

PAY EQUITY, DISCRIMINATION AND UNDERVALUATION

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By

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ABSTRACT

Comparable worth legislation is designed to remedy what its proponents perceive to be the systematic and entrenched under-valuation of the labour of those who work in occupations in which women predominate. Comparable worth legislation would mandate equal pay for certain jobs within an establishment judged by some standard as of equivalent value, absent certain sanctioned exceptions. After outlining the major points at issue in the comparable worth debate, (this thesis looks at the argument that current practice in labour markets engenders or perpetuates a discriminatory condition harmful to certain groups.) It then argues that the conceptual heart of the pay equity advocacy is an attack on the market as a pricing vehicle in the name of a theory of distributive justice heavily reliant on the concept of desert.

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NOTE ON NOMENCLATURE

In the United States, "comparable worth" is the usual shorthand referent for the subject under discussion. In Canada, the workmanlike - if somewhat cumbersome - "equal pay for work of equal value" has recently been replaced by the sobriquet "pay equity". All three phrases are used interchangeably throughout this thesis.

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GENERAL INTRODUCTION

Pay equity laws would allow those working in certain occupational categories to obtain pay increases on the basis of comparisons with jobs which are different but judged equivalent along various measurable dimensions. A claimant successful in proving a job equivalent to another whose pay rate is higher, could take demands for adjustment to an agency or board empowered to force employers to equalize over time the "matching" jobs with matching pay. The playing field in which such claims could range would be delimited by the division of the economy into "establishments" defined along functional, geographical or corporate lines.

The thesis of this paper is that pay equity is a public policy proposal which rests on two conceptually separable claims - claims which are, in fact, also normatively separable - and that both these claims are, for different reasons, indefensible as presently made.

The two separable claims are

- 1) a claim about discrimination based on a judgement about the history and present status of women in the workplace, and
- 2) a claim that market-driven economies do not, in a large number of instances, reward labour as it deserves to be rewarded, that is that they undervalue the labour of significant groups.

The accusation that working women have endured a historical pattern and practice of maltreatment amounting to discrimination explains, if validly defended, the clustering of women in low-paying sectors of an economy. It

is subject to various empirical tests, and ultimately reflects a contestible but perfectly respectable (possibly provable) judgement on the meaning of the pattern of interaction between work and women. An assessment of this claim requires several steps - 1) a definition of discrimination, 2) an elaboration of how the sort of "mischief" or "harm" outlined as affecting certain groups qualifies as discrimination and 3) a study of whether the solution proposed in light of the harm diagnosed is the best adequate alternative. Particularly in need of an answer in this regard is the question of whether the solution proposed is in itself inoffensive from the standpoint of equality rights or justifiable as an override of equality of right protections.

Part I of this thesis looks at the claim about gender discrimination as a set of propositions with putative explanatory validity concerning actual practice, institutional culture and socio-economic patterns.

It will be argued that accusations of discrimination must address several major questions, three of which will be discussed in some detail.

1) Does the charge of discrimination follow from what is known about income determinants and the male/female wage gap?

2) Does the charge of discrimination follow from what is known about the actual distribution of women in job hierarchies and the causes of these admittedly asymmetric patterns of distribution?

3) Is the pay equity solution - complete with a monitoring and enforcement mandate and the power to penalize employers financially - an appropriate response to the nature of the problem, given the answers to 1 and 2 above. Appropriateness in this context requires special reference to the questions of legal adequacy.

Part II will abandon the struggle with what one commentator has called the "ambiguities of income and employment statistics" for discussion of more abstract concerns. It will suggest that charges of undervaluation are not even comprehensible as descriptive claims about pricing practices in market-driven economies.

The charge of undervaluation is examined and found inconsistent with the Hobbesian basis of market value (a defined term.) It is further suggested that the connection between factor equivalence and value can be tied to a pattern of criticism of market-driven economies which would apply the strictures of rationalism to market price outcomes - a pattern with which bureaucratic predilections of modern governments are only too sympathetic. The rationalism which is being referred to here has nothing to do with the fact that institutions rationalize pay practices for purposes of efficiency and the pursuits of goals along broadly Weberian lines. The reference is to a desire to rationally justify the entire system of practices and institutions which constitute a market-driven economy in the area of pricing. The phrase "market-driven economy" in this thesis is meant to signify that whole array of institutions and practices which both facilitates the demand-driven operation of the price mechanism and fine-tunes this operation as dictated by social and human considerations.

It is suggested in the final chapter that a desert-based standard is implied by the pay equity preoccupation with compensable factors. It is argued that such a standard is, in fact, difficult to confine within liberal constraints - even in an age when theories of distributive justice termed "liberal" run the gamut from libertarian to radically redistributive.

Despite difficulties encountered in modeling the determinants of income differentials, assessing the impact of the female labour force influx and weighing the role of rational choice and sex-disparate life plans in gender distribution in job hierarchies, pay equity might still be warranted if certain jobs are devalued when women do them. If its proponents were right about sexist undervaluation, the case for what Thomas Mahoney calls "the politization of employment compensation" might still stand.

However, wage gaps and asymmetrical patterns of distribution by gender do not prove undervaluation. In fact, the claim about undervaluation may - in a market context - be so fraught with conceptual difficulties, unexplored presuppositions and far-reaching implications, as to defy proof or disproof. Women do face a nexus of circumstances which inhibit their ability to command premium wage rates as a group. Two of these conditions - a positioning problem and a problem lodged in the ineffective utilization of the potential power of combination - are discussed in Part II. It is ultimately suggested that the slighting of traditional women's tasks by either employers or society as a whole ranks much lower on an explanatory continuum than those advocating equal pay for work of equal value would have it.

The thesis as a whole presupposes that public policy which sanctions and supports compensatory interference with the market pricing of labour on an equity basis can be justified under certain conditions, or at least can be justified in a manner consistent with the political culture of what Mark

Gold has called post-liberal plural states.*

To make this point clear, the normative basis which underlies this critique, is outlined at the outset. These three propositions are not defended herein. The only thing that need be said about them here is that they can be defended from within the liberal tradition broadly construed, whereas it is a fundamental contention of the argument made in Part II of this paper that an important justificatory underpinning of comparable worth has ultimately illiberal implications. The following normative principles also serve to locate the pre-suppositions of this assessment as residing neither in collectivist nor in extreme libertarian thought.

1) Inasmuch as pay scales emerge from voluntary bargains uncorrupted by force or fraud, they may be held to be morally innocent, if not morally commendable. A market viewed as an environment for facilitating bargain-striking is ethically unobjectionable under certain conditions.

2) All human beings have an equal right to whatever level of remuneration their bargaining power can command. This right is an entitlement which implies nothing about desert or merit.

3) This entitlement may be overridden in cases where a) force or fraud corrupts procedures, b) other entitlements conflict or c) on the basis of need defined in terms of the universal right to a subsistence minimum but not in terms of a right to equal shares or a right to the preconditions for self-actualization or the freedom to pursue self-chosen aims or some such maximal standard. A preponderant weight of evidence must support such an override.

*Post-liberal plural states are defined by Gold as "... marked by the blurring of the public/private distinction, the recognition of a wider role for government and the breakdown in fact of a strong or single conception of the rule of law." "Equality Rights", Supreme Court Law Review vol. 4:131, p. 156.

Postulate 1 narrows the range of discourse within which the analysis will operate. It says simply that market-driven economies are capable under certain conditions of producing morally acceptable outcomes. The wide range of theory and ideology which denies that a market-driven economy, however adjusted, is so capable is left out of account in these considerations.

Postulate 2 outlines a stance on rights as entitlements in a Lockean sense - asserting equality between individuals whose property in their labour power may be acquired and transferred through consent and contract.

Postulate 3 sets an opposing limit. Market-driven economies and the pay rates they produce have no absolute status which would render them universally proof from intervention. Postulate 3c, in particular, separates these judgments from a strict entitlement stance on justice in holdings. Need may justify coercive interference with even legitimately held entitlements, but only to keep human beings alive and functioning, not to ensure them equal access to opportunities, much less any pre-defined outcome. More importantly, desert is not a basis for interference with entitlements. A presumption against intervention without a cogent warrant is also expressed. This assertion places this analysis squarely into the prevailing liberal winds on the justification of intervention. It implies that putative interveners should shoulder the burden of proving the case for a given intervention beyond reasonable doubt.

PART I: PAY EQUITY AND DISCRIMINATION

CHAPTER I DISCRIMINATION AND EVIDENCE

In Canadian anti-discrimination law, definitions of discrimination tend to begin and end with the dictionary. Discrimination is the treatment or consideration of, or making a distinction against, a person or thing, based on a group, class or category to which that person or thing belongs, rather than on individual merit. "Discrimination" as used hereafter will indicate making a wrongful distinction on such a basis.

Pay equity is, at least partially, about discrimination, that is, it is a proposal to compensate for the making of wrongful distinctions by employers, or pervasively by the community itself through custom, practice and the structuring of institutions. Pay equity also requires, as a concomitant of the remedial action sought for a given class (women in female-predominant jobs) a basis for making distinctions which is itself not wrongful by the canons of current Equality of Rights legislation. Pay equity, as an implemented programme, must itself distinguish without discriminating.

It is necessary to be clear on this point; pay equity as a remedy requires differential treatment on the basis of sex.) At least for the period of time necessary to correct the perceived inequities in compensation practices, the law will have to become sensitive to considerations of gender. Raises may well have to be proportionally larger for employee A because she is a woman in a given category, and

proportionally smaller for employee B, a male. Males in certain areas will undergo relative pay deprivation because of pay equity, in the "but for" causative sense; that is but for pay equity, the pattern of reward distribution in certain establishments would probably have continued to preserve a different set of internal spreads within a wage hierarchy. This, of course, may be justifiable on the basis of past and present discriminatory practices, but it is important to remember that pay equity proponents face two semi-independent tasks:- a) proving certain practices discriminatory and b) proving that the proposed solution (which also involves the making of distinctions) does not itself violate important equality of rights considerations or, if such violation is unavoidable, that it is justifiable in the circumstance as the least onerous method of solving the perceived problem.

Chapter I will examine, after outlining the pay equity argument, the question of whether the claims made about wage gaps and asymmetrical occupational distribution amount to convincing proof that a harm or mischief is being done to working women which can be labelled discrimination.

Chapter II will look at the legal status and implications of pay equity as a remedy implying coercive exactions in its own right, that is mandating that "the class of employers" rectify the "inequity" in the wage rates of certain groups.

a) Definition and Argument

Comparable worth has been variously described, on the one hand, as a logical extension of current job evaluation practice, concerned only with relative pay inequities at the level of the individual firm, and

constituting no great intrusion into the free play of the market and, on the other hand, as a drastic, revolutionary attempt to impose administrative wage control on the whole economy. Such breathtaking descriptive vistas signal a chronic difficulty; the theory of comparable worth does not lend itself to capsule definition. Witness one such attempt:

"Comparable worth" is the new feminist proposal to use legislation, regulation, and court decision to achieve equal incomes between men and women, by legally mandating that "male dominated" and "female dominated" occupations judged to be equivalent, along various allegedly measurable dimensions, be paid equally.¹

This is succinct and accurate, yet citing other attempts, none emphasizing the same salient features, may serve to demonstrate how difficult it is to capture the full import of the theory within a short compass.

By comparable worth I mean the view that employers should base compensation on the inherent value of a job rather than on strictly market considerations."²

Comparable worth is a concept that encourages an organization or community to express the value it attaches to components of jobs by identifying and weighting various factors - such as knowledge and skill, accountability, and working conditions - so that relationships between job content and wages are made explicit and comparisons can be made.³

Majors' perspective seems broadly political. Johansen would seem to be concerned primarily about intra-organizational job comparisons. O'Neil alone mentions the market.

Attempting to categorize the concept with respect to that venerable set of political labels - radical, liberal and conservative - also elicits considerable disagreement.

Comparable worth has radical implications because it initiates an end to women's economic dependency and questions the market

basis of wages.⁴

If comparable worth retards the integration of women into non-traditional employment it will be a conservative doctrine indeed.⁵

... the framework is traditionally liberal because it argues for equal treatment.⁶

All these quoted passages demonstrate an endemic difficulty: a rigorous definition of the concept requires the application of analytic frameworks from several different disciplines. Job evaluation technique, for example, a central part of the comparable worth cure for the undervaluation of women's work, is a sub-branch of both applied psychology and personnel management. This aspect of the debate focuses fundamentally on what job evaluation systems tell us about the worth of jobs - and how well.

Comparable worth, in one of its incarnations, is a theory about earnings differential and, as such, rests upon some fundamental premises about the distributive efficacy of the market. The crucial issue from this perspective is a series of disagreements about the effect of structural impediments on labour prices and labour mobility.

The sociological literature broadens out from here into the whole question of what might be called the social determinants of income formation and distribution. It is at this point that the arguments about comparable worth begin to lose conceptual manageability.

Comparable worth also has important legal implications. A substantial portion of the literature on comparable worth is to be found in American law journals. In the U.S., unlike in Canada, the development and elaboration of the concept of pay equity is inextricably associated with

litigation. So much is this so that a retrospective look at comparable worth in the American context quickly becomes a catalogue of judgements, appeals and Supreme Court pronouncements.

The large question here is on what basis can discrimination be imputed, responsibility assigned, and penalty exacted for the sort of pay inequity which advocates of comparable worth find in the current structure of wage relations.

These several perspectives by no means exhaust the conceptual and analytic frameworks that can be applied to comparable worth, but they are sufficient to suggest the difficulty of disentangling a reasonably functional comprehension of the theory which remains true to the richness of its implications.

Eight connected steps are offered as constituting the main sections of the comparable worth debate.

(1) There is a gap between the average earnings of fully employed males and those of fully employed females. Figures vary, but the gap as a disaggregated figure is indisputably large. In the United States,

As of 1982, female workers earned on average 64 cents for every dollar earned by full-time year-round male workers.

The average female white full time worker earns only 56% as much as the average male white full time worker .⁸ (U.S. census data)

The most common reference in Ontario is to a wage gap of 38%.⁹

(2) The male/female earnings gap has existed, largely undiminished, over a length of time such that two inferences may be drawn: first, this earnings gap is not an ephemeral and aberrant fluctuation in the structure of wage relations, but rather a persistent tendency entrenched in the modern

labour market; secondly, this being the case, it is equally clear that the institutional arrangements which support and shape this labour market - contract, individual or collective bargaining and particularly the legal framework governing labour relations - are either perpetuating or failing to operate so as to lessen, this earnings gap. In the U.S.,

Since 1955 women's earnings as a percentage of men's have stayed remarkably stable, especially in light of the dramatic increase over the past three decades in the proportion of women in the labour market.¹⁰

Women's median full time earnings in 1955 were 64% of men's, yet by 1973 women's median earnings were only 57% of men's earnings.¹¹

One aspect of labour law in particular is seen by the advocates of comparable worth as ineffective in addressing their concerns - equal pay for equal work law. It has been illegal in both the United States and Canada to pay women less money for performing equal or substantially similar work in a given employment environment for more than twenty years. It is rational to assume, absent appreciable wide-scale tacit circumvention of the equal opportunity laws on a scale rivalling the flouting of prohibition, that these laws have had time to affect this earnings gap in some discernible fashion. There is no evidence of current wide-scale avoidance of equal pay laws by employers. There is no clear evidence of a diminishing wage gap - this over a period of time sufficient to register statistical shifts in pay patterns. Therefore, whatever else equal pay laws do achieve, they are not reducing this wage gap.

(3) It is not the aggregate wage gap about which the proponents and enemies of comparable worth are actually arguing. The earnings gap is divisible into component parts - a portion attributable to legitimate

differences which ~~warrant~~ differences in pay rates, and a leftover portion usually referred to as the earnings gap residual.

Legitimate reasons for pay differentials include productivity-related differences in input and output, but the category is broader. Sanctioned reasons for the payment of unequal wages include such things as seniority and union membership, which may have little to do with demonstrable contributions to productivity or profit. Since all experts agree that some portion of the earnings gap is attributable to legitimate differences, comparable worth focuses on, or to be more precise, should focus on this earnings gap residual.

Believing that they can satisfactorily explain this residual, comparable worth adherents declare it evidence of gender discrimination. Opponents reject this contention. They treat the residual as just that - something as yet unexplained or, more fully, as due to insufficiencies in data, as yet undetermined variables, or inherent problems with all attempts to model in a methodologically sound manner the way in which a market determines labour prices.

The distinction between legitimate and possibly discriminatory determinants of income differentials is often obscured by a penchant, particularly on the part of supporters of comparable worth, to attack virtually all income determinants as reflecting the taint of gender bias. "Discrimination may affect each and every component of the overall wage gap."¹²

The comparable worth debate tends to oscillate back and forth between discussion of the earnings gap residual and the earnings gap

generally.¹³

(4) Female occupational segregation is both a key cause of the earnings gap residual and the reason equal pay for equal work laws do not reduce it. Most women work at jobs in which women predominate. Men and women, in fact, do different work. In Canada,

In 1970, 60% of all female professional and technical workers were in the traditional occupations of nursing and pre-college teaching; by 1979 this percentage had dropped to about 52%; however, 80% of women were in occupations in which women constituted 70% or more of the total employment.¹⁴

Ontario has a segregated labour force with approximately 60% of female workers clustered in 20 out of 500 occupations.¹⁵

Since women are by and large not found in the same occupations as men, they cannot gain pay adjustments on the basis of equal work laws. The gender pay imbalance attributed to occupational segregation is a key problem which comparable worth is designed to redress.

Without segregation, jobs would not differ greatly in their sex compositions, and so sex labels could not influence wages.¹⁶

The primary goal for equal pay for comparable worth is to correct the wage discrimination that is a by-product of occupational segregation.¹⁷

(5) Occupationally segregated jobs in which women predominate cluster at the lower end of any rank ordering of jobs according to relative pay rates. "Many occupationally segregated jobs have become women's work and are accompanied by low wage setting."¹⁸ This is an important constituent of the comparable worth argument. Black men over six foot five predominate in professional basketball. This fact appears to have no noticeable negative impact on their salaries. Comparable worth requires a connection between gender, occupational segregation and low pay.

(6) Occupational segregation exists because a free market for labour does not. By a free market is meant one which operates according to the neoclassical concept of profit maximization through the optimal employment of factor inputs to produce output at a level where marginal cost equals marginal revenue. Inasmuch as employers are striving to attain maximization so defined, so are they acting "rationally" by the lights of orthodox or neoclassical economic theory. The proper functioning of this model of the market requires mobility of resources and substantial competition for the supply of factor inputs such as labour.

Several sets of theories challenge the accuracy with which the neoclassical model replicates the way in which labour prices are actually derived. These theories tend to focus on the structural conditions within markets and within firms. Neoclassical explanations of the earnings gap, occupational segregation and lower relative pay, on the other hand, center on individual job/person differences in productivity-related factors, and on the "rationality" of female job choices made on bases not necessarily synonymous with those of most men.

(7) Not only are occupationally segregated women paid poorly, they are not paid what their labour is worth in one of two possible ways: a) occupationally segregated jobs are not ranked and remunerated in a fashion consonant with their social value to the community; b) occupationally segregated jobs are not ranked and remunerated in a fashion consonant with their actual value to a particular employer.

Pay differentials are greater than can be explained by skill levels, contributions to profit, or labour supply curves of the jobs or the qualifications of the job incumbents.¹⁹

This shift from the question of low pay to the question of

underpayment constitutes a fundamental point of contention and the crux of the comparable worth controversy.

"Are women underpaid for their work or do they merely hold jobs which are worth less?"²⁰ The advocates of comparable worth insist that the underpayment of occupationally segregated women is the result of a pattern and practice of undervaluation of women's work because it is done by women, that is, because of sex. The clear implication is that, all other things being equal, the same job would be better compensated if the jobholders were not predominantly women. This pattern and practice, according to the theory, either does constitute discrimination under existing anti-discriminatory, statutory prohibitions, somehow interpreted, or should constitute discrimination under some new definition of discriminatory pattern and practice, yet to be enacted.

Women's work is undervalued in the market historically.²¹

...advocates of comparable worth claim the [wage] gap exists because of sex discrimination.²²

Specifically, comparable worth concerns the issue of whether work done primarily by women and minorities is systematically undervalued because the work has been and continues to be done primarily by women and minorities.²³

(8) The remedy for this type of discrimination is the imposition of a regulatory and enforcement structure which will ensure that those working in female predominant occupations receive equal pay for work of comparable, that is equivalent value. This goal can be achieved through the use of sex-proofed evaluation systems and job-content analyses which measure the worth of a given job to a given employer.

Job-content analysis and job evaluation are techniques for systematically and explicitly articulating the values operating

in a specific labor market in terms of what people do on their jobs, and then systematically ordering jobs into a relative wage structure based upon the values articulated.²⁴

So intimately is comparable worth connected with job-content assessment and job evaluation systems that one proponent of comparable worth operationally defines it as,

...the application of a single bias-free point factor job evaluation system within a given establishment, across job families, both to rank-order jobs and to set salaries.²⁵

We now have an extended definition of comparable worth in the form of an eight-point argument - a series of inferentially connected and statistically bolstered premises about the relationship between the earnings gap, occupational segregation, undervalued work, and sex discrimination.

The key elements in this extended argument cum definition are these:- Market-driven economies devalue the worth of women's labour through a process of channelling and labelling. Women are funnelled into a relatively narrow range of occupations. These jobs become imbued with a stigma, "women's work", and the money payments attached to performance in these occupations are less than they otherwise would have been.

