

NOTE

Value, Work and Women

Whether old or new, labor statistics graphically report the disparity between women's and men's wages. In 1881, the average daily earnings of building trades' painters in Pennsylvania was \$1.17 for women and \$2.50 for men.¹ In 1981, the median weekly earnings of women in the United States who worked at full-time waged jobs was \$224. The parallel figure for men was \$347.² This historical disparity between women's and men's wages is growing.³ Graphic data on sex-based wage disparity among those employed in the executive branch of Minnesota state government⁴ recently sparked Minnesota legislators to adopt a new statute to remedy pay inequity.⁵

It is the policy of this state to attempt to establish equitable compensation relationships between female-dominated,⁶ male-

1. Bureau of Labor Statistics, U.S. Dep't of Labor, Bull. No. 604, *History of Wages in the United States from Colonial Times to 1928*, at 195-98 (1934).

2. Mellor & Stamas, *Usual Weekly Earnings: Another Look at Intergroup Differences and Basic Trends*, *Monthly Lab. Rev.*, Apr. 1982, at 15, 16. (data from the Current Population Survey by the Bureau of Labor Statistics, Department of Labor).

3. Although there are slight fluctuations in the increase, the disparity grows. The median income of women employed full-time was 63% that of full-time male employees in 1956. By 1973 that figure had shrunk to 57%. Ratner, *The Policy and the Problem*, in *Equal Employment Policy for Women* 20 (R. Ratner ed. 1980), L. Howe, *Pink Collar Workers*, 289 (1977) (graphic representation). The pay gap between average earnings of Minnesota employed women and men increased from \$4,190 in 1976 to \$4,929 in 1981. Minnesota Council on the Economic Status of Women, *Pay Equity and Public Employment*, Report of the Task Force on Pay Equity 1 (March 1982) [hereinafter *Task Force Report*].

4. Legislative and judicial employees and members of the Minnesota National Guard are not executive branch employees. A new statute, *see infra* note 8, covering approximately 29,000 employees working in law enforcement, craft and maintenance, service, health care, and corrections' positions deals with wage disparities. *Task Force Report*, *supra* note 3, at 14, 15.

5. *See Hearings on H.B. 2005 Before the House Committee on Governmental Operations*, 72d Sess., Feb. 18, 1982; Watkins, *Minnesota Passes Comparable Worth Law for 36,000 State Employees*, *Comparable Worth Project Newsletter*, Winter 1982, at 1, 13.

6. "Female-dominated class" means any class in which more than 70% of the incumbents are female. 1982 Minn. Laws 634 § 4.

dominated,⁷ and balanced classes of employees in the executive branch. Compensation relationships are equitable within the meaning of this subdivision when the primary consideration in negotiating, establishing, recommending, and approving total compensation is comparability of the value of the work in relationship to other positions in the executive branch.⁸

Enactments like this have been labeled "comparable worth" statutes.⁹ Definitions of "comparable worth" and thus the meaning of these statutes vary. Similarly, judicial decisions in sex discrimination actions brought under "comparable worth theories" have resulted in conflicting judgments with differing rationales.¹⁰ In statutes, judicial decisions and social commentary, the rubric comparable worth has meant pay inequity, equal pay for comparable work, equal pay for work of comparable character, equal pay for work of comparable value and other notions which juxtapose expressions of equality, comparability, value, worth, and work.¹¹ Such confusing and vague terminology limits the efficacy of comparable worth as a legal remedy.¹² This article examines and clarifies the language and concepts underlying comparable worth.

Confusion about the definition and legal status of comparable worth stems from different underlying theories about the causes of sex-based wage disparities. Many business analysts suggest that wage disparities are a product of women's employment choices. Their perspec-

7. "Male-dominated class" means any class in which more than 80% of the incumbents are male. 1982 Minn. Laws 634 § 5. "A higher percentage is used for the definition of male classes than for female classes because there are more men than women in state employment and in the labor force generally. Therefore, a male class must be 'more segregated' than a female class in order to be equally out of balance." Task Force Report, *supra* note 3, at 19.

8. 1982 Minn. Laws 634 § 1.

9. *The Comparable Worth Issue*, Gov't Empl. Rel. Rep. (BNA Special Report) 115-19 (Oct. 26, 1981) [hereinafter *BNA Comp. Worth Rep.*].

10. See *International Union of Electrical Workers v. Westinghouse Electric Corp.*, 631 F.2d 1094 (3rd Cir. 1980), *cert. denied*, 452 U.S. 967 (1981) (after a job evaluation study rating job classifications, practice of paying female jobs less than male jobs declared discriminatory); *Christensen v. Iowa*, 563 F.2d 353 (8th Cir. 1977) (after a job evaluation study rating job classifications, practice of paying female jobs less than male jobs adjudicated nondiscriminatory).

11. *BNA Comp. Worth Rep. supra* note 9, at 115-19; Manual on Pay Equity: Raising Wages for Women's Work (J. Grune ed. 1980); H. Remick, *Comparable Worth: Equal Pay for Equal Worth* (paper delivered at the 1977 Annual Meeting of the American Association for Affirmative Action); Goodman, *Equal Pay for Work of Equivalent Value*, Wash. Post, May 21, 1977, at A11, col. 1.

12. At present no operational, practical definition of "comparable worth" exists. Milkovich, *Emerging Debate*, in *Comparable Worth: Issues and Alternatives* 23, 36 (E. Livernash ed. 1980). "Comparable worth is a misnomer . . . a euphemism. I think it's basically been used by people to exploit this issue. This is plain old discrimination." *BNA*

tive focuses on an individual woman and her choice to take a job at a given salary as if she were genderless and acting alone. These analysts explain wage disparities by pointing to individual women's choices not to change jobs, to work for a wage only occasionally, to work only part-time, or to work in non-unionized low margin industries like services and textiles.¹³ This perspective assumes each individual woman acts outside any particular set of pressures or social context.

Law makers and business representatives, most of whom are men,¹⁴ often view wage disparities from this individualistic perspective. They focus on women's choices rather than on the reasons for those choices. Thus, they see wage disparity as the result of women's choices rather than as the result of discrimination. From their perspective the causes of wage disparity are nondiscriminatory. They therefore tend to see sex-based wage disparities, especially across occupations, as beyond both the reach of the legal system and the responsibility of employers.

Research contradicts the proposition that isolated, individual job

Comp. Worth Rep., *supra* note 9, at 53 (quoting former EEOC Vice Chair Daniel Leach). See *Christensen v. Iowa*, 563 F.2d 353 (8th Cir. 1977) (female university clerical workers denied a remedy); *Lemons v. City and County of Denver*, 620 F.2d 228 (10th Cir. 1977), *cert. denied*, 449 U.S. 888 (1980) (nurses' claim that higher paid jobs were of equal worth to the city dismissed); *Gerlach v. Michigan Bell Tel. Co.*, 501 F. Supp. 1300 (E.D. Mich. 1980) (Equal Pay Act standard of substantially similar job duties bars female engineering layout clerks' claim of sex discrimination based on comparison of traditionally female to traditionally male jobs and wages within the telephone company); *Odomes v. Nucare, Inc.*, 653 F.2d 246 (6th Cir. 1981) (female nurse's aide denied a remedy under Title VII because her job duties were not substantially similar job duties of more highly paid male orderly); *Power v. Barry County, Mich.*, 539 F., Supp. 721 (W.D. Mich. 1982) (female corrections officers' claim of sex discrimination based on comparable worth dismissed).

13. United States Equal Employment Opportunity Commission, *Hearings Before the United States Equal Employment Opportunity Commission on Job Segregation and Wage Discrimination*, April 28-30, at 668-76 (1980) (testimony by Virgil Day, Business Round Table) [hereinafter EEOC Hearings]; Equal Employment Advisory Council, *Comparable Worth: A Symposium on the Issues and Alternatives* 65-67 (Nov. 21, 1980) (testimony by Dr. Herbert Northrup, Professor of Industry, University of Pennsylvania); U.S. Bureau of Labor Statistics for 1977 estimated women in unionized jobs averaged \$1,500 a year more in wages and fringe benefits than women in non-union plants or offices. Wertheimer, *Leadership Training for Union Women in the United States: Route to Equal Opportunity*, in *Equal Employment Policy for Women* (R. Ratner ed. 1980). As of 1982, however, only 15% of wage-earning women were union members. 981 Gov't Empl. Rel. Rep. (BNA) 21 (Sept. 27, 1982).

