Thoughts on Comparable Worth Litigation and Organizational Strategies

Nancy Gertner
Silvergate, Gertner, Fine, Good & Mizner

Follow this and additional works at: https://repository.law.umich.edu/mjlr

Part of the Civil Rights and Discrimination Commons, Labor and Employment Law Commons, Law and Gender Commons, and the Legislation Commons

Recommended Citation
Available at: https://repository.law.umich.edu/mjlr/vol20/iss1/5

This Symposium Article is brought to you for free and open access by the University of Michigan Journal of Law Reform at University of Michigan Law School Scholarship Repository. It has been accepted for inclusion in University of Michigan Journal of Law Reform by an authorized editor of University of Michigan Law School Scholarship Repository. For more information, please contact mlaw.repository@umich.edu.
THOUGHTS ON COMPARABLE WORTH LITIGATION AND ORGANIZATIONAL STRATEGIES

Nancy Gertner*

To watch the evolution of Title VII is to watch the gradual constricting of a law that many had heralded as a tool of social change for women. Its passage represented a statement that the so-called free market had not worked for women. Women were denied access to higher paying and high-status positions. Even when a job was integrated, women's work was undervalued and their wages frequently depressed. With the passage of Title VII came the hope that the law would do what the market could not—break the cycle of discrimination.

Sex discrimination, in contrast with other forms of discrimination, seemed particularly intractable because it derived not only from overt discrimination, where the actor necessarily intended to harm women, but also from a wide range of more subtle policies, practices, and attitudes—employers who judged particular women by the average characteristics of the group, state laws that excluded women workers from certain jobs in the name of protection, and women, socialized to believe that certain jobs were appropriate for them, who excluded themselves from higher paying jobs.


This Article grew out of a talk I was asked to give on litigation and organizational strategies for securing pay equity. Others were asked to address conceptual issues and to summarize the state of the law. Although my task was more practical, I felt compelled to look very briefly at the larger picture—the evolution of the law of comparable worth—and the smaller picture, a case study of one broad-based complaint for pay equity in which I participated as counsel.

2. This is not to suggest that the framers of Title VII had this idea in mind. Indeed, the legislative history of Title VII could not have been more sketchy. See, e.g., Schlei, Foreword to B. Schlei & P. Grossman, Employment Discrimination Law at vii (2d ed. 1983); see also Miller, Sex Discrimination and Title VII of the Civil Rights Act of 1964, 51 Minn. L. Rev. 877, 880-82 (1967).
Title VII litigation initially focused on access to jobs and promotional opportunities, in the hope of breaking down the barriers to free competition with men for men's jobs. But it soon became clear that equal access alone was not sufficient. Notwithstanding the gradual lowering of some of the most overt barriers, large numbers of women remained relegated to jobs completely segregated from male jobs—driven there by the same subtle and not so subtle mix of factors motivating discrimination in job access. And in these segregated cloisters women's work continued to be undervalued. More than equal opportunity and access to the men's jobs was needed, for the result of employment selection processes continued to be sex discrimination.\textsuperscript{4}

Antidiscrimination law, however, had no theories for results. It had only theories of process. It was concerned with factors that allegedly distort decisionmaking about employment in a market setting otherwise presumed to be fair. Unequal results were significant only insofar as they reflected an impermissible process.\textsuperscript{5} As a litigator for plaintiffs, my job was to place comparable worth claims in the framework of these extremely limited process theories.

Efforts to situate comparable worth litigation within existing Title VII process theories, however, met with two persistent criticisms. First, many sounded the theme of institutional competence,\textsuperscript{6} claiming that the courts lacked the competence to deal with this new cause of action. Although in "equal pay for equal work" claims, courts had a standard by which to judge women's work—the standard of the men's job—comparable worth claims seemed to open the door to \textit{a priori} absolute measures of "worth" or "value." Second, and related, some feared that the comparable worth approach, by exposing all jobs to inquiry and by imposing external standards on employers, ran the risk of wholesale intervention in the marketplace.\textsuperscript{7} These criticisms im-

\textsuperscript{4} The pressure for affirmative action is an example. Equal opportunity and equal access were helpful, but did not address the fact that women were still socialized into certain jobs, that employers continued to stereotype women because of the patterns they observed, and that these patterns continually reinforced themselves. Affirmative action was necessary to break the cycle.


\textsuperscript{6} See generally H. Hart & A. Sacks, \textit{The Legal Process} 3-4, 179-98 (tentative ed. 1958).

\textsuperscript{7} See \textit{AFSCME v. Washington}, 770 F.2d 1401, 1407 (9th Cir. 1985) ("We find nothing in the language of Title VII or its legislative history to indicate Congress intended to
ply that the theory of comparable worth parts company with the rest of antidiscrimination law.

My goal as litigator was to demonstrate that comparable worth theories fell well within the tradition of antidiscrimination law, and that questions of institutional competence and impact on the market have been raised and rejected as against the more traditional theories, when they were applied to standard issues like hiring and firing. It was clear, however, that the approach suffered some realistic problems—some that mirrored difficulties found elsewhere in antidiscrimination law, and some that were unique to comparable worth claims.8 Where an employer had no written job evaluation scheme for a court to assess and accept in whole or in part, even courts finding overt, intentional discrimination faced difficulties in fashioning appropriate remedies. Second, some comparable worth claims seemed to raise substantial problems of proof, with perhaps the worst offenders—the least rational employers—subjected to the least scrutiny.9 Although these problems were not unusual in discrimination litigation, the fact that they seemed to pose more difficulty for courts in the wage claim arena than in any other was unusual. Third, comparable worth claims—like many other claims in sex discrimination law—presented fundamental problems in defining the nature of sex discrimination.

abrogate fundamental economic principles such as the laws of supply and demand or to prevent employers from competing in the labor market.