It may, of course, be argued that this chain of inference is ultimately beside the point. It may be plausibly suggested that women are simply advancing a claim that their newfound political and economic power can now sustain in the brokerage arena of contemporary pluralism. This argument will be put aside for the present with the comment that justificatory 'derivations' remain interesting in a "Paretian" sense even if they are ultimately moral camouflage. That is, the sort of justifications (or lack of same) which such justifications receive are in themselves revealing of the sort of polity the post-liberal state is becoming.

As mentioned previously, statistical proof that women are on average more poorly paid than men is only the preliminary step in a chain of inference which must bridge the crucial gap between assertions about low pay and those about undervalued reward. It will be seen that considerable difficulties are associated with even the most bland and obvious-sounding truisms about women and low pay. Whether in fact the advocates of pay equity have proven what they need to prove about income differentials and their causes will be discussed in the next section.

b) Determining the Causes of Pay Differentials

Over the last 25 years the size of the female labour force in Ontario has increased dramatically. In 1985, there are approximately 2.1 million women in the Ontario work force. This represents a three-fold increase since 1961, when the female labour force numbered 684,000. In 1984, 57% of women in Ontario were employed, considerably higher than the 1962 rate of 32%.²⁶

The increased labour force participation of women has been called "the most important labour market development of the twentieth century."²⁷ The facts and figures on post-war changes in the role of women in the work force are impressive enough to sustain this observation. As of 1982, half of all women were members of the labour force, an increase of 50% since 1950. The female proportion of women in the labour force as a whole has mushroomed over the same period. "42% of all workers are female, an increase of 46% since 1950."²⁸

The reasons for this infusion of new female workers are familiar in outline, reflecting both changing sexual stereotypes and changing economic realities. The consciousness-raising efforts of the feminist movement have had an undoubted impact on the traditional stay-at-home values of many women

- more women want to work, for longer periods, and at a greater range of occupations than ever before.

The declining birth rate of the past fifty years has freed more women from nurturant obligations in the home to pursue employment opportunities, further strengthening the participatory trend. Those women who do raise children spend fewer of their total available active life-years doing so. Around 1900 the average life expectancy for all women was 47 years, eighteen of which were spent childbearing. Mushrooming divorce rates and the trend towards marriage later in life have also had a revolutionary effect on the shape of the labour market.

... in 1960 only 28% of twenty to twenty-four year old women had never been married; by 1980 this proportion had increased by 52% and is expected to be 55% by 1995. ... In 1980 a white female who married at age 22 could expect to live about 79.4 years and stop having children at age 30. There was a 47.4 percent chance that her first marriage would end in divorce."²⁹

Even families which are traditional in other respects change behaviour in response to "expectational" pressures and the vagaries of an economy periodically ravaged by inflation and slow growth. In times of high inflation and sporadic productivity growth, many families turn to dual bread-winning to maintain their standard of living. Dual-earnings households are found in all segments of the occupational prestige and pay structure. "In 1950, 70% of all American households were headed by men whose income was the sole source of family income. In 1984, less than 15% of families fit this traditional model."³⁰

All of the above-mentioned social changes are a staple part of any discussion of women and the labour force, but their effects on the earnings gap are extremely complex and difficult to interpret. One thing is clear;

however, there is little doubt that the scope and rate of entrance of this large new group of women into the labour market is comparable in scale to the great successive influxes of immigrants into the new world during the latter part of the last and the first part of this century.

It would be surprising if such dramatic changes had not affected male/female earnings ratios in some measure, and so they have, but the direction, not to mention the precise impact of these changes is difficult to assess. Thomas Sowell points out that,

Historically, women's position relative to that of men declined for more than two decades, across a broad front, from peaks reached in the thirties or earlier. Women's share of doctoral degrees - both Ph.D's and M.D.s - declined, along with their representation on college and university faculties (including the faculties of women's colleges run by women administrators), as did their representation among people listed in Who's Who. Women's income as a percentage of men's declined over a twenty-year period from 1949 to 1969.³¹

There is some evidence that during the period 1969-84 this decline has halted, stabilized, and begun to reverse itself,³² but these changes are too recent to support strong conclusions.

For the purposes of a discussion of comparable worth, we need only grant that the relationship between the female labour force influx and women's earnings as a percentage of men's presents no overwhelming evidence to support the conclusion that "every day in every way" things are getting relatively better for the pay prospects of women. The post-war experience of women is at least equivocal, if keeping up with males is the barometer of progress.

Methodological Problems

Perhaps it is only natural that the scientists tend to stress what we do know; but in the social field, where what we do not

know is often so much more important, the effect of this tendency may be very misleading.³³

No one suggests that all the differences between the average earnings of females as compared to males are illicit or discriminatory. There is, however, a general problem with any and all arguments about earnings differentials - they rely almost exclusively on statistical analysis.

Virtually all factors relevant to the determination and distribution of income generally are, of course, components of any discussion about why men continue to outearn women in relative terms. However, certain broad categories of explanation continuously reappear in the comparable worth debate. These are usefully catalogued by George Milkovich as follows: -

- Differences in employers and industries,
- Differences in employee characteristics,
- Differences in union membership,
- Differences in labor market conditions,
- Differences in content of work,
- Differences in employee work behaviors,
- Discrimination.³⁴

Attempts to analyze the relative importance of these broad families of determinants and the interrelationship between them run head on into two basic difficulties.

First, there is a lack of adequate, publicly available data, and second, proxies are often used which, on their face, seem to include most factors, but on closer examination reveal that much of the information is too abstract.³⁵

In social science research, proxying usually means letting one class of phenomena about which we have information, stand for another about which we know much less. Substituting "age" for "experience" in an analysis of wage determinants is one example.

For purposes of utility and validity, a proxy must have two essential elements: it must be reasonably representative of the real class in which we are interested, and information about the real class must be obtainable from the proxy. Ergo, what is proven true about the proxy can then be inferred to be true of the real class. In a court of law a prima facie case of employment discrimination in hiring cannot be made unless the plaintiffs present a proxy for the available work force which the court accepts as valid. Indeed, a legitimate counter against the charge of discrimination is a direct challenge to the validity of the plaintiff's proxy. The population as a whole, for example, with its complement of aged, infirm and uneducated, is not an acceptable proxy from which to make inferences about the composition of the class of astronauts.

The debate on the determinants of the earnings gap presents a running series of "cautionary tales" about the use of proxies in an analysis of income determinants. One example of this chronic difficulty which bedevils virtually all aspects of the comparable worth debate, inextricably reliant as it is on the use of statistics, must stand as representative. Consider the following quote:

Adjusting for occupational prestige (with which income should correlate positively), education, weeks and hours worked, average income in state of residence, and age (which captures some, though not all, of the experience factor), ... white women earned 57 percent as much as white men in 1959, 54 percent as much in 1969, and 57 percent as much in 1975.³⁶

This quote is entirely representative of the sort of technique marshalled in defense of comparable worth. "Adjusting" means "quantitatively correcting for the influence of", usually by means of some form of multiple regression. No attempt is made in this paper to examine regression or any other

statistical technique as to general methodological soundness and limitations. Yet some reference to particular difficulties cannot be ignored in a discussion of comparable worth. Witness the same author's rhetorical response questioning the soundness of the statistical method used above:

I am not sure that occupational prestige is a good proxy for income. A truck driver can earn more money than a college professor, though the professor enjoys more prestige than the driver. In fact for many people prestige is a substitute for income.³⁷

and his observations on "age" as a proxy for "experience":

Suppose, for example, a woman takes a job after rearing a family. Let us say she is forty years old and worked five years before leaving the labor market to rear a family. A forty-year-old man who has worked steadily may have twenty years of experience behind him. Ten years later, the woman has fifteen years of experience, but the man now has thirty years. So he is still fifteen years ahead of her, and she will never catch up with him.³⁸

This give and take is symptomatic of a problem which haunts all attempts to speak with assurance about the wage gap. If figures don't lie, what they do tell us can mislead to the point of mischievous consequence. As one expert puts it, "Sources of bias in any analysis are limited only by the imagination of econometricians."³⁹

The problem is that reliable data on experience and on continuity of experience is sketchy, necessitating the use of age as a proxy. Remember that we are referring to basic quantitative data - accumulated years per capita; we are not even addressing at this stage whether all units of experience can be considered equal and reducible to some common quantitative term for the purpose of statistical analysis. There is no reason to assume that all types of experience affect earnings in the same way.

Consider another problem. Attempting to capture in a statistically useful manner what people do while performing a given job, is a basic step without which all attempts to separate legitimate work-related performance requirements meriting differential compensation from bogus differences implying discrimination, must fail.

Job description is now a considerable discipline in its own right. The Dictionary of Occupational Titles published by the U.S. Department of Labor lists over 10,000 entries, categorized and weighted according to the "basic premise that every job requires a worker to function in relation to Data, People and Things in varying degree." It is difficult to believe that occupational codes derived from assigning various weights to factors under these three headings or any variant thereof, capture all of the pay-relevant differences in what people actually do. The necessary and inescapable level of abstraction required by an attempt to catalogue multifarious job functions must end in greater or lesser degrees of reductionism. Yet differences in work content, in all likelihood missed by formulations too abstract to capture all relevant particulars, do account for differences in wages.

(To those who might legitimately reply that all use of such numerical techniques is reductionist but no less essential and useful for being so, and is accepted practice in the study of society, one must respond that the attempt to construe quantitatively the way a labour market sets prices is a relatively new and untried extension of the purview of social science technique. Attendant difficulties must not be glossed over with references to the general utility of statistical method.)

For summary purposes, important income determinants considered as contributing to the earnings gap about which reliable data is available, may be listed as follows: age, marital status, union membership, occupations chosen, and hours worked per year.

Determinants which require the use of proxies, the validity of which is open to constant challenge or on which data is unavailable or skimpy, are: regional pay rates, job content, turnover rates, experience, continuity of experience, and amount and type of on-the-job training received.

About some putative determinants, we know both a lot and a little. About education for example, we know that as of 1970, men's and women's accumulated years of schooling reached substantial parity. We know virtually nothing about differences in the quality of education received. It is a relatively safe assumption that all college degrees are not equal in the eyes of employers and consequently do not command equivalent salaries. Nor do we know whether the sort of education acquired has anything to do with the work being performed. The Xerox salesman with a degree in Art History is not easy to fit into an appropriate tabulation.

The assumption that such variations are to be found equally in the education of men and women is just that - an assumption; but such assumptions are often made for methodological reasons.

Many studies leave out variables without proving their irrelevance. For instance, studies often fail to "correct" for the fact that the average age of full-time female employees is less than that of males. How important such differences can be is shown in one instance reported by Sowell. "The median age of all Puerto Rican income-earning heads of family was 36 years,

according to 1970 Census data, while the corresponding age among Jews was 50 years."⁴⁰

The difficulty in drawing firm conclusions from available information is not limited to proxy problems or the over-abstractness of theoretical models. Proliferating studies, sound and carefully drawn as they may be, tend to have the cumulative effect of clouding rather than clarifying the issue.

Several examples must suffice - single women in their thirties who have worked continuously since leaving school earn slightly more than single men of the same age. (Sowell) Wage discrimination is due to rank rather than occupational segregation. (Halaby) A study of 11,252 Michigan school teachers showed women earning \$539 less on average than men, the difference essentially disappeared when the authors controlled for differences in number of accumulated post-bachelor level college credit hours. One could go on, but mercifully one needn't because further chapter and verse brings one no closer to consensus. Two final pieces of research must stand for how Sisyphean, not to mention odd, this analysis of earnings gap determinants can be.

Tall men generally earn more than those who are short ... a man earns about \$750 more annually for every inch he is above five foot six inches. A Canadian survey showed that men earning \$25,000 or more were almost four inches taller than those earning \$5 - 10,000.⁴¹

... only 40 percent of the earnings of white men can be accounted for by measurable factors. That is, if we look at a population of white men, a full 60 percent of the differences in earnings among them cannot be explained by anything we can measure.⁴²

The debate on the determinants of wages generally, and on the causes of the gender wage gap specifically, continues with little sign of conclusive resolution. A critique of comparable worth is not aided by a continued pursuit and analysis of studies of this sort. Such a process can easily degenerate into a series of protracted debunkings directed at the whole enterprise of quantitative social analysis. It must be admitted that some temptation to move in this direction - to secretly applaud the cynical critic who defined the loose and incautious use of quantitative analysis as the attempt to derive important conclusions about complex social changes by counting fire hydrants in Omaha - is provided by the affray surrounding comparable worth and the wage gap. Nevertheless, no such inference is either intended or required. The significance of the methodological difficulties surrounding the earnings gap is simply to cast doubt on glib statements about what we know and what we do not. The debate about the determinants of pay differentials remains at this point in time, a minefield of contestible premises and technical conundrums.

As George Milkovich suggests,

... existing empirical formulations and methodologies have not adequately modeled the wage determination process and hence do not adequately account for the role of discrimination. ... available data tends to be useful for only the aggregate economy, industry or occupation-wide analysis. This level of analysis misses the diversity and complexity of wage decisions made at the employer/employee level.⁴³

The unsatisfactory and provisional status of what passes for knowledge in the study of income determination is a major analytical insufficiency which vitiates the claims that pay equity is justified. It may of course be remediable through improvements in social science technique. Although they have not yet done so, studies might in theory emerge to isolate a variable

or set of variables which reliably explain a given component of wage setting as being traceable to discrimination. In fact, present methodology usually proceeds by isolating those variables which are quantifiable directly or through proxying, and attributing discriminatory causation to varying percentages of the unexplained residual difference remaining when that which is quantifiable has been accounted for.

It might be argued that the persistence and size of the residual gap is in and of itself acceptable inferential support for the imputation of a discriminatory element operative in wage differentials. After all, we know that direct discrimination in hiring and promotion exists; it has a documented history. We know that there is a large and persistent wage gap between median male and median female wages. We know further that many qualifications/determinants, in which males had historic advantages - education, for instance - are levelling out distributionally across gender lines, yet the gap persists. Is the imputation of a discriminatory element, either directly or through occupational segregation, really impermissible under these conditions? Need we in fact put a number on or isolate a reliable predictable variable before we can act?

Reasoning along these lines is certainly permissible in argument, in policy debates and media forums. The problem is that pay equity is about law and sanction. It carries with it an assignment of liability (if not necessarily guilt) restricted to a given class - the class of all employers.

Arguments based on the mere plausibility of a given causal factor (discriminatory undervaluation) seem a poor basis for moving beyond debate to the actual putting in place of a programme. In an age relying heavily on

quantifiable verification in rationalizing initiatives, it does not seem that the possible meaning of the as yet unexplained should be used as persuasive justification for broad-ranging changes in the legislative parameters of labour-pricing.

Occupational Segregation

A linguist from some other planet, armed only with a knowledge of English syntax and some metaphysical acuity, if confronted with the dusty records of the comparable worth debate in some far distant future, might catch the essence of the controversy about occupational segregation by examining verb forms alone. Those arguing that women suffer from occupational segregation are constantly found using expressions such as, forced into, excluded from, steered away, socialized into, trapped, ghettoized, and pushed, to describe the occupational experiences of women. Their opponents, who in the main believe that women choose to work where they do, respond that this constant use of the passive voice is misleading - a determinism without either philosophical justification or causal explanation. Some opponents of comparable worth go further, suggesting that this proliferation of the passive in the mouths of those supporting comparable worth indicates a hidden subtext in their animadversions. One critic states plainly that the repeated assertions that working women are done unto rather than do betray the existence of a sexist mind set on the part of many of the very spokespersons who have set themselves up as the defenders of working women; that in fact, many women's advocates actually,

... regard women as essentially helpless, unable to rise unless Government supplies the pulling and the bootstraps. They

believe that women do not seek out jobs but accept passively whatever work is thrust upon them ... a horribly demeaning portrayal of women by their self proclaimed defenders.⁴⁴

This may be reading too much into the use of language; after all, terms flavoured with the accents of passivity pervade the social sciences generally. Their use by the adherents of comparable worth may be nothing more than habituation. The opponents of comparable worth argue that no one is forcing men into plumbing or women into clerical jobs. The contention is at least superficially supported by the fact that there are male clerks and female plumbers. The exclusivity of job categories in our society is not water tight; it is a proportional, rather than a categorical fact. Yet a question must naturally be directed at those who suggest that women's occupational choices represent a rational evaluation of needs, goals, and prospects. Why would a significant portion of the working population so disproportionately opt for lower relative earnings and status prospects?

The kind of career divergence along gender lines which is revealed by studies is difficult to comprehend if one accepts an underlying assumption of substantial symmetry between the aims, goals, and to use a somewhat loose term for which I can find no satisfactory equivalent, the life plans of men and women. In fact, some of the enemies of comparable worth deny that there is any such symmetry, and in many cases argue that many men and women do not have congruent life plans, and that this fundamental fact explains why many men and women make different job choices. If women do not necessarily bring the same standards of assessment to career choices that men do, they may also make different decisions about the training and educational "capital" which they wish to accumulate preparatory to entering the work force and while pursuing careers. Should it also be

the case that certain occupational categories suit female life plans better than others, a connected set of premises is established which may, so it is argued, explain much occupational concentration without reference to structural flaws in the labour market or discriminatory biases on the part of employers. Employers may, of course choose to gratify a taste for discrimination, however neoclassical theory suggests that such behaviour in inefficiency and will wither away over the long term.

Again, one must be careful not to talk in explanatory absolutes. The debate on occupational concentration is not about the presence or absence of structural flaws in the marketplace or the presence or absence of discrimination. It is about:

- a) the gender-specific differences in ability to choose options, and
- b) assuming choice to be operative in an important way in shaping the structure of a labour-market, the relative ability of this market to solve its own admitted problems without the imposition of new regulations by government.

(In this context, choice is defined so as to ignore the metaphysical conundrums about determinism. Choice here means only what Kai Neilsen describes as "the second order ability" to choose options within a given framework or set of constraints.

"We are free if we are rational creatures who have the ability and the opportunity to do what we want to do and can reflect on our desires dispassionately and form second-order desires about what to do and then can in fact, in accordance with ... our desires, do what we, on reflection, most want to do."⁴⁵

The accusation that women are occupationally segregated can be taken to imply that working women, for reasons yet to be established, are less able

than, say, white males to actualize their reflective desires through choice of occupations or jobs.)

Those who do not believe choice, so defined, to be the main explanation of occupational concentration, among them the proponents of comparable worth, have two options when confronting the sex-disparate life plan thesis. They can simply deny that the thesis is true, or if true, very important in explaining occupational concentration. Or they admit that life plans, including work place aims, do vary significantly along gender lines and then go on to assert that they should not and that the fact that they do is in itself a corollary of discrimination. It would be unfair to label this latter postulate a feminist position, although many feminists are found who heartily espouse it. Much of the leading edge of feminist radicalism has little sympathy for the premise of substantial gender sameness in goals or anything else but rights. Angela Miles, in a recent article on feminist radicalism, deplores "... the limitation of liberal reform which ignores women's specificity and presumes sameness...".⁴⁶

More properly, the belief that life plans should be gender-blind is one of the normative judgements of an egalitarianism which, without necessarily denying human differences, is hostile to almost all of the political, social, and economic consequences of the manifestation of these differences in current liberal-democratic polities.

More moderate proponents of comparable worth simply assert that the differences in occupational distribution by gender are too large and too persistent to reflect the role of rational choice in the labour market. Structural flaws and discrimination, they insist, must supplement and correct voluntaristic assumptions. Yet the argument between those who

believe that women choose the work they do and those arguing that women are segregated spans a wide gulf of conceptual disagreements. Here, an attempt is made only to marshall and assess evidence from several key empirical studies which bear on the question of occupational segregation and sex-disparate life plans. We look in detail at two studies which shed light on this issue - one explaining occupational concentration in terms of rational choice, and the other looking at job concentration within a single firm.

Occupational)Concentration and Sex-Disparate Life Plans - the Polacheck Thesis

Solomen Polacheck in a widely-quoted study¹⁵ has suggested that differences in life plans constitute rational ground for choosing certain jobs, and that those framing life plans who envisage work interruptions at various points during their careers make choices which those planning to work continuously throughout their working lives do not. Women, still caught between their perceived primary responsibilities for the maintenance of home and family, yet still desirous of maximizing life-time earnings, choose to work at jobs which exact minimum financial penalties for extended absences and discontinuous labour force participation. This model developed within the usual working assumptions of human capital theory posits that,

... if unique atrophy (measuring the erosion of earnings power associated with periods of labor force intermittency) can be attached to each occupation, then those females with greater labor force intermittency are more likely to be in occupations with low atrophy⁴⁷

Women choose careers which require the accumulation of less human capital in full knowledge of the fact that they may be in and out of the work force, and thus less able to collect the payoffs associated with

education and on-the-job training. Jobs that require little or no skill enhancement have relatively flat earnings curves. They can be entered and exited with maximum ease and minimum pay loss. Pay loss in this sense does not refer to compensation foregone while not working, but rather to the penalty paid for the atrophy of skills while not working. Polacheck chose five broad occupational categories within which to test his model:

- 1) Professional
- 2) Managerial
- 3) Clerical and Sales
- 4) Operative
- 5) Unskilled Labour and Service Workers.

