claim proof of disparate impact is not sufficient to establish a prima facie violation of Title VII.\(^1^0^3\) In its holding, the *Spaulding* court relied on and agreed with the decisions in *Lemons v. City of Denver*\(^1^0^4\) and *Christensen v. Iowa*\(^1^0^5\). These courts refused to accept a construction of Title VII which would allow an establishment of a prima facie violation of the Act "whenever employees of different sexes receive disparate compensation for work of differing skills, that may, subjectively, be of equal value to the employer, but does not command an equal price in the labor market."\(^1^0^6\) In so holding, the court stated that comparable worth plaintiffs need to prove "disparate treatment."\(^1^0^7\)

The *Spaulding* court asserted that the case did not actu-

\(^9^9\). *Id* at 867.

\(^1^0^0\). After the court maintained that Title VII did not contain a cost justification defense, it stated that the cost, as disruptive as it may be, was a direct result of discrimination created and maintained by the defendant. In a cause-effect relationship, it said, "one cannot be heard to argue that the effect is the evil to be eradicated." *Id* at 868. In response to the state's contention of its "lack of revenue," the court replied that when the Governor withdrew the appropriation in the 1976-77 biennium, the state had a surplus budget. *Id* at 868.

\(^1^0^1\). *See infra* notes 193-203 and accompanying text.

\(^1^0^2\). 35 Fair Empl. Prac. Cas. (BNA) 217 (9th Cir. 1984).

\(^1^0^3\). *See id* at 231. The *Spaulding* court stated that its decision was in accord with Power v. Barry County, 539 F. Supp. 721 (W.D. Mich. 1982). The *Barry* court maintained that the *Gunther* Court's "recognition of intentional discrimination may well signal the outer limit of legal theories cognizable under Title VII." 539 F. Supp. at 726 (emphasis added).

\(^1^0^4\). 620 F.2d 228 (10th Cir.), *cert. denied*, 449 U.S. 888 (1980).

\(^1^0^5\). 563 F.2d 353 (8th Cir. 1977).

\(^1^0^6\). *Spaulding*, 35 Fair Empl. Prac. Cas. (BNA) at 231 (citing *Christensen v. Iowa*, 563 F.2d 353 (8th Cir. 1977)).

\(^1^0^7\). 35 Fair Empl. Prac. Cas. (BNA) at 233.
ally fit into a disparate impact model.\textsuperscript{108} This model, it stated, was created to deal with \textit{specific} employment practices.\textsuperscript{109} It held that disparate impact is not the "appropriate vehicle from which to launch a wide ranging attack on the cumulative effect of a company's employment practices."\textsuperscript{110}

An employer's reliance on the market rate is certainly not as "specific" as practices found violative of Title VII under the disparate impact theory.\textsuperscript{111} However, market rate is still within the ambit of Title VII if this reliance, while neutral on its face, has a discriminatory impact. Title VII's prohibition of discriminatory employment practices was intended to be broadly inclusive, proscribing "not only overt discrimination, but also practices that are fair in form, but discriminatory in operation."\textsuperscript{112} Title VII, and the purpose behind it, should not be enforced only when it is effortless to do so. To apply disparate impact to one employment practice and not another is to draw artificial and arbitrary lines which the legislature did not intend to have drawn. Title VII contains no language which indicates that nonintentional discrimination is lawful.\textsuperscript{113} No other court has construed Title VII in this way with regard to any other facet of employment.\textsuperscript{114} Courts must "avoid interpretations of Title VII that deprive victims of discrimination of a remedy, without clear congressional mandate."\textsuperscript{115}

Furthermore, for the court to accept a "disparate treatment" argument and reject a "disparate impact" argument for comparable worth plaintiffs creates an unjustifiable burden. The line between intentional and nonintentional dis-

\begin{itemize}
\item \textsuperscript{108} \textit{Id.} at 231.
\item \textsuperscript{109} \textit{Id.} The court said that the disparate impact model of proof was applicable to such specific employment practices as an employer's intelligence tests which adversely affect minorities, height and weight requirements affecting those of a certain sex, or policies requiring commencement of leave upon pregnancy. \textit{Id.} at 231-32.
\item \textsuperscript{110} \textit{Id.} at 232 (citation omitted).
\item \textsuperscript{111} \textit{See}, \textit{e.g.}, Wright v. Olin Corp., 697 F.2d 1172 (4th Cir. 1982) (disparate impact theory appropriate in challenge to program which excluded fertile women for jobs involving possible exposure to harmful chemicals).
\item \textsuperscript{113} \textit{See} 42 U.S.C. §§ 2000e to 2000e-17 (1982).
\item \textsuperscript{114} \textit{See}, \textit{e.g.}, Bellace, \textit{Comparable Worth: Proving Sex-Based Wage Discrimination}, 69 IOWA L. REV. 655, 671 (1984).
\item \textsuperscript{115} County of Washington v. Gunther, 452 U.S. 161, 178 (1981).
\end{itemize}
COMPARABLE WORTH