8. The problems listed here are in addition to the general problems concerning the limitations of discrimination theory. See generally Freeman, supra note 5.

9. One way of describing these problems is to categorize employers. The employer with no written companywide evaluation system, perhaps not even a set of written criteria for setting wages, but with disparities between comparable men’s and women’s job rates, might pose two difficulties for plaintiffs. If plaintiffs can demonstrate discriminatory animus of some sort in the wage-setting processes, they establish liability. But the problems described above in fashioning remedies persist. For a suggestion that these problems are not unsolvable, see infra text accompanying note 52. If the plaintiffs cannot trace the “bad” results to overt, intentional discrimination or cannot otherwise identify the mechanism by which these results are achieved, the court may find that they have failed to make out even the minimal prima facie case standard. I suggest that such a result would be wrong in the light of Title VII case law for nonwage claims. See infra notes 24-27 and accompanying text. In effect, current case law suggests that the employers who have been least careful in fashioning objective written criteria in advance—whom I have described as the least rational employers—may be most successful in defending these cases. To be sure, however, such an employer takes a risk that the plaintiff will try to use the presence of subjective criteria, or shifting criteria coupled with adverse results, as circumstantial evidence of overt, intentional discrimination.
I. EXISTING PROCESS THEORIES OF WAGE DISCRIMINATION

There are two overall theories of discrimination: (1) overt, intentional discrimination, termed “disparate treatment,” which either involves classification in terms of a particular trait that characterizes members of a protected group, or classification expressly in terms of membership in the protected group; and (2) neutral rule discrimination, termed “disparate impact,” where the enforcement of an ostensibly neutral rule, seemingly unrelated to a particular group, has the net effect of discriminating against the group.

In the case of intentional discrimination, the theory is that sex discrimination may not be the motivation for fixing wage rates any more than it can provide the basis for making other job decisions, like promotion or hiring. The court is concerned with the result—unequal wage rates for men and women—only insofar as it is the starting point for the analysis of whether the wage differential derives from sex discrimination. Bad results are important because they reflect an impermissible process. Implicit in this is the view that the market will function appropriately for women once we eliminate these isolated “glitches” of intentional sex discrimination.

Likewise, in the disparate impact theory of discrimination, an employer may not select a criterion for employment or wage setting that has a disproportionate adverse impact on women. We, as a society, make the judgment that such wage-setting processes are impermissible. For the purpose of this analysis, it

---

10. County of Washington v. Gunther, 452 U.S. 161 (1981), paved the way for this analysis. Prior to Gunther, if an employer used a wage determination that was transparently sex-biased, a woman could not challenge it unless she could prove that her job was equal to that of a man in the same establishment.

11. The issue is not and never has been “culpable” intent, which was the position taken by the court in AFSCME v. Washington, 770 F.2d 1401 (9th Cir. 1985). Sex discrimination has never been characterized by an express, overt intent to harm women. Indeed, sex discrimination was frequently characterized by the opposite—a beneficent, if not chivalrous, intent. See Gertner, supra note 3, at 182. The goal of sex discrimination litigation was to identify an impermissible motive, one that society would not permit as the basis of actions involving women employees.

For example, courts have rejected “customer preference” as a defense to the failure of employers to hire women. See, e.g., Diaz v. Pan Am. World Airways, 442 F.2d 385 (5th Cir.), cert. denied, 404 U.S. 950 (1971); Fernandez v. Wynn Oil Co., 653 F.2d 1273 (9th Cir. 1981); Witt v. Secretary of Labor, 397 F. Supp. 673 (D. Me. 1975). The question in these cases was not whether the employer meant to treat women harshly; it plainly did not. Nor was the question whether the employer intended to treat individual women differently on account of their sex; it plainly did. The sole question was whether the court would permit such treatment.

does not matter if the criterion at issue was one within the employer's control—such as prior job experience or training requirements—or was one beyond the employer's control—such as certain educational prerequisites or height and weight requirements. Again, the result is less important than the mechanism by which it was effected. The law will not permit an employer to rely unnecessarily on characteristics not evenly distributed among males and females in the population, however beneficent his or her intent.

Moreover, because sex discrimination masquerades as sex stereotyping, the distinction between disparate impact and disparate treatment may not be so clear. The distinction between impact and treatment theories may mean nothing more than choosing job requirements that reflect the employer's image of the job—an image typically determined by the job's male incumbents. In this arena, again, the implication is that once specific impediments, such as the use of impermissible criteria, are removed, women will function successfully in the market.

Under each category, there are the "easy" cases—cases that should pose no problem for the courts, but in fact do. These are the cases in which there appears to be direct evidence of sex discrimination. Today, however, few jobs are labelled "M" or "F"; sex discrimination is rarely that explicit. Although it may be easier to prove that a given employer focused his ire on a given woman, dismissing an entire class of people by simply de-valuing their jobs comes about in far more subtle ways.