These categories include 96 percent of all working women. His conclusions reveal that the more time spent at home, the greater the odds of the intermittent workers being employed, "in both unskilled and household service relative to clerical and sales (occupations) ... and clerical and sales relative to operative (occupations) ...".⁴⁸

Polacheck goes on to say that continuous labour force participation is most important for professional and managerial workers. Intermittency has an opportunity cost in the atrophy of earning-related skills which varies between occupational categories. His assessment of the importance of this factor on the participation of women in the more lucrative occupational categories is dramatic:

... if women were to have a full commitment to the labour force, the number of women professionals would increase by 35 percent, the number of women in managerial positions would more than double, and the number of women in unskilled occupations would decrease by more than 60 percent.⁴⁹

It may be doubted that women actually calculate their desired lifetime earnings curves in the manner in which investment bankers assess stock options, but human capital models such as this predict that it would

be rational to do so. It is difficult to prove any thesis which has as a basic premise that wage disparities have their roots in "lifetime optimizing behaviour".⁵⁰ Some women may expect career interruptions and plan their lives accordingly, but it seems implausible that most women, or for that matter most men, frame career decisions with such long range foresight. Even if it is true that some jobs have flatter long-term earnings curves and lower skill atrophy rates, it is not proven that such information is widely known. Paula England, in a 1982 study, has challenged Polacheck's thesis more directly. She suggests that if it is true, "... women who have more continuous employment patterns should be more apt to be in men's jobs than women with less commitment to the labour force."⁵¹ England's analysis found no significant correlation between increased continuity in the labour market and the probability of a woman choosing a "man's job". Yet Polacheck's thesis remains plausible to the degree that it might explain certain expectational differences between men and women job choosers which are impossible to measure.

Gender Distribution Within an Establishment - The XYZ Case

Perhaps more progress can be made in assessing the question of segregation and sex-disparate life plans by focusing analysis on a particular firm. Looking at job distribution within the internal labour market of a single employer rather than a broad occupational pattern may focus the dispute along more empirically rewarding channels.

There are two good reasons for shifting away from broad-range analysis of gender predominance in occupational sectors towards a firm specific study. First, the greater the specificity, the easier the

validation of method, model and empirical results. Secondly, the advocates of comparable worth are almost always found arguing that relative intra-establishment gender pay inequities are all that comparable worth laws are designed to counteract. Many establishments are a hodge-podge of traditional and customary practices, some of which comparable worth supporters have no desire to attack. For instance, many firms have management tracks. They promote certain targeted groups to fill slots designated as management preparatory without regard for the possible superior competence of employees working outside the designated tracks. This is certainly not strictly rational behaviour. Such practices as advancement by seniority and fixed tracks of promotional progression may well put barriers to advancement in the way of groups in which women predominate. It would be methodologically interesting to find a firm which allows analysts to investigate what gender distribution in a job hierarchy would look like if customary practices had a minimal impact on promotion and pay systems. Carl Hoffman and John Reed were called in to study a firm which was in many ways a model of rational personnel practices. The study which resulted from their investigations is of considerable interest for those looking at gender discrimination in the work place.

The establishment in "the XYZ study"⁵² was a leading firm in its industrial sector. Personnel practices at XYZ were considered exemplary; a model of non-discriminatory promoting based on merit rather than custom. The firm had no management track, that is, did not preselect which group of entry-level job holders would be moved upwards. XYZ promoted largely from within, from its own large and predominantly female group of clerical staff.

Nevertheless, to the considerable bewilderment of XYZ, the ratio of women to men at supervisory levels did not reflect the sex composition of the group from which they were selected. XYZ was vulnerable to charges of sex discrimination because American labour law, as enforced by the Equal Employment Opportunity Commission and the Office of Federal Contract Compliance, has interpreted the relevant anti-discrimination statutes so as to require parity of results in hiring, promotion and pay.

Hoffman and Reed were brought in to study the reasons for the proportional dearth of female supervisors at XYZ. Their conclusions saved XYZ from almost certain conviction and liability as a discriminatory employer. They also present a serious challenge to those who would minimize the role of employee choice in the distribution of women throughout a job hierarchy. XYZ had diminished the structural and customary impediments to job access to an absolute minimum. If male predominance persisted, then discrimination was not at fault. In fact, Hoffman and Reed proceeded to explain the gender maldistribution at XYZ without recourse to discrimination or segregation. The division of XYZ examined by the Hoffman and Reed study had 6,000 employees, 500 supervisors, and 5,500 employees in entry-level clerical positions. 82 percent of the entry-level jobs were filled by women between 1971 and 1978, yet female clerks were only 74 percent of those promoted in 1978, and only 61 percent of those promoted in earlier years. XYZ was statistically guilty of non-parity promoting. Somewhat to their own surprise, Hoffman and Reed discovered that "Male and female clerks at XYZ were promoted in almost exactly the same proportions as they expressed interest in promotions."⁵³

In the year prior to the survey from which Hoffman and Reed collected their data, 28 percent of the male clerks asked to be promoted, as opposed to only 14 percent of the female clerks. The company's response had been "if anything, more positive towards the women who asked than towards the men."⁵⁴ Since those who registered their desire, or at least availability for promotion, were twice as likely to be promoted as those who did neither, the XYZ data reveals an almost perfect correlation between gender differences in promotions requested and gender differences in promotions received. This result was further reinforced by survey responses revealing that, "... 25 percent of the male clerks compared to 10 percent of the female clerks indicated that they followed posted openings closely."⁵⁵

Could perceptions among women that their promotional prospects were poor have affected their motivation to request them? Hoffman and Reed took this into account and asked their sample just that question with this result:

... although a good many respondents of both sexes were dissatisfied with various aspects of their jobs, only a negligible proportion complained about discrimination of any sort ... and males were more likely than females to complain.⁵⁶

Unable to find either deliberate bias or structural impediments to women's promotional prospects at XYZ, Hoffman and Reed turned to behavioural considerations, examining particularly the aspirations of their male and female respondents. When asked about ultimate career ambitions,

... women were twice as likely to be content with their present positions, and those who did aspire to higher positions set their sights lower than men ... only 14 percent sought positions above the level of supervisor, compared to nearly half the men.⁵⁷

Only half as many women as men were willing to accept a transfer as a promotional requirement. Analysis of the effect of marriage on promotion-seeking behaviour tended to confirm the supposition of Sowell and others about the negative impact of marriage on the promotion-seeking behaviour of women. "Marriage appears to increase promotion-seeking behaviour among highly motivated men and decrease it among highly motivated women."⁵⁸ 53 percent of the married female clerks replied that they would give up their jobs with XYZ if their spouse's job required a move, and only 4 percent of the male clerks responded in kind. Four times as many women as men who were married and had children under 18 stated that they were unavailable for work at certain specified hours. Six times as many women as men in the same category had not worked overtime in the year prior to the study.

The analysis of behavioural and motivational differences between male and female clerks suggests that females respond to career choices differently than male clerks. Female clerks at XYZ lowered their levels of aspiration and avoided the added responsibilities that would accompany promotion more often on average than men did, and for reasons which men cited much less often as relevant to their own decision-making process. The behavioural profiles of female supervisors mimicked the profiles of those clerks of both sexes who were likeliest to be promoted. XYZ's records also show a much higher rate of voluntary self-demotion among female supervisors than among their male colleagues. In sum,

... those women who sought and accepted promotions at XYZ were disproportionately women who - whether willingly or through force of circumstance - had avoided the pattern of aspirations, values and behaviour which led many of their female co-workers to choose not to compete for promotions.⁵⁹

The conclusion of Hoffman and Reed's study is clear and unequivocal - choices based on sex-disparate life plans were the main determinant of differences in gender distribution at XYZ. Other conclusions may be added:

1. At least some companies behave the way neoclassical models predict that they should behave; that is, some firms minimize reliance on customary and often irrational methods of assessment while promoting and, one must presume paying, on the basis of merit.
2. In such a firm, outcomes which do not replicate "parity", which are not proportionate to the gender composition of entry-level employees - occur at higher levels in job hierarchies in spite of processing which is fair and which provides equal advancement opportunities to all.
3. In such a firm, those factors which are isolated as causally relevant to disparate outcomes for men and women have little or nothing to do with the present actions of employers or circumstances over which employers can exercise control. (The legal problems associated with loading blame for historical conditions on present actors will be discussed in Part I chapter 2).

Why is XYZ important to the comparable worth debate? What does a single study prove? XYZ is important because one of the central questions in the comparable worth controversy is whether the marketplace can correct its own mistakes. Those who push for the imposition of pay equity on the private sector contend that the labour market cannot or will not end discriminatory treatment without outside intervention. No one suggests that there are no structural flaws or discriminatory biases present in the labour market; the issue is whether the remedy proposed (comparable worth) is

appropriate for the breadth and intransigence of the maladjustment diagnosed.

A second major analytical confusion here is that pay equity as remedy is seen as necessary because adherence by employers to formal rules of equal treatment in wage setting practice cannot correct disproportions in pay rates in job categories that are uni-sexually predominant. Yet it is unclear what principle of justice requires that those who will choose a situation and its associated set of conditions merit, or are entitled to, unbargained - for monetary compensations for so choosing. Concentration is not segregation. The element of unfairness, so obviously connected with the legitimate use of the term "segregation" - with its almost inseparably related connotation of discrimination - disappears if Polachek and XYZ are accurately characterizing market practice and the practice of individual firms.

Pay equity is to compensate occupationally concentrated women. The question is - for what? If it is for low median rates of pay, women will have to get in line with male waiters, taxicab drivers and custodians. There is no gender-specificity to the state of being poorly paid. Pay equity's thrust is clearly directed at occupationally concentrated women without clear indication of a pattern of coercion in the labour market unique to women as a class which would justify remedial measures. There is a close fit here with the difficulty surrounding the usefulness of employing present knowledge about income determinants to support claims about discrimination. What we "know" about the distribution of women in job hierarchies supports no more conclusive judgements about discrimination than what we "know" about how pay rates are arrived at.

NOTES

¹Bruce Powell Majors, "Comparable Worth: The New Feminist Demand", Journal of Social, Political and Economic Studies, Vol.10, No.1, Spring, 1985, P. 55.

²June O'Neil, "An Argument for the Marketplace", Society. Vol.22, No.5, July/August 1985, p.55.

³Elaine Johansen, "Comparable Worth: The Myth and the Movement", Westview Press, Boulder and London, 1984, p.4.

⁴Shirley Harkness, "Women's Occupational Experience in the 1970's: Sociology and Economics", Signs, Vol.10, No.3, Spring, 1985, p.516.

⁵Johansen, op. cit., p.127.

⁶Roslyn L. Feldberg, "Comparable Worth: Towards Theory and Practice in the United States", Signs, Vol.10, No.2, Winter, 1984, p.323.

⁷Ronnie J. Steinberg, "A Want of Harmony: Perspectives on Wage Discrimination and Comparable Worth", Comparable Worth and Wage Discrimination, Helen Remick, ed., Temple University Press, Philadelphia, 1984, p.3. hereafter called "Remick".

⁸Michael Evan Gold, A Dialogue on Comparable Worth, ILR Press, New York State School of Industrial and Labour Relations, Cornell, 1983, p.3. hereafter called Dialogue.

⁹"Green Paper on Pay Equity", Ontario Legislature, Office of the Attorney General, 1985, p (i).

¹⁰Steinberg, op. cit. p.4.

¹¹George T. Milkovitch, "The Emerging Debate", Comparable Worth Issues and Alternatives, Robert Livernash, ed., Equal Employment Advisory Council, Washington, D.C., 1980, p.38. hereafter called Livernash

¹²Green Paper, p.11.

¹³The Ontario Green Paper suggests that the comparable worth explanation of the earnings gap accounts for between 10 and 15 percent of the female wage shortfall - that is, between one-third and a little less than half of the 38 percent total average shortfall is accounted for by the occupational segregation and consequent low pay which comparable worth is designed to redress.

¹⁴Ray Marshall and Beth Paulin, "The Wages of Women's Work", Society, Vol.22, No.5, July/August, 1985, p.29.

¹⁵Green Paper, p.(i).

¹⁶Paula England, "Socioeconomic Explanations of Job Segregation", in Remick, p.29.

¹⁷Ronnie Steinberg, "Evaluating Jobs", Society, Vol.22, No.5, July/August, 1985, p.44.

¹⁸Paula England, "Socioeconomic Explanations of Occupational Segregation", in Remick, p.30.

¹⁹Ibid, p.28.

²⁰Ray Marshall and Beth Paulin, "The Wages of Women's Work", Society, Vol.22, No.5, July/August, 1985, p.30.

²¹Ibid, p.35.

²²Dialogue, p.2.

²³Ronnie Steinberg, "A Want of Harmony: Perspectives on Wage Discrimination and Comparable Worth", in Remick, p.4.

²⁴_____, "Evaluating Jobs", Society, Vol.22, No.5, July/August, 1985, p.46.

²⁵Ibid, p.49.

²⁶Green Paper, p. 2.

²⁷Ray Marshall and Beth Paulin, "The Wages of Women's Work", Society, Vol. 22, No. 5, July/August 1985, p. 29.

²⁸Ibid.

²⁹Ibid.

³⁰Ibid.

³¹Thomas Sowell, "Weber and Baake, and the Presuppositions of Affirmative Action", Fraser Institute, p. 50.

³²See Andrea Beller, "Changes in the Sex Composition of U.S. Occupations 1960, 1981" The Journal of Human Resources, 1982, pp. 235-250.

³³F. A. Hayek, The Constitution of Liberty, University of Chicago Press, Chicago, 1960, p. 98.

³⁴George T. Milkovich, in Livernash, p. 43.

³⁵Ibid., p. 42.

³⁶Dialogue, p. 4.

³⁷Ibid., p. 5.

³⁸Ibid., p. 5.

³⁹Jacob Mincer "comment", Women in the Labour Market, Columbia University Press, 1979, p. 282.

⁴⁰Thomas Sowell, "Weber and Baake, and the Presuppositions of Affirmative Action", Fraser Institute, p. 43.

⁴¹Conrad Winn, "Affirmative Action for Women: More than a case of simple justice", Canadian Public Administration, Vol. 28, No. 1, Spring, 1985, p. 33.

⁴²Jennifer Roback, "The 59¢ Fallacy", Reason, Vol. 16, No. 4, Sept., 1984, p. 37.

⁴³George Milkovich, "The Emerging Debate", in Livernash, p. 46.

⁴⁴Peter Schwartz, "Women's Worth", Reason, Vol. 14, No. 3, July 1982, p. 42.

⁴⁵Kai Neilsen, Equality and Liberty, New Jersey, Roman and Allenheld, 1985, p. 112.

⁴⁶Angela Miles, "Feminist Radicalism" Canadian Journal of Political and Social Theory, Vol. 9, No. 1-2, 1985, p. 17.

⁴⁷Solomon Polacheck, "Occupational Segregation Among Women: Theory, Evidence, and Prognosis", Women in the Labour Market, Cynthia B. Lloyd, Emily S. Andrews, and Curtis L. Gilroy, eds., New York, Columbia University Press, 1979.

⁴⁸Ibid., p. 138.

⁴⁹Ibid., p. 147.

⁵⁰Ibid., p. 154.

⁵¹Quoted from Marshall and Paulin, "The Wages of Women's Work", Society, Vol. 22, No. 5, July/August, 1985, p. 31.

⁵²Carl Hoffman and John Reed, "When is Imbalance not Discrimination?", Discrimination, Affirmative Action, and Equal Opportunity, W. E. Black and M. E. Walker, eds., The Fraser Institute, 1982, pp. 187-216.

⁵³Ibid., p. 193.

⁵⁴Ibid.

⁵⁵Ibid., p. 196.

⁵⁶Ibid., p. 195.

⁵⁷Ibid., p. 197.

⁵⁸Ibid., p. 198.

⁵⁹Ibid., p. 205.

DISCRIMINATORY HARM AND THE LAW

Had Congress intended to make an employer responsible for being the last actor in a chain of events, surely there would have been debate over whether an employer should be held liable for the acts of others.¹

Most studies have shown that pay equity legislation should have at least some impact on wage costs facing employers, the relative incomes of employees, and the conduct of labour relations within the firm. As is the case whenever a piece of new legislation upsets the status quo, groups that are potentially adversely affected will try to use the courts to limit the effect of the legislation, while groups that can potentially benefit will turn to the courts to realize their claims. Thus, it is obvious that pay equity will produce litigation. It is also clear that the rate of litigation will be affected by the form the legislation takes: the stricter the legislation, the greater the potential cost impact, and hence, the greater the incentive to bring and to defend against claims. The purpose of this section is to outline some of the legal issues which may emerge under pay equity.

Background of the Concept

Eleanor Holmes Norton, Chairperson of the Equal Employment Opportunity Commission under the Carter administration, has called comparable worth the equity issue of the eighties. Rita Cadieux, Deputy Chief Commissioner of the Canadian Human Rights Commission, has stated that comparable worth represents "... a bold new element in the long standing

struggle of Canadian women for equality in the work force."²

Comparable worth's opponents are no less sensitive to the "equity" aspect of comparable worth, although much less sanguine about its prospects. One recent study insists, "Adoption of comparable worth theory would ... entangle the judiciary and administrative agencies in issues that would be difficult to resolve and almost impossible to manage."³

The phrase "equal pay for work of equal value" was first used in an important context at the 1919 Peace Treaty Meetings which set up the International Labour Organization. Lord Balfour, to whom the first use of the phrase is attributed, apparently felt that it more precisely expressed the I.L.O.'s policy objectives in this area than the more commonly used "equal pay for equal work".⁴ Whether this early usage constitutes a point of origin for the concept of comparable worth is a source of scholarly debate which need not concern us here. More persuasive as a technical point of origin was the 1951 I.L.O. conference which promulgated convention #100 in which the phrase "equal pay for work of equal value" was entrenched.

Janice Bellace suggests that although the statements and resolutions of the "highly politicized 1951 session" did not constitute a clear and unequivocal endorsement of comparable worth, there is little doubt that the I.L.O. perceived and continues to perceive "its equal pay formulation as being broader and more flexible than equal pay for substantially similar work."⁵ The United States has not ratified Convention #100 of the I.L.O., and Canada did so only in 1972.

It is safe to say that the principles embodied in Convention #100 and restated at the 1957 and 1975 meetings of the I.L.O. had little impact on comparable worth as a political movement until the flood of research data

on female participation in the labour force began to reveal substantial evidence of a persistent earnings gap - this only in the mid to late seventies. There is another, perhaps more basic, reason for the essential dormancy of comparable worth as a "causus belli" for rights activists until recently. Feminists and minorities advocates had other, more patent abuses to fight. It is sometimes difficult to remember that it has been illegal under American federal law to pay "classes" of employees different wages for performing the same work only since 1963, and for those under Canadian federal jurisdiction only since 1956!

A generation ago, it was common enough to hear stated as a serious contention that it was all right to pay women less because they needed less. The extent to which such a comment would appear outdated, if not positively eccentric in the mid-eighties, is the measure of progress made and of a substantially successful interplay between sanction and attitudinal change over a relatively short period of time. Still, the success of this process in lessening inequalities in hiring, promotion, and compensation for equal work was achieved only at the cost of ceaseless vigilance on the part of disadvantaged groups. Until the mid-seventies, the energies of fair employment rights activists were primarily directed towards monitoring compliance with these new equal opportunity laws. The drive for pay equity is seen as needed to complete the thrust towards fairness whose evolution began with equal pay for equal work laws - a thrust made necessary by the social fact that men and women in many instances do not do the same type of work.

U.S. Developments

The eighty-eighth Congress passed both of the key pieces of federal legislation around which debate on comparable worth is focused in the United States - the Equal Pay Act (1963) and Title VII of the Civil Rights Act (1964). Of the two, the Equal Pay Act is by far the more explicit. Its standard is the equal pay for equal work maxim.

It requires employers to pay men and women the same wages if they work in the same establishment under similar working conditions, performing "equal work" on jobs that require equal skill, effort and responsibility.⁶

It permits pay differentials based on seniority, merit, quantity or quality of production, or any factor other than sex. Title VII, while less specific on the question of pay differentials, generally prohibits "employment practices that discriminate on the basis of race, color, religion, sex or national origin."⁷

Occupationally segregated women "trapped" in jobs in firms without analogues which are integrated or male-dominated are without recourse under the Equal Pay Act. The two acts do overlap, and the nature of their inter-relationship is the source of much debate. The nub of the controversy so far as it is relevant to comparable worth is whether,

Title VII goes beyond the Equal Pay Act to require compensation between men and women performing jobs that are not "equal" under the standards of the latter act, but are viewed as being of "comparable worth" to the employer or perhaps, in a broader sense to society at large.⁸

Fourteen American states have equal pay laws on the books prohibiting unequal compensation rates for comparable work,

Nine of these states specify that wages must be equal for females performing comparable work, while five ... require pay equity for females performing work of comparable character.⁹

Eleven other states are, with widely varying degrees of enthusiasm, studying the matter.

At least half of these state laws are substantive nullities because the concerned state governments have never bothered to commission the job evaluation studies without which it is impossible to establish whether or not employers are obeying or disobeying the law.¹⁰ And most of the states which do have both laws and commissioned studies against which to check compliance, apply comparable worth legislation only to the public sector.¹¹

The Courts

The American courts have developed several approaches to the question of valid or invalid distinctions. Tussman and tenBroek identify "five possible and exhaustive relationships between the class of all individuals possessing the defining "traits" set out in legislation, and the class of all individuals tainted by the "Mischief" at which the law aims. The form and degree of overlapping between these two classes will determine the reasonableness or rationality of the legislative classification."¹¹

Without going into detail, these relationships relate to questions of inclusion, exclusion and distribution. Classifications should ideally be neither over- nor under-inclusive, and the "Mischief" should taint all in the class and none outside it. American law also looks at the question of legitimacy of aims. Justice Brennan, in his majority opinion in *Western & S.L.I. Co. versus Board of Equalization* states:

"In determining whether a challenged classification is rationally related to the achievement of a legitimate state purpose, we must answer two questions: 1) Does the challenged legislation have a legitimate purpose? and 2) Was it reasonable for the lawmakers to believe that the use of the challenged classification would promote the purpose?"¹²

In general, race and - to a lesser degree - sex are considered indivious bases for making distinctions, to the point that programmes whose purposes imply the making of race- or sex-based distinctions will receive strict judicial scrutiny.