14. 79.3% of full-time employed lawyers and judges are men. 71.6% of managers and administrators are men. These figures do not include self-employed persons. Rytina, *Earnings of Men and Women: A Look at Specific Occupations*, Monthly Lab. Rev., Apr. 1982, at 25, 26. [hereinafter Lab. Rev. Earnings]. In 1982, 6,578 (or 88%) of the 7,482 state legislators were men. In 1981, 514 (or 96%) of the 535 federal legislators were men. National Women's Political Caucus, *National Directory of Women Elected Officials* 6-10 (1982).

related choices or job characteristics alone cause the wage disparity between the sexes.¹⁵ Controlling for number of children, city size, education, experience, health, work hours, marital status, migration, region, and union membership, one study found eighty percent of sex-based wage disparity unexplained.¹⁶ Based on these studies, some legal scholars argue wage disparities alone should constitute discrimination prohibited by law.¹⁷ Explaining wage disparities as a product of job choices and characteristics is inadequate for it fails to consider the pressures behind those choices.

Many public leaders and academics, most of whom are women,¹⁸ see women as a group which functions within a social context. These commentators note that the individualistic perspective of wage disparities obscures the striking differences between wage earning women and men: women and men work in different occupations¹⁹ and employers pay less

15. See C. Lloyd & B. Niemi, *The Economics of Sex Differentials* 232-39 (1979) (citing twenty different studies which report various percentages of wage disparities unexplained by job characteristics or employee choices); EEOC Hearings, *supra* note 13, at 232, 273 (testimony of Mary Corcoran, associate professor of Political Science, University of Michigan). See also Note: *Women, Wages, and Title VII: The Significance of "County of Washington v. Gunther,"* 43 U. Pitt. L. Rev. 467, 497 n.165 (1982) (economic theories why employers discriminate).

16. Oaxaca, *Male-Female Wage Differentials in the Telephone Industry*, in *Equal Employment Opportunity and the AT&T Case* 34 (P. Wallace ed. 1976).

17. See Note, *Women, Wages, and Title VII*, *supra* note 15; Newman & Vonhof, "Separate But Equal"—*Job Segregation and Pay Equity in the Wake of Gunther*, 1981 U. Ill. L. Rev. 269; Gasaway, *Comparable Worth: A Post-Gunther Overview*, 69 Geo. L. J. 1123 (1980-81); Blumrosen, *Wage Discrimination, Job Segregation, and Title VII of the Civil Rights Act of 1964*, 2 Mich. J. L. Ref. 399 (1979).

18. *E.g.*, nearly 90% of those who testified before the EEOC advocating comparable worth were women. EEOC Hearings, *supra* note 13.

19. As of 1980, 54.7% of employed women were either clerical or service workers. Bureau of Labor Statistics, U.S. Dep't of Labor, Bull. No. 208015, *Perspectives on Working Women: A Databook* 102 (Oct. 1980). 95% of the craft workers, 95.3% of engineers and 97.9% of mechanics and repairers are men. Over 90% of telephone operators, bank tellers, keypunch operators, child care workers, and sewers and stitchers are women. Lab. Rev. Earnings, *supra* note 14, at 27-31.

for women's work than for men's work.²⁰ They view the existence of men's jobs and women's jobs as sex-based job segregation. Observing women as a group in society, these commentators suggest other reasons for wage disparities. The urgency of economic need often pressures women to work for less money because they cannot afford to search and wait for the

20.					
Occupation	% Male	Weekly Earnings (1981 National Averages)	Occupation	% Female	Weekly Earnings (1981 National Averages)
airline pilots	99.9	530	medical secretaries	99.9	218
plumbers and pipe fitters	99.9	404	legal secretaries	99.4	260
furnace tenders and stokers, except metal	98.9	342	other secretaries	99.3	229
mechanics and repairers	97.9	328	receptionists	98.0	199
tool and die makers	97	436	dental assistants	97.9	182
clergy	95.7	285	practical nurses	97.3	227
engineers	95.3	547	child care workers, private household	97.3	79
transport equipment operatives	95.1	307	teachers' aides, except school monitors	97	166
architects	95	432	sewers and stitchers	96.7	156
craft and kindred workers	94.4	360	prekindergarten and kindergarten teachers	96.5	264

Lab. Rev. Earnings, *supra* note 14, at 26-29. See also Glenn & Feldberg, *Degraded and Deskilled: The Proletarianization of Clerical Work*, in *Women and Work: Problems and Perspectives* 202 (1980) (study of clerical work suggests as it became more routine work, wages were lowered and field was opened to women).

highest paying job or to change occupations.²¹ Bias against women in the workplace makes it a hostile environment in which to work productively and thus gain recognition through promotions or merit increases.²² Further, the absence of monetary compensation for housework and child rearing legitimizes the idea that women do not need to be paid for their work.²³ From these commentators' social perspective, the relationship between sex-based job segregation and wage disparities creates a need for related legal remedies.²⁴

The individualistic perspective underlies the traditional legal concept of comparable worth called equal pay for equal work. This concept means the same remuneration for the same work performed. Part I of this article traces the development of this well-accepted doctrine.²⁵ The social perspective, analyzed in Part III, embodies a concept of comparable worth not currently legal doctrine. This concept, "pay for the social value of women's labor," means remuneration based on recognition of women's contribution to society. Part III of this article also proposes means to implement this concept.²⁶ The Minnesota statute²⁷ exemplifies a third concept of comparable worth, "comparable pay for comparable work." This concept means the same remuneration for the same value of work performed. It straddles the two perspectives. It envisions the objective of pay for the social value of women's labor but uses implementation mechanisms and assumptions about comparison, job evaluation, and wage setting found in equal pay for equal work. Analysis of the Minnesota statute in Part II demonstrates how the assumptions underlying the statute's implementation obstruct achievement of its objective.²⁸

21. See Howe, *supra* note 3, at 288; Smith, *The Movement of Women into the Labor Force*, in *The Subtle Revolution* 1 (R. Smith ed. 1979). This conclusion also follows from the increase of women in the wage-earning work force and their increasing poverty. Ehrenreich & Stallard, *The Nouveau Poor*, Ms., Aug. 1982, at 217.

22. See C. MacKinnon, *Sexual Harassment of Working Women*, 25-55 (1979) (documenting pressures on women to stay out of the workplace); Coser, *Stay Home, Little Sheila: On Placement, Displacement, and Social Change*, in *Women and Work*, *supra* note 20, at 153 (documenting pressures on women to stay in the home).

23. *Women and Work*, *supra* note 20, at 137; Glazer, *Everyone Needs Three Hands: Doing Unpaid and Paid Work*, in *Women and Household Labor* 249-70 (S. Berk ed. 1980); Sawhill, *On the Way to Full Equality*, in *Women in the U.S. Labor Force* 40, 52 (A. Cahn ed. 1979); EEOC Hearings, *supra* note 13, at 174 (testimony by Helen Hacker, professor of Sociology, Adelphi University).

24. See *supra* note 17; EEOC Hearings *supra* note 13; and Greenberger & Gutman, *Legal Remedies Beyond Title VII to Combat Sex Discrimination in Employment*, in *Women in the U.S. Labor Force* 75 (A. Cahn ed. 1979).

25. See *infra* pp. 165-70.

26. See *infra* pp. 183-85.

27. 1982 Minn. Laws 634.

28. See *infra* pp. 170-82.

The concept of comparable pay for comparable work merely extends the mechanisms and assumptions inherent in the concept of equal pay for equal work. Those mechanisms and assumptions make statutes based on either concept ineffective as a way to redress women's economic inequality. Nevertheless, promulgating these statutes, even in their current form, may provide some women with immediate economic resources. Moreover, attempts to adopt and change such statutes will focus public attention on assumptions in current legal doctrine which perpetuate women's economic inequality.

The mechanisms and assumptions in both equal pay for equal work and comparable pay for comparable work must be challenged and changed to accomplish the goals of comparable pay statutes. Women²⁹ must first recognize, define, and value women's contributions to society. Women can then structure attempts to achieve remuneration for women's contributions by adapting comparable pay statutes and the mechanisms inherent in them. Through these efforts women may effectuate meaningful solutions for women's economic inequality and realize pay for the social value of women's labor.