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Comparability, already blurred, should be erased. The side of a line that comparable worth plaintiffs are on should not determine whether they have an action for discrimination under Title VII. The factual differences between the Spaulding and AFSCME decisions dictate that the latter's holding should not tremendously affect the AFSCME plaintiffs' case on appeal. The Spaulding decision is replete with criticism of the plaintiffs' statistical study. No formal study of job worth was pursued. Conversely, the job evaluation in AFSCME was the basis for the plaintiff's argument.

Finally, courts should not consider the Spaulding decision as unequivocal and fully supported. True, the decision was reached by a 3-0 vote. However, the author of the concurring opinion, while agreeing with the final decision, disagreed with the majority's meshing of "adverse impact with varying concepts of comparable worth." That is, the district court's final findings of fact and conclusions of law contained nothing pertaining to the concept of comparable worth. The plaintiffs continually stressed that this case was not based on the comparable worth theory. Hence, "it was . . . not possible for [the] court . . . to render any definitive ruling on the validity of comparable worth (and

116. A court's "assumption that in most cases intentional meddling with the wage-setting process somehow can be distinguished sharply from nonintentional meddling is based on a misunderstanding of job evaluation and compensation practices. Blatant discrimination of the Gunther variety is the exception and not the rule." Bellace, supra note 114, at 671.

117. Spaulding, 35 Fair Empl. Prac. Cas. (BNA) at 234 (Schroeder, J., concurring).

118. See 35 Fair Empl. Prac. Cas. (BNA) at 226-29. For instance, the nurses' statistics never compared female nursing wages to wages of female faculty members in other departments. If there is no such comparison, the court "[has] no meaningful way of determining just how much of the proposed wage differential was due to sex and how much was due to academic discipline." Id. at 229. The court said the nurses' statistics were "rife with unreliability." Id. The "statistics were compiled by a paralegal services company that did not use a regression model but only, apparently, a simple matching technique." Id.

119. Id. at 234 (Schroeder, J., concurring).

120. See id.

121. See id. Justice Schroeder pointed out that the reason the plaintiffs did not articulate a comparable worth theory was because the case was filed long before County of Washington v. Gunther, 452 U.S. 161 (1981).
disparate impact), as a tool in employment discrimination cases.\footnote{122}

While the Spaulding decision may affect the AFSCME plaintiff's strategy on appeal,\footnote{123} the AFSCME case was nonetheless an indisputable victory for comparable worth plaintiffs. It will most likely be a catalyst for future comparable worth suits throughout the country. The Ninth Circuit Court of Appeals decision is expected sometime in 1985.\footnote{124} However, regardless of how profound the AFSCME decision's impact might seem, other federal courts, including the Ninth Circuit, may very well construe the decision to be quite limited. Plaintiffs must take great care in articulating their arguments. They must fit their claim within a possibly narrowly construed holding of the case, or alternately, be able to persuasively argue that the AFSCME holding encompasses a broader claim. Nonetheless, even the most narrow interpretation of the AFSCME holding cannot refute that the court found that: (1) the State of Washington's own job evaluation study revealed large disparities of pay for jobs of comparable worth between predominantly female and male classifications; (2) the State essentially ignored the study and continued the same wage compensation rate; and (3) in doing so, the State intentionally discriminated against the plaintiffs.

III. Establishing a Comparable Worth Claim

Plaintiffs have an abundance of ammunition, yet must be cautious in bringing a comparable worth action. Due to its

\footnote{122. 35 Fair Empl. Prac. Cas. (BNA) at 229.}

\footnote{123. The AFSCME respondents will no longer be able to rely on the "disparate impact" theory. This should not pose any significant problems for them as the district court found a violation of Title VII by both the disparate impact and disparate treatment theories. See AFSCME, 578 F. Supp. at 864-65.}