In American law strict scrutiny is characterized by: 1) "... a presumption of unconstitutionality, and hence, a burden on the defendant to demonstrate that the legislative purpose is compelling and that the classification is necessary to the accomplishment of this purpose ..." 2) "... the notion that the State must select the least restrictive means for accomplishing its objective."¹³

The justification of various kinds of affirmative action have had to face and overcome certain "strict scrutiny" tests because possession of a prescriptive biological trait (such as a black skin) is seen as an extremely suspect basis for making classifications and distinctions of any sort related to employment - even for the good of those thereby distinguished.

The 14th amendment has proven to be something of a double-edged sword; while it has helped propel many human rights claims, it has also been used with some success to challenge affirmative action programmes and other programmes aimed at redressing inequalities. (e.g. Regents of the University of California v. Baake on the question of reverse discrimination).

Employment and Discrimination

Two principle definitions of employment discrimination have evolved in American labour law. One definition generally called disparate treatment is readily understood: an employer commits disparate treatment

discrimination when he or she hires, promotes or pays more to a [white, male] applicant instead of an equally qualified [black, female] applicant because of a preference for [white, male] employees. "Because of" in disparate treatment case implies intent. The specific intent to disadvantage for racial [or sexual] reasons is critical in disparate treatment cases. Pay discrimination suits are often fought and won by plaintiffs on the basis of proven disparate treatment.

Those claiming systematic pay undervaluation as a basis for pay readjustments under comparable worth are seldom blessed with direct proof of an employer's intent to disadvantage. Past patterns of behaviour which allow judgements to be made about the balance of probabilities, can - to a degree - corroborate imputations about intent. In general, comparable worth claimants must either adduce indirect evidence of intent or seek a definition of discrimination which does not require proof of intent.

Disparate Impact

Since *Griggs v. Duke Power*¹⁴, a definition of discrimination which does not require proof of intent has been available for those seeking redress for employment discrimination - disparate impact.

Griggs was not a dispute about employment pay practices. *Griggs* involved an employer's use of a high school diploma as an applicant screen. Requiring applicants for certain jobs at Duke Power to possess diplomas had the effect of eliminating proportionally more blacks than whites from the applicant pool. At no time was it shown that the defendant intended to disadvantage blacks through the use of its diploma requirement. Indeed evidence was introduced that Duke Power sincerely believed that the diploma

was a useful predictor of prospective applicants' ability to perform jobs - many of which involved the comprehension of fairly complex materials handling instructions. Nevertheless, Duke Power was found guilty under the principle that its use of a high school diploma requirement had had a "disparate impact" on blacks. Disparate impact can serve the purposes of pay discrimination suits also, in fact it may be that something like disparate impact is essential for the establishment of the legal validity of comparable worth.

Schlei and Grossman state cogently the requirements of a discrimination proceeding under disparate impact,

The plaintiff bears the initial burden of establishing a prima facie case of substantial adverse impact, that is, of showing that the test at issue selects those from the protected class at a "significantly" lesser rate than their counterparts. If the plaintiff does not meet this burden, the test's validity is irrelevant. If sufficient impact is demonstrated, the burden shifts to the defendant to validate the selection device, that is, to show that it is "job-related". If the employer fails in its burden, use of the test will be deemed in violation of Title VII. If the employer succeeds, the plaintiff then attempts to rebut the defendants' evidence by showing that although the test is job-related, it does not constitute a business necessity in that an alternative selection device exists which would have comparable business utility but could have a lesser adverse impact.¹⁵

One method of defense open to an employer is to impugn the validity of the plaintiff's proxy for the available work force. An adverse impact argument may well turn on whether the plaintiff's or the defendant's proxy for the available workforce is accepted by the court.

In a detailed discussion of adverse impact, Michael Evan Gold argues that in effect almost all of a defendant's options in a disparate impact suit are attacks on the plaintiff's prima facie case; an attempt to impugn the validity of the plaintiffs' proxy. The fundamental question is - when

is a proxy close enough to the class for which it stands to justify its use as a basis for comparison in proving disparate impact?

In theory, comparable worth is only interested in distribution and pay patterns within a given organizational system. Much of what follows here and in Part II will directly challenge this assumption of limited scope.

Entry-level gender distribution, for instance, was "the proxy" which the plaintiffs in the XYZ case made use of to frame their prima facie accusation of "promotional" sex discrimination through occupational segregation.

Proxy problems, and particularly statistical validation of the adequacy of proxies, are critical to the validity of hiring, promotion and pay discrimination suits because plaintiffs who cannot prove intent must seek a comparative referent against which to claim disadvantage or undervaluation.

Society as a whole is an extremely problematic point of reference against which to base claims of disparate impact discrimination. Inasmuch as society as a whole contains large segments which do not work, cannot work, or will not work, the societal whole is an unreliable basis against which to infer conclusions about employment situations. Viewing all employment situations as being contained within a labour market, the relevant whole would appear to be something which we may designate the available work force. However, the concept of an available work force is also fraught with difficulties for the purposes of drawing meaningful inferences. In a given employment situation, just what is the composition

of and what are the boundaries of the available work force? The available work force for a job in Augusta, Georgia, does not include people in Southern California. Obviously, labour markets have defined geographical and transportation parameters. Having divided the labour market into various discrete labour markets, and reduced the available work force to, say, at its most generous, people between the ages of eighteen and sixty-five living within a manageable commuter distance of the job location, we have still done remarkably little. We have said nothing about interest in or ability to do a given job. Measures of real interest in a specific job are highly problematic and even if such indicators were available, they would be prohibitively expensive to apply. (Imagine trying to ask every potential candidate in a medium-sized city if he or she were interested in every potential opening.) If interest is problematic, ability is equally vexing. The reasons that employers apply tests in the first place to potential employees is so that they may reduce the available work force to a realistic applicant pool containing only those whom the employer deems viable potential job-fulfillers.

Interest and ability also, of course, affect promotion and pay conditions; indeed differences in these characteristics along gender lines appear to have explained virtually all the purported discrimination at "XYZ". Proxy problems are one of three key difficulties in making a case of Disparate Impact Discrimination. The others are a) overcoming the market defense and, b) problems with arguments based on associative causation. Before looking specifically at these two other questions, a review of two key court cases is undertaken.

Gunther

In *County of Washington v. Gunther*,¹⁶ the Supreme Court dealt with the question of the relationship between the two pieces of federal legislation which govern the definition of employment discrimination. The Congress itself was aware of possible interpretive overlap between Title VII and the EPA. To forestall possible jurisdictional difficulties concerning the relationship between the two Acts, Congress included in Title VII an amendment designed to clarify their interrelationship. Until *Gunther*, most jurists had held that the so-called Bennet Amendment¹⁷ to Title VII required sex-based pay discrimination cases to conform to the "equal work" standard embodied in the EPA. Since the Eighty-eighth Congress had specifically rejected the comparable worth standard less than a year before framing Title VII, this restrictive reading of the relationship between Title VII and the EPA seemed eminently reasonable. The *Gunther* Court, in a split decision, disagreed. In *Gunther*, four female prison guards in an Oregon county jail brought suit claiming that they were paid unequal wages for work which was substantially equal to that of male prison guards. They also argued that even if the jobs were not "substantially equal" as defined in law, at least part of the pay differential was attributable to intentional discrimination (disparate treatment). *Gunther* is not a ruling on the validity of comparable worth. The Court specifically abstained from any comment on what it called the "controversial doctrine of comparable worth".

Respondents claim is not based on the controversial concept of 'comparable worth', under which plaintiffs might claim increased compensation on the basis of a comparison of the intrinsic worth or difficulty of their job with that of other jobs in the same organization or community.¹⁸

Gunther's significance is almost entirely negative. Had the court's analysis of the legislative intent of the Bennet amendment construed the meaning of the word "authorized" to incorporate the equal work standard of the Equal Pay Act into Title VII discrimination claims, comparable worth would have been deprived of any possible legislative standing at one blow. The Court, however, held that the word "authorized" expressed only the desire of Congress to embed the "four affirmative defenses" of the EPA into Title VII. The four affirmative defenses are the aforementioned protections of employers' rights to differentiate in pay on the basis of seniority, merit, quantity or quality of production, or any other factor other than sex.

The passage which formed the basis for the majority's judgement in the Gunther case reads as follows:-

The Equal Pay Act is divided into two parts: a definition of the violation, followed by four affirmative defenses. The first part can hardly be said to 'authorize' anything at all: it is purely prohibitory. The second part, however, in essence 'authorizes' employers to differentiate in pay on the basis of (... the aforementioned affirmative defenses). It is to these provisions, therefore, that the Bennet amendment must refer.¹⁹

The ruling allowed that proof of substantial equality in occupational duties was not a necessary element of the prima facie requirement in a Title VII discrimination suit.

The majority's reading of the legislative intent of the Bennet Amendment has been criticized by several legal scholars.²⁰ In a follow-up attempt at clarification, Senator Bennet himself stated his own view on how he meant his amendment to be construed.

... it must be interpreted to mean that discrimination in compensation on account of sex does not violate Title VII unless it also violates the Equal Pay Act. ... it is not

unlawful employment practice ... to have different standards of compensation for nonexempt employees where such differentiation is not prohibited by the Equal Pay Act...²¹

The Court is of course not obliged to recognize such post facto "dicta" as determinative, yet the evidence of legislative intent the Court deigned to credit as substantiating their own broad, rather than this narrow interpretation, is both skimpy and unpersuasive.²²

Dissent

Justice Rehnquist, writing for himself and the three other dissenting justices summarized the argument that the majority had not only misread Bennett but had also misconstrued legislative intent.

"...the most plausible interpretation of the (Bennett) Amendment is that it incorporates the substantive standard of the Equal Pay Act. - the equal pay for equal work standard - into Title VII ... The attenuated history of the sex amendment to Title VII makes it difficult to believe that Congress thereby intended to wholly abandon the carefully crafted equal work standard of the Equal Pay Act."²³

He goes on to point out that the Court's decision "ignores traditional canons of statutory construction and relevant legislative history."²⁴ During the Congressional hearings which preceded the implementation of the EPA, the Kennedy administration had strongly urged the adoption of a comparable rather than an equal work standard. Quoting a congressman who in the EPA deliberations had suggested that, "the word comparable opens up great vistas. It gives tremendous latitude to whoever is to be the arbitrator in these disputes."²⁵ Rehnquist found it difficult to believe that the Congress which had clearly rejected comparable worth in 1963 had meant to embrace it (without saying so) in 1964 when drafting Title

VII. Rehnquist goes further, implying that the Court's decision virtually nullifies the EPA itself.

if plaintiffs can proceed under Title VII without showing that they satisfy the "equal work" criterion of the Equal Pay Act, one would expect all plaintiffs to file suit under the "broader" Title VII standard.²⁶

Searching for a reason for what he regards as the Court's gross misreading of the Congressional record, Rehnquist can only surmise that the majority justices were engaged in correcting perceived flaws in the implications of the two acts - a little judicial legislating in effect. It seems that The Gunther Majority was worried about the possibility that a narrow reading of the relationship between title VII and the EPA might deprive victims of a remedy leaving discriminatorily underpaid women "no relief" when they are incumbents in unique jobs or jobs not equivalent to those held by men. What Rehnquist calls this "parade of horrors" ignores the lower court rendering in *IUE V. WESTINGHOUSE*:

Before closing this opinion, we would like to briefly comment on the plaintiffs' argument that Congress could not conceivably have intended to isolate one form of purposeful discrimination and exempt it from the broad prohibitions of Title VII. They refer to the hypothetical situation whereby, given this court's decision, an employer could isolate a job category which was traditionally all female, arbitrarily cut the wages of that job class in half for the sole reason that its holders were female, and yet not run afoul of the broad remedial provisions of Title VII ... even assuming that this would in fact be true, such discrimination could not be maintained. Title VII would still prohibit sex discrimination in hiring, firing, promotion, transfer, classification and terms and conditions of employment, and any attempt to perpetuate the effects of such purposefully discriminatory yet allegedly lawful activities would run afoul of these prohibitions."²⁷

What is the relevance of the Gunther decision for the debate on comparable worth? The High Court's denial that claimants under Title VII need prove equal work, left a door ajar for future comparable worth

litigants. Yet the court certainly did not adopt a standard of equal pay for comparable work, much less comparable worth. The court simply held that, substantial equality not being required, the plaintiffs had successfully stated a legitimate prima facie claim under Title VII based on intentional sex-based wage discrimination. A balanced assessment of the meaning of Gunther is found in an article in the University of Colorado Law Review,

The holding, {Gunther} therefore, has been interpreted as leaving the door open for comparable worth cases, at least where an employee presents "direct evidence" of intentional discrimination. Because the burden of proof remained with the plaintiffs, however, and also because the Court seemed to require direct evidence of intentional discrimination, the Gunther decision may allow only a limited variety of disparate treatment claims.²⁸

The court essentially held that whatever the future might hold, the relevant statute (Title VII) covered the situation before it in Gunther.

AFSCME V. State of Washington

On September 4, 1985, the United States Court of Appeals for the Ninth Circuit reversed a lower court decision which comparable worth activists had hailed as a landmark legal espousal of their point of view. Whether Justice Jack Tanner's decision in AFSCME v. State of Washington²⁹ (1983) was a generally useful precedent, even unreversed, was a question of some debate, but its categorical and complete rejection by the appellate court is undoubtedly a blow to those adherents of comparable worth who saw in the equity perspective of the court system, the royal road to the rapid implementation of their advocacy. Opponents took immediate heart. Virginia Lamp, a labour relations attorney with the U.S. Chamber of Commerce, said:

"Comparable worth is an idea with superficial and political appeal, but which is now legally bankrupt."³⁰

Defenders vowed to take their case to the Supreme Court with comments such as, "We intend to break out of the ghetto of low wages one way or another."³¹ Perhaps this latter statement betrays a certain presentiment that the judicial road to the implementation of comparable worth may not be the smoothest way to go. If this is true, it is particularly ominous because it is the judicial/civil liberties mode of reasoning which has recently been most supportive of the sorts of ameliorative measures and compensatory readjustments to which comparable worth bears a family likeness. This is certainly true of the heritage of the Warren Court in the United States. The Canadian experience is substantially different, but may well be moving in the American direction. Court failures from the perspective of civil rights may well reduce comparable worth advocacy to the status of an interest group demand in the political bargaining market - little different from the sort of demands for special treatment made by farmers, veterans or textile workers. It may be that this is where comparable worth belongs, but if this is true, then the reported claims of comparable worth enthusiasts that their advocacy demand is "the equity issue of the eighties" are mistaken.

Although *American Federation of State, County and Municipal Workers v. State of Washington* is probably the most publicized court case which discusses comparable worth, it may not be the most fruitful from an analytical perspective. Nevertheless its prominence demands some comment. A 1974 study commissioned by the state of Washington, showed, "clear

indications of pay differences between classes {of state employees} predominantly held by men and those predominantly held by women."³²

The consulting firm of Norman Willis and Associates was hired to perform a comprehensive state-wide examination of the salaries of public sector employees. The study encompassed fifty predominantly male job classifications and sixty-two predominantly female job classifications - predominance being defined as 70% dominance by one sex or the other. Using a relatively standard job evaluation system which awarded points to weighted factors such as skill, effort and responsibility type, the Willis study concluded that female-dominated job classifications were on average paid approximately 20% less than men's classifications of comparable worth. Various follow-up studies tended to corroborate the initial findings. The state legislature subsequently passed several pieces of legislation designed to close this gap over a period of time consistent with the exigencies of the public purse. The pace of improvement was not rapid enough to suit AFSCME, the major union representing state employees (fifty percent of whom were female), and they took the state government to court. The district court found for the plaintiffs and imposed damages estimated at between \$800 million and one billion dollars in back pay and wage increases. The case proceeded along the following lines - the plaintiffs first constituted themselves as an acceptable class, meeting the requirements of numerosity, typicality, commonality, and adequacy of representation. The plaintiffs overcame challenges as to commonality and adequacy of representation lodged by the defendants. The class at issue was defined by the court as, "male and female employees of all job classifications ... which were 70% or more female"³³

The plaintiff alleged discrimination through the maintenance of historically sex segregated job classifications. The court ruled these claims "at issue" but finally irrelevant as causative. Sex segregation, was relevant as "an element of probative evidence supporting the plaintiff's disparate impact and disparate treatment arguments."³⁴ Justice Tanner elaborated the "broadly inclusive interpretation of Title VII." Reading the legislative history of Title VII in the light of *Gunther*, the district court denied that the "equal work" standard of the EPA was available as a *prima facie* cause of dismissal.

Although the four affirmative defenses authorized by the EPA were available to the defendants, only the factor "other than sex" was a possible relevant defense in a pay discrimination suit of this sort. All attempts to establish a defense on a cost justification basis were ruled clearly illegitimate (*Los Angeles Department of Water and Power v. Manhart*).³⁵ Citing *Wambheim v. J.C. Penny Company Inc.*³⁶ as sanctioning the applicability of a disparate impact prohibition to Section 703 (A) (1) of title VII, the court held that "the applicability of the disparate impact analysis" to the pay discrimination sections of Title VII is "well established".³⁷ It was particularly this finding in which both the novelty and the salience of AFSCME for comparable worth advocates resided. Under disparate impact, the plaintiffs were required to show only that by a "preponderance of the evidence", the challenged practice had a discriminatory impact - intent was irrelevant. Burden of proof then shifted to the defendant whose options reduced themselves finally to the attempted demonstration of overriding business considerations as a defense against the

charge of "impact" discrimination. Inasmuch as Justice Tanner was inclined to weight the defendants' claims of business necessity against "the countervailing national interest in eliminating employment discrimination,"³⁸ the defendants were placed in the unenviable position of having to "override" not merely a set of specific charges, but the national interest in combating what Tanner called "the status quo of prior discriminatory employment practices."³⁹ The court also accepted the plaintiff's assertions under the disparate treatment line of reasoning accepting "impact" differences as proof that the employer's practices were a pretext for intentional discrimination.

Although finding that as a matter of fact the plaintiff's case did "not require the court to make its own subjective assessment as to comparable worth,"⁴⁰ the court's acceptance of disparate impact was heavily reliant on a comparable worth analysis of the meaning of pay differentials. Conclusion of fact # (36) is worthy of quotation in full,

The wage system in the State of Washington has a disparate impact on predominantly female job classifications. Several comparable worth studies since 1974 found a 20% disparity in salary between predominantly male and predominantly female jobs which require an equivalent or a lesser composite of skill, effort, responsibility and working conditions as reflected by an equal number of job evaluation points. There is a significant inverse correlation between the percentage of women in a classification and the salary for that position.⁴¹

Finding that the defendants should have been able to "foresee" the adverse impact of their practices, the state was found culpable under disparate treatment and disparate impact and granted injunctive relief in the range earlier mentioned.

AFSCME was a landmark in at least two ways; it was the first court decision to sanction a mandated pay readjustment on the basis of what one

legal scholar has called, "a disparate impact comparable worth" basis, "founded on the theory that the preservation of historical relationships requires the preservation of historical discrimination."⁴² Secondly, while Justice Tanner was sensible to the operative force of impact and effect in the plaintiff's arguments, he remained unmoved by the possible impact of the huge size the financial restitution authorized by his decision. In AFSCME, the plaintiffs relied on the statistical evidence brought forth by the state's own job evaluation studies. In the finding of liability under disparate impact, this evidence was certainly a determinative element in the findings. This fact casts some doubt on the broad gauge utility of the AFSCME decision, as Levitt and Mahoney put it, "after the decision in AFSCME ... few employers will conduct comprehensive job evaluations which could subject them to potentially devastating liability."⁴³

Appellate Court Reversal

Inasmuch as the finding of culpability, even under the more conventional and accepted disparate treatment basis, was in the AFSCME case reliant on the premise of the "forseeable adverse impact" of pay practices, the comparable worth analysis played a leading role in both lines of argument. Had the district court's findings been sustained, there is little doubt that comparable worth's legal validity would have been greatly strengthened. In a judgement rendered on September 4, 1985,⁴⁶ the United States Court of Appeals for the Ninth Circuit categorically rejected the lower court rendering in both its disparate treatment and disparate impact versions. In sum, the appellate court said that the State of Washington had

not violated the law by paying less for jobs held primarily by women than for jobs held primarily by men, established as of equivalent value through the use of job evaluation techniques.

The appellate court held that,

- 1) The state's decision to base compensation on the competitive market rather than on a theory of comparable worth did not establish its liability under a disparate-impact analysis, and
- 2) State's participation in the market system did not allow inference of discriminatory motive so as to establish its liability under a disparate treatment theory ...⁴⁴

The appellate court first addressed the question of disparate impact. Essentially, it was held that the lower court had erred in not confining its analysis of impact to the specific facts in the case at issue.

Disparate impact must be "confined to cases which challenge a specific, clearly delineated employment practice applied at a single point in the job-selection process."⁴⁵ The assertions of the lower court as to the need to weigh a defense of the business necessity of adherence to market rates of pay against "historical injustices", and the possibility of perpetuating a discriminatory status quo were an illicit attribution of responsibility and entirely irrelevant.

The appellate court also impugned the single-minded reliance of the lower court on the job evaluation study upon which the claims of job comparability rested.

The state's decision to base compensation on the competitive market ... involved the assessment of a number of complex factors not easily ascertainable...⁴⁶

The clear message is that the job evaluation study could not bear the burden of inference, much less the burden of proof which the lower court had placed

on it. As the justices put it, the question of the market determination of wages is "too multi-faceted to be appropriate for disparate impact analysis."