17. See infra note 19.
18. In County of Washington v. Gunther, 452 U.S. 161 (1981), the plaintiffs alleged that the employer determined that their jobs should be paid 95% of the male wage rate for comparable jobs. In Fitzgerald v. Sirloin Stockade, 624 F.2d 945 (10th Cir. 1980), the plaintiff assumed most of the duties of the former director of her department after he left the job, but received no increase in pay. In International Union of Electrical, Radio & Machine Workers v. Westinghouse Electric Corp., 631 F.2d 1094 (3d Cir. 1980), cert. denied, 452 U.S. 967 (1981), the employer's manual instructed plant managers to depress wages for certain jobs solely because those jobs were held by women.
19. The classic example, originally cited by Margaret Mead, is the fact that in some societies, men fish and women weave, and fishing is considered more important than weaving. In other societies, men weave and women fish, and weaving is considered more important than fishing. K. MILLETT, SEXUAL POLITICS 224 (1970) (citing Mead, Prehistory and the Woman, BARNARD C. BULL, Apr. 30, 1969, at supp. 7); see also Blumrosen, Wage Discrimination, Job Segregation, and Title VII of the Civil Rights Act of 1964, 12 U. MICH. J.L. REF. 399, 417-19 (1979).
Without direct evidence of sex discrimination, the plaintiff proffers circumstantial evidence. One can use statistical evidence to buttress an individual claim of sex discrimination with respect to a single decision, or one can offer evidence of a pattern and practice of discrimination in other arenas. One can depose the decisionmakers, the salary evaluators, to determine their explanations and attempt to prove that those explanations are pretexts. Or one can trace other decisions those decisionmakers have made that are discriminatory, which permit the inference of discrimination in the arena of wage setting as well.

In instances of disparate impact discrimination, as with disparate treatment actions, there are the "easy" cases—ones in which the plaintiff can target the single mechanism by which the disparate impact is effected. One example is the situation in


21. In one sense, this is an innovation of antidiscrimination law. Plaintiffs offer proof of the discriminatory animus of a decisionmaker in one employment area, whether involving the plaintiffs or not, to create an inference of discrimination in the relevant employment area in which the plaintiff is involved.

Winn Newman and Ruth Blumrosen have argued that a showing of intentional initial assignment discrimination, coupled with a showing that the jobs occupied by women are paid less than those occupied by men, should make out a prima facie case of intentional discrimination. In initial assignment discrimination, men and women, applying for entry-level positions requiring minimal qualifications and having the same background, are assigned to different sex-segregated positions. According to Newman and Blumrosen, segregating the women in one department raises an inference of discrimination every bit as strong as racially segregating schools. A sexually separate job structure results in inferior wages because the employer who believes that women should be excluded from certain jobs is likely to believe that the segregated jobs it permits women to perform have less value than those performed by men.

If the men are earning more than equally qualified women because of an act of the employer, it is reasonable to shift the burden to the employer to prove that the content of the jobs justifies the rate. Initial assignment sex segregation, coupled with lower wages for the female jobs, according to Newman, falls within the category of "actions taken by the employer from which one can infer, if such actions remained unexplained, that it is more likely than not that such actions were based on a discriminatory criterion illegal under the Act." Newman & Vonhof, "Separate but Equal"—Job Segregation and Pay Equity in the Wake of Gunther, 1981 U. ILL. L. Rev. 269, 288 n.91 (quoting Furnco Constr. Corp. v. Waters, 438 U.S. 567, 576 (1978)); see also Blumrosen, supra note 19.

22. According to the Supreme Court in Franks v. Bowman Transportation Co., 424 U.S. 747, 763 (1976), Title VII "prohibit[s] all practices in whatever form which create inequality in employment opportunity due to discrimination on the basis of race, religion, sex, or national origin."

It should be noted that while Gunther clarified the law with respect to disparate treatment, holding that even dissimilar jobs can be challenged where there is a showing of intentional discrimination, it muddied the law with respect to disparate impact. Justice Brennan’s opinion suggested that the fourth affirmative defense of the Equal Pay Act, 29 U.S.C. § 206(d)(1)(iv) (1982)—"any other factor other than sex"—now engrafted onto Title VII wage litigation, may well have been designed to confine the application of the
which an employer regularly pays a premium above established wage rates to certain employees, and this premium reflects sex stereotypes, such as a "head of household" premium or a premium for travelling on a regular basis.23

Both with respect to disparate impact and disparate treatment, however, there are the "weakest" cases. But as I show below, these cases may perhaps be the most important. These are the cases in which the results—wage differentials between men and women—are vastly disproportionate, but the plaintiff can neither trace these results to a specific discriminatory animus nor identify the mechanism by which the results are achieved. Because we have no theory to cover results—and indeed, we disparage all such theories,24—the fair employment laws cannot attack the problem head on. The problem is typically characterized as a problem of proof—an insufficiency of evidence to show either discriminatory animus or a discriminatory mechanism. In a non-wage discrimination disparate treatment case, for example, a situation may be presented where the plaintiff can offer nothing but general statistical evidence of discrimination in hiring and proof of a specific adverse employment decision (such as that the plaintiff was qualified but not hired), but not any specific discriminatory conduct towards the plaintiff. Although under current law, such a suit would survive a directed verdict after the plaintiff's case, it may well not succeed on the merits.25

Act to wage differentials attributable to intentional sex discrimination. Although he did not say so expressly, his words can be interpreted to mean that practices "fair in form but discriminatory in operation" would not without a showing of intentionality fit within this standard. Some commentators have suggested, however, that this interpretation is not compelled by the phrase "any other factor other than sex." See Newman & Vonhof, supra note 21, at 277 n. 42. But see Spaulding v. University of Wash., 740 F.2d 686, 700-01 (9th Cir.) (requiring plaintiffs to prove discriminatory intent), cert. denied, 469 U.S. 1036 (1984).