\footnote{124. Telephone interview with Lisa Newell, AFSCME plaintiffs' attorney (July 24, 1984). It is interesting to note that the Washington Court of Appeals previously rejected a comparable worth claim. In Tacoma-Pierce v. Tacoma-Pierce County Health Dep't, 22 Wash. App. I, 586 P.2d 1215 (1978), the court denied the plaintiffs' nurses' claims that their work had traditionally been undervalued when compared to male public health sanitarium workers. \textit{Id.} at \textit{\_\_}, 586 P.2d at 1218. The court held that it would "ignore economic reality to pay employees of different sexes the same compensation for different jobs which may, subjectively, be of equal value to the employer." \textit{Id.}}
controversial nature,\textsuperscript{125} novelty, and revolutionary impact,\textsuperscript{126} courts will no doubt be very prudent, if not skeptical, in scrutinizing comparable worth claims. Of the different types of comparable worth theories proposed, courts will most likely consider those similar to that in \textit{AFSCME v. State of Washington.}\textsuperscript{127} That is, allegations of sex-based wage discrimination which are supported by evidence such as a job evaluation have the best chance of being accepted by the courts. Comparable worth actions which lack any type of concrete evidence will likely be rejected by the courts as insufficient in setting forth a prima facie case of discrimination.\textsuperscript{128} The following discussion sets forth two types of comparable worth arguments plaintiffs can bring, the various methods of advancing them, the approaches they can anticipate from employers, and arguments to refute those approaches.

\textbf{A. Pure Comparable Worth}

The most controversial theory of comparable worth has been labeled "pure comparable worth."\textsuperscript{129} A proponent of this theory postulates that whenever there is job segregation by sex, wage discrimination is virtually inevitable.\textsuperscript{130} She has contended that "[w]henever there is job segregation, the same forces which determine that certain jobs or job categories will be reserved for women or minorities, also and simultaneously determine that the economic value of those jobs is less than if they were . . . ‘male jobs.’"\textsuperscript{131} The author cited to a plethora of economic, historical, and social studies...
to fortify her argument. She observed that women have, for so long, been segregated from men in the work force. Since male-occupied positions have historically been higher paying, the segregated work force perpetuates women's inaccessibility to higher wages. Indeed, the studies lend much convincing support to her thesis.

According to this pure comparable worth theory, plaintiffs need not show disparate treatment or impact to establish a "prima facie" case of wage discrimination. To establish a prima facie case, they need only prove that their jobs are predominantly filled by women and that their wages are on the lower end of the wage scale.

In light of the fact that the district court in Spaulding v. University of Washington disallowed a "disparate impact" argument in a comparable worth claim, employees would be foolhardy to rely on a pure comparable worth theory. With the courts so anxious about any comparable worth claim, they will most likely demand more than an allegation of wage discrimination based solely on the pure prima facie elements. If this theory were accepted by the courts, an employer could be liable for wage discrimination without any evidence of discrimination against employees. Though the law is continually in flux, many courts may feel that the AFSCME v. State of Washington decision has moved far enough in granting relief to plaintiffs who have established a prima facie comparable worth case of discrimination via disparate impact or treatment. Plaintiffs would be wise to present a much more solid case than that required in a "pure comparable worth" claim. This advice, however, is not meant to disparage the pure comparable worth argument. But as statistically sound as the argument may be, courts do

132. Id. at 402-57.
133. Id. at 402. The author maintained that there was literature from as far back as 1910 which disclosed the stability of patterns of sex discrimination. Id. at 403 n.10.
134. The main theme of the article is that wage discrimination is the direct result of job discrimination. See id. at 401. Many of the job markets women enter are traditionally segregated and lower-paying. They are lower paying, in part at least, because they are jobs reserved for women. Id. at 456.
135. Id. at 459.
136. 35 Fair Empl. Prac. Cas. (BNA) 217 (9th Cir. 1984).
not seem willing to accept such a drastic and loose standard for establishing a prima facie case of wage discrimination.

B. Job Evaluation

1. Employer's Job Evaluation

Undoubtedly, the majority of litigation over comparable worth will stem from results of job evaluation studies. States which take the initiative to innocuously implement a wage compensation study effectively assent to pay women their comparable worth. That is, unless the factors used within the job evaluation are carbon-copies of the discriminatory marketplace, it is difficult to imagine a study which would not reflect that women are consistently being paid less than men for comparable work. Following its affirmative action in ordering the study, a state will again have to affirmatively act in increasing women's wages. For, having been the impetus for the study, the state could not be heard to simply say that the results are incorrect. The AFSCME case illustrates this situation. The entire AFSCME opinion is void of a single mention of the study's validity. By neither addressing nor questioning the study's validity, the court and defendant implicitly acquiesced in its results. If the state, as in the AFSCME case, fails to appropriate funds to ameliorate the discriminatory wage rate, it must be prepared to defend itself in a "failure to pay" suit. In such a suit, the defendant would still have the right to try and overcome the presumption of the study's accuracy. If successful, the defendant would then have to offer evidence of the difference in job values in order to rebut the charge of wage discrimination.