Having impugned the validity of the assertion of adverse consequences as argued under disparate impacts, disposal of the accusation of a culpable awareness of the potential for discrimination of these selfsame consequences under disparate treatment followed without much need for complex ratiocination. Admitting that the "necessary discriminatory animus" may be inferred from both statistical and circumstantial evidence, the court denied that adjusting wages with reference to the market constitutes evidence because the defendants did not create the market disparity. The plaintiffs had failed to supply the "corroborative evidence as set out in (32 u.s.c.a. s 2000e et seq.) of Title VII which would bolster their heavy reliance on the comparable worth study. Disparate treatment discrimination was rejected by the court.

The AFSCME appeal was clearly a judgement on the legal validity of comparable worth. Certainly the appellate justices saw it as such; "We must determine whether comparable worth, as presented in this case, affords ... a basis for recovery under Title VII."⁴⁷

The crux of the judgement was that the court didn't view market wage setting as a specific, clearly delineated practice like denying the class of people under five-foot nine inches in height access to jobs on the police force for no reasons demonstrably related to job performance. This, in the court's opinion, is clearly the situation which impact theory was designed to cover as demonstrated by both legislative intent and prior case law (Griggs v. Duke Power, Antonio v. Ward Cove Packing Co., and Dothard) "the

result of a complex of market forces does not constitute a single practice."⁴⁸

The demolition of disparate impact proved equally fatal to the accusation of disparate treatment.

Neither law nor logic deems the free market system a suspect enterprise ... in reality the value of a particular job to an employer is but one factor influencing the rate of compensation...⁴⁹

Nowhere in the relevant legislation did the court find evidence of an intent to "abrogate fundamental economic principles such as the laws of supply and demand". Finally the court dismissed the argument that the State of Washington's failure to live by the conclusions of its own commissioned study was evidence of intent to discriminate with this clear statement:

We also reject A.F.S.C.M.E.'s contention that, having commissioned the Willis study, the State of Washington was committed to implement a new system of compensation based on comparable worth as defined by the study. Whether comparable worth is a feasible approach to employee compensation is a matter of debate.⁵⁰

Footnote on Other Relevant Judgements

One judgement is an inadequate basis upon which to dismiss the legal validity of a complex social programme. Yet the AFSCME decision is consistent with several other important judgements. In *Spaulding v. University of Washington*,⁵¹ the plaintiffs, the predominantly female teaching staff at a nursing faculty, alleged wage discrimination on the basis of a pay differential between themselves and the faculty members in other departments. No direct proof of discriminatory intent was adduced, but statistical evidence was introduced as a basis for the claim of a pattern and practice of disparate treatment. A disparate impact claim was

also made. The appellate court was not kind to the plaintiffs' evidence of disparate treatment stating that it "failed to control for exactly those differences between individuals that can legitimately lead to their being treated differently."⁵² Unable to ascertain if the wage differential was due to legitimate factors or to sex, the court dismissed the claim of disparate treatment although leaving open the possibility that better (that is, corroborated) statistical evidence might alter future interpretations. Disparate impact received shorter and more categorical dismissal in *Spaulding*. Stating that the adverse impact claim rested solely on the "theory of comparable worth", the court stated that disparate impact was not "the appropriate vehicle from which to launch a wide-ranging attack on the cumulative effect of a company's employment practices".⁵³

The essence of the decision in the *Spaulding* case was that the market is too complex a set of behaviours to constitute what one justice called a "cognizable practice". In at least three other cases - *Taylor v. Charley Brothers*, *Christenson*, and *I.U.E. v. Westinghouse*⁵⁴ - the courts demanded direct evidence of discriminatory intent thereby placing a heavy burden of persuasion on the plaintiff's prima facie case which could not be met simply by supplying evidence of pay disparities through comparable worth studies.

Gunther and *AFSCME* taken together give little reason to believe that comparable worth's future in the courts is promising. If anything they reinforce the premise that proof of intent is a fairly demanding prima facie requirement in a sex-based wage discrimination case. Comparable worth advocates have two possible strategies available to them: 1) They may

attempt to reassert through further litigation the applicability of adverse impact to wage-discrimination suits, or 2) dilute or destroy the direct evidence stipulation which makes uncorroborated statistical evidence - the staple of a comparable worth claim - so difficult to sustain in court. At the moment, all speculation on how such arguments might proceed is unrewarding. What we do know is that the current U.S. court climate is clearly unfavourable to comparable worth's prospects.

Two key problems which comparable worth will have to overcome if it is to fare better in the courts are: a) the market defense; and b) reliance on rate of association arguments.

Proof, Evidence and the Market Defense

The American Heritage Dictionary defines evidence as "the data on which a judgement or conclusion may be based or by which proof or probability may be established". Proof, the operative evidentiary legal requirement for the assignment of liability, is defined "in lege" as the "whole body of evidence that determines the verdict or judgement in a case". More narrowly, as in logic and argument, proof is the validation of a proposition by the application of specified rules.

Our study of two key legal cases which may be said to involve at least an assessment of the important presuppositions underlying comparable worth has uncovered a difficult evidentiary problem. The American courts have so far proved unwilling to grant that bracketing pay scales to the market constitutes a specific and delimitable practice of the sort about which judgements as to "impact" can be made. They have also proved dubious about the use of uncorroborated statistical evidence as constituting a

necessary and sufficient prima facie case of intentional discrimination - the only other alternative available under the relevant American federal statutes. Given the general unlikelihood that employers will co-operate in convicting themselves by bandying about prejudicial verbiage concerning intent, the above two facts may prove a serious obstacle to comparable worth litigation. Those familiar with Jim Crow style legislation are fully prepared to countenance the sensible proposition that facially neutral practices may discriminate. In fact, both Canadian and American courts have struck down certain facially neutral hiring practices (police height and weight requirements, for instance). The real problem is that the courts do not see labour pricing in a market as a practice at all; or if they do, they are tacitly admitting that it is a practice which operates on a scale of complexity "not dreamt of in the philosophies" of the most hubristic of statistical modellers.

A market itself is not a discriminatory practice and neither is setting pay rates with reference to market pricing. The market may be a social institution, but as F. A. Hayek and others have pointed out, no one is responsible for it. It may be that this very conception of a market as something almost unwilled, beyond culpability and perhaps beyond control, which should be directly attacked here. If so, such an attack must inevitably connect with various strands of ideological critique which express hostility to the idea that in liberal democratic polities the market tail must wag the dog of community values and institutional arrangements.

The advocates of comparable worth have, in fact, a formidable ally at this level. As early as 1948 Karl Polanyi stated that

"No society could naturally live for any length of time unless it possessed an economy; but previously to our time no economy has ever existed that, even in principle, was controlled by markets."⁵⁵

The notion that the efficient operation of a free market economy tends to produce, as a fortunate by-product, the most felicitous social arrangements, has never, even in the nineteenth century heyday of bourgeois liberalism, held the field uncontested. Concern for the mitigation of perceived distribution or material inequalities created by the automatic processes of a market which "considers not the worth of persons", has manifested itself in legislation, social policy, and liberal political theory throughout the era of bourgeois dominance.

Polanyi's critique is only a particularly trenchant statement in a long tradition. We will return to this important line of argument and its relation to the comparable worth controversy in the final chapter of this paper. At this juncture, two things need to be said. 1) The adherents of pay equity have not in the main been particularly forthcoming in connecting their attacks on market-driven wage hierarchies with non-market or anti-market theories of economy or value. Statements like the following are representative:-

"It is true that comparable worth is based on some elements of just price or equity, but in the absence of auctions for labor, a sizable equity element is inevitable in labor markets."⁵⁶

Whatever the merits of this assertion, in the absence of any analytical elaboration of what is meant by the phrase, "some elements of just price", it does not constitute a theory. (The major exception is the large-scale acceptance by pay equity theorists of the structuralist or institutional explanation of the barriers to labour mobility, which in turn

explains occupational segregation and female ghettoization.) (See Appendix I,).

2) The courts, however active or prone to judicial legislating they might become in Canada or the United States, must remain concerned with individual culpability and liability. Participation in market-driven bargaining under accepted rules of procedure is unlikely to become a culpable action in a legal sense, without considerable and unanticipated changes in the orientation of the legal structure as presently constituted.

Causation and Rates of Association

Legal responsibility depends on causal connections. Experts on the rules of evidence describe three widely understood definitions of causation. Necessary or "but for" causation may be said to exist if B would not have happened unless A happened first. Sex would be a necessary cause of women's low pay if it could be demonstrated that but for femaleness, the pay of a given group would be higher. Sufficient causation occurs if B happens whenever A happens (i.e. if femaleness, occupational segregation and low pay were always found together, sufficient cause would exist to connect the three phenomena.)

Although the adherents of comparable worth often claim necessary and sufficient proof of pay undervaluation, what they in fact usually can prove is this: the rate of association between membership in the class of all fully-employed females and the mean pay level for all fully-employed people is less than the rate of association between membership in the class of all fully-employed males and this same wage mean. Associative causation is the source of many useful and usable inferences in everything from choosing a

wife to betting on the horses, but its use in anti-discrimination suits is beset with certain important difficulties. Rate of association arguments, when applied in a court of law can "... create an irrebuttable presumption that disparities ... are caused by race [or sex]".⁵⁷

A well-known critic of disparate impact goes on to suggest,

If congress had intended to create an irrebuttable presumption that race [or sex] causes different rates of association, surely there would be traces of such an intent in the legislative history. ... the maxim that correlation does not imply causation is widely known. An intent to use correlations or associations to establish liability would have unquestionably sparked considerable debate on Capitol Hill and in the press over whether correlations prove anything at all about race [or sex]⁵⁸

Irrebuttable claims are just that, impossible to disprove. They are offensive not only to Karl Popper's concept of negative disprovability, but more importantly, accusations based on rates of association place an impossible exculpatory burden on defendants. (This problem has nothing to do with the validity of class action suits in which it is assumed that whatever has happened to a group has happened to all the members of that group as individuals.)

It is rate of association arguments which are the staple of comparable worth litigation. Nobody would seriously argue that occupational concentration is a statistical oddity. The problem is that any given instance of a pay differential which relies solely on comparable worth generalizations may not explain the particular facts in a given case. This is yet another reason why the claim "that comparable worth is designed only to ensure internal equity at the level of an establishment" is misleading. Most comparable worth litigants cannot begin to sustain claims without constant reference to broad societal tendencies and generalizations about

labour markets, none of which are necessarily relevant to the dispute at issue. And one might add that proving statistical evidence relevant without more direct corroboration is extremely difficult. We do not have evidence about pay-determinants whose reliability matches that of actuarial tables.

If rate of association is a frail support on which to base a disparate impact case without more direct substantiation, then disparate impact itself is in trouble and so is comparable worth. If other evidence exists, it usually is of such a kind as to support the better accepted and more easily proven disparate treatment definition of discrimination. Too rarely will it prove possible to substantiate the claim that a given pay hierarchy represents evidence of an employer's intent to discriminate. Statistical data is almost always the meat and often the whole meal in a comparable worth complaint. There is, as this thesis has shown, no shortage of this sort of evidence - occupational distribution by gender and associated pay rates are widely available facts. The real question is whether these statistical facts alone, can bear the weight of inference required to meet the evidentiary requirements of legal validity in a pay discrimination suit under common law precepts.

Comparable worth is alive but seriously ill in the American courts. It is alive because the split decision in *Gunther*, while not ruling directly on the validity of the concept, did not foreclose the prospect of addressing comparable worth at a later date. If *Gunther* had come down on the side of the "equal work" standard determinative for the Equal Pay Act, comparable worth would have died aborning. The Court did not do this and comparable worth may be said to be still breathing. Comparable worth remains alive also because the AFSCME reversal will almost certainly be appealed to the

Supreme Court.

Leaving aside speculation about what the Supreme Court might or might not do if forced to rule directly on the legal status of comparable worth, the fact remains that the appellate court ruling (AFSCME) which has most directly addressed comparable worth as an equity issue has rejected it as an invalid basis for proving discrimination in no uncertain terms.

The Canadian Legal Perspective

A balanced judgement on the current state of equality rights legislation in post-Charter Canada is found in Bayefsky and Eberts:

"When equal protection of the law was placed in the Charter with the intention of incorporating American jurisprudence, what precisely was subsumed? Is equality of results a goal which Section 15 seeks to satisfy? ... Are affirmative remedies either permitted or required for the adequate protection of equality rights? If so, in what form and how far-reaching? The legislative history preceding incorporation into section 15 of the particular phrase, 'equal protection of the law' is too sparse to provide an answer."⁵⁹

It may be that the pay equity controversy (together with such issues as mandatory retirement) will provide some answers to these questions. Court tests of the validity of comparable worth laws are inevitable. Speculation as to how such cases might turn out is not undertaken here. However, some general comment on the possible place of pay equity in Canada's new legal environment is warranted.

In the pre-Charter Canadian legal environment, there was considerable leeway granted to parliaments "to distinguish between persons in the pursuit of 'valid federal objectives'". In *Bliss v. A.G. Can.*⁶⁰ it even seemed unclear whether even the then existent Human Rights Legislation (the Canadian Bill of Rights) could serve as a basis for drawing any sort of

comprehensible line between valid and invalid distinctions. It seemed that only conformity with the enabling powers granted to Parliament under the BNA Act was relevant.

"... Parliament should prescribe conditions of entitlement to the benefits for which the [BNA] Act provides. The establishment of such conditions was an integral part of a legislative scheme enacted by Parliament for a valid federal purpose in the discharge of the constitutional authority entrusted to it under 5.91(2)a and the fact that this involved treating claimants who fulfill the conditions differently from those who do not, cannot, in my opinion, be said to invalidate such legislation."⁶¹

A test for drawing lines between justified and unjustified distinctions was articulated in *Private R.C. MacKay v. R.* by MacIntyre, J.⁶²

It would be necessary to inquire whether any inequality has been created for a valid federal constitutional objective, whether it has been created rationally in the sense that it is not arbitrary or capricious and not based upon any ulterior motive or motives offensive to the provisions of the Canadian Bill of Rights, and whether it is a necessary departure from the general principle of universal application for the law for the attainment of some necessary and desirable social objective."⁶³

This is somewhat more helpful than "Bliss", but still unclear as to what constitutes a necessary departure, what is meant by arbitrary and no help at all on questions of the level of judicial scrutiny to be attained to certain grounds of distinction.*

It is safe to say, however, that in the pre-Charter legal climate, affirmative action measures did not face the sort of double-edged 14th amendment difficulties previously alluded to in the context of American anti-discrimination law.

*It should be noted that in some jurisdictions it is a statutory obligation that the relevant Human Rights agency investigate all complaints of discrimination on grounds of employment and such other areas as housing.

Pay Equity in Canada

In spite of ratification of the 1972 I.L.O. Convention #100, no Canadian employment standards or Human Rights statute incorporated the comparable worth theory or used the formulation "equal pay for work of equal value" prior to 1976. In that year the Province of Quebec adopted its Equal Pay Act which, although not explicitly mandating equal pay for work of equal value, has tended operationally to interpret the intent of its Act as sanctioning remedial pay adjustments on a basis of comparable rather than equal work.

Although all jurisdictions in Canada have enacted equal pay for equal work laws as part of either their human rights codes or employment standards legislation, only Manitoba, Quebec, and the federal government have enacted pay equity laws. The experiences of Manitoba and Quebec are poor indicators of the likely impact of the legislation in Ontario. Manitoba has only recently passed its law, and it only applies to the public sector. In Quebec, the application of the law is quite limited, few claims have been brought under the law, and the law was introduced into a province with different civil law traditions. Although there have not been dramatic changes due to the federal legislation, there has been some litigation.*

Under the Canadian Human Rights Act, 1977, federally regulated employers in both the public and private sectors were prohibited from paying

*Under the federal law, for example, the Human Rights Commission rejected a claim based on a wage differential between National Research Council personnel and Treasury Board employees. The commission ruled that although both NRC and Treasury Board were closely related arms of the federal government, they were two separate establishments. It is clear from this that even when "establishment" is clearly defined in the legislation, how it applies to a particular organization can be clouded with ambiguity.

males and females different wages for performing work of equal value in the same establishment, unless such differences were based on a "reasonable factor other than sex." (For a complete review of Provincial legislation, see Appendix II).

Legal Issues and the Charter of Rights and Freedoms

Since its enactment in April of 1982, the Charter has been an important source of challenges to legislation. Section 32 of the Charter provides that all activities and enactments of the federal and provincial governments are to be covered. Therefore, pay equity legislation must conform to the Charter.

Most legal commentators indicate that Section 15 will be the most significant section in terms of pay equity. Because this section of the Charter only came into force in April of 1985, the law in this areas is only beginning to develop. Section 15(1) provides for equal treatment for all Canadians without discrimination based on sex, among other things.

Canadian writers feel that programs that attempt to benefit a particular disadvantaged group will not meet 14th Amendment-style challenges under the Charter. First, they point out that such programs are not precluded in all cases in the United States, that U.S. law is not very well defined on this issue, and that many of the U.S. programs successfully challenged are not analogous to Canadian enactments. Second, although S.125 provides for equal treatment, other sections of the Charter establish additional rights that benefit particular groups such as native peoples (Section 25), ethnic groups (Section 27), and minority language groups (Section 28).

As Mr. Justice Tarnopolsky has written, unlike the history of the United States, Canada's history has involved the recognition of group rights as well as individual rights, so that:

although the right to non-discrimination is essentially an individual right, in a country which recognizes that justice and equality of dignity involves the recognition of rights which one enjoys as a member of group, it should be no great extension of this principle to argue that the rights of individuals who are members of disadvantaged groups might best be realized by programs which are directed towards aiding those groups to reach the same "starting line" as the rest of the population.⁶⁴

Finally, Section 15(2) of the Charter was also enacted, which provides that the equality guarantees of Section 15(1) do not preclude any law, program, or activity that aims to improve the conditions of disadvantaged individuals or groups, including those disadvantaged by sex,. It could be argued that Section 15(2) lays to rest any doubts about the validity of affirmative action or other remedial programs which come within the language of Section 15(2). It seems fairly clear that pay equity legislation would come under the wording of Section 15(2), although this is bound to be litigated. Even if the court finds that it does not come within the wording of Section 15(2) however, the law could still be protected by S.1 of the Charter, which allows for reasonable limits to be placed on Charter freedoms, as justified in a free and democratic society. Thus, pay equity legislation should be safe on these grounds, at least.

However, the legislation may not be safe from other Charter-based challenges. First, Section 15(2) allows for remedial programs for those disadvantaged for any number of reasons. However, it is not clear what constitutes a sufficient degree of "disadvantage" to warrant the passage of remedial legislation. As the Abella Royal Commission on Equality in

Employment pointed out, a judicial inquiry into whether or not a group was disadvantaged would emerge in order to justify the legislation. It was also pointed out that the standards used to improve affirmative action programs in the United States have been, as previously discussed, stiff. If followed in Canada, a program aimed at redressing inequalities could be successfully challenged if:

- 1) it does not use validated statistics to establish the existence of disadvantages,
- 2) it does not provide a numerical remedy, available only to qualified applicants, and
- 3) it is not temporary in nature (i.e., it should not last longer than the inequity).

Second, pay equity legislation could be challenged if it did not treat all women equally. Several Charter decisions have upheld existing laws because under those laws all members of a group had been treated equally and there had been no discrimination as between group members (see ReBaker and the Association of Professional Engineers of B.C., Koch vs. Koch, and Father Don's Natural Products Ltd., vs. McKenzie et al.).⁶⁵ The implication in each of these decisions is that had the laws treated members of the same group differently, they would have offended Section 15 of the Charter. Thus, although remedial legislation might be justifiable under Section 15(2), it could still be challenged if opportunities were open to only some of the members of the minority group and not others. Such a claim would be highly speculative, due to the paucity of litigation in this area, but could prove vexing for the legislation. Statistical difficulties have

been discussed in detail elsewhere.

Under the heading of equality we might also consider this scenario.

X Underpaid woman A, a nurse's aid^e, seeks and wins a pay adjustment on the basis of a difference in the pay rate of a male hospitality orderly doing "equivalent" work. Woman B, a child care worker - member of group widely regarded as underpaid and one which pay equity advocates most wish to help - fails to sustain a claim because there is no equivalent male within the day care centre with whom pay rates can be compared. Woman B brings suit under Section 15(1) of the Charter, arguing a denial of equal access to redress. Section 15(2) may very well not sustain the selectivity inherent in restricting the purview of pay equity comparisons to "internal establishments" and jobs with more than 70% female incumbents. The law is either struck down or broadened to allow inter-organizational comparisons - precisely the prospect most feared by critics and an eventuality whose realization is not seen by proponents as inherent in pay equity's logic. (That this has not yet happened under the federal law may have more to do with the general paucity of complaints, than with inherent obstacles.)

Finally, Section 2(d) of the Charter, which protects freedom of association, could be used to challenge pay equity legislation. A too extensive legislative restriction on collective bargaining has been regarded as inconsistent with the guarantee of "freedom of association". The Ontario Court of Appeal ruled in the Broadway Manor Nursing Home Case of 1984 that freedom of association guarantees not only the right to form unions, but also the fundamental means of advancing the union's interest, including collective bargaining, and striking. Without that protection, the freedom to associate is rendered meaningless. Thus, it could be argued that, to the

extent that pay equity restricts the collective bargaining process, it violates Section 2(d)'s guarantee. In the Broadway Manor case, however, the court made clear that Section 1 could be used to justify legislation that limits collective bargaining, if the limitations are consistent with the purposes the legislation seeks to further. Limiting collective bargaining in certain areas under pay equity legislation would be consistent with the aims of the legislation: increasing female salaries. Thus, pay equity should survive a Section 2(d) challenge. Still, the law is not settled in this area.* Therefore, there is still the possibility that a clever litigator could use Section 2(d) to successfully challenge pay equity legislation.