23. A larger proportion of men than women qualify as heads of households or are generally more available to travel regularly. Under the Equal Pay Act, a head of household differential is not a "factor other than sex." 29 C.F.R. § 800.149 (1986); see Neeley v. Metropolitan Atlanta Rapid Transit Auth., 24 Fair Empl. Prac. Cas. (BNA) 1610 (D. Ga. 1980) (finding that a prima facie case of wage discrimination existed where the employer had a written policy requiring special approval for salaries for new employees that exceeded by more than 10% the salaries at their last job).

24. See Freeman, supra note 5.

25. Cf. New York City Transit Auth. v. Beazer, 440 U.S. 568 (1979) (finding that statistics purporting to demonstrate that the exclusion of individuals who were receiving methadone treatment fell disproportionately on black or Hispanic employees were insufficient to establish intentional discrimination on the part of a public employer); Hudson v. International Business Machs. Corp., 620 F.2d 351 (2d Cir.) (finding that statistical evidence of discrimination is probative but not determinative in an individual discrimination claim), cert. denied, 449 U.S. 1066 (1980); King v. Yellow Freight Sys., 523 F.2d 879 (8th Cir. 1975) (same).
Likewise, there are the disparate impact cases in which the plaintiff offers evidence of a statistical disparity but cannot identify the particular mechanism to explain that disparity. Commentators speculating about the comparable situation in a wage discrimination setting have suggested that, in contrast to "regular" Title VII cases, such an approach may not even survive a directed verdict at all.

In the category of "hard" cases, there are instances where the plaintiff can identify the mechanism, where there is even an express justification for the wage policy in terms of women, but where courts do not characterize that mechanism or that justification as discrimination. In AFSCME v. Washington, for example, the appellate court sustained the use of the prevailing market rate to value jobs even where it was alleged that the market discriminated against women.

This kind of decision raises fundamental questions concerning the definition of sex discrimination. If the market does not value women's jobs in terms of the marginal productivity of women, as some economists would predict, but rather reflects the historic undervaluation of women's work, how can the market be used lawfully to set women's wages? Put otherwise, if the employer in AFSCME had been explicit about the impact of that policy on women, saying, in essence, "I value these jobs held principally by women at a low rate, because the market values them at that low rate" or, "I pay women this wage because I can get away with it; men would not tolerate it," the court could have

26. Under the usual disparate impact scenario, the burden would shift to the employer both to offer an explanation for the disproportionate impact and to justify it under the business necessity standard. See supra note 16.

27. See, e.g., Newman & Vonhof, supra note 21, at 290. There is an interesting historical parallel here. Just as the courts seem to be more strict with wage claims than with other Title VII claims, so the courts in the early 1920's differentiated between laws regulating women's hours, which they held to be appropriate, and laws regulating women's wages, which they initially invalidated. Compare Muller v. Oregon, 208 U.S. 412 (1908) (upholding state's power to regulate women's hours) with Adkins v. Children's Hosp., 261 U.S. 525 (1923) (invalidating a congressional attempt to fix minimum wage standards for adult women), overruled, West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) (upholding state's establishment of minimum wages for women). Comparable worth claims, like the laws regulating minimum wages, may initially be viewed with skepticism by some courts, because they appear to be price-fixing—anathema to the free market system.

28. 770 F.2d 1401 (9th Cir. 1985).

29. For a general outline of the neoclassical economics model, see M. Gold, A Dialogue on Comparable Worth 17-20 (1983).

labelled that conduct as overt sex discrimination. In effect, the market is communicating the very same messages.\textsuperscript{31}

II. The Problem Areas

There are generally three problem areas in litigating sex discrimination claims. First, even in the “easy” disparate treatment cases, where the plaintiff has proved either through direct or circumstantial evidence that there was discriminatory intent, remedy remains a problem. Where the employer has no single evaluation plan governing all jobs, indeed, no explicit formula, the court must come up with a measure of the job’s worth.\textsuperscript{32} In other Title VII discrimination settings, the court makes a “thumbs up” or “thumbs down” determination as to whether the woman gets the job from which she was excluded because of discrimination. In an “equal pay for equal work” situation, there is a clear measure; whatever the men were paid the women will be paid.

The standard critique is that the court lacks competence to arrive at a fair measure.\textsuperscript{33} Critics argue that if the court adopts a market measure, it may be reifying the existing discriminatory

\textsuperscript{31} The policy question is made explicit when the employer is to present his defense to a disparate treatment or disparate impact claim. Where the plaintiff presents a prima facie case of discrimination, the employer must come forward with “legitimate nondiscriminatory reasons” for the treatment of the plaintiff or plaintiffs. In a wage discrimination case, the reasons must fit within one of the four affirmative defenses of the Equal Pay Act. At this point, the court must determine whether or not the “market” appropriately fits into the Equal Pay Act categories, and in particular, the category “any other factor other than sex.”

In disparate impact cases, the court must address the policy question when the plaintiff has isolated the mechanism responsible for the disparate impact, and if that mechanism is the market. Alternatively, the question will arise when the plaintiff has shown that the employer’s policies effect a disproportionate adverse impact on women, and the employer comes forward with an explanation for the disproportionate impact and with the claim that the mechanism is the market. For the purpose of this analysis, I do not address the question of whether or not County of Washington v. Gunther, 452 U.S. 161 (1981), requires shifting the burden of proof as to the four affirmative defenses under the Equal Pay Act, or whether the procedural standard of Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981), in which only the burden of going forward is shifted, should apply.