138. For information about job evaluations, see Blumrosen I, supra note 2, at 429-57; and Gasaway, supra note 2, at 1155-60.
139. The marketplace discriminates against women because, after all the factors that influence wage rate are taken into account, there still exists an inexplicable wage gap. See supra notes 9-12 and accompanying text.
140. See Comment, Equal Pay, supra note 2, at 499.
141. Id.
2. Plaintiff's Job Evaluation

In situations where the state has not undertaken a wage evaluation study, plaintiffs have several options. Plaintiffs, whether unionized or not, may be able to hire a reputable independent firm, although this may entail substantial cost. If the firm undertakes a study which reveals a wage disparity for comparable work, the plaintiffs could use this to establish their disparate impact claim. Should the state wish to contest the validity of the study's results, it must prove by clear and convincing evidence that the study's results are completely erroneous. In order to do so, the state may have no other recourse than to hire a firm to make its own study. Typically, however, the studies' results would not substantially deviate from each other. Years of studies have consistently revealed that women receive less compensation than men for comparable work. Nonetheless, if there were a drastic difference between the two studies, a "battle of the experts" would ensue, and it would be left to the trier of fact to determine which study is more accurate.

3. Fact of Employer Not Implementing A Job Evaluation

Another opportunity plaintiffs have if the state refuses to implement a job evaluation study is to use that very fact as evidence of discrimination in their action. In the 1981 district court case of *Taylor v Charles Bros.*, plaintiffs sued their employer for purposeful sex discrimination in violation of Title VII. In holding for the employees, the court stated that the "[d]efendant Charles Brothers' intention to discriminate against women in setting their wage rates lower than men may be inferred from the fact that it had not undertaken any evaluation which would have indicated the value..."
of the jobs held by either men or women . . . ."146 While admittedly the defendant partook in other actions violative of Title VII,147 the court seemed to interpret its failure to implement an evaluation as an admission of those discriminatory practices.148 In a disparate treatment case, where intent is a necessary element, this type of argument may very well persuade the judge that the plaintiff has established a prima facie case.149 With a disparate impact claim this "inferred intent" to discriminate, though not a requisite element, would indeed bolster a plaintiff's action.150

These three preceding tactics — employing the state's own evaluation plan, employing one's own evaluation and possibly forcing the state to implement a wage discrimination study, or highlighting the state's failure to implement a study — should effectively aid a plaintiff in a comparable worth claim.151 Because job evaluations are critical to a plaintiff's comparable worth claim, one of these three options is imperative for success.

IV. JOB EVALUATIONS

As noted earlier, credible job evaluations will most likely produce results favorable to the employees.152 Defendants cannot complacently sit back and hope that plaintiffs will not employ one of these three tactics. The inevitable argument with which defendants will respond is that no job evaluation can measure the true worth of any given occupation.153 They will maintain that a job's worth is influenced by many factors such as supply and demand, collec-

146. Id. at 614.
147. See id.
148. See id.
149. Cf. Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248 (1981) (holding that to establish a prima facie case of discrimination under the disparate treatment theory, plaintiffs need only show facts which support an inference of intent to discriminate).
150. See supra notes 84-88 and accompanying text.
151. But see B. SCHLEI & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 477-78 (1983) (establishing that another possible means of setting forth a comparable worth claim is through regression analysis or an expert witness).
152. See supra notes 138-39 and accompanying text.
tive bargaining, market forces, and economic conditions. More than one critic of comparable worth has expressed the contention that "wage discrimination remains an amorphous theory and an unmeasurable concept . . . [and] experts agree that the necessary analytical methodology does not exist today." Employers will challenge the validity of the evaluations in an attempt to discount their impact. However, plaintiffs should not be deterred by these tactics and would do well to utilize one or more of the following arguments to support a comparable worth claim.

A. Established Use of Job Evaluations

The most persuasive and indisputable fact plaintiffs can rely on is that employers routinely use job evaluations as a tool to set wages in accordance with their relative worth. In Corning Glass Works v. Brennan the United States Supreme Court observed that "most of American industry use formal, systematic job evaluation plans to establish equitable wage structures in their plants." Significantly, the Court incorporated a Corning representative's testimony at a Senate hearing in its opinion. The representative stated that "[j]ob evaluation is an accepted and tested method of attaining equity in wage relationship. . . . We sincerely hope that this committee . . . will recognize in its language the general role of job evaluation in establishing equitable rate relationship."