I. Equal Pay for Equal Work

Equal pay for equal work means the same pay for the same work. Although this notion has had continuous support from labor and government officials since the late nineteenth century,³⁰ federal law did not require employers to pay the same wages to women and men doing identical work until 1963. In that year, Congress enacted the Equal Pay Act (EPA)³¹ as an amendment to the Fair Labor Standards Act of

29. For several reasons, this author suggests women identify with other women to work for equitable remuneration. Historically, men in control of resources have not recognized and remunerated women's social contributions. Men may come to support the elimination of the economic inequality of women, but such support cannot be assumed given this history. (Men should consider why such a change would be in their interest.) Men may also be less able to define something which is not theirs, *i.e.*, women's ways of working. Working together as women, for women, can be revitalizing as well as burdensome. The process is as important as the end. Through evaluating our circumstances and possible means for change, we value ourselves.

30. In 1868, the National Labor Union passed a resolution urging Congress to enact legislation guaranteeing equal pay for equal work for public employees. Buckley, *Equal Pay in America*, in *Equal Pay for Women* 35, 41-42 (B. Pettman ed. 1975); "As long ago as 1898 a federally appointed industrial commission spoke out in favor of 'equal pay for equal work.'" BNA Operations Manual, *Equal Pay for Equal Work: Federal Equal Pay Law of 1963*, at 3 (1963) [hereinafter BNA Equal Pay Manual].

31. "No employer having employees subject to any provision of this section shall discriminate, within any establishment in which such employees are employed, between

1938.³² Through the EPA, Congress proposed to remedy what it perceived to be a

serious and endemic problem of employment discrimination in private industry—the fact that the wage structure of ‘many segments of American industry has been based on an ancient but outmoded belief that a man, because of his role in society, should be paid more than a woman, even though his duties are the same.’³³

The EPA also requires the same pay when job duties are substantially identical, but not exactly the same. This narrow extension beyond the same pay for the same work, for example, provided female workers with a remedy in *Schultz v. Wheaton Glass Co.*³⁴ At the glass manufacturer's Millville, New Jersey plant, female selector-packers' hourly wage was ten percent less than that of male selector-packers.³⁵ Differences in job duties occurred only during oven shutdowns.³⁶

During such shutdowns the idled female selector-packers are assigned to what is known as the “Resort” area, where they inspect and pack glassware rejected by the Quality Control Inspection Department. Idled male selector-packers are similarly reassigned to the Resort area, but some of them are assigned to do work which otherwise would be done by snap-up boys.³⁷

The court held the ten percent wage difference impermissible because “Congress in prescribing ‘equal’ work did not require that the jobs be identical, but only that they must be substantially equal.”³⁸ In *Schultz*,³⁹ substantially equal meant substantially similar job duties.

Thus, under the EPA, a comparison of job duties determines whether pay is fair and, therefore, whether there is a need for a legal

employees on the basis of sex by paying wages to employees of the opposite sex in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex.” 29 U.S.C. § 206(d)(1) (1976).

32. 29 U.S.C. §§ 201 to 219 (1976 & Supp. V 1981).

33. *Corning Glass Works v. Brennan*, 417 U.S. 188, 195 (1974), citing S. Rep. No. 176, 88th Cong., 1st Sess. 1 (1963).

34. 421 F.2d 259 (3rd Cir. 1970), cert. denied, 398 U.S. 905 (1970).

35. *Id.* at 261.

36. Differences in job duties must occur more often than occasionally to bar the claim. *Id.* at 265 n.10.

37. *Id.* at 263. Snap-up boys' work was restricted to males by a collective bargaining agreement. They received two cents more per hour than female selector-packers, and twenty-one and one half cents per hour less than male selector-packers. *Id.*

38. *Id.* at 265.

39. *Id.*

remedy. This comparison process assumes one person's job can and should be compared to another person's job. It also makes one person's job and wage the standard for comparison. Under the EPA, men's work is the standard to which women's work is compared.⁴⁰ If he cuts meat and she cuts meat but he is paid more than she is, she must compare her work and wage to his when bringing an action based on the concept of equal pay for equal work. When there is no "he" with whom to compare a "she," however, the EPA provides no remedy. Thus, this comparison procedure demonstrates the meaning of "equal" in the EPA. Equal means equal to men.

Despite remedies available under the EPA, wage disparities and job segregation are growing. Among the ten fastest growing occupations from 1972 to 1980 were four which were approximately ninety percent female.⁴¹ In fact, most women work in sex-segregated occupations⁴² where the only men around are supervisors.⁴³ Therefore, if the EPA's comparison procedure is the only method for mobilizing and attaining equality in wages, most women's economic situation, and consequently the gap between women's and men's wages, will not change.

The need to more effectively remedy women's economic inequality has influenced interpretation of Title VII of the Civil Rights Act of 1964 (Title VII).⁴⁴ This federal statute prohibits employment discrimination on the basis of sex.⁴⁵ Although concern over economic inequality of the sexes has figured in the legislative consideration of Title VII, particularly upon its amendments,⁴⁶ neither the statute nor its legislative history defines the terms "on the basis of sex" or "discrimination."⁴⁷ Thus, until recently, lower federal court decisions⁴⁸ differed on whether the same pay

40. Prohibitions against lowering one person's wage as a remedy are found in most employment discrimination statutes including the federal Equal Pay Act and Title VII. This prohibition also protects the male standard for comparison. 29 U.S.C. § 206(d)(1963).

41. Secretaries 99.3%, cashiers 85.1%, registered nurses 95.8%, and bookkeepers 90.6%. Lab. Rev. Earnings, *supra* note 14, at 26-29; Leon, *Occupational Winners and Losers: Who They Were During 1972-1980*, Monthly Lab. Rev., June 1982, at 18, 19.

42. *Id.*

43. See Barrett, *Women in the Job Market: Occupations, Earnings, and Career Opportunities*, in *The Subtle Revolution* 31, 46 (R. Smith ed. 1979).

44. 42 U.S.C. § 2000e to 2000e-17 (1976 & Supp. V 1981).

45. "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 compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin"; 42 U.S.C. § 2000e-2(a) (1976) (emphasis supplied).

46. Pregnancy Discrimination Amendments of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (amending 42 U.S.C. § 2000e (1976)). See H.R. Rep. No. 948, 95th Cong., 2nd Sess. 2-3 (1978), and S. Rep. No. 331, 95th Cong., 1st Sess. 2-3, 6 (1977).

47. See *County of Washington v. Gunther*, 452 U.S. 161, 190 n.4 (1981).

48. See *supra* note 10.

for substantially similar work limitation of the EPA circumscribed cases brought under Title VII. The Supreme Court decided that question in *County of Washington v. Gunther*.⁴⁹

In *Gunther*, women employed as jail guards claimed their employer, Washington County, Oregon, had determined that female guards in county jails should receive ninety-five percent of the wage that male guards received.⁵⁰ When the County decided to pay female guards only seventy percent of what males were paid,⁵¹ the women filed suit alleging that the difference in pay constituted intentional sex discrimination prohibited by Title VII.⁵² All parties agreed that the job duties were too dissimilar to fulfill the substantially similar requirement of the EPA.⁵³ The district court found that the women's suit could not be brought under Title VII unless the degree of similarity between job duties fit the EPA requirement.⁵⁴

The Supreme Court disagreed. It found the EPA restriction of substantially similar job duties did not limit sex-based Title VII actions.⁵⁵ The Court explicitly avoided establishing what degree of similarity of job duties is necessary to establish sex-based wage discrimination cases under Title VII.⁵⁶ As a result, the lower courts now face a new question: What degree of similarity between job duties does Title VII require to establish sex-based wage discrimination when job duties are not substantially similar? Although in *Gunther*, the Supreme Court expressly stated it was not ruling on the issue of comparable worth,⁵⁷ lower courts have struggled with that notion when presented with discrimination claims calling for a comparison of job duties which are not substantially similar. Different decisions espouse different standards.⁵⁸ Thus, the lower courts, employers, and employees need a uniform standard to establish a sex-based wage discrimination claim under Title VII, and to remedy situations where the "male" standard of the EPA is totally inadequate.⁵⁹

49. 452 U.S. 161 (1981).

50. *Id.* at 180.

51. The County implemented the full wage increase recommended for male employees but only 10% of a 30% increase recommended for female employees. 20 Fair Empl. Prac. Cas. (BNA) 788, 789 (Or. 1976).

52. 452 U.S. 161, 181 (1981).

53. *Id.* at 165.

54. 20 Fair Empl. Prac. Cas. (BNA) 788, 801 (Or. 1976).

55. 452 U.S. 161, 181 (1981).

56. *Id.* at 167 n.8.

57. *Id.* at 166.

58. *EEOC v. Hay Associates*, 545 F. Supp. 1064 (E.D. Pa. 1982); *Power v. Barry County, Mich.*, 539 F. Supp. 721 (W.D. Mich. 1982); *Odomes v. Nucare, Inc.*, 653 F.2d 246 (6th Cir. 1981).