Pay Equity and Collective Bargaining

There is the possibility that the interaction of pay equity with existing labour laws could complicate and perhaps fundamentally undermine the traditional practice of collective bargaining. One problem is acutely outlined in an unpublished legal brief to the Advisory Committee of the Premier of Ontario. Considering the quite logical prospect that unions and management might be directed to work out a pay equity plan jointly, this comment is made:-

"The principle of exclusivity holds that as management and the union are the only parties to the agreement, individual employees covered by it cannot bring claims directly to management (S. 68 of the Labour Relations Act of Ontario) although the duty of fair representation is designed to protect employees because of this lack of direct access, the union is not bound to raise every claim brought by the employee, and is

*Broadway Manor was overturned by the Supreme Court of Canada, in April 1987.

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excused from bringing claims for legitimate reasons, such as industrial relations practices and policies. It is conceivable that some pay equity claims may not be brought because of other legitimate union concerns."⁶⁶

One may go further. The reasons that pay equity exists at all as an issue in unionized contexts is precisely because union bargainers have in the main found it convenient to put forward "other legitimate concerns" such as the largest aggregate pay increase possible and improved working conditions, rather than bargain for gender-related adjustments.

How a pay equity law, the Charter and the legal protections surrounding collective bargaining in the private sector would interact is virtually impossible to forecast, but a successful Charter-related challenge by an individual unionized employee could undermine traditional union agenda-setting perquisites.

It is possible also, that management, aware of possible equity challenges to agreements, might hold back a reserve of funds and plead that very need as justification for offering less up front money at the bargaining table. This could result in stress between men and women in the same bargaining unit, further reducing its effectiveness, or even dissolution of units along gender lines. (The underlying assumption here is that men will, in the main, be unwilling to forego maximum pay increases in the name of gains for women.)

The possible effects of pay equity legislation on collective bargaining require a detailed treatment which is not undertaken in these remarks. It must suffice to point out that the interpolation of a permanent "adjudicatory" layer between interested parties in a bargaining dispute may well result, if the equity aspects of a large number of collective

agreements are continually challenged. It is difficult to understand why unions generally should greet this potential enhancement of the role of arbitration at the expense of the hard, one-on-one, give and take of traditional bargaining with any more enthusiasm than management. It is a root assumption of liberalism that interested parties are in the best position to judge the intricacies of a given bargaining situation. The prospect of having to refer all bargained decisions to a judge or administrator, an outsider who does not have to live with the results of his "equity" input into a settlement, should not inspire great transports of satisfaction from either side of the bargaining table.

In fact, it is not clear where the union movement stands on pay equity. Those unions with a large proportion of female members and those unions which see their prospects for growth as dependent on recruiting more female members (women are after all, the most dynamic growth factor in the labour market) have been vocal in support of comparable worth. The U.A.C., the Teamsters and other male-dominated unions have been much less so - whatever resolutions may be found on the books at annual meetings. There is no groundswell here - simply union politics coalescing along straightforward gender lines.

Even in unions with large female memberships, sentiment towards comparable worth is far from uniform. Sol Chaiken, President of the International Ladies Garment Workers Union (85% female), is unequivocal on the subject,

I'll be damned if I know a way to get the women more money ... The value of their work isn't set by theoretical principles but on the value of the work in the marketplace, and in the face of the competition from overseas, where garment workers make thirty cents an hour ..."⁶⁷

To sum up, Section 15(1) of the Charter, providing for equality of rights, may be violated by claims limited to only certain members of a protected class. Section 15(2) might not support a programme which does not guarantee fair treatment to all members of a target group. Since only those women working in female predominant job categories are supposed to require pay equity on grounds of discrimination through occupational segregation, this may be a problem. Predominance standards may have to go and the restriction of claims to delimited establishments may be attenuated.

Also, the interaction of pay equity with existing labour law could limit the number of claims made and undermine the traditional practice of collective bargaining.

Nothing more conclusive can be said at this juncture, definitive judgements must await developments in case law.

NOTES

¹Michael Evan Gold, "Griggs Folly: An Essay on the Theory, Problems, and Origins of the Adverse Impact Definition of Employment Discrimination and a Recommendation for Reform", Industrial Relations Law Journal, Vol. 7, No. 4., 1985, p. 513. Hereafter called "Griggs".

²Rita Cadieux, "Canada's Equal Pay for Work of Equal Value Law", in Remick, p. 173.

³Robert E. Williams and Douglas McDowell, "The Legal Framework" in Livernash, p. 249.

⁴Janice Bellace, "A Foreign Perspective", in Livernash, p. 141.

⁵Ibid.

⁶Title VII Pub. L. No. 88-352, 78 Stat. 253)Codified at 42 v. Sc. #2000e-2000-e17 (1982) Equal Pay Act of 1963 Pub. L. No 88-38 77 Stat. 56 (cod. at 29 v. SC. #206(a)(1) (1982).

⁷Robert E. Williams, Douglas S. McDowall, "The Legal Framework", in Livernash, p. 199.

⁸Ibid.

⁹Ibid.

¹⁰A B.N.A. Special Report, "Pay Equity and Comparable Worth", Bureau of National Affairs, Washington, D.C., 1984, p. 55.

¹¹Anne F. Bayefsky, "Defining Equality Rights", Equality Rights and the Canadian Charter of Rights and Freedoms, Anne F. Bayefsky and mary Eberts, eds., Toronto, Carswell, 1985, p. 52.

¹²451 U.S., 648 at 668 (1981).

¹³Mobile v. Bolden: 446 U.S., at 75 (1980) and Dun v. Blumstein: 405 U.S., 330 at 342 (1972).

¹⁴Griggs v. Duke Power, 425 U.S. 161 (1981).

¹⁵Michael Evan Gold, "Griggs Folly: An Essay on the Theory, Problems and Origin of the Adverse Impact Definition of Employment Discrimination and a Recommendation for Reform", Industrial Relations Law Journal, Vol. 7, no. 4, 1985, pp. 432-433.

¹⁶Gunther v. County of Wash. 20 Fair Empl. Prac. Cas. (BNA) 788, 791 (Or. 1976) rev'd. in part, 602 F. 2d. 882 (9th Cir. 1979), Aff'd., 452 U.S. 161 (1981).

¹⁷Title VII, Section 703(h).

¹⁸Gunther v. County of Wash.

¹⁹Idem.

²⁰See Norman Viera, "Comparable Worth Gunther and the New Drive for Equal Pay", University of California at Davis Law Review, Vol. 18, 1985, pp. 449-487.

²¹Robert E. Williams and Douglas S. McDowell, "The Legal Framework" in Livernash, p. 229.

²²See in particular Justice Rehnquists dissent in Gunther.

²³Idem.

²⁴Idem.

²⁵Idem.

²⁶Idem.

²⁷International Union of Elec. Workers v. Westinghouse Elec. Corp., 631 F. 2d 1094, 1101 (3d. Cir. 1980). cert. denied, 452 U.S. 967 (1981).

²⁸Nancy Levitt and John Mahoney, "The Future of Comparable Worth Theory", Univeristy of Colarado Law Review, Vol. 56, 1984, p. 109.

²⁹American Federation of State, County, and Municipal Employees v. State of Washington 578 F. Supp. 846 (W.D. Wash. (1983)). Hereafter called AFSCME.

³⁰New York Times, Sept. 6, 1985. p. 1.

³¹Ibid.

³²BNA Special Report, p. 29.

³³AFSCME.

³⁴Idem.

³⁵Los Angeles Water and Power v. Manhart 435 U.S. 702, 17 Fair Empl. Prac. Cas. (BNA) 395 (1978).

³⁶Wambheim, 705 F. 2d at 1495, 31 Fair Empl. Prac. Cas. (BNA) at 1298-99.

³⁷AFSCME.

³⁸Idem.

³⁹Idem.

⁴⁰Idem.

⁴¹Idem.

⁴²Idem.

⁴³Levit and Mahoney, Op. Cit. p. 114.

⁴⁴770 F. 2d, 1401.

⁴⁵Idem.

⁴⁶Idem.

⁴⁷Idem.

⁴⁸Idem.

⁴⁹Idem.

⁵⁰Idem.

⁵¹Spalding v. University of Washington, 740 F. 2d, 686, 35 Fair. Empl. Prac. Cas. (BNA) 217 (9th Cir. 1984), cert. denied, 105 s. ct. 511 (1984).

⁵²Idem.

⁵³Idem.

⁵⁴See Susan Kelly Claybrook, "Are Apples and Oranges Ripe for Comparison?", Baylor Law Review, Vol. 27, 1985, pp. 227-254. Taylor v. Charley Brothers Co., 25 Fair Empl. Prac. Cas. (BNA) 602 (W.D. Pa. 1981). Christenson v. Iowa, 563 F. 2d, at 356 (8th Cir. 1977) IUE, Op. Cit., Note #30.

⁵⁵Karl Polanyi, The Great Transformation, Chicago, University of Chicago Press, 1946, p. 43.

⁵⁶Ray Marshall and Beth Paulin, "The Wages of Women's Work", Society, Vol. 22, No. 5, July/Aug. 1985, p. 38.

⁵⁷Gold, Dialogue, p. 176.

⁵⁸Ibid.

20. ⁵⁹Anne F. Bayefsky, "Defining Equality Rights", Equality Rights, p.

⁶⁰Blilss v. A.G. Can [1979] 1 S.C.R. 183 at 186.

⁶¹Bayefsky, op. cit., p. 64.

⁶²Private R.C. Mackay v. R. [1980] 2 S.C.R. 370.

⁶³Bayefsky, p. 65.

⁶⁴Ibid., p. 221.

⁶⁵[1978] 1 S.C.R. 123 at 137 [1969] 2 S.C.R. 221 at 227 [1981] 1 S.C.R. 370 at 222.

⁶⁶unpublished brief, submitted to Ontario Women's Directorate, Government of Ontario, Sept. 1986.

⁶⁷John Bunzel, "To Each According to Her Worth", The Public Interest, No. 67, Spring.

PART II: PAY EQUITY AND UNDERVALUATION

I. PAY EQUITY, UNDERVALUATION AND THE MARKET

The push for pay equity legislation has evolved as a response to the contention that, in societies whose central pricing institution is the market-driven economy, women's work is devalued. In fact, this claim is sometimes generalized beyond these confines to embrace a historico-anthropological judgement on women's perennial fate:

"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."¹

This analysis will confine itself to the accusation levelled against market-driven economies. (The phrase "market-driven economy" is meant to signify that whole array of institutions and practices which facilitates exchange through the demand-driven operation of the price mechanism.)

It is imperative that the true implications of the claim that the labour of certain groups is devalued be separated from the empirically verifiable premise that many (women and others) are poorly paid. The latter statement is, in fact, non-contentious in itself. The former is both a normative judgement and, if valid, a predictive thesis which would suggest that, over time, any job which becomes labelled as "women's work" would be subject to the prospect of relative pay deprivation - even if, for example, it were neuro-surgery.

The essence of a market is voluntary exchange on the basis of information communicated through prices. This bears re-stating for an important reason. Many of the eminent theoretical examinations of capitalism and market economies actually spend relatively little of their

critical ammunition on the nature and limitations of voluntary exchange as a cardinal distributive principle. In the writings of Marx and Karl Polanyi, for example,- replete as they are with trenchant comments about the harrowing social consequences of capitalism - we find attacks directed against conventions, institutions and historical patterns that have only an indirect relation to exchange as a process.

It is a salient point against Marx as a sociologist, made by Raymond Aron² among others, that his critique does not adequately distinguish among:

- a) problems generic to the process of rapid industrialization,
- b) problems associated with capitalism under a particular set of historical conditions - such as those found in 19th century England with its particular pattern of property holdings,
- c) problems intrinsic to an economy based on exchange relationships and contract.

Polanyi's powerful anthropologically-informed attack on capitalism also can be found wanting as an indictment of market exchange. As Charles Lindblom puts it:

"... he [Polanyi] does not disentangle the effects of market from those of private property or from the effects of a new distribution of property brought about by enclosures of land. The market system came to England in an unusually bruising way."³

Pay equity, as a critique of market-engendered wage rates affecting a large group of workers, suffers from similar specification problems.

The questions which must be addressed in this context are variations on the following theme - what is it that the proponents of pay equity are actually finding fault with? Is it (a) the market as a labour-pricing

mechanism (a valuing problem)? Is it (b) the pattern of holdings in pay, into competition for which working women have been relatively suddenly thrust without certain advantages which males tend to possess automatically for historical and structural reasons (a positioning problem)? Is it (c) the fact that certain organizationally effective sub-groups consistently take better advantage of the process of bargaining/contracting than do others, and that males still set the agenda for most such organizationally effective sub-groups (a problem of power)? It may, of course, be all three.

But close examination of the actual sources of the situation in which women find themselves tends to reveal that the market is not in fact under-valuing the labour of women or anyone else. The pattern of wage holdings with which pay equity proponents find fault is rather the result of a correct valuation of the proximate worth of labour as exchangeable (the only thing a market valuation is supposed to engender) in the light of real differentials in positioning and in the effective use of power.

The central point here is that a consistent, endemic lack of clarity about the sources and cause of the perceived mischief at issue in the pay equity debate casts doubt on the likelihood that the proposed solution will be either apt or adequate.

This lack of clarity has three elements: (a) confusion about what market value is, (b) a thin historical analysis of the pattern of female interaction with work, and (c) a lack of appreciation of the significance for women of the single largest price-distorting element in market-driven economies - the fact that large numbers of workers, instead of behaving like atomized individuals, combine to raise price levels.

Market Value

The wage rates produced by a market, like its product prices, may be rational in terms of neoclassical process assumptions, but they are a source of considerable bewilderment from most other vantage points. Anyone who takes the trouble can turn up numerous interesting oddities. Clergymen earn thirty percent less than bricklayers; we not uncommonly pay the child who cuts our lawn more per hour than the person who watches our children while we're out; dog pound attendants and zoo keepers earn more money on average than nursery school teachers and day care workers; endless additions can be made to this list. A neoclassical market is rather like a Wagnerian opera; if you step outside of the presuppositions which make it believable, even for an instant, the view one gets of the panorama being played out is radically altered, the scene looks forced, meaningless and sometimes downright silly.

Commodity prices are equally incomprehensible when looked at without supply and demand bifocals. They are also constantly changing in relative terms. Smith tells us that diamonds are "worth" more than water - the deteriorating condition of our lakes will likely someday reverse this valuation. A pound of Belgian chocolates is "worth" more than a pound of nutritious soybeans - mushrooming population growth may change this assessment also.

The supporters of comparable worth would be the first to point out that many of these pricing oddities reflect sexism. Is it coincidence that dog pound attendants and zoo keepers are mostly male and nursery school teachers and day care workers mostly female? Yet market outcomes are mysterious in ways which have nothing to do with sex or, for that matter, mysterious in ways having nothing to do with anything comprehensible by any

standard other than that embodied in the famous words of Thomas Hobbes.

The value or worth of a man is, as of all other things, his price - that is to say, so much as would be given for the use of his power - and therefore is not absolute but a thing dependent on the need and judgement of another.⁴

Market value has never been more succinctly characterized. Hobbesian relativism is the orthodoxy of neoclassical economics with regard to value theory.

Neoclassical economics defines occupational worth in terms of the process of market exchange. The working assumptions of wage pricing are the working assumptions of equilibrium price theory - widely disseminated information, competition and factor mobility.

Market determined wages reflect consumer valuations of the products and services of labor as realized by employers, the comparative productivities of labour in satisfying consumer demands and employee tastes and preferences for alternative jobs.⁵

A market system is also a limited use institution. Even when functioning properly, that is functioning on the basis of substantial factor mobility, reasonably well disseminated information and lack of significant price distortion through monopolistic tampering, there are certain things a market cannot do. As Lindblom puts it:

"For organized social life, people need the help of others. In one set of circumstances, what they need from others they induce by benefits offered. In other circumstances, what they need will not be willingly provided and must be compelled."⁶

In market contexts, the process of exchange rewards on the basis of subjective preference and bargaining power, and prices reflect variations in these factors with an accuracy found in no alternative system. This is, of course, not the whole story. A system of property rights is assumed,

structural distortions are manifest, and the well-known ethical difficulties with treating human beings as commodities - all intrude in various ways into the neat hermetic world of neo-classical pricing theory. The difficulty is that one cannot solve problems whose roots are in patterns of acquisition and transfer, or related to maldistribution of power, by forcing prices to diverge from exchange rates. One will only damage the ability of the market as a processing mechanism to do (the admittedly limited) thing which it does do surpassingly well, that is translate preferences into prices.

A market-driven economy, hedged in as it is by the legislative safeguards and correctives designed to lessen its dehumanizing effects on individuals and groups, remains in the critical area of price formation essentially Hobbesian. It is difficult to draw hard and fast distinctions here as to what the phrase "essentially Hobbesian" implies. In the era of minimum wage laws and Wheat Boards, price-fixing is common practice in post-liberal plural economies. Two points need to be made in this context:

- 1) The supposed efficacy of the price-fixing which is accepted practice in modern liberal polities is far more contestible than often thought;
- 2) Before the development of the pay equity advocacy, no sustained argument within liberalism existed which suggested that the whole range of market-engendered prices in a given area should march in review past an extrinsic standard such as compensable factor equivalence.

This second point requires elaboration. It is often suggested that wage rates already conform to standards of internal equity, that is that they reflect an organization's internal ranking of jobs, a ranking often based on analysis of compensable factors. Thus, it might be argued,

compensable factors are not an extrinsic standard of review but are already embedded in the price formation process. Ideally, job evaluation does produce a rational ranking of functions by importance on the basis of agreed upon criteria. But this is not how prices are set except in isolated pockets within markets which are insulated from supply and demand considerations.

"... ranking does not by itself establish either rate or value. The process of setting wage rates is a separate and distinct step, with reference to an external market."⁷

Pay equity's singularity as an authoritative administrative response to a problem supposedly lodged in exchange relations lies in this; it introduces what might be called a third-party criterion into the exchange bargain between employer and employee. No rate or rate change would stand which did not also automatically accrue to third parties within the establishment doing work of equivalent value (over time).

Equal pay for equal work laws also introduce third party criteria into a bargaining situation. A strict entitlement argument could be made that identity itself is no basis for third party interference in a bargain. Post-liberal consensus, as embedded in current Human Rights law does not concur with such a stance, although this in itself is no definitive refutation. So obvious does it seem to most that justice demands that identity of task-fulfilment receive equal reward (within given organizational confines) that the question is no longer seriously discussed. (One might ask, however, if there is no possible basis for arguing that a separated mother of four should receive more pay for identical work than a single male counterpart). Leaving aside the equal pay for equal work question as substantially settled, whatever its theoretical interest, one

difference is noticeably relevant. Identity is far easier to establish than equivalence and requires no elaborate system of cross-comparisons to support judgements.

Here we come up hard against the key problematic assumption underlying the contention that market processing undervalues the labour of certain groups.

This assumption may be expressed as follows:

The criterion used to establish a comparative equivalence between the labour requirements of Job X and Job Y also establishes a basis for making claims about the value to be attached to such labour. Does it in fact follow that different types of labour, found equivalent by a process of measuring and comparing so-called compensable factors, such as skill, are equally valuable? The short answer is it does not follow. Value, as conventionally understood, is a derivative of the perceived worth to others of a person's good and services. Skill, effort and responsibility - standard measures of labour equivalence or job equivalence - do not obviously capture value, so defined. Such compensable factors may be an element in making one person's labour more valuable than another's, but no iterated list of compensable factors, be it however so long, can define what value is. Value is a dependent variable, dependent on a literally incalculable number of factors, not all of which are even distinguishable through rational inquiry.

"Comparisons of skill, etc. measure just those things. One cannot conclude either that the sum of those criteria reflects the intrinsic value of the job to the employer or even that there is any intrinsic value."⁸

In market-driven economies price follows value. What then is the pay equity movement, with its constant reference to equivalence and compensable factors, really attacking through the contention that the pay rates of certain female jobs are undervalued? It is difficult to believe that all proponents of pay equity - an impressive list including politicians, civil servants, sociologists and political theorists - have simply misunderstood the lack of valid logical transference between claims about factor-equivalence and claims about value in markets. Instead one is led, perforce, to the conclusion that, animating pay equity is a reflective judgement that price should not follow value as established in markets, at least in many instances, and that pay rates should derive from rational, discernible standards that do allow the making of valid statements about equivalence, similarity and identity.

Supporting claims about the "undervaluation of women's work" are normative judgements like the following: "nurturing and caring-related occupations should be better rewarded in our society". Such a judgement, with its implied criticism of market-driven outcomes and the structure of community values which is partially, but by no means completely, derived therefrom, must be defended on grounds appropriate to such value judgements. It is not clear, however, that those performing a given type of work can derive a right to a given level of remuneration, either relatively or objectively determined, from such judgements. At the least, certain intervening theoretical steps must first connect such judgements with a principle consistent with the presuppositions of market-driven liberal states.

If pay equity is designed to ensure full equality of opportunity, certain implications and criteria for evaluating claims are operative. If the aim is actually to trigger a societal re-evaluation of the status position of given types of work through altering the money payments attached to them; then a different set of derivations can be made and the basis for evaluating claims alters.

This latter prospect and its possible justificatory basis is discussed in the final chapter. Two specific problems related to the question of specifying the causes and roots of the pay shortfall at issue deserve further treatment - the previously mentioned positioning and power problems.

Pay Equity, Positioning and History

Pay equity relies not simply on current statistical disproportions for persuasive support but also on an interpretation of history, specifically the modern history of women's interaction with work. This interpretation, should it be sustainable, would tend to connect the significance of pervasive patterns of evolution in the workplace experience of women with other patterns such as the treatment of American blacks or Canada's native people. Should pay equity successfully bracket itself by analogy with the blatant disadvantaging suffered by certain minorities, claims about discrimination would be immeasurably strengthened. Such a marriage by analogy would allow the mobilization of conventional affirmative action/level playing field arguments as justification for rectifying payments of some kind to disadvantaged working women.