Job evaluations are used widely in both public and private sectors. Though job evaluations vary from one an-

156. See generally Note, supra note 4, at 1098 n.77 (listing articles which posit that there is no objective standard by which a defendant can determine the relative worth of jobs).
157. See Note, supra note 12, at 674. For a description of some of these systems, see Blumrosen I, supra note 2, at 430 n.133.
159. Id. at 199.
160. Id. at 200.
161. D. TREIMAN, JOB EVALUATION: AN ANALYTIC REVIEW 49 n.1 (1979). The majority of large private firms, the federal government, and most state and large county governments use formal job evaluation procedures.
other, they all share the same methodology. That is, remuneration is based on the content of the job, not the characteristics of its holder. Basically, jobs are described via questionnaires, observations, or interviews with employees. Each job is then broken down with respect to its characteristics of difficulty, responsibility, working conditions, duties, and any other important factors. Jobs are then ranked according to their value to the organization. Once completed, the job plan aids in setting wages for the organization. In its method of setting wage rates for the organization, the industry-accepted job evaluation does, in fact, compare dissimilar work. In light of this comparison, the common contention that any implementation of a comparable worth theory will be "highly subjective and indeterminate" has little weight.

B. Market Rate Should Not Be Considered

Critics of comparable worth contend that while wages are determined by job-related factors, other influences such as societal values, labor-management relations, and market rate influence them as well. This fact cannot be denied. However, these outside influences, particularly societal values and market rate, are in many ways the root of the problem. Societal values perpetuate the major source of discrimination. That is, women's jobs are valued less because they are "women's work" and not because of any productivity-related attributes of the work performed. This

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162. See Comment, Comparable Worth Theory, supra note 2, at 510.
164. See Comment, Comparable Worth Theory, supra note 2, at 510. Frequently, the factors used in job evaluations mirror the "equal skill, effort, and responsibility" language of the Equal Pay Act. See supra note 33 for the text of the Act. Some factors used in job evaluations are the amount of "skill, responsibility, and physical and mental effort requisite to job performance, and the quality of the work environment." See Note, supra note 12, at 676 (citation omitted).
165. See Comment, Comparable Worth Theory, supra note 2, at 510.
166. See Note, supra note 4, at 1098.
167. Id.
168. See Blumrosen I, supra note 2, at 402-28 (observing that if society perceives women's economic value as less than that of men, women are paid less than men).
169. See Milkovich, supra note 154, at 42. The author asserted that the proper question is not "what causes women to be employed in lower paying jobs," but rather, "what causes female jobs to be paid less than male jobs?" Id. at 43.
depressed wage rate for women in turn becomes the market rate to which other employers look in establishing their wages for women. It is a vicious cycle in which the cause of what comparable worth advocates are trying to remedy happens to be the same factors which opponents state are essential in wage setting. No job evaluation is free from subjectivity. However, the alternative of ignoring the tremendous hardships inflicted on women because of wage disparity would disregard the very purpose of Title VII. Because sophisticated job evaluations have been developed and utilized throughout the years to aid employers in setting wages, employers have no ground to now assert that there is no yardstick to measure a job's worth.

Even if employers accept the use of a job evaluation study, as stated earlier, most will adamantly contend that the market rate is an influential factor that must be considered. This argument is not without support. The Tenth Circuit Court of Appeals in *Lemons v. City of Denver* focused on the market rate in denying the plaintiffs relief. The plaintiffs, city nurses, argued that their wage rate should not be compared to the community wage rate for nurses as the community rate was the product of historical underpayment for nurses. The court relied on the Eighth Circuit's *Christensen v. State of Iowa* decision in holding that "'[w]e do not interpret Title VII as requiring an employer to ignore the market in setting wage rates for genuinely different work classifications.'"

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[In enacting Title VII of the Civil Rights Act of 1964, Congress intended to prohibit all practices in whatever form which create inequality in employment opportunity due to discrimination on the basis of . . . sex . . . and ordained that its policy of outlawing such discrimination should have the "highest priority."

Id. at 763 (citations omitted).

171. See supra note 167 and accompanying text.

172. 620 F.2d 228 (10th Cir.), cert. denied, 449 U.S. 888 (1980).

173. 563 F.2d 353 (8th Cir. 1977).

174. Id. at 232 (quoting Christensen v. State of Iowa, 563 F.2d 353 (8th Cir. 1977)). The Christensen plaintiffs were clerical workers who alleged undercompensation as compared to the physical plant workers. The court said that defendants' determination by "community wage rate" was a legitimate justification for the differential. Christensen, 563 F.2d at 362. See also Spaulding v. University of Washington, 35 Fair
With no subsequent Supreme Court case explicitly ruling otherwise, the holdings of *County of Washington v. Gunther*¹⁷⁵ and *AFSCME v. State of Washington*¹⁷⁶ shed new light on the subject. Both cases uphold the validity of the job evaluation studies. If a female employee is paid the market rate for her job and a job evaluation study reveals that she is paid significantly less than a male holding a comparable job, the market rate should not be a defense. For the court to allow such a defense would acknowledge the marketplace's inherent discrimination, yet sanction its use as a means to continue discrimination. The former cases' holdings might have been different had the plaintiffs relied on job evaluations to support their claims.