59. See *supra* p. 167.

Judicial interpretation remains a possible source for a Title VII standard. Other possible sources include the Equal Employment Opportunity Commission (EEOC),⁶⁰ federal legislation, or state legislation. The EEOC, a federal agency, enforces both the EPA and Title VII.⁶¹ Part of its enforcement authority includes setting administrative guidelines.⁶² As an interpretation of nondiscrimination, EEOC guidelines could institute a standard of comparable pay for comparable work as the minimum requirement for Title VII compliance. The EEOC, however, is a political entity.⁶³ Its policies change with executive administrations. The current administration is unlikely to promote a standard of comparable pay for comparable work;⁶⁴ it has retreated from former attempts to address pay inequities.⁶⁵

New federal legislation could also provide a standard. Federal legislators, for the first time, intend to introduce a comparable pay bill this session.⁶⁶ The legislative route, however, is at best a long one. Equal pay bills were introduced in nineteen consecutive Congressional sessions before passage in 1963.⁶⁷

Despite the improbability of immediate federal legislation, the history of the rise of the concept of equal pay for equal work shows that innovative state legislation sometimes precedes and guides federal law

60. 42 U.S.C. § 2000e-4(a) (1976).

61. *Id.* §§ 2000e-4(a), 2000e-5.

62. *Id.* § 2000e-4(g)(3).

63. The EEOC is a five member board. The President appoints members with the advice and consent of the Senate. Not more than three members of the board may be members of the same political party. *Id.* § 2000e-4(a).

64. EEOC Chairman Clarence Thomas testified at a hearing on Sept. 30, 1982 held by three house subcommittees under the House Committee on Post Office and Civil Service. He said he found the area of comparable worth overwhelming and suggested that the EEOC would not act on the issue because the state of the law was too unclear. He also noted that comparable worth cases were likely to be costly class actions which would strain EEOC resources. *Comparable Worth Issue Needs Addressing in Government, Congresswomen, Unions Charge*, 982 Gov't Empl. Rel. Rep. (BNA) 7, 8 (Oct. 4, 1982). "Clarification is more likely to come inside a court than from an administrative agency during this administration." *BNA Comp. Worth Rep.*, *supra* note 9, at 51 (interview with Eleanor Norton, former chairperson of the EEOC).

65. See Statement of Assistant Attorney General William Reynolds before House Labor Subcommittee on Employment Opportunities, 184 Daily Lab. Rep. (BNA) F-1 (Sept. 23, 1981) (noting the Department of Justice will no longer support the use of mandatory quotas or statistical formulas to redress past job discrimination and will emphasize relief for individual victims as opposed to systemic class-oriented relief).

66. See statement by Sen. Edward Kennedy at hearings before three subcommittees of the House Committee on Post Office and Civil Service. *Kennedy Tells Panel Studying Pay Equity He Will Introduce Comparable Worth Bill*, 980 Gov't Empl. Rel. Rep. (BNA) 27 (Sept. 20, 1982).

67. Gitt & Gelb, *Beyond the Equal Pay Act: Expanding Wage Differential Protections Under Title VII*, 8 Loy. U. Chi. L. J. 723, 737 (1976-1977).

makers.⁶⁸ State legislators embraced the equal pay concept forty-four years before federal legislators passed the EPA.⁶⁹ Twenty-two states had statutes providing equal pay for equal work by 1963.⁷⁰ Many of these statutes contain the word "comparable," or phrases with similar connotation.⁷¹ State legislation like the new Minnesota statute⁷² may guide federal law to meaningful remedies for women suffering economic inequality.

II. Comparable Pay for Comparable Work

The concept of comparable pay for comparable work is similar to the concept of equal pay for equal work. Equal pay for equal work means the same remuneration for the same work performed. Fairness suggests employees receive the same pay if their job duties are substantially similar. A comparison of one job to another reveals the degree of similarity between jobs. Comparable pay⁷³ for comparable work means the same remuneration for the same value of work performed.⁷⁴ Fairness suggests employees receive the same pay if their job duties are of substantially similar value to the employer. A comparison of one job to another, by the employer, reveals the degree of similarity between jobs.⁷⁵ Thus, equal pay for equal work and comparable pay for comparable work both determine fairness by comparing job duties.⁷⁶

68. *Id.* (detailed summary of the history of the EPA).

69. 1919 Mont. Laws 147 § § 1, 2 (current version at Mont. Code Ann. § 39-3-104 (1982); Mich. Stats. Ann. 28.824 § 556 (1919) (current version at Mich. Comp. Laws Ann. § 750.556 (1968)).

70. See BNA Equal Pay Manual, *supra* note 30, at 39.

71. *Id.* at 40-51 (Alaska, Arizona, Arkansas, Hawaii, Massachusetts, Montana, Oregon, Pennsylvania).

72. 1982 Minn. Laws 634.

73. I use "comparable" pay rather than "equal" pay to reflect situations such as *Gunther* where actual pay may be a percentage of the pay rate of another job. Also, "comparable" rather than "equal" distinguishes the two concepts and recognizes that the pay, at least by legal definition, is determined by comparison of one job to another.

74. Similar definitions are often given to the phrase "comparable worth." See Women's Labor Project of the National Lawyers' Guild, *Bargaining for Equality: A Guide to Legal and Collective Bargaining Solutions for Workplace Problems that Particularly Affect Women* 139 (1981).

Although there are many definitions of comparable worth, the quintessential element common to all is that discrimination exists when workers of one sex in one job category are paid less than workers of the other sex in another job category and both categories are performing work that is not the same in content, but is of the 'comparable worth' to the employer in terms of value and necessity.

Power v. Barry County, Mich., 539 F. Supp. 721, 722 (W.D. Mich. 1982).

75. See *infra* pp. 171-72.

76. Pay for the social value of women's labor means the same remuneration for similar contributions performed to further the existence of society. Fairness suggests employees

The exact connection between value, work, and wages is unknown. How current wage structures developed is a question historical economists continue to debate.⁷⁷ Despite the unanswered questions and the complexity of the issue, employers have used job evaluation systems to measure, rank and compare jobs for at least one hundred years.⁷⁸ Management consultants originally conceived job evaluation systems as managerial techniques for arranging jobs in a hierarchy for purposes of creating pay incentives.⁷⁹ This methodology of comparing jobs has become embedded in our legal conceptualization of economic equality in both equal pay for equal work and comparable pay for comparable work statutes.

Most job evaluation systems do not attempt to explicitly define value or worth.⁸⁰ Rather, evaluators take for granted that jobs stand in a hierarchical relationship to one another with respect to the level of pay each merits.⁸¹ Employers' perceptions of job worth, however, are implicit in the factors they choose to compare and rank jobs. Generally, job evaluation systems classify, compare and rank jobs according to four categories of job content: skill,⁸² effort,⁸³ responsibility,⁸⁴ and working conditions.⁸⁵ Congress adopted these same criteria in the EPA⁸⁶ in response to industry's well-established commercial practice.⁸⁷ The Minnesota statute defines comparability in a similar manner:

receive the same pay if their job duties are of substantially similar value to society. A comparison of women's labor to men's labor reveals the degree of similarity of value between jobs.

77. See M. Dobb, *Theories of Value and Distribution Since Adam Smith* (1973); B. Csikos-Nagy, *Socialist Price Theory and Price Policy* (1975); T. Lee, *Income and Value Measurement: Theory and Practice* (1975).

78. D. Treiman, *Job Evaluation: An Analytic Review*. Interim Report to the EEOC 1 (1979) [hereinafter Treiman].

79. Equal Employment Advisory Council, *Comparable Worth: A Symposium on the Issues and Alternatives* 27 (Nov. 21, 1980) (testimony by Dr. Donald Schwab, professor, University of Wisconsin).

80. Treiman, *supra* note 78, at 31.

81. *Id.*

82. "Skill" is the complexity of the operation or task, the total knowledge and skills needed for acceptable performance. *Id.* at 21, 32.

83. "Effort" is dynamic and static. In some systems, it is the amount of original self-starting thinking required by the job for analyzing, evaluating, creating, reasoning and arriving at conclusions. *Id.*

84. "Responsibility" is the risk of causing loss or damage, and answerability for actions and their consequences. *Id.*

85. Generally, "working conditions" applies only where there is environmental hardship and risk of health or life of the worker; physical effort, disagreeableness of environment and hazards are factors. *Id.* But see *infra* p. 172.