\textsuperscript{32} In contrast, if the employer has a single evaluation system, and the plaintiff can show discriminatory treatment in its application to women, i.e., that women’s jobs are rated at a percentage of the men’s jobs, or the plaintiff can show disparate impact because of the play of one factor or another, the remedy consists of excising the offending factor and recalculating the wage. The fact that the starting point of analysis is the employer’s evaluation of the jobs limits the court’s task and avoids the problem of using outside evaluators or engaging in a war of experts.

\textsuperscript{33} See supra text accompanying note 6.
pattern. If it calls for experts to use *a priori* methods of evaluation, it will be lost in a battle of experts, lacking the expertise itself to determine which is the better measure. Explicit in the *AFSCME* decision was the familiar concern of comparable worth critics that disparaging the market as a justification for wage setting would lead to wholesale judicial intervention in the marketplace, with judges second-guessing employers.

Second, similar issues are raised in a disparate impact situation, where the plaintiff has identified the mechanism of discrimination as the act of setting women's wages according to the prevailing wage rate; or in a disparate treatment claim, where the employer's defense is that the market qualifies as a "factor other than sex."

In *AFSCME*, the court characterized the claim that the market has a disproportionate impact on women as too diffuse; the plaintiff had to identify the mechanism with greater precision. At the same time, relying on the Supreme Court's decision in *Personnel Administrator v. Feeney*, the court concluded that disparate treatment was not proved by showing the defendant's implementation of a market-based wage system, even knowing its adverse impact on women.

But the court's position was disingenuous. The issue is not whether the plaintiff identified the measure with sufficient precision or proved intentional discrimination. Ultimately, the issue is whether the court approves of the formula on which the employer has relied. The plan in question in *Feeney*, a veterans' preference plan, like the market formula in *AFSCME*, was a plan that the court felt was justified *notwithstanding* its adverse impact on women. In contrast, not hiring a woman because of "customer preference," or using a "head of household" premium—whether cast as disparate impact or disparate treatment—are formulae of which the courts disapprove. The question is fundamental: Will society permit the market formula to be used where its impact is skewed against women?

Third, problems arise in what I have already described as the "hard" cases—where there are significant results that appear

---

34. *But see infra* notes 41-46 and accompanying text.
35. See M. Gold, supra note 29, at 41-43.
36. According to the court, disparate impact analysis is "confined to cases which challenge a specific clearly delineated employment practice applied at a single point in the job selection process." *AFSCME* v. Washington, 770 F.2d 1401, 1405 (9th Cir. 1985).
38. See *City of Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702 (1978); *see also* cases cited supra note 11.
discriminatory, that is, men’s wages are substantially higher than women’s wages, but because the employer has no single evaluation system, or no explicit evaluation system, the plaintiff can neither identify the mechanism for a disparate impact argument nor prove discriminatory intent beyond what inferences might be drawn from the statistics.

This is the case to which most of the critics’ ire is directed. This is the case in which it is suggested that the plaintiffs are trying to show that the disparities between men’s wages and women’s wages are out of proportion to the differences in the jobs—or the forbidden results argument again. This is the arena where the critics—underscoring the limits of institutional competence, and warning against wholesale interventions in the market—are at their loudest. The court, it is argued, has no way of determining whether the disparities between job and salary are “appropriate.” Moreover, the theory is not self-limiting; any two jobs held predominately by men and women may be compared, raising the specter of wreaking havoc with the marketplace.39

If this is “all” that the plaintiff has, most defendants will move to dismiss on the ground that this is a “results theory” of wage discrimination not contemplated by Gunther. A motion to dismiss, however, is the wrong approach. The claim properly raises questions of proof, such as whether the evidence is sufficient to show discriminatory intent or disparate impact, and not preliminary questions of theory. To weed out the claim at the preliminary pleading stage is to carve out ab initio the category of employer that most requires scrutiny. This is the employer who has eschewed a single objective evaluation system, and whose wage-setting system is so subjective that the employee cannot identify the mechanism by which discrimination is accomplished.40 Whether these cases will ultimately be successful is, of course, another matter.

39. Even multiple regression analysis does not address these claims. To apply multiple regression analysis, the plaintiff must identify the factors likely to have been the basis for the employer’s decision. The statistician could derive those factors from the employer’s explanation of his wage-setting policy. Next, the statistician could determine if these reasons were true or mere pretext. If the plaintiff can prove that the employer’s proffered reasons do not account for the disparity between men’s and women’s wages, the question of remedy remains: What should be substituted for the employer’s measure?

40. In Title VII litigation generally, an employer who offers subjective post hoc explanations for a particular employment practice runs the risks of not being believed by the fact finder or of the fact finder rejecting such explanations as inadequate to rebut a showing of disparate impact or disparate treatment. In wage discrimination claims, there is a chance that such an employer may well escape scrutiny altogether.
III. Institutional Competence and Impact on the Market

Under the Equal Pay Act, it was not sufficient to justify paying women lower wages for equal work by pointing to the prevailing wages in the market. The market did not qualify as a "factor other than sex." 41

Moreover, if it is the case that the raison d'être for Title VII was that the market was not adequately valuing women's work, that it mirrored sex stereotypes and continued to reflect historic attitudes towards women's work, 42 then relying on market factors means simply reifying these existing patterns. Curiously enough, in other non-wage discrimination settings, courts have had no problem identifying this vicious cycle. For instance, from the outset of Title VII litigation, courts have rejected the view that "customer preference" could justify hiring members of one sex or another. 43 Customer preference, after all, simply reflected societal sex discrimination. Moreover, customer preference is one factor responsible for market discrimination against women.