Nonetheless, employers might assert that despite the *Gunther* and *AFSCME* rulings, the fourth affirmative defense of the Equal Pay Act¹⁷⁷ allows the market rate to be an influence. They would argue that this "factor other than sex" defense permits them to take the market rate into consideration. The argument would posit that the market rate defense is a "factor other than sex" which allows for a pay differential in a Title VII gender-based wage discrimination action. Hence, the market rate is acceptable, if not necessary, as an aid in setting wages. But this argument fails to appreciate that, in an equal pay action, courts have held that employers may not assert that wages were paid in accordance with the prevailing market wage.¹⁷⁸ Thus, while "market rate" is a "factor other than sex," it is not a valid defense

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¹⁷⁸. See, e.g., *Corning Glass Works v. Brennan*, 417 U.S. 188, 204-05 (1974) (commenting that the differential in men's and women's wages arose because men would not work at the low rates paid to the women and reflected a job market in which Corning would pay women less than it paid men for the same job; this disparity obviously became illegal with the advent of the Equal Pay Act). *Cf* Brennan v. Price William Hosp. Corp., 503 F.2d 282 (4th Cir. 1974), *cert. denied*, 420 U.S. 972 (1975) (fact that women were available at a lower wage rate than men was not a defense under the Equal Pay Act); *Horner v. Mary Institute*, 613 F.2d 706 (8th Cir. 1980) (general belief that women will work for less does not justify disparity although employer may consider marketplace value of skills of particular individuals in determining employee's salary).
in an equal pay action. There appears to be no legitimate reason why this ruling should not also apply to a comparable worth action. If Title VII has as its broad remedial purpose the prevention of discriminatory compensation, a defendant's reliance on discriminatory market rates should not be accepted as a defense.

Those who maintain that "market rate" must be incorporated apparently do so in the belief that supply and demand are the ultimate determinants of what job should be accorded what wage. If there is a shortage of jobs, employers will naturally pay more to attract workers; conversely, crowded job markets cause a reduced wage. Put simply, an employer should pay what an employee will accept. If this is the case, how does the "invisible hand" of the marketplace explain the depressed state of nurses' salaries, despite an estimated 65,000 to 70,000 nationwide shortage of nurses?

The marketplace is not an impersonal absolute but an aggregate of attitudes and beliefs of employers. When enacting Title VII, Congress meant to alter the market by requiring employers to alter their behavior. The market wage is laden with discriminatory biases and will only enforce and perpetuate the huge disparities between the compensation for men and women. Finally, while opponents of comparable worth argue that Title VII was not meant to intervene in the marketplace, a more accurate assessment is that it was intended to interfere with it. If there was no discrimination in the marketplace, there would be no need for Title VII. To reach its main objective of equal employment practices, Title VII has frequently interfered with supply and demand. Recruitment, promotion, seniority systems, and fringe benefits are but a few practices which Title VII affects. By affecting these, supply and demand of the marketplace is naturally also affected. To alter a discriminatory practice in the marketplace, it follows that one must alter the marketplace itself.

179. See Nelson, supra note 2, at 254-63.
181. See Comment, Equal Pay for Comparable Work, supra note 2, at 500.
182. See Blumrosen I, supra note 2, at 471-72; Blumrosen II, supra note 2, at 1, 5.
C. Job Evaluation's Subjectivity
Underestimates Discrimination

While job evaluations can and should be implemented, they too are not free from undervaluation of "women's work." If anything, they underestimate the amount of discrimination towards women. At almost every stage of the internal evaluation process, subjective and biased views as to the nature of the job and its importance may come into play. Subjective judgments can severely influence four areas of the evaluation process: job analysis, job description, selection of compensable factors, and the act of weighing these factors.

An explanation for some of this subjective judgment is the fact that job evaluations originated out of industrial settings where most of the workers were men. Accordingly, many points were given for tasks inherent within the industrial setting. Thus, evaluations accorded high priority to jobs involving heavy lifting or working in cramped or awkward quarters. When tasks affiliated with jobs traditionally held by women were evaluated, they were not perceived to be as "valuable" as those tasks done by men. Hence, skills such as manual dexterity and demands such as fatigue or repetition — characteristics of women-dominated clerical jobs — were not accorded a high point value. Furthermore, male evaluators are likely to better appreciate the difficulties associated with traditionally male jobs than those