86. See *supra* note 31.

87. *Corning Glass Works v. Brennan*, 417 U.S. 188, 199-202 (1974).

Comparability of the value of the work means the value of the work measured by the composite of the skill, effort, responsibility, and working conditions normally required in the performance of the work.⁸⁸

Thus, both equal pay for equal work and comparable pay for comparable work entail a process of comparing which scrutinizes the same four criteria of job content.⁸⁹

Both concepts also embody the same standard of comparison. Implicit in job evaluation systems is "a" standard which is "the" standard, *i.e.*, "his" standard found in the concept of equal pay for equal work. Interpretations of "skill" demonstrate this standard. Skill is more often measured in terms of experience than in terms of formal education.⁹⁰ Women's work often has no requirement of prior experience so it receives less points than men's work.⁹¹ Manual skill means ability to handle tools rather than manual dexterity.⁹² This definition downgrades fine assembly work, done largely by women. Defining interpersonal skill as negotiation rather than as conciliation or counseling has the same effect.⁹³ Each factor contains "his" standard. Manual effort,⁹⁴ for example, is usually measured by strength requirements rather than fatigue levels. Consequently, predominately male blue-collar jobs will almost invariably score higher on the effort factor than predominately female blue-collar jobs.⁹⁵ Responsibility means supervisory and budget control rather than organizing.⁹⁶ Women organize; men supervise.⁹⁷ Working conditions for low level office workers are not considered by evaluators. The difference between windowed and windowless offices, however, is taken into account for executive positions.⁹⁸ Most secretaries are women, most executives are men.⁹⁹ Thus, the definition of working conditions as well as the other criteria comprising job content do not include women's experience as women workers.

88. 1982 Minn. Laws 634 § 3.

89. Wage structures need not necessarily focus on job content. In Japan they are based on the jobholder's characteristics, *e.g.*, age and education. Marsh & Mannari, *Pay and Social Structure in a Japanese Firm*, 12 *Indus. Rel.*, Feb. 1973, at 16-32.

90. Treiman, *supra* note 78, at 10, 32.

91. *Id.* at 10.

92. *Id.* at 32.

93. *Id.*

94. Systems originally designed for evaluating managerial systems often lack specificity necessary to evaluate effort in manual positions. *Id.* at 23. See *supra* note 83.

95. Treiman, *supra* note 78, at 32.

96. *Id.*

97. *Id.* at 32-33.

98. *Id.* at 33.

99. See *supra* note 14 and note 20.

Comparable pay statutes implementing data from current job evaluation studies devalue women's work simply by their definition of what work is and what work is given value. The goal of comparable pay statutes is to value women's work.¹⁰⁰ To achieve this goal, the definitions evaluators and legislators use to describe, and thus to value work, must incorporate rather than exclude women's experience as women workers.

Job evaluation ultimately rests on someone's judgment. Someone decides which factors to use as measuring sticks. Someone writes job descriptions or interviews an employee for information about the work required in a position.¹⁰¹ Someone assigns a numerical value to each criterion of job content for each job. Someone then matches each job's point counts with wages and salaries.¹⁰² That someone is the employer or his agents: consultants hired to implement the job evaluation system¹⁰³ or supervisors trained by the consultants.¹⁰⁴ Exclusive employer control over the evaluation process impacts negatively on women in at least two

100. *E.g.*, *infra* pp. 177-78.

101. Treiman, *supra* note 78, at 39.

102. *Id.* at 8-29.

103. The state of Minnesota, for example, hired Hay Associates, an international management consultant which has done job evaluation studies of businesses and governments world wide. See *EEOC v. Hay Associates*, 545 F. Supp. 1064, 1068 (E.D. Pa. 1982). The Minnesota study was largely completed from 1978 to 1979. Funds for continuing evaluation of job classifications not yet evaluated are a regular budgetary item in the Department of Employee Relations. Interview with Catherine Warrick, Director of Affirmative Action, Department of Employee Relations, Member of the Task Force on Pay Equity, in St. Paul, Minnesota (Sept. 16, 1982). "Of the 1,673 job classes in the state government, 762 have been assigned points under the Hay job evaluation system . . . jobs which have not yet been evaluated are primarily those of unclassified managers and one person classes . . . only eight percent of those with ten or more incumbents have not yet been evaluated" Task Force Report, *supra* note 3, at 19. Even when consulting firms evaluate jobs it is the employer who decides which firm will conduct the evaluation. Also, until the Minnesota statute, it was the employer alone who determined how or whether to use data produced by job evaluations to change or set wages. Data from the study in Minnesota was released to a task force created to study the economic plight of state employees in 1981. Task Force Report, *supra* note 3.

104. Job evaluators train supervisors of the employee positions to collect data on the jobs' contents. Even interviews prove inadequate to educate the supervisor as to the job content of many, especially clerical positions. Task Force Report, *supra* note 3, at 11; Treiman, *supra* note 78, at 39. Part of the problem may be intimidation of employees in on-the-spot interviews which seem more like interrogations. Interview with Carol Flynn, Assistant Director of the American Federation of State, County, and Municipal Employees (AFSCME) Council 6, Member of the Task Force on Pay Equity, in St. Paul, Minnesota (Sept. 16, 1982). Also, women tend to underestimate their jobs when asked to evaluate or describe them. *Equal Pay for Women Will Be Gained in Public Sector Bargaining, Speakers Say*, 963 Gov't Emp. Rel. Rep. (BNA) 21 (May 17, 1982) (statement by Debby King, University of Connecticut Labor Education Center representative).

ways. First, women's work is pigeonholed rather than evaluated thus maintaining the status quo.¹⁰⁵ Second, positions held by women are systematically valued lower than positions held by men. Evaluators value women less than men because women, as women, are valued less than men.¹⁰⁶

Job evaluation systems pigeonhole, rather than evaluate, women's work. Typically, employers use job evaluation systems to rationalize existing wage structures.¹⁰⁷ Evaluators use guide charts in assigning numerical values for job duties.¹⁰⁸ These charts sometimes assign a numerical value to certain jobs as an example to guide the person conducting the evaluation.¹⁰⁹ Thus, the evaluator may "know" before conducting the evaluation that Clerk I positions correspond to XX points. Women's jobs are also pigeonholed rather than evaluated because of a lack of specificity in lower level job descriptions.¹¹⁰ Less specific descriptions lead to lower point counts because it appears that there is little content in the undefined or ill-defined job. To overcome this invisibility, women must define their work with specificity and inform employers and evaluators about that work.

Numerous studies provide overwhelming evidence that female workers are less highly regarded than male workers with identical experience.¹¹¹ Female work products are also rated lower than male work products even when the work product is the same.¹¹² Job evaluation systems which do not recognize this phenomena produce male advantage and female disadvantage solely on the basis of gender. Employer defined and implemented job evaluation systems have failed to remedy this inherent bias. Women's¹¹³ efforts to define their work and adapt evaluation systems can begin to change how women are viewed as women workers.

Eighteen states¹¹⁴ have enacted laws which may be categorized as comparable pay statutes. The language in these statutes varies, as does

105. *See infra*.

106. *See infra*.

107. Treiman, *supra* note 78, at 4.

108. *Id.* at 21-23.

109. Interview with Bonnie Watkins, Program Associate, Minneapolis Council on the Economic Status of Women, in St. Paul, Minnesota (Aug. 31, 1982).

110. Treiman, *supra* note 78, at 39.

111. *Id.* at 43-45.

112. *EEOC Hearings*, *supra* note 13, at 147, 152 (testimony by Ann Viviano, instructor of Psychology, Pace University).

113. *See supra* note 29.

114. Alaska Stat. § 18.80.220(5) (1981); Ark. Stat. Ann. § 81-624 (1967); Cal. Gov't Code § 19827.2 (West Supp. 1981); Ga. Code § 54-1003 (Supp. 1982); Idaho Code § 44-1702 (1977); Ky. Rev. Stat. § 337.423 (1983); Me. Rev. Stat. Ann. tit. 26, § 628 (1974); Md. Ann. Code art. 100 § 55A (1979); Mass. Ann. Laws ch. 149, § 105A (Supp. 1982);

the terminology describing comparable worth.¹¹⁵ Perhaps most legislators intended to insure equal pay for equal work.¹¹⁶ Most of these statutes, however, function as more or less hollow policy statements rather than as rigorously applied standards for regulating wages.¹¹⁷ They are also inadequate because they lack mechanisms for implementing comparable pay adjustments.¹¹⁸

New statutes in Idaho and Minnesota attempt to correct deficiencies in implementation of comparable pay adjustments for public sector employees.¹¹⁹ The Idaho statute provides that the Idaho Personnel Commission determine relative compensation rates for different job classifications through a job evaluation system.¹²⁰ Implementation remains totally under the state employer's control. The Minnesota statute establishes a procedure for identifying job classifications in need of adjustment,¹²¹ with control shifting to the collective bargaining process¹²² after identification and appropriation of funds by the legislature.¹²³ Minnesota employees, through their collective bargaining agent, now have a voice in the process which determines who actually receives comparable pay adjustments.¹²⁴ This unique transfer of power poses new opportunities and new pitfalls for ameliorating the economic status of women through legislation.