Nor is it the case that the "market factors" argument can be distinguished from other justifications because this factor implicates something over which the employer has no control. 44 Griggs v. Duke Power Co., 45 which pioneered the disparate impact approach, involved an employer making decisions on the basis of societal factors beyond his control (high school diplomas), the net effect of which was discrimination against blacks.

Finally, the suggestion that comparable worth-type wage discrimination claims will wreak havoc in the market is overstated. It is not the case that "market factors" justify a specific wage, that there is some paradigmatic scale that the market necessarily reflects. Frequently, the market offers a range of wages. Moreover, it is difficult to imagine large private or public employers enslaved by the prevailing market rates. What is more


In contrast, the court in Christensen v. Iowa, 563 F.2d 353, 356 (8th Cir. 1977), permitted wage discrimination on the basis of market factors under Title VII. Two judges held that a university's practice of paying men at a rate higher than the evaluated worth of their jobs, while paying women at the evaluated worth of their jobs, did not violate Title VII because Title VII permitted wage discrimination on the basis of market factors. The court conceded a different result under the Equal Pay Act per Gunther. Id. at 356 n.7.

42. See M. Gold, supra note 29, at 21-22.

43. See cases cited supra note 11.

44. See Gertner, supra note 3.

likely is that they control the market rates by the wages they assign. 46

Nor is it the case that these theories will necessarily lead to massive intervention in the wage market or wholesale interference with an employer's prerogatives. As already noted, the problem with disparate treatment cases, where the employer has no single evaluation plan or explicit set of criteria defining wages, is a problem of remedy. Likewise, there will be remedy problems with disparate impact theories, should these claims survive. Neither remedy problem, however, is insurmountable. 47

As long as the court permits disparate treatment claims, at minimum all jobs in an employer's plant are subject to scrutiny in terms of the means by which wage rates are set. The universe of jobs reviewed is not restricted by the "equal pay for equal work" standard. Moreover, all of Title VII to some extent suffers from the same disability. When the court has to decide whether the reasons advanced by an employer are pretexts—what was the real reason for the action—or review recruitment, job selection, job assignment, promotion, or fringe benefits, it is necessarily interfering with management prerogatives.

The argument that courts are not competent to address these issues—particularly in the case of the "worst employer" scenario, where the allegedly discriminating employer has no single evaluation system or even an explicit system—has been challenged with varying degrees of success. 48 Winn Newman notes that third-party resolution of wage inequities involving dissimilar jobs is "old hat" to the industrial relations world, and even to the judicial sector. 49 The techniques have been developed by the 1946 War Labor Board, by labor arbitrators, and, within certain limits, by courts articulating the "equal pay for equal work" standard of the Equal Pay Act. 50 It is surely the case that courts are now required to make comparable subjective decisions.

---

46. This analysis is derived from Weiler, The Wages of Sex: The Uses and Limits of Comparable Worth, 99 HARV. L. REV. 1728, 1761 (1986).

47. See infra text accompanying notes 48-52.

48. This is a variant of an old argument in sex discrimination law. In the pregnancy discrimination cases, the implication was that while courts could easily look at men and women to determine the ways in which they are the same, to acknowledge differences and determine the significance that those differences are to receive is outside the competence of the court. See, e.g., General Elec. Co. v. Gilbert, 429 U.S. 125 (1976).

49. Newman & Vonhof, supra note 21, at 271.

50. Id. at 271-72.
Under the pretext analysis, for example, they must determine difficult questions of human motivation.  

In any case, recent commentary suggests that there is an approach to evaluating jobs that uses the standard discrimination approach. Rather than picking between a priori job values, the court can look to predominately men’s jobs within a given plant to rank the way in which that employer values different tasks within the framework of the men’s jobs alone. Once a job point system is discerned in the men’s wages, the same can be applied to women’s work.  

Although it is surely the case that the “easiest” value for the court to assign to a job is the market value, such a process will necessarily perpetuate the existing pattern. To the extent that women have not been part of the market as a result of historic discrimination, sex stereotyping, the residual impact of protective labor legislation, socialization, and inchoate discrimination, society must make a choice. Some disruption is the price for eliminating the vestiges of sex discrimination.

IV. ORGANIZATIONAL STRATEGIES

It should be clear that litigation alone is insufficient to redress the problem of wage discrimination. If disparate treatment analysis is rejected, the remaining theory cannot begin to address the subtle forms of wage discrimination. Moreover, the institutional competence and market arguments, if accepted by courts without limitation, will effectively limit disparate treatment claims as well. Plaintiffs’ counsel must develop organizational strategies both in tandem with litigation and, as will be discussed, as part of a long-term strategy.

Collective bargaining must be a focus of attention. There is no question that unions are accepted as ongoing actors in the marketplace; plaintiffs in Title VII litigation, apparently, are not. Whereas courts fear major incursions into the market from comparable worth claims, they have no such fear when unions bargain, arbitrate, or even strike over comparable worth.  