The apostles of affirmative action have been blessed with a stroke of tactical good fortune. The first great injustice at which they took aim was one of the clearest cases of entrenched, systematic malfeasance which the modern history of liberal/democratic polities offers its observers - American's treatment of its black minority. Affirmative action is the outgrowth of America's struggle to address this problem in the light of the new sensibilities and strivings for fairness of the post-Eisenhower years.

Seldom does a pattern stretching back into generational time show such clear evidence of injustice to its interpreters. Here, whatever case there is for affirmative action is at its best. The nub of what controversy surrounds it, is the question of whether compensatory redress for the obvious sins visited upon the fathers of today's black Americans must be paid to their children and their children's children in the guise of actual favoritism, whether or not they themselves have been disadvantaged because of race. An answer to this question is not easily found, requiring careful and judicious assessment of the effect of reverse discrimination on the store of social good will which has permitted minority groups to make what progress they have in fact made. At the least, however, the injustice itself and its causes are not seriously disputed.

In what sense may it be said that the historical experience of working women justifies an actual affirmative remedy - that is, for example, pay rate adjustments not offered to males? Interpreting the relationship between the female labour force influx and a pattern and practice which on the balance of probabilities amounts to discriminatory disadvantaging is no simple task.

Pay equity proposals rest on what has been called a "thin historical analysis." At issue is a circular interpretation of events.

"No evidence, other than the wage gap itself, of these historical events is proffered. In other words, it is assumed that there was historical undervaluation, which led to the wage gap which proves the historical undervaluation."⁹

Further confusion attaches to conventional truisms about women's jobs.

"Outside of domestic service, women entered the labour force through the textile industry and mining. Food serving as a common job for women appears decades subsequent to nursing. There is even confusion about what is meant by "traditional". For example, prior to this century, women did not work in clerical or secretarial or sales functions."¹⁰

Is it possible that the supposed historical facts can be marshalled into varying interpretive formulations, not all of which imply undervaluation or justify remedial action? One such scenario is offered here by way of demonstration only. It is not suggested as a complete explanation of a given complex of experience, only as an example of the sort of second order analytical "work-needing-to-be-done" which is largely absent from the argument about historical undervaluation. If it is even plausible, it sheds doubt on the argument that pay equity is required in the name of rectificatory justice.

The Female Labour Force Influx and Women as an Immigrant Wave

The fact that a positive relationship between women's new prominence in the work force and concrete status and material gains relative to those of men is difficult to find in the data, presents something of a riddle for those ready to point to undervaluation as a direct cause of this unhappy state of affairs. Why should male/female pay ratios be getting worse in a

period leavened by the influence of feminism and generally conceded to have ushered in more positive attitudes towards women? Surely the attitudes and practices which fostered discrimination were both more widespread and more deeply ingrained in 1937 than they were in 1967. Why should female wages and some status attainment indicators be declining as a percentage of men's? At this stage, a theory is offered which posits that the rate and scope of changes in labour force participation may well represent fundamental causes of the wage gap in their own right. In a technical sense these changes constitute a rapid infusion into a system. In searching for some analogy with reference to which they could be put into perspective, the great waves of immigration into North America come to mind as constituting similarly dramatic infusions of new blood into a labour market.

Perhaps the earlier movement is useful in clarifying certain aspects of the latter. Consider an extrapolation in this fashion: subtract from the total number of working women as of, say, 1984, all those who would have been working if the indices of social and economic conditions had remained virtually unchanged since 1940, and then imaginatively load the large remaining group, who may legitimately be called new entrants, onto boats in New York harbour and funnel them through Ellis Island. This group is now the latest infusion of new workers into an economic system and differs little in its situation from that of previous waves of Irishmen, Germans and Jews. What conclusion might one draw from this exercise, albeit recognizing that all deductions must remain speculative?

control mechanism. As such, it automatically adjusts for alterations in its functional environment. Like that of any cybernetic system, the adaptive capacity of the labour market is finite and adjustments, though automatic, are not immediate. Question: what does a huge influx of new workers, whether they be Irishmen, women or red-shoed people, do to the cybernetics of a labour market? Whether the economic system is "thriving", "stationary" or "declining" (in Adam Smith's terminology) has great bearing on this question; but some things remain applicable to just about any level and pace of affluence.

Being there first has certain inevitable advantages. Economic benefits accrue to people simply because they are in a system ahead of others. We would not expect the new arrivals to interpolate themselves throughout the economy in any even, symmetrical fashion. Also, the new entrants would be on average younger than incumbent workers. All new entrants will find access to the system most immediately at the more modest entry points. They will fill what room is made for them at the broader, more accessible levels of an occupational structure which is pyramidal in shape. The first generation of Irish immigrants, even in the expansive and open economic context of late nineteenth century North America, found themselves channelled disproportionately onto the docks of New York and into the coal mines of western Pennsylvania. Their children and their children's children spread into all or most levels of the labour market, but more than one hundred years later an ethnic screen would register an unrepresentatively large proportion of Irishmen in certain occupations. This process takes place over a generational time span which exceeds the frame of reference of most sociological studies of income determinants. The

process of arrival, penetration at the lowest, most accessible levels and eventual diffusion may well closely resemble what has actually happened and is continuing to happen to the large influx of new working women.

This analogy may serve to suggest a simple theoretical possibility. No economy ever absorbs an influx of new workers fairly, if by fairly is meant evenly throughout an occupational hierarchy. By "influx" is meant simply any new group of workers introduced into an existing system at a rate which in historical and demographic terms is rapid. It is logical to assume that too large and too rapid an influx would strain the absorptive capacity of an economy beyond its capabilities entirely. Short of cataclysmic political or social upheaval, this is of course an unlikely eventuality, but why certain groups interested in egalitarian outcomes assume that their studies should reveal even diffusion is almost never explained in their analyses. This being said, comparable worth may still make its case. The assertions of comparable worth theory depend mainly on the contention that the rules of the game are "fixed"; that is, the rules which foster or at least permit diffusion over sufficient time periods do not operate in the same fashion for disadvantaged women as they do for others.

As the theory goes, women workers are systematically and institutionally held back in a manner which mirrors the experience of blacks and native peoples far more than the past treatment of the Irish or the Jews. Perhaps fortunately, few sociologists were around in 1905 to analyze the labour diffusion patterns of the hordes of new immigrants. If they had been, there is little doubt that comparable worth would have had a much longer pedigree as a policy issue, for all sides admit the relationship

between wage gaps and patterns of diffusion. Why is experience of women in the post-war labour market is more like that of blacks rather than Irishmen circa 1866?

All arguments relying on broad-based comparisons are of course open to criticism on numerous grounds; yet there does exist some evidence from another quarter which tends to confirm the thesis that a labour-force influx can have a drastic effect on the wage rate of the "influxing" group which has nothing to do with discrimination. The only recent labour force shift which has been dramatic enough in scope to be deemed worthy of a pop label is the post-war baby boom. In the late nineteen sixties the demographic effect of this phenomenon created a huge increase in the supply of young workers relative to the number of older workers. Consider this assessment of the result:

Did the earnings of baby-boom new workers fall in comparison with prime or middle-aged workers? The answer is a resounding yes. The earnings of young workers fell from 63 percent of the earnings of middle-aged workers in 1968 to 54 percent in 1974. This supply increase actually caused a larger fall in earnings than the one that women have experienced. And the baby-boomers' financial bust happened over a shorter period of time.¹¹

The use of analogies of this sort serves two purposes. It demonstrates to a degree how complex and dramatic the labour force participation changes have been for women, and it points out one of the most seminal and least often stated assumptions underlying theoretical structures like comparable worth. This buried premise can be brought out in a series of questions. All right, you've told me what's wrong, then how should the world look? That is, with what model of proper distribution are you contrasting the unacceptable status quo? Where may we find it, so as to

assess the validity of your contentions?

If the model is actually an ideal structure, a construct of "perfect equity" as even diffusion based on the belief that groups' representation and pay structures should mimic proportional representation of all identifiable groups in the community at large - one could make some case, perhaps for this contention. Yet in fact, such an assertion is almost never made explicit. On the other hand, if the comparable worth argument seeks validity beyond the bounds of its own statistical observations with reference to the historical experience of other "minority" groups, it should seek to validate which comparisons are most similar and most revealing.

This extended analogical discussion of the effect of a labour force influx into a labour market is meant to proffer an alternative to the theory that the occupational concentration of women in low-paying jobs is a rigid and unchanging socioeconomic fact. It suggests that change is occurring, but at a pace perhaps insufficient to satisfy the agendas of certain groups. As previously mentioned, single women in their thirties with the same length and continuity of work force experience are earning, according to some studies, slightly more than their male counterparts. The case might still be made that the imposition of comparable worth would lead to a significant and healthy acceleration of this process. However, a different perspective on the cost-benefit analysis of pay equity legislation is likely to develop - one much less palatable to those whose arguments for a coercive solution are heavily reliant on assertions about the inability of market-driven economies to solve problems in their own way and in their own time - if impediments to labour mobility are seen as porous and permeable rather than fixed and immutable.

Specifically, as regards the issue of gender discrimination and undervalued worth, the foregoing discussion seeks to provide what might be called a positioning-based alternative explanation of the social phenomenon at issue. Seen from this engineering or cybernetic perspective, discrimination - at least as commonly understood - tends to disappear from the causal nexus.

At a further level of abstraction, the foregoing scenario suggests a kind of entitlement-based explanation of wage disparities. Robert Nozick has pointed out "that things come into the world already attached to people having entitlements over them."¹² This is quite true as a matter of fact - as true of a given pattern of holdings in pay (frozen at a given instant in time) as it is of other types of property.

Pay equity's true grievance may be that a particular "pattern of holdings in pay" developed which left only certain openings for penetration by newly emergent groups. This fact may be a chronic disadvantage which attaches to any labour force influx, witness the baby boomers experience.

Pay Equity, Power and Organization

The economic power of women - a power which in modern bourgeois societies is so directly contributory to political clout and status position - has not experienced an increase commensurate with changes in the formal legal situation of females. More accurately, the traditional sources of power upon which women have customarily drawn in society are not such as to be conducive to equality in the apportioning of income between the sexes. In states whose main allocation device remains the market-driven economy - however much their institutions and practices have been modified by ethical

and/or egalitarian considerations - money follows power. If the dispersal of money must follow upon differing degrees of the possession of power, then the pay equity proposal should deal with this fact.

In complex economies, power and its corollary benefits accrue to those who organize. Organizationally effective subgroups, such as unions, protected by legal conventions which give great advantages to "collective" bargainers, often succeed in pushing the "value" of their labour higher than the exchange rate which might have been achieved had each group member bargained as an individual. It is arguable that these organized sub-groups, whose importance was largely unanticipated by the neo-classical theory of markets, are a major source of the problem at issue in the pay equity debate. Yet the advocates of pay equity do not tend to see their problem in these terms.

Consider two explanations of the wage differential between Employee X (a unionized male who performs janitorial duties in a factory) and Employee Y (a non-union female clerk working in the same establishment). X earns \$24,200 a year (annualized hourly rate) and Y earns \$17,600 a year. The \$6600 male pay rate advantage can be explained as follows. Explanation I: Proper weight (value) is not being given to the functional demands associated with clerical work, such as filing, dealing with the public, sitting in front of video display terminals and the manipulation of office equipment; the wage being paid X, on the other hand, reflects a consistent, deeply rooted tendency to over-reward (value) physical strength, endurance of dirty work environments and the occasional lifting of heavy objects. Explanation II: X is a Teamster; Y is not.

Explanation I is very much steeped in the factor equivalence logic associated with comparable worth.

Explanation II suggests that people gain power over the wage determination process by combining effectively - a power which has little to do with the tasks they actually perform. If the tasks themselves are irrelevant (many janitors earn much less than \$24,200), determining task equivalence and basing claims about the legitimacy of pay adjustments thereon becomes a somewhat tenuous and tendentious exercise.

Group-combining distorts the process of valuation through exchange. Post liberal consensus is that this distortion is a salutary counterweight to the existence of oligopoly, monopoly and the inevitable fact that employees are many and employers fewer.

Taking absolutely no exception to this, a reasonably dispassionate surveyor of the literature on pay equity must be perplexed by how seldom due cognizance is given to the role played by unionization in causing male/female pay differentials. Only 16% of Canadian working women are organized as opposed to 47% of Canadian males. It is possible to blame this differential itself on discrimination. However, the familiar "segregation" arguments are attached to equally familiar disabilities - lack of proof and circularity. The facts about female absence from unionized sectors of the labour market themselves prove discrimination only on the assumption that parity would be the inevitable result of non-discriminatory patterns of development. Surely the history of unionization, the family wage concept and the female labour force infusion are too complex to sustain such an assumption without detailed analysis and careful critique.

In certain not uncommon situations within establishments, pay equity-based comparisons would result in "piggy-backing" and wholesale dramatic inflation of salary structures. A non-union group could simply wait for the most powerful bargaining unit within an organization to complete negotiations, find a factor comparison point showing equivalence between two given jobs within the respective groups, and demand that the entire salary range within the two groups be adjusted accordingly.

Legislation could, of course, be drafted disallowing non-union/union comparisons, thus preventing the "piggybacking" problem which would strike so centrally at a union's *raison d'être*. (Why join if you can sit back, let someone else negotiate and then demand equal pay on the basis of factor equivalence?) Yet so many of the more egregious disparities (the janitor/clerk example is both real and common) would be left unaddressed, posing a difficult conundrum - effective pay equity versus a weakened collective bargaining process.*

In summary, there is confusion here about value, but also perhaps a buried distaste (with rationalist overtones) for the very fact that modern liberal society, like all its predecessors) shows a vexing tendency to fission into groups, some of which proceed to take better advantage of situations than do others. Although the neoclassical model, in which atomized individuals transmit preferences, breaks down as an even half-way adequate description of reality, from the perspective outlined here, discrimination and undervaluation remain difficult to pinpoint as major

*Difficulties likely to affect the process of collective bargaining itself, should pay equity become law, are a separate complex issue not dealt with here.

causal forces in the evolution of wage disparities. Power through combining rather than undervaluation of specific functional attributes as between "man's work" and "women's work" appears more causally important as an explanation of differences in remuneration. Women too can organize. That they have done so less often and less effectively than men turns discussion directly back to the already examined arguments about sex-disparate life plans, or alternatively, requires detailed analysis of the specific obstacles thrown up against organizing within discrete sectors of the economy in which women predominate. Here again, a great deal of work remains to be done.

In the final chapter, based on what might be called the "specification difficulties" outlined here, it will be argued that a legislative solution which mandates that market pricing adhere to "equivalence standards" based on compensable factors (pay equity) is not only poorly focussed on the major causes of the grievance at issue, but is also likely to distort pricing in the name of desert, not correct imbalances in the name of equity.

NOTES

¹Micheal Evan Gold, Dialogue, p. 40.

²See particularly Raymond Aron, Main Currents in Sociological Thought, New York, Anchor Books, 1968, pp. 163-196.

³Charles E. Lindblom, Politics and Markets, New York, Basic Books, 1977, p. 76.

⁴Ibid., p. 89.

⁵Thomas Hobbes, Leviathan, The Library of Liberal Arts, Indianapolis & New York, 1958, Book I, Chapter 10, p. 79.

⁶Thomas Mahoney, "Approaches to a Definition of Comparable Worth", Academy of Management Review, Vol. 8, No. 1, 1983, p. 17.

⁷Unpublished brief, Board of Trade of Metropolitan Toronto, submitted to Ontario Pay Equity Committee, March, 1986, p. 2.

⁸Ibid.

⁹Ibid., p. 3.

¹⁰Ibid.

¹¹Jennifer Roback, "The 59¢ Fallacy", Reason, Vol. 16, No. 4, Sept., 1984, p. 36.

¹²Robert Nozick, Anarchy State and Utopia, New York, Basic Books, 1974, p. 221.

Throughout the history of thought flows a powerful current of antagonism to exchange, breaking to the surface from time to time, as in Montesquieu among many others, and of course in Marx, and manifested in long-standing moral and legal rules like those against usury. Even if the antagonism often fails to point to specific characteristics of market systems ... it has to be acknowledged."¹

II. PAY EQUITY, JUST PRICE AND DESERT

Is there perhaps another justificatory basis for pay equity? It will be argued here that the pay equity advocacy contains a non rectificatory strand of reasoning, one which has little to do with the belief that compensation is owed because of discriminatory treatment. This alternative perspective is, in fact, a just price/desert-based moral stance on the equity of exchange valuations in general. This moral viewpoint, although in itself eminently defensible - tied in as it is with theories of distributive fairness far older than those associated with liberalism - suffers from severe disabilities in the context of the controversy over comparable worth. The first of these disabilities is that this moral colouration is in fact, a stance rather than a full-fledged set of connected propositions. As it stands, the just price/desert tincture distorts rather than clarifies what pay equity is about. The various attacks on market outcomes remain ad hoc, sporadic and are unaccompanied by suggestions about alternatives which link with standard critical approaches to market economy. Obscured by claims about discrimination, the just price side of the comparable worth debate emerges fitfully, in blurred outline, and does not constitute a fully-fledged argument. Secondly if this distributive (as opposed to rectificatory) line of approach is an important element in the attack on market pricing, then this fact casts serious doubt on claims that

pay equity is a moderate proposal. Whatever its intrinsic merits, it is difficult to square just price reasoning with the exchange/preference basis of modern liberal and even post-liberal socioeconomy. The final section of this analysis will argue that:

- a) the just price/desert element in comparable worth is real and important although submerged;
- b) this moral attitude towards market exchange rates is difficult if not impossible to square with any of the standard theories of distributive justice which purport to claim liberal bases.

Pay Equity and Just Price

As a theory about giving individuals and groups pay rates which mirror their "compensable factor deserts", comparable worth might take the following justificatory line: a fair rate structure should show evidence of a certain kind of symmetry which reveals a proportional connection between differences in rates and differences (measurable) in what people actually do (and endure) while working.

Such proportional connections can be established and validated through the use of compensable factor evaluations. People deserve to be compensated on such a basis because to ignore or slight such connections is tantamount to saying that differences in tasks, efforts, responsibilities and burdens are irrelevant or only partially and sporadically relevant criteria for allocating remuneration. Such a state of affairs is morally unacceptable. This ethical distaste for exchange as the paramount basis for reward distribution, so described, is not creeping socialism but rather rehabilitated Aristotelianism without the teleology.

A Just Price

Just price theory does not, it is safe to say, absorb the attention of the mainstream in either socialist or neoclassical economy circles. A survey of the literature on pay equity will turn up only an occasional scattered reference betraying a recognition that comparable worth and just price theory share salient common features as normative structures. Marshall and Paulin dance lightly around this connection with the statement that:

"It is true that comparable worth is based on some elements of just price or equity, but in the absence of auctions for labour, a sizable equity element is inevitable in labour markets."²

This intriguing thought is not explored further. Those interested in following this line of thought through to its potential implications must supply their own elaborations.

The concept of value which is embedded in just price reasoning is conventionally held to mean absolute value, value as apart from value in use and value in exchange, something independent of supply and demand, intrinsic and fixed. Experts on the fully-fledged theory of just price as found, for instance, in its medieval incarnation, would deny that this use of the term "absolute" is appropriate. It seems to suggest that to the Schoolmen, just prices were immutable natural phenomena, as fixed as the stars in the spheres of medieval astronomy. Scholars such as Dempsey³ and De Roover⁴ suggest that this understanding is modern misinterpretation.

The essence of just price theory, so these scholars would argue, is not immutability or imperviousness to exchange - it is rather the basing of judgments about worth on standards centered in the collective purposes of

the community. Markets, subjective preferences and household science (economics) itself, must operate within limitations laid down by a community's aims. In the Weltanschauung of the Catholic Middle Ages these purposes were, of course, ultimately transcendent. Prices reflected collective estimations of the value of persons and their pursuits, always with an eye to their place in a highly elaborated purposive scheme.

"The prices of things function not according to the whim or utility of individuals but according to the common estimate."⁵

So said Justinian's Legist Paul in the Digest On the Roman Law more than fourteen hundred years ago - an insight with which Polanyi or Marx would find little fault. The just price of a loaf of bread, a jug of wine or a man's labour must, under such principles, conform to a sense of fitness (proportion) whose ultimate arbitrator is collective judgments about the Good and the values which support its pursuit. A problem is immediately evident. Community standards do not, under any social system, naturally solidify into prices like a precipitate settling out of solution. Human judgments are required to interpret values into something (a price) which attaches to goods and services. How is this process to be construed, made reliable, formalized if you will, to minimize errors and abuses? Here traditional just price theorists looked to Augustine and ultimately to Aristotle for help, finding it, it must be admitted, only at a rather rarified level. Albertus Magnus (1198-1280) commenting on Aristotle's Ethics makes the following statement about value:

"There is accordingly always a just mean between gain and loss. This mean is preserved, when in a voluntary contract the antecedent situation is equivalent to the consequent, that is to say, before and after the contract. A couch, for example, prior to the contract had a value of five; if one received five for it, the situation consequent to the contract is equal to

that which was antecedent. ... Such exchange however, does not take place through an equality of the things exchanged but rather according to the value of one thing in relative proportion to the value of the other with due regard for the need which is the cause of the transaction."⁶

Dempsey goes on to suggest that the need mentioned in the aforementioned passage is not simply personal but that the principles of justice involved "derive from the general nature of human needs in society."⁷ Albertus' formulation, as do almost all Scholastic interpretations, looks to Aristotle's discussion in The Nichomachean Ethics (book five 1133a line 7-i7)

Reciprocal exchange in the right proportion is determined by a diagonal combination of terms. Let A be a builder, B a shoemaker, C a house and D a shoe. Now the builder must take the shoemaker's product from the shoemaker and give him part of his own product. Thus, if (1) proportional equality is established between the goods, and (2) reciprocity effected, the fair exchange we spoke of will be realized. The relation between builder and shoemaker must, therefore, correspond to the relation between a given amount of shoes and a house or a quantity of food.⁷

A just price then, is a kind of proportion, a proportion with terms and a frame of reference which takes cognizance of the things exchanged, the exchangers, and the fact that if right proportion is not observed "there will be no exchange and no community."⁸ It has been widely recognized that such resolutely abstract formulations as are found in Aristotle and his interpreters could not be used without translation to explain price formation even in ancient Athens. In fact, so abstract is just price theory in the hands of such thinkers that it does not, unelaborated, even constitute a basis for making second order normative judgments about the justness or unjustness of any given price. One is still left with the problem of determining how "diagonal combinations of terms" and "antecedent

and consequent proportion" can establish and judge a price bargain.