183. For a discussion of the problems inherent in job evaluations, see A. Gold, supra note 1, at 51-77. See also Blumrosen I, supra note 2, at 428-57 (despite objective criteria, women's work is ultimately undervalued in job evaluations).
184. See Blumrosen I, supra note 2, at 434.
185. Id. at 434-35.
186. Telephone interview with Lisa Newell, AFSCME plaintiffs' attorney (July 24, 1984).
187. Id.
188. An illuminating example of this phenomenon is found in Thompson v. Boyle, 499 F. Supp. 1147 (D.D.C. 1979), modified, 678 F.2d 257 (1982). Female book bindery workers sued the Government Printing Office and claimed their work was equal to that of the male bookbinders. The defendants used their job evaluation to defend their practice of paying women lower wages. The job evaluation asserted that women were given no points for hand sewing experience because the sewing was of the variety most women knew how to perform. Id. at 1155.
189. See Blumrosen I, supra note 2, at 435.
associated with women’s jobs. To some extent “one of the unstated goals of job evaluation may be to confer legitimacy on the status quo, which, at least in part, is a product of sex discrimination.”

Therefore, though the job evaluation strives for objectivity, it is still afflicted with inherent subjectivity and bias. Nonetheless, as this subjectivity clearly works against women, courts should not prohibit the job evaluation’s use in a wage discrimination action. Overall, job evaluations give a fairly good appraisal of a job’s true worth. This conclusion is, in part, based on the fact that there are states other than Washington that have set up job evaluation systems based on the comparable worth theory. Idaho has successfully implemented the Hay System, which compares jobs with respect to “know-how,” problem-solving, and accountability. That these states have willingly developed these evaluations lends credence to the position that they can be effectively utilized. Comparable jobs should be equally compensated, and thus far, the job evaluation is the best method of ascertaining what jobs are comparable.

V. Cost of Comparable Worth

Another “practical consideration” which militates against the comparable worth concept is the economic bur-
The cost of implementing a comparable worth system and increasing women's wages would be tremendous. Employers complain that in addition to the tremendous cost of increasing women's wages, there is also the cost of designing and implementing a job evaluation study and the possibility of court-ordered backpay.

While the significant expense cannot be denied, neither can society deny the existence and perpetuation of sex-based wage discrimination. The court in *AFSCME v. State of Washington* quickly discarded the state's contention that the economic burden would be prohibitive. The court maintained that the cost of correcting sex-based wage discrimination was not a defense to an award of back pay and injunctive relief. The court went on to note that Title VII does not contain a cost-justification defense. "Charges of opponents [of comparable worth] that adoption of the concept would be 'economical disaster' are the same arguments that were used against child labor laws." Similarly, the court in *Brown v. Board of Education* refused to accept the defendant's cost-justification argument. If the court had, "separate but equal" might still be the accepted rule in education today.

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197. See Nelson, supra note 2, at 290-94.
199. See Nelson, supra note 2, at 290-91.
202. Id. at 867-68. The court stated that "where a legal injury is of an economic character '[t]he general rule is, that when a wrong has been done, and the law gives a remedy, the compensation shall be equal to the injury.'" Id. at 869 (quoting Wicker v. Hoppock, 73 U.S. (6 Wall) 94, 99 (1867)).
204. 464 F.2d 382 (5th Cir.), cert. denied, 409 U.S. 981 (1972).
205. Id. at 384. To accept the Board's argument that it "lacks 'the facilities, the buses, personnel or the know how to bus' is of no avail . . . [and] would render the entire plan of desegregation a futile gesture." Id.
Furthermore, the Civil Rights Act simply contains no language that would justify denying relief on the basis of cost. The United States Supreme Court in County of Washington v. Gunther\textsuperscript{206} noted that federal courts "must avoid interpretations of Title VII that deprive victims of discrimination of a remedy, without clear congressional mandate."\textsuperscript{207} Understandably, cost is a major factor in a comparable worth suit; however, the language of Title VII does not provide for balancing this cost against the harm inflicted.

The effects of comparable worth suits need not be as drastic as employers contend they will be.\textsuperscript{208} The AFSCME court rejected an "all deliberate speed" approach and mandated an immediate injunction.\textsuperscript{209} The primary reason for this stringent order was quite likely the fact that the State of Washington intentionally continued to discriminate against the plaintiffs after the job evaluations were known. Other courts might allow for a gradual implementation of new wage rates, thus permitting employers time to adjust to the increased costs.

Another method of implementing the comparable worth theory is through unionized collective bargaining.\textsuperscript{210} As the percentage and strength of women in labor unions increases, collective bargaining becomes a viable option for them. A classic example of collective bargaining's success in a com-

\textsuperscript{206} 452 U.S. 161 (1981).