Moreover, unions in major industries and unions of public employees have a unique power to effect pay equity. Arguments

---

51. In other areas, lay decisionmakers are called upon to place a value on human life, as in jury trials of wrongful death cases.
52. See Weiler, supra note 46, at 1768.
about the mythical market determining this or that prevailing wage wax thin where the subject of the discussion is a market leader. The ability of unions to achieve comparable worth in these arenas can have a ripple effect across the market. Indeed, where public employers are concerned, workers can lobby as citizens to effectuate comparable worth plans, for the same reasons. The State of Washington is one such example.

This strategy is crucial, particularly where a limited percentage of American industry is organized and where women are largely clustered in the unorganized sectors. Strategies aimed at affecting wages in the organized sector of private industry, along with strategies aimed at affecting wages in the public sector, may well have an impact on the market price for women's work.

In the arenas where collective bargaining takes place, the focus can be on bargaining directly or indirectly for comparable worth. Obviously, the parties can adopt the practice of setting wages according to comparable worth principles. Alternatively, they can bargain for a single, rational wage evaluation plan. As previously noted, the absence of such a plan makes a crucial difference in litigation—posing remedy problems in some cases, undermining the proof in others.

There can be no doubt that unions and management have the competence to bargain about these issues. Indeed, the more that wage issues are litigated in the forum where they have been addressed in the past—wage arbitration—the more job evaluation skills are refined and are then perhaps translatable in a Title VII setting.

54. See supra text accompanying note 46.
55. In the early 1970's, the State of Washington hired a consultant to perform a comprehensive evaluation of its wage structure. The consultant reported that distinctively "female" jobs were paid 20% less on the average than comparably valued "male" jobs. N. Willis & Assocs., State of Washington Comparable Worth Study (1974). Then-Governor Dan Evans included in his proposed budget some money to remedy the identified disparities. Governor Evans' successor, Dixie Lee Ray, however, removed that item from the state budget, and what had begun as a political solution wound up in litigation in AFSCME v. Washington, 770 F.2d 1401 (9th Cir. 1985).
56. See supra notes 32-35 and accompanying text.
57. Bargaining for the principle of comparable worth or for a single evaluation plan arguably falls within the mandatory subjects of bargaining. Cf. NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342, 349 (1958) (distinguishing mandatory subjects from matters that parties are not obligated to bargain over). A union's failure to bargain on this subject on behalf of its female employees arguably violates the duty of fair representation. See, e.g., Local Union No. 12, United Rubber, Cork, Linoleum & Plastic Workers v. NLRB, 368 F.2d 12 (5th Cir. 1966) (finding that the NLRB had jurisdiction over an unfair labor practice claim alleging a violation of the duty of fair representation in the union's discriminatory failure to file a grievance on behalf of its black members), cert. denied, 389 U.S. 837 (1967).
I would make these suggestions even if comparable worth litigation were not under fire. Title VII litigation is too costly and too lengthy a process to provide continuing pressure on an employer to effect pay equity. Only ongoing organizational pressure, coupled with the threat of Title VII litigation, will yield consistent results.

V. A CASE STUDY: Krikorian v. General Electric Co.

In 1978, Local 201 of the International Union of Electrical Workers (IUE), brought an omnibus action against the General Electric Company (GE) for sex discrimination in hiring, initial assignment, and wage setting. Local 201 and the IUE had filed the action in response to a consent decree that had been entered into by GE and the Equal Employment Opportunity Commission, which the union and the International found to be woefully inadequate.58

Although the IUE had a strong record on civil rights enforcement,69 GE challenged the standing of the local to represent its women members. According to the company, in the event of a finding of discrimination, Local 201 would be held equally liable for any discrimination found by the court. In response to the challenge to Local 201’s standing, I entered an appearance on behalf of the class of all women in the Local 201 bargaining unit who worked in the four associated plants.60

Two bargaining units were involved. The Riverworks and Everett plants produced steam turbines and aircraft engines primarily under defense contracts. The Wilmington and West Lynn plants produced light machinery. The sex discrimination problem, however, was not only intraplant; significant interplant sex segregation was evident as well.

At the time I entered the suit, approximately forty percent of the workers in the Wilmington and West Lynn plants were

59. The IUE’s general counsel for many years was Winn Newman. Newman was a crucial force behind the IUE’s efforts to bring about pay equity in the electrical industry. He has been counsel of record or amicus in the major litigation concerning these issues, and has written and spoken extensively on comparable worth.
60. That action was entitled Krikorian v. General Electric Co., and it proceeded in tandem with Local 201 v. General Electric Co.
women. Only sixteen percent of the 166 blue collar classifications were integrated by sex. Of the remaining jobs, one-half employed women workers almost exclusively, while the others employed only men. The “women’s jobs” were all the lower rated jobs. Moreover, the women’s jobs of assembly and machine operator were five to nine ratings below similar semiskilled jobs in Riverworks and Everett, which were overwhelmingly male.

In Riverworks and Everett, ninety-one percent of blue collar workers were men. Women were represented, if at all, in only one-third of 172 blue collar classifications, and again, only in the lower rated jobs.

This pattern of interplant job segregation derived from initial assignment discrimination, reinforced by a policy that did not permit transfers between the bargaining units. Intraplant job segregation also had its genesis in initial assignment discrimination, reinforced by a system of promotion through job families.