Theoretically, the collective bargaining process enters into the

1982 Minn. Laws 634; Mont. Code Ann. § 39-3-104 (1981); Neb. Rev. Stat. § 48-1219 (1978); N.D. Cent. Code § 34-06.1-03 (1975); Okla. Stat. tit. 40 § 198.1b (Supp. 1982); Or. Rev. Stat. § 652.220 (1982); S.D. Comp. Laws Ann. § 60-12-15 (1978); Tenn. Code Ann. § 50-321 (1977); W. Va. Code § 21-5B-3 (1981).

115. *BNA Comp. Worth Rep.*, *supra* note 9; 3 Empl. Prac. Guide (CCH) ¶ 20,080 (1980).

116. Interview with Bonnie Watkins, *supra* note 109.

117. These statutes had the reputation of being merely pious statements of the legislature or just good advice. *BNA Equal Pay Manual*, *supra* note 30, at 32.

118. *BNA Comp. Worth Rep.*, *supra* note 9, at 115-19.

119. Idaho Code § 67-5309B (Supp. 1982); 1982 Minn. Laws 634.

120. Idaho Code § 67-5309B(a) (Supp. 1982).

121. 1982 Minn. Laws 634 § 6-8.

122. Job classifications are grouped together along occupational lines into bargaining units. Minn. Stat. § 179.71 subd. 3 (Supp. 1981). Employees in these bargaining units elect a union to represent them in contract negotiations and grievance procedures. *Id.* § 179.61-179.76. As of March 1982, 29,000 employees of the State of Minnesota had formed 16 separate bargaining units and elected union representatives. Task Force Report, *supra* note 3, at 14. Managers, confidential employees, certain physicians, constitutional officers, and employees involved in mediation and arbitration for state employees are excluded from all bargaining units. Minn. Stat. § 179.74 subd. 4 (Supp. 1982).

123. 1982 Minn. Laws 634 § 6-8.

124. This assumes employees' voices get through the union hierarchy. Even in unions with predominately female members, few if any women are found in top positions. Wertheimer, *supra* note 13, at 229.

distribution of funds only after identification of "underpaid"¹²⁵ job classifications and an appropriation by the Minnesota legislature.¹²⁶ The statute carefully delineates the steps preceding collective bargaining action. The Commissioner of the Department of Employee Relations submits a report to the legislative commission on employee relations.¹²⁷ This report contains a list of all job classifications in which a compensation inequity exists, and an estimate of the appropriation necessary for providing comparability adjustments for all classes on the list.¹²⁸ Findings from data produced by a job evaluation study¹²⁹ form the basis for this information.¹³⁰ The commission can approve, disapprove, or modify either the list or the proposed appropriation. Its recommendation goes before the full legislature for approval, rejection, or modification by March 1 of every odd-numbered year.¹³¹

Funds earmarked by the legislature for comparable pay adjustments are generated from an open appropriation for wage increases and employee compensation benefits such as cost of living increases.¹³² This fund does not include regular salaries and wages which are appropriated for separate department budgets.¹³³ Comparable pay adjustments are not paid directly to those employees working in underpaid job classifications. Rather, each bargaining unit receives

that proportion of the total proposed appropriation which equals the number of positions in the unit . . . approved by the commission¹³⁴ for comparability adjustments divided by the total number of positions on the list approved by the commission for comparability adjustments.¹³⁵

Thus, if the legislature allocates five million dollars for comparable pay adjustments and one collective bargaining unit has ten percent of the total

125. "Underpaid" means paid less than other job classifications which have the same or fewer Hay points. See *supra* pp. 171, 173.

126. 1982 Minn. Laws 634 § 8.

127. The governor appoints this commissioner. Minn. Stat. § 42A.03 subd. 2 (Supp. 1981). This legislative commission is a twelve member joint committee of the state legislature that gives interim approval of labor agreements after adjournment of the full legislature, monitors the state's civil service system, and studies statutes regulating the state's employment practices. Minn. Stat. § 3.855 (Supp. 1982).

128. 1982 Minn. Laws 634 § 6.

129. See *supra* note 103.

130. Interview with Catherine Warrick, *supra* note 103; Interview with Bonnie Watkins, *supra* note 109.

131. 1982 Minn. Laws 634 § 8.

132. See 1979 Minn. Laws 332 art. 1 § 115; 1981 Minn. Laws 356 §§ 61-62.

133. Interview with Carol Flynn, *supra* note 104.

134. This passage is inconsistent as it does not mention possible modifications by the full legislature as allowed by the preceding passage in the statute.

135. 1982 Minn. Laws 634 § 6.

number of people in need of pay adjustments, it will receive \$500,000 to distribute to employees in any appropriate classification. Assuming the legislature appropriates only a portion of the funds needed to establish equity in all underpaid classifications,¹³⁶ "distribution of any appropriated funds within each bargaining unit . . . shall be determined by collective bargaining agreements"¹³⁷ Within collective bargaining units, negotiations between the certified union representative and the employer determine which of the appropriate job classifications receives what portion of the unit's comparable pay funds. In these negotiations the Commissioner of the Department of Employee Relations acts as the employer on behalf of the state.¹³⁸

Funds appropriated for comparable pay adjustments can be divided among appropriate job classifications within each collective bargaining unit in different ways. Due to the special objectives of labor and management, either may bargain for the bulk of the funds for the "most" underpaid job class, *i.e.*, the job class within the bargaining unit which the job evaluation study showed to have the lowest salary when compared with other jobs with the same or lower point counts. Other options include across-the-board increases for all employees in targeted positions, pay adjustments for job classes in which incumbents have morale problems, or increases in job classes with the lowest annual salaries of any targeted jobs.¹³⁹

The legislative objective of the statute is to increase the wages of women in sex-segregated, low-paying, and traditionally undervalued positions. Previous legislative action,¹⁴⁰ testimony during legislative committee hearings,¹⁴¹ and the statute's statement of purpose¹⁴² articulate

136. See *infra* pp. 181-82. Pay equity adjustments for the 1983-85 biennium are estimated at \$20 to \$40 million, two percent to four percent of the projected state budget. Task Force Report, *supra* note 3, at 24.

137. 1982 Minn. Laws 634 § 6.

138. Minn. Stat. Ann. § 43A.06 subd. (3) (West supp. 1982).

139. Interview with Catherine Warrick, *supra* note 103.

140. The Minnesota legislature established an advisory council on the economic status of women in 1976. It became a permanent agency in 1981. Ten legislative representatives, and eight members of the public are appointed by the governor for two year terms.

The council . . . stud[ies] all matters relating to the economic status of women in Minnesota, including economic security of homemakers and women in the labor force, opportunities for educational and vocational training, employment opportunities, the contributions of women to the economy, their access to benefits and services provided to citizens of this state, and laws and business practices constituting barriers to the full participation of women in the economy.

Minn. Stat. Ann. § 3.9222 subd. 3 (West Supp. 1982).

141. *Hearings on H.B. 2005 before the House Committee on Governmental Operations*, 72d Sess., Feb. 18, 1982 (statement by Nina Rothchild, former executive secretary of the Minnesota Council on the Economic Status of Women, current Commissioner of Employee

this objective. Placing part of the implementation process on the collective bargaining table adds other objectives to the statute. Negotiators from the Department of Employee Relations (hereinafter "management"), and unions representing employees in bargaining units,¹⁴³ have their own objectives to pursue and problems to avoid in connection with the comparable pay adjustments.

Management hopes that instituting comparable pay for comparable work adjustments will correct the previously unsuccessful attempts during the collective bargaining process to produce pay equity for everyone employed in the executive branch of state government.¹⁴⁴ "When the rewards system matches what people do, turnover goes down, morale goes up and there are less problems with discrimination claims. Fair treatment increases production."¹⁴⁵ Thus, management's objective is increased production by means of an environment in which employees perceive that the pay they receive is fair.