\textsuperscript{207} Id. at 178. See also City of Los Angeles v. Manhart, 435 U.S. 702, 716-17 (1978), in which the Court stated that Title VII does not contain "a cost justification defense comparable to the affirmative defense available in a price discrimination suit."

\textsuperscript{208} In 1982, the Minnesota legislature implemented legislation requiring Minnesota to pay state employees comparable wages for comparable work. Commissioner Nina Rothchild of the Legislative Commission on Employee Relations said that the comparable worth program ran very smoothly. Payment Equity and Comparable Worth, supra note 19, at 59. Furthermore, Hewitt Associates, in a survey to 537 of its members, asked if the company's salary administration program could effectively deal with the concept of comparable worth. Sixty-three percent of the respondents replied that it could. Id. at 7.

\textsuperscript{209} AFSCME, 578 F. Supp. at 868.

\textsuperscript{210} See Gasaway, supra note 2, at 1166-67. It should be noted than many unions support the comparable worth theory. These include the AFL-CIO, AFSCME, United Food and Commercial Workers, United Electrical, Radio, and Machine Workers, National Education Association, Service Employees International Union, and Communication Workers of America. Pay Equity and Comparable Worth, supra note 19, at 4.
parable worth situation occurred a few years ago. A study by an independent consultant revealed that the City of San Jose, California paid women fifteen percent less than it paid men for comparable work. After a strike by the AFSCME employees, a settlement provided that 1.45 million dollars would be allocated over the next two years to raise the women's wages.

Many state legislatures are enacting statutes which mandate equal pay for comparable worth. Other states are not far behind and are passing laws requiring a study of pay inequity between women and men performing comparable work. That these state legislatures are taking affirmative steps to address comparable worth is a clear signal that it is a formidable issue of increasing importance. Significantly, expense has not deterred these states from implementing or considering the implementation of a system in which comparable worth is operative.

Finally, states are now on notice and should anticipate potential comparable wage suits. Accordingly, they may want to avoid the threat of litigation and take initiative themselves. By conducting their own job evaluation studies they can, based on the study's results, allocate money to resolve the comparable worth problem. In 1973, the State of Minnesota implemented its own job evaluation study. Its results were the impetus for an appropriation of 21.7 million

211. See A. Gold, supra note 1, at 88.

212. Id. AFSCME's collective bargaining "has been successful in negotiating pay equity raises for its members in Minnesota; San Jose, California; New York State; New York City; Green Bay, Wisconsin; City of Los Angeles; San Mateo County, California; Belmont, California; San Carlos, California; Illinois; Portland, Oregon; and Spokane, Washington. Pay Equity and Comparable Worth, supra note 19, at 74.

213. At present, fourteen states have "comparable worth" laws that prohibit paying a woman a salary or wage rate which is less than that paid to a male when both are doing "comparable work" or performing work of "comparable character." Pay Equity and Comparable Worth, supra note 19, at 55. Still, many other states have considered or are now considering incorporating the concept of comparable worth into their wage-setting policies for public employees. Id. at 61-68.

214. See id. at 55-68 for an excellent examination of states currently undertaking studies on pay disparities between men and women doing comparable work and states requiring development of a pay plan that incorporates comparable worth concepts.
dollars to upgrade the pay of 9,000 state jobs held by women.215

VI. Conclusion

The undervaluation of women's jobs continues to be a severe economic and social problem. As long as the true worth of women's jobs is not recognized, women will carry with them an unjust and undeserved economic burden. It is time to fully embrace Justice Steven's remark that "[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes."216 To strike at this "entire spectrum," courts, and society as a whole, must attack the major source of wage discrimination which is currently not prohibited by case or statutory law. This phenomenon, allowing unequal pay for comparable worth, drastically affects women because of the high rate of sex-segregation in the workplace. The concept of comparable worth is a valuable and workable weapon. With the advent of AFSCME v. State of Washington217 comparable worth plaintiffs have support and hope for victory. The decision exemplified the utility of a job evaluation in establishing a prima facie case of disparate treatment or impact. With the aid of job evaluations, a tool used throughout American industry, employees will be equipped with sufficient evidence to set forth a prima facie case of discrimination.

Plaintiffs should expect to be confronted with the argument that job evaluations do not reflect the necessary influence of market rate. But if the market rate itself is discriminatory, Title VII militates against its incorporation in job evaluations, as well as its use as a defense. Though

215. See The Milwaukee J., Dec. 25, 1983, at 2, col. 1. The State of Minnesota set aside one and one-half percent of its payroll for the new budget. It should take five years to completely eliminate the sex bias against women. Id. at col. 3.
the remedy may be costly, expense should not be a bar to those seeking justice.

ELLEN M. RYAN