The Riverworks and Everett jobs were clearly more lucrative for the company, and more important for the union as well. Eighty percent of the union membership was male, largely clustered at these plants. The two plants with the largest percentage of women had not played a powerful role in the local union political structure. As a result, before the lawsuit, there had been little pressure to force GE to change the conditions at the Wilmington and West Lynn plants. There were numerous examples of the different treatment that women in these two plants received, as contrasted with the workers in the predominately male plants. Training opportunities were substantially more extensive at Riverworks and Everett. The union had bargained for a wider range of protections for job security, and for promotion incentives within the Riverworks and Everett plants—job posting, layoff and transfer supplements—with nothing comparable at Wilmington or West Lynn.

The political issues that formed the centerpiece of this litigation came to a head when women workers in the Riverworks plant precipitated a strike over the rating assigned a “women’s job” known as “prep to braze.” Prep to braze is rated R 12 (day

61. See Hams, Women Taking Leadership in Male-Dominated Locals, 8 WOMEN’S RTS. L. REP. 71, 72 (1984). Hams’ statistics derive from status reports supplied to the union by the company during the course of various negotiating sessions.

Because part of my strategy was to work with the women to bolster their political role in the union, and because Ms. Hams was my chief liaison, I believe that a description of internal union politics from her unique vantage point is more valuable than my own. I can only describe what I tried to do. She has described what actually occurred.

62. See id. at 72.

63. See id. at 75.
work) in Riverworks and IR 12 (piecework) in Everett. It was alleged that the rating was five ratings below some male jobs requiring comparable skill and effort. The strike provided the first impetus for negotiations in the Krikorian suit.

The new militancy of the women in the "prep to braze" job coincided with two other political developments within the union organization: the growth of the union organization at the Wilmington plant\(^{64}\) and the creation of the Women's Committee of Local 201. The latter is described as follows:

Over a period of years [beginning in 1976], the [Women's] Committee developed from an ad hoc group into a permanent fifteen member elected body of the local, over the opposition of much of the local's leadership. The Women's Committee struggle for recognition was won with the outspoken support of male and female union activists who believed in women's rights and wanted to see more rank and file participation in the union structure. Ironically, the Krikorian suit was being filed by the leadership during this same period—women's grievances had brought about this suit—yet women's leadership in the union was still a controversial and threatening issue.\(^{65}\)

I entered the case in 1979, shortly after the prep to braze strike had been settled and the first round of conciliation talks was underway. I had several goals. Looking at the case from the point of view of a litigator, it was a substantial claim. In particular, the jobs in Wilmington and West Lynn could be traced to jobs labelled "M" or "W" by the company during World War II. Indeed, during this time the GE rate structure had been investigated by the War Labor Board and found to have been discriminatory. The War Labor Board had found that GE reduced the point values for women's jobs by thirty-three percent, after they had been evaluated on the same point scale as the men's. When the company merged the "M" and the "W" jobs, they put the women's jobs on the bottom. It was a classic case of disparate treatment. For other jobs, particularly those in the newer "male" plants, the litigation was bound to be more difficult.

At the same time, it was clear to me that "winning" in the context of this litigation had to mean more than another consent

\(^{64}\) See id. at 78.

\(^{65}\) Id.
decree or even a judicial finding of discrimination. For the women to secure their gains over the long run, they had to participate more effectively in the union. As a result, my assistant, Sharon Beckman, and I met regularly with the plaintiffs and the Women's Committee of the local. We encouraged the women to bring to the table all of the issues that had been of concern to them, and not simply the issues that their male leadership had flagged. We attempted to publicize the efforts of the Women's Committee in our dealings with our own clients, underscoring the importance of the Women's Committee as a vehicle for expressing their concerns. Finally, we made it clear to both the union and the company that as the plaintiffs' counsel our constituency was the women members of the union, and that we would not settle unless they approved. We had the power to block a settlement, and we would exercise that power. Because the litigation was important to the union and its leadership, this position gave the women additional leverage in their dealings with their own organization.

Finally, in October 1982, the Krikorian and Local 201 actions were settled. Wage rates for 353 employees at Wilmington and West Lynn were increased. At the same time, provisions were added to increase intraplant movement to higher wage and higher status positions. Employees at Wilmington and West Lynn finally received the same protections from GE as their counterparts in Riverworks and Everett—i.e., layoff and transfer local agreements, job posting and upgrading local agreements, secondary job posting agreements, and agreements to prevent abuse of temporary assignments. The company opened training programs for a wide variety of positions not only at Riverworks and Everett, but also at Wilmington and West Lynn. The terms of the training programs were changed to make them more attractive to women employees. Provisions were added for maternity benefits and child care leaves at all plants. In addition, the company was required to make initial assignment to job positions according to a set formula. Finally, the company gave back pay awards to the individual plaintiffs, and to some retired members of the class who would be unable to enjoy the benefit of the new policies.

66. Ms. Beckman had been hired specifically to work on the Krikorian litigation.
67. See Hams, supra note 61, at 79.
Our role, however, did not end with the settlement of the litigation. We asked the Women's Committee to monitor the settlement and to report back to us periodically. They have continued to do so, bringing us up to date on the company's compliance with all of the provisions. Some of the members of the Women's Committee have secured leadership positions in the union. The Committee has a regular column in the union newspaper and remains highly visible. We were simply one of many catalysts.

CONCLUSION

As the courts constrict the available comparable worth theories under Title VII, harping on concerns about institutional competence and the marketplace, attention must be directed towards the organizational strategies described above. Women must look in part to unions, whose role in the market is clear and whose competence in this area is undenied. They must look to public employers and public officials in their capacity as citizens. Litigation may play a part; it cannot be the whole picture.