Compression of job hierarchies is an additional management concern connected with comparable pay adjustments.¹⁴⁶ Compression occurs when steps or levels in a career advancement plan are lost.¹⁴⁷ If the Clerk I classification receives comparable pay adjustments but the Clerk II position does not, the difference in responsibilities between the two positions will remain while the difference in salary will become negligible. Employees in Clerk I positions will have little incentive to move up the career ladder. Such destruction of the salary ranking also undermines the managerial objective of promoting employees' perceptions of fair treatment.

Another management concern is union use of whipsaw tactics to gain wage increases.¹⁴⁸ In response to the possibility of comparable pay adjustments for female units, male-dominated bargaining units are sure to fight hard for salary increases. The whipsaw is one tactic they can use to attempt to gain those increases.¹⁴⁹ The whipsaw effect occurs after one bargaining unit has been granted a benefit. Other units hold out for higher

Relations and J. Geisher, former chief negotiator for the State of Minnesota.)

142. See text accompanying notes 6-8 *supra*.

143. See Task Force Report, *supra* note 3, at 15.

144. In 1973 the state civil service system became a professional management system. Changes included a schedule of consistent and systematic performance evaluations and progressive discipline. Interview with Catherine Warrick, *supra* note 103.

145. *Id.*

146. Interview with Catherine Warrick, *supra* note 103.

147. *Id.*

148. "Whipsaw" is a traditional labor term for collusive action by two unions against a common employer or an employer group. See International Ass'n of Machinists and Aerospace Workers v. National Ry. Labor Conference, 310 F. Supp. 905, 910 n. 5 (D.C. 1970); NLRB v. Truck Drivers Union, 353 U.S. 87, 90 n. 7 (1957).

149. *Id.*

or at least similar benefits because the former agreement provides a sense that everyone should receive the same. The possibility of a strike increases and the employer faces unpleasant alternatives. For example, if a female unit receives a comparable pay increase, a male unit may negotiate for some compensation to balance the benefit going to women. Moreover, if one male unit achieves a benefit to compensate them because female units are receiving comparable pay adjustments, other male units may hold out for the same benefits. This scenario would simply perpetuate women's economic inequality and thwart the purpose of comparable pay adjustment: paying women for their contribution to society.

Union objectives in implementing the Minnesota statute include increased wages, more cohesive action in certain bargaining units, and higher union membership. Any implementation of comparable pay adjustments accomplishes the traditional union goal of raising wages. Union leaders involved in passage of the statute also hope that the issue of comparable pay can create a focal point for cohesive action at the bargaining table for units that have lacked unity in previous negotiations.¹⁵⁰ Additionally, comparable pay is a rallying topic for union organizers attempting to increase union membership.¹⁵¹

Unions also confront problems created by the statute. Unions representing both female and male bargaining units, for example, face traditional problems of raiding¹⁵² and fulfilling the duty of fair representation.¹⁵³ One union reported raiding by another union immediately after enactment of the statute.¹⁵⁴ The raiding union claimed it would protect the interests of men better than the union which had worked for passage of the bill.¹⁵⁵ State employed males may also question whether their union is fulfilling its obligation to represent all employees equally¹⁵⁶ by negotiating for comparable pay adjustments which benefit women. Traditionally, however, unions have ignored women workers' interests when they conflicted with men's interests.¹⁵⁷ Thus, comparable pay may be seen as

150. Interview with Carol Flynn, *supra* note 104.

151. *Id.*

152. "Raiding" is an attempt by one union to organize and represent employees already represented by a different union. See *United Textile Workers v. Textile Workers Union*, 258 F.2d 743, 745 (7th Cir. 1958).

153. Part of a union's duty of fair representation is the requirement that bargaining positions be based on good faith consideration of the interests of all the employees represented by the union. See M. Lieberman, *Public Sector Bargaining: A Policy Reappraisal* 110-11 (1980). Cf. *Truck Drivers Local Union v. NLRB*, 379 F.2d 137 (D.C. Cir. 1967) (union action benefiting as many employees as possible is permissible).

154. Interview with Carol Flynn, *supra* note 104.

155. *Id.*

156. See *supra* note 153.

157. E.g. B. Wertheimer, *We Were There: The Story of Working Women* 199-208 (1977)

compensation for past discrimination and an attempt to best represent the interests of all by working for equality between the sexes.

At the bargaining table, each party will have to prioritize comparable pay objectives and concerns with their other interests. Similarly, a variety of concerns will influence management and labor actions during discussions in the legislature preceding appropriations. Legislators control all financial allocations from the state treasury.¹⁵⁸ Therefore, including collective bargaining at any stage of the implementation process of comparable pay adjustments for public employees will inevitably trigger lobbying.

Under the statute, comparable pay adjustments must come from the same "pot of gold" as other incidental salary increases.¹⁵⁹ If the legislature appropriates no funds for comparable pay adjustments, all employees can bargain for their share of the whole pot rather than just their share of the pot remaining after removal of the comparable pay appropriations. Looking at the practical effect of comparable pay, men in overpaid jobs and unions representing bargaining units composed of overpaid job classifications may lobby against a comparable pay appropriation to protect their own interests.

This "same source" problem will also affect the lobbying efforts of the Commissioner of Employee Relations. Management officials lobbied for the inclusion of balanced, non-sex-segregated,¹⁶⁰ job classifications in the policy statement of the statute because pay inequities also exist in those classifications.¹⁶¹ Employees in balanced job classifications may see advocacy for comparable pay adjustments as a lack of consideration of

(discussion of unequal treatment of women workers by men controlling the American Federation of Labor 1886-1910).

"Restrictions on discrimination have not contributed to any substantial improvement in the relationship between women and unions. From 1962 to 1976 female union membership increased from 19 to 22 percent. However, twenty-five unions account for half this membership, and only 7 percent of leadership positions are held by women, hundreds of whom annually file charges of sex exclusion, discrimination or prejudicial classification against unions."

J. Kenneally, *Women and American Trade Unions* 190 (1978).

158. Minn. Const. art. IX, § 9.

159. 1982 Minn. Laws 634 § 8. Cost of living raises and other salary adjustments are paid out of the treasury through the supplemental appropriation. A minimum pay equity adjustment, one which only raises all targeted positions to parity with the lowest salary for a male job with the same Hay point count, would be 13% of the original 1981-1983 supplemental salary appropriation. 1981 Minn. Laws 356 § 62.

160. "'Balanced class' means any class in which no more than 80 percent of the incumbents are male and no more than 70 percent of the incumbents are female." 1982 Minn. Laws 634 § 2. See also, *supra* notes 6-7.

161. The need for prorated fringe benefits for part-time employees is one example of other pay equity adjustments. Interview with Catherine Warrick, *supra* note 103.

pay inequities applicable to them. This perception would taint management's image of fair treatment.

A larger than normal allocation of state funds to the supplementary salary appropriation with the increase slated for comparable pay adjustments would resolve many of the concerns of management, unions and overpaid employees. Unfortunately, other forces are likely to prevent an increased allocation. Private sector businessmen oppose comparable pay for comparable work as governmental interference with market forces.¹⁶² Fear of possible spillover into the private sector¹⁶³ through comparable pay strikes or legislation directed at the private sector may motivate private employers to oppose and lobby against comparable pay adjustments.¹⁶⁴ Moreover, the state's economic situation reflects the national recession.¹⁶⁵ For legislators in this environment, wage increases to achieve comparable pay for comparable work are too easily seen as a salary increase to be denied rather than back pay for long overdue debts.

Securing and retaining¹⁶⁶ an adequate appropriation for comparable pay adjustments is doubtful. Washington state exemplifies this problem. In 1974 the state pioneered the use of job evaluations to identify job segregation and wage discrimination.¹⁶⁷ The Washington State study showed "that overall, women received about 20% (approximately \$175 per month) lower pay than men for comparable work"¹⁶⁸ The

162. See *National Public Employer Labor Relations Association Testimony on Comparable Worth Before Joint U.S. House Subcommittee on Pay Equity*, 992 Gov't Empl. Rel. Rep. (BNA) 47 (Dec. 13, 1982); Equal Employment Advisory Council, *Comparable Worth: A Symposium on the Issues and Alternatives* (1981). (The EEAC is an association organized in 1976 to promote the common interest of employers and the public on issues of discrimination and equal pay.).

163. At least one large private sector employer in Minnesota attempted implementation of comparable pay adjustments in light of the new enactment. Interview with Bonnie Watkins, *supra* note 109.

164. E.g., "Private industry groups put heavy pressure on the mayor of San Jose not to give in to AFSCME Local 101 during a nine-day strike by the . . . [public employee union in 1981]." *Equal Pay for Women Will Be Gained In Public Sector Bargaining Speakers Say*, 963 Gov't Empl. Rel. Rep. (BNA) 20 (May 17, 1982). See also D. Tice, *Compared to What?*, Corporate Report-Minnesota, Feb. 1983, at 6, 16.

165. See Minnesota Dep't of Finance, *Annual Financial Report* (June 30, 1982).

166. What appears in the statute as a linear chronology will actually happen concurrently. Appropriations decisions and contract negotiations occur from January to June of every odd-numbered year; The supplemental benefits appropriation has occurred at the very end of the last two legislative sessions. Contract agreements prior to this appropriation will be contingent upon such an appropriation. See 1979 Minn. Laws 332 art. 1 § 115; 1981 Minn. Laws 356 § § 61-62.

167. Task Force Report, *supra* note 3, at 6.

168. A Brief Summary of Comparable Worth, Report by the Washington Federation of State Employees AFL-CIO (Sept. 16, 1981) (emphasis deleted).

Washington state legislature, however, has yet to allocate funds to correct the continuing inequity.¹⁶⁹ Similarly, the Minnesota statute does not require an appropriation.¹⁷⁰ Nevertheless, the combined commitments of labor leaders, managers, and legislators who worked for passage of the statute¹⁷¹ promise some kind of appropriation. If these promises hold out, the question becomes how much of an appropriation can be expected in light of each group's particular constraints.

Enactment of the Minnesota statute was both a gain and a loss for female employees in collective bargaining units in the state executive branch. The statute now defines and in essence limits allocations for comparable pay adjustments. The legislative appropriation publicly prioritizes comparable pay adjustments with other demands on state funds. Gaining comparable pay adjustments at the bargaining table above those in the appropriation is impossible. Thus, the legislative allocation constrains women seeking comparable pay adjustments no matter how strong their bargaining strength or how small the appropriation.

Indeed, this legislation relegates women to the status of an interest group competing for scarce resources. Women control few levers of power with which to compete as an interest group.¹⁷² This is one reason comparable pay statutes are needed. Without such levers, however, women may not obtain what the Minnesota statute envisions, for a small appropriation, split between many employees, will not change the status quo of wage disparities nor aid women in financial straits.

169. *AFSCME Memorandum in Support of Comparable Worth Charge Against Washington State*, 932 Gov't Empl. Rel. Rep. (BNA) 36 (Oct. 12, 1981). Questions raised about comparability of job content as to lower level positions did not deter implementation of adjustments recommended for upper level management jobs, including the Governor's positions, in Washington state. The same consultant used the same methodology to study and compare all positions evaluated. G. Taber & H. Remick, *Beyond Equal Pay for Equal Work: Comparable Worth in the State of Washington* 12 (May 1978) (paper presented at the Conference on Equal Pay and Equal Opportunity Policy for Women in Europe, Canada, and the United States, Wellesley College, Wellesley, Massachusetts).

170. 1982 Minn. Laws 634 § 6.

171. Members of the Task Force on Pay Inequity included legislators, labor, public, and management leaders. The group focused on options for changing inequalities as established by the job evaluation study in a non-adversarial forum conducive to concession and resolution. With data from the study as a base, the group agreed on a plan for implementing comparable pay. Interview with Bonnie Watkins, *supra* note 109. Task Force Report, *supra* note 3.

172. Witness the difficulty women have had obtaining a federal equal rights amendment to the Constitution.

III. Pay for the Social Value of Women's Labor

Comparable pay for comparable work statutes recognize only the social value of men's labor. Men define work. Men's experience as male workers defines what they see and value as work. Both the comparison procedure of the Equal Pay Act and the descriptions of work in job evaluation systems perpetuate male work as the standard to which men compare everyone else. Seen from this perspective, the wage disparity between women's and men's wages is not surprising.

Women work. Women contribute to the ongoing existence of society. Pay for the social value of women's labor means remuneration for women's contribution to society. It encompasses and embodies women's experience as women workers. To achieve that goal women first must recognize that male-defined society does not currently remunerate women's contributions. Next, women must articulate and specify how women work and what work women do. Women must then fight for remunerations for these contributions. Changing job evaluation systems on which comparable pay statutes are based, and adopting such statutes with more women-defined and controlled implementation processes, can help women achieve pay for the social value of women's labor.

Comparable pay statutes are one method to reach that goal. Current comparable pay statutes should provide some economic aid to at most a few women. A transfer of economic resources to women is needed to change the current economic imbalance between the sexes. To receive meaningful appropriations for comparable pay adjustments women must educate legislators about the realities of women's situation. Moreover, all involved in the statute's implementation process must focus on the goal of pay for the social value of women's labor to overcome barriers embedded in that process. Unlike the discretionary funding allowed by current comparable pay statutes, future enactments should require legislative appropriations. Such requirements will more effectively assist changing the economic inequality between the sexes.

Future enactments must also compensate more women. The Minnesota statute covers only a small number of women.¹⁷³ Coverage should be extended to all female employees in the public sector. Other states' equal pay statutes should also be adapted to reach the economic situation of more women. Changing existing equal pay statutes by adding mechanisms to implement comparable pay for comparable work would

173. The statute does not even cover all women employed in the executive branch. Employees at the state university system are exempted. 1982 Minn. Laws 634 § 9.

create remedies for women now excluded from redress because of the restrictive comparison procedure in such statutes.¹⁷⁴ Legislation must also address the economic situation of those women who work without remuneration¹⁷⁵ to change the state of economic inequality.

Current comparable pay statutes are valuable not only because they transfer economic resources to some women, but also because they provide impetus for change. They focus public attention on women's economic inequality. Hopefully, this will prompt legislative action that provides remedies to affect large numbers of women. Further, current statutes provide a starting point for action. Women can add implementation mechanisms to existing statutes—a less onerous task than starting from scratch. Likewise, women can change job evaluation systems. Such efforts will be instrumental for achieving recognition and remuneration of women's contribution to society.

The concept of comparable pay for comparable work uses job evaluation systems to implement economic equality.¹⁷⁶ Job evaluation itself is not the cause of women's lower status in the economic hierarchy. Rather, the exclusive maleness of job evaluation systems and their use produces devaluation of women's work. Thus far, neither equal pay for equal work nor comparable pay for comparable work statutes have questioned either who makes the evaluation or what is considered valuable when men compare job duties and assign wages. Women must reshape job evaluation systems to overcome the individualistic perspective of discrimination and "equality" which reinforces rather than changes inequality.

Women must define what work is and what work is valuable in order to eliminate male advantage entrenched in most job evaluation systems. Women can begin by recognizing and defining the form and substance of women's work. Women then must add, to what men now reward as work, new criteria and definitions which account for women's contributions.¹⁷⁷ More input from women employees during the process of gathering information about a job is crucial to obtaining remuneration which reflects women's contributions to society.

174. Adapted mechanisms are also needed in new comparable pay statutes. e.g., Cal. Gov't Code § 19827.2 (West Supp. 1981).

175. See *supra* note 23.

176. Some courts continue to miss the significance of a prior employer determination of value of job duties when discussing the courts' hesitation to make such determinations. See *Gerlach v. Michigan Bell Tel. Co.*, 501 F. Supp. 1300, 1321 (E.D. Mich. 1980); *Power v. Barry County, Mich.*, 539 F. Supp. 721 (W.D. Mich. 1982).

177. More specific examples of entrenched male advantage in criteria definitions are given with suggestions for neutralization in Remick, *Strategies for Creating Sound, Bias-Free Job Evaluation Plans* in *Job Evaluation and EEO: The Emerging Issue* 85-112 (1979).

IV. Conclusion

The operation of the Minnesota statute exposes three major obstacles to its objective of ameliorating the economic status of women. The statute permits a totally inadequate appropriation, applies to only a few women, and reinforces and continues male advantage entrenched in determining the value of work and thus the compensation deserved. This statute and others like it do not question the process of comparing women to men as the means to establish or recognize fairness and equality. Pay for the social value of women's labor envisions remuneration based on recognition of women's contribution to society. Perhaps realization of this concept will be delayed until society has more adequate standards of value, worth, and work. Nevertheless, one mechanism for realizing economic equality is to question and change the standard and criteria which determine value in the concept of comparable pay for comparable work.

Men have defined equality, value, and work in ways which produce and reproduce economic inequality between the sexes. Women whose worth has not been recognized and remunerated must define equality, value, and work from women's perspective to transform economic inequality into economic equality.

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