However, like Mephistopheles from the wings, comes modern rational method in the form of compensable factor methodology. It is an interesting irony that ultra-modern technique can, in the hands of the advocates of comparable worth, be used to make an ancient theory of distributive fairness practicable in application - can in fact take just price reasoning beyond theoretical abstruseness and make it workable. With modern methods it is actually possible to derive a ratio which suggests that a physiotherapist is worth three-fifths of a tenured professor. Consider the judgement that those working in care-related occupations are under-rewarded by market-driven economies. The complaint here is really that society's sense of proportional fitness is being violated. Why should, for instance, a daycare worker - someone who cares for children (arguably our most precious resource) - earn one-tenth the wages of a successful stock-broker? Here, buried beneath claims about sexism, is a straightforward ethical distaste for market outcomes, animated by a belief that the stockbroker-daycare worker disproportion and those like it - are somehow a mistranslation of actual community sentiment about relative values. So bewildered are some by the moral insufficiencies revealed in innumerable exchange-based outcomes that the imputation of various kinds of diabolical causation - sexism, racism, the Old Boy network, etc. are virtually irresistible. A somewhat simpler and less dramatic explanation is available however, that is that the wage disproportion between stockbrokers and daycare workers reflects precisely what a society based on liberal-individualistic bourgeois principles finds "equitable" in the rewards to be given to those who shepherd money rather than children. This may itself be seen as deplorable,

but the critical underlay here is not rectification for discrimination but a belief that such pricing does not give people their just deserts. The critical importance of compensable factor method may now be readily seen. Armed with a value judgment about worth and the intuition that the community's real judgment is somehow being distorted by market processing, the question of adjustment can now be turned over to technicians (job evaluation experts) who can, by assigning variables and weights to factors connected with skills, efforts and responsibilities prove precisely the point at issue, i.e. that jobs x, y and z are underrewarded. Never before have those appalled by the ethical insufficiencies of exchange-based valuations had so ready to hand a method for justifying normative judgments and furthermore one which is beautifully imbued with the prestige of scientific method. Although Part I of this thesis would suggest that compensable factor methodology is very far from having earned the right to make strong claims about scientific validity, the very fact that such technique exists and can attach numerical scores to virtually all jobs, gives modern day just price reasoners a blessing not available to their ancient and medieval forebears. The assertion that pay equity's proponents believe that value is absolute is misleading, as is the same charge leveled at medieval economic theory. It is more accurate to suggest that comparable worth theorists look to a concept of community in which exchange bargains play a much reduced role, and "rational" judgments a greatly enhanced one. In its current cautiously politicized form, pay equity's advocates do not always draw this inference, but it remains implicit both in the broad-gauge applicability of the technique and the moralistic flavour which surrounds

the charges of undervaluation.

If the foregoing surmises are accurate, comparable worth would not die even should the thesis that the history of women and work reveals a pattern of discriminatory treatment be disproven. Pay equity has another arrow in its quiver, an argument that can call upon a long and thoughtful critical tradition. This paper will not endeavour to assess this tradition beyond the remarks already made, nor attempt to make pay equity out to be something which it is not - a fully-fledged theory of distributive justice. Only one aspect of this issue will be explored further, the question as to whether this moralistic stance on rate disproportions can find a justification which is liberal in even the loosest sense.

Comparable Worth, Desert and Liberalism

Modern liberalism is a roomy clearing house for theories about justice in distribution. Rawlsian egalitarianism, Nozick's strict entitlement stance and everything in between are seen, by defenders, as liberal when properly understood. Can distributing reward on the basis of proportional equivalence, rationally determined, find a place within this spectrum? Liberal political theory presumes certain fundamentals, whatever its contemporary guise - atomized individuals, the freedom to strike bargains (contract), plurality of aims and the triumph of the virtue of tolerance over any particular conception of the Good. Why did just price reasoning fall out of favour with the growth of this ensemble of ideas? Again the unrivalled, if somewhat, ferocious, clarity of Thomas Hobbes provides a useful starting point:

"Justice of actions is by writers divided into commutative and distributive; and the former they say consists in proportion

arithmetical, the latter in proportion geometrical. Commutative, therefore, they place in the equality of value of the things contracted for, and distributive in the distribution of equal benefit to men of equal merit. As if it were injustice to sell dearer than we buy, or to give more to a man than he merits. The value of all things contracted for is measured by the appetite of the contractors, and therefore the just value is that which they be contented to give. And merit ... is not due by justice, but is rewarded of grace only."¹⁰

Let God, says Hobbes, worry about proportionality; men's value is measured by "the appetite of contractors." Two hundred and fifty years later R.G. Collingwood put it, if possible, more bluntly:

"A just price, a just wage, a just rate of interest, is a contradiction in terms. The question what a person ought to get in return for his goods and labour is a question absolutely devoid of meaning. The only valid questions are what he can get in return for his goods or labour, and whether he ought to sell them at all."¹¹

Post-liberal plural states have in fact abandoned or mitigated some of the more harrowing implications of pure unadulterated Hobbesianism, but the interesting question from the perspective of pay equity is, on what basis have they done so? It is arguable that all the major deviations from Hobbesian principles which are defended as consonant with a modified (more just) liberalism have been made in the name of two countervailing principles - equality and need. Those influenced by the socialist critique of the results of treating persons as commodities frame solutions which would distribute first and foremost in conformity with human needs; those pressing the economic implications of moral equality suggest the need for compression in the direction of equal shares and strong justifications for deviations therefrom. For instance, minimum wage laws, so often thrown into the equal value controversy as a demonstration of a related market intervention, appear to have nothing to do with the establishing of "fair proportional"

relationships throughout a hierarchy of rates (pay equity). ⁴ The justificatory basis of the minimum wage is simply that no one should work at such a rate that his or her basic needs cannot thereby be met. It seems even more obvious that pay equity is not about income equality per se, although wage compression might very well result from its implementation. The root idea is equal pay for work of equal value, i.e. fair proportion as established through comparing compensable factors. Such a scheme is in theory compatible with large inequalities in remuneration as long as they are rationally justified.

What is comparable worth's justificatory root, again assuming that something more than rectification is at stake in this debate? It appears that pay equity looks not to need or equality but to desert as cardinal principle. If this is the case, then to establish a basis for assessing whether comparable worth is a notion compatible with liberalism one must look at various liberal attitudes towards desert.

Justice can be seen as treating all persons in accordance with their merits (deserts). Assuming the existence of a reliable method for determining merits, one can argue that merit should establish certain types of obligation on the part of others. One way of specifying this obligation is to suggest that employers reward workers on a basis which takes into account differences in merit. At a more abstract level it may be argued that:

"In thinking about the rightness of any distributive scheme or the justice of any social arrangement, it is vital that we do not leave out of consideration giving individuals what they deserve. ... People should have certain benefits or burdens because they deserve to have them."¹²

In job areas which allow the assessment of such differences, employers already reward performance. The use of compensable factors allows the further generalization of this process. What's wrong with basing pay on differences in what people actually do, achieve and endure while working? It is a reasonably common moral intuition that:

"where a person works hard and makes some significant contribution to his society, doesn't he deserve some reward? Is it just that the lazy chap who makes no special contribution or effort at all should receive the same as someone who has worked very hard and made a contribution?"¹³

As stated, this commonsensical proposition sets out an exaggerated antithesis. No system of reward is likely to shower largesse on lazy fellows who do nothing (although liberal-democratic systems permit lazy fellows the freedom to live off accumulated savings.) It is nevertheless true that market-driven economies are just as likely to better reward someone with the character of a P.T. Barnum than an Albert Schweitzer. Markets satisfy preferences, rewarding merits only by indirection and only those merits which facilitate the transmission of benefits (or the perception of benefits) to others. Market-driven economies also ignore effort, they care only about successfully applied effort. Market economies are not meritocratic or desert-based, although the pressures they subject actors to push forward and select for certain types of characteristics. As John Ruskin put it:

"... in the community regulated only by the laws of supply and demand, but protected from open violence, the persons who become rich are, generally speaking, industrious, resolute, proud, covetous, prompt, methodical, sensible, unimaginative, insensitive, and ignorant. The persons who remain poor are the entirely foolish, the entirely wise, the idle, the reckless, the humble, the thoughtful, the dull, the imaginative, the sensitive, the well-informed, the improvident, the irregularly

and impulsively wicked, the clumsy knave, the open thief and the entirely merciful, just, and Godly person.¹⁴

Desert/merit distributive standards play a role in a market economy but it a subsidiary role, a tune played in a minor key often drowned out in the cacophony of snake oil and Pet Rocks millionaires. Some, many of them of a distinctly rationalistic turn of mind, find in desert a morally superior basis for justifying distributions. However, and this is the point of major relevance for the question at issue (pay equity's compatibility with liberalism), thinkers reflecting on the liberal tradition and its meaning who agree on virtually nothing else, are almost unanimously suspicious of desert as a distributive standard. In the judgment of egalitarians and redistributionists desert is suspect because it can be used to support the thesis that natural endowments and socially acquired advantages should affect shares.

"Perhaps some will think that the person with greater natural endowments deserves those assets and the superior character that makes their development possible. Because he is more worthy in this sense, he deserves the greater advantages that he could achieve with them. This view, however, is surely incorrect. It seems to be one of the fixed points of our considered judgments that no one deserves his place in the distribution of natural endowments any more than one deserves one's initial starting place in society. ... Character depends in large part upon fortunate family and social circumstances for which he can claim no credit."¹⁴

More vigorous still is Stuart Hampshire:

"Is there anything whatever that, strictly speaking, a man can claim credit for, or can properly be said to deserve, with the implication that it can be attributed to him, the ultimate subject, as contrasted with the natural forces that formed him? In the last analysis, are not all advantages and disadvantages distributed by natural causes, even when they are the effects of human agency."¹⁵

Rawls and Hampshire worry that desert-based principles, should they become

ascendent (in the manner outlined satirically in Michael Young's "The Rise of the Meritocracy", for instance) can lead to the denial that anything at all is due to persons by virtue of their common humanity, moral worth or intrinsic nature. This stream of liberal thought operates,

"... with a principle of equality in which a human being is to receive a certain treatment merely in virtue of being a human being, open to reason and with a sense of justice. (They do) not operate with the meritocratic conception that a person should have a certain treatment because of his/her ability, effort, achievement or contribution (the traditional desert bases).¹⁶

On the other side of the liberal ideological spectrum, strict entitlement theorists virtually ignore desert as irrelevant. What is deserved is that which is legitimately acquired, legitimately transferred and not in violation of the rights of others. The only question relevant to the legitimacy of a pay bargain is whether the payer has just title to that which he disburses and whether the payee agrees to the transaction. (By this standard, even equal pay for equal work laws are a suspect interference with freedom of contract). Finally, there is a more moderate but still relatively conservative approach to desert which can be traced back to David Hume and which is particularly apposite in the context of the pay equity debate because it strikes directly at the rationalistic substructure which undergirds the argument about undervaluation.

We shall suppose that a creature possessed of perfect reason but unacquainted with human nature, deliberates with himself what rules of justice would best promote public interest, and establish peace and security among mankind. His most obvious thought would be, to assign the largest possession to the most extensive virtue, and give everyone the power of doing good proportioned to his inclination. In a perfect theocracy where a being infinitely intelligent governs by particular volitions, this rule would certainly have a place and might serve to the wisest purposes. But were mankind to execute such a law, so great is the uncertainty of merit, both from its natural

obscurity, and from the self-conceit of each individual, that no determinate rule of conduct would ever result from it. ..."¹⁷

Would modern developments in technique have altered Hume's judgment? Probably not; a thinker as sensitive to human fallibility and subjectivity as was Hume would, one suspects, have looked at studies purporting to prove reliable indications of merit with a great deal of skepticism - perhaps pointing out that human beings will judge the deserts of others as suits their own interests and, further, that mere expertise is no defense against such a prospect. F.A. Hayek is speaking very much in this tradition when he alludes to the great danger inherent in allowing some to stand in judgment over the merits (deserts) of others without reference to clear general rules or the vital interest supplied by a contractual relation.

... it is neither desirable nor practical that material rewards should be made generally to correspond to what men recognize as merit and that it is an essential characteristic of a free society that an individual's position should not necessarily depend on the views that his fellows hold about the merit he has acquired. ... Our problem is whether it is desirable that people should enjoy advantages in proportion to the benefits which their fellows derive from their activities or whether the distribution of these advantages should be based on other men's views of their merits.¹⁸

Pay equity, broadly and intensively implemented, would decouple the power to judge worth from the quid pro quo intimacy of an individual bargaining relationship without substituting standards, the bases of which are likely to be understood by the average citizen. (Those who doubt this are referred to the complex multiple regressions which underly much state of the art job evaluation technique.) Here we come very close to bedrock in the discussion of basing distribution on equivalence and proportion.

The real problem with compensable factor job analysis - the citation of studies revealing that nurses are worth 573 points, while sanitary engineers are worth 530 points - is that the only thing proven by such studies is that some group or some person thought that nurses were worth 573 points and sanitary engineers 530. Job evaluation is no cure for subjectivity, and subjectivity itself can shelter discriminatory labour practices. Thomas Mahoney points out that whatever theoretical perspective is brought to bear on the marketplace - whether it is radical, administrative or neoclassical - "...judgments of worth ultimately are based on subjective norms regardless of the tradition employed, and will vary with the subjective norm applied."¹⁹ What Mahoney does not say is that one tradition, that which looks back of Hume, is somewhat more forthright in admitting to this fact. Both the just price tradition and the administrative outlook tend to lose sight of subjectivity - the former because of the strength of its teleological convictions, and the latter because of the professional tendency to overestimate the orderliness, rationality and tractableness of social phenomena which comes with dedication to rationalization as a life-time pursuit. This Humean critical tradition would have it that the choice between market processing of labour prices and a desert-based compensable factor pricing is not a choice between objective science and discriminatory randomness. It is rather a choice between what sort of subjectivity is most conformable with the multiform human aims assumed by liberalisms.

The preceding discussion has left desert, and by implication pay equity (as a distributive argument) something of an orphan looking for roots within the liberal tradition. Is this case overdrawn? Have all possible

defenses been examined? There are, I think, two remaining responses to the contention that just price/desert reasoning is illiberal - a utilitarian response and an argument that the moral autonomy of individuals in and of itself requires the recognition of differences in what people do. Utilitarian arguments can bolster desert-based systems of reward on grounds of efficiency. Most businesses recognize the need to provide incentive systems which reward performance. Such systems must be consistent and non-arbitrary, i.e. rationally devised, and such rationality is required to produce what is usually called internal equity.

Internal equity is simply the arrangement of job, person, and pay hierarchies within an organization in such manner that employees themselves perceive the structural arrangements as more or less fair. This does not mean that all jobholders are content with their duties or their remuneration. It simply means that an organization, like a just polity, must apply known and comprehensible rules to its human resources. If organizations do not, their employees' perceptions of persistent arbitrariness, inconsistency and unfairness will cause them to either leave the organization or fail to perform adequately.

Translated into the vocabulary of desert, internal equity requires that within the relative intimacy of an organization those who do better must be encouraged through incentives and be seen to receive such incentives to encourage better performance from others. It might be argued that as goes an organization so should go the entire economy. (The limitation of comparable worth comparisons to within discrete organizational confines, as is currently argued for in most pay equity bills, is not either necessary or

strictly logical. If the technique can be made sensitive enough why should a nurse in Sarnia not compare with a busdriver in Moncton? Michael Evan Gold suggests that:

"Government would eventually set pay within firms because the drive for equality that underlies the movement for comparable worth could not tolerate the variety of job ratings that would exist otherwise. If firm A rated machine operators above secretaries and secretaries above custodians, but firm B rated these jobs in a different order, charges of discrimination would be inevitable. The only acceptable solution would be a national job evaluation plan, and only the government could manage such a plan.)²⁰

Could even this not be justified on the grounds of efficiency? Utilitarian arguments must be wielded carefully when applied to the question of market pricing. From the perspective of utility, internal equity is only a means to the attainment of the utilitarian aim of greater and greater material prosperity and growth. Efficient factor allocation and least cost production are far more critical considerations from this perspective. It would not be easy for a Utilitarian to argue plausibly that preserving a given internal rate proportion must take precedence, should that preservation interfere, for example, with factor mobility by distorting prices or forcing an employer to ignore changes in conditions as signalled through price changes. Tasks may remain the same with regard to internal measures of equivalence and lose value for other reasons. Consider the fate of precision watch-makers in the age of digital electronics. Those concerned with efficiency will defend internal equity only within limits and those limits are, in fact, imposed by external conditions and changes in conditions. Conventional utilitarian defenses of pay equity tend to focus on two possible productivity-enhancing prospects - lowered quit rates and increased morale leading to increased productivity. The effects on

productivity of incremental increases in wage rates and altered relativities within wage/status hierarchies is difficult to forecast. Most studies indicate that the effect of a raise on employee productivity is evident, if at all, only in the very short term. As for turnover rates, they are determined, in the main, by the general unemployment level. The efficiency-based arguments for pay equity are weak and poorly validated.*

Finally, there is this to be said in favour of desert: if one takes anything other than a hard determinist stance on causation and the wellspring of human action, and if one accepts that within some limits people are responsible for what they do, then taking cognizance of better and worse actions is one way of validating the moral autonomy of individuals. Standards such as need and intrinsic ontological equality cannot endow actions with significance. (From an ontological perspective a contemplative cave-dwelling solitary is presumably as worthy as a busy humanitarian and their needs are at least similar.) Desert presumes the significance of actions. If action has significance, is it not logical to reward with regard to a standard which recognizes better and worse actions? Markets reward only one type of action, benefit conferral; surely the range of human endeavour demanding recognition is not to be so narrowly circumscribed?

"People can make contributions, say that of an artist, a scientist or simply as a person who is very friendly and open to children, which have very little market value."²¹

*It has been argued, mostly by structural critics of neoclassical models, that raising the price of factor inputs can act as an impediment to the entrance of new firms and thereby work to the advantage of established firms.

Since modern technique allows us to make more than merely intuitive estimates about comparative contributions, arguments that nurses, welfare workers and ministers are more worthy of recognition (and reward) than circus barkers, ad-men and stock brokers can find considerable support. I would argue that comparable worth owes much of its surface plausibility to this train of thought, whose ultimate source is well adumbrated by Kai Neilsen:

"... if we drop all ascriptions of desert, this would deprive us, it could be argued, of our ability to control our destinies as social and moral beings. If it is generally recognized that people cannot properly be said to be deserving of anything whatsoever, if they cannot properly be held responsible for what they do, then they cannot intelligibly be regarded as autonomous, moral beings or as rational agents in control of their own lives. To drop ascriptions of desert is to drop as well ... ascriptions of moral agency."²¹

Pay equity is strongly imbued, at the level of presupposition, with a belief in a meritocratic standard of reward. It is arguable that the broad scale implementation of comparable worth would evolve into a process whereby the entire range of exchange-produced outcomes would be marched in review past an ultimately incompatible bar of judgment - the theory of justice as proportional fairness rationally established. Only thus will daycare workers, clericals and generally all those who are ineffectual bargainers or poorly positioned but deserving along various other interpretive dimensions find their due.

The objection to the foregoing is simple. To say that no one deserve anything may indeed deprive moral autonomy of a key structural support; but admitting this does not entail making desert a major basis for the allocation of pay - no more than does subscription to a Kantian conception of the person entail an egalitarian division of social product.

In the eyes of many of the more eminent philosophers of liberalism including those who discover numerous deficiencies in the market, desert plays precisely the role it should play in the current socioeconomic balance which is the post liberal plural state - a subsidiary, restricted and minor role. Desert operates within firms and organizations as the principle underlying internal equity and even here within its properly Weberian framework, desert gives way to other considerations among them, supply and demand and the exigencies attached to rapid change.

If comparable worth enhances the role played by desert-based evaluations, then pay equity pushes the market-driven economy, and with it the neo-liberal society, in a direction which would further diminish the Hobbesian essence of that society, and would do so without a clear or even half-way realized vision of the implications of what might evolve in its place. Pay equity as an argument for rectification is simply weak; pay equity as a disguised distributive argument is not weak but has illiberal implications.

Summary

It is the basic premise of this thesis that the case of pay equity legislation has not been well made, although the normative presuppositions which underly the analysis allow for the possibility that such a case could be made under certain conditions. Part I of this analysis reduces itself to the simple claim that the evidence collected by advocates and analysts about the causes of pay differentials, the reasons behind sex-disparate job-choosing and the connection between low pay and factors which employers can control is, to put the kindest possible face on it, provisional as proof of

discrimination. In Part II it is suggested that pay equity as an argument about undervaluation, seeks to solve a problem which is either unreachable through manipulation of the price mechanism or solvable only at the cost of the interpolation of a non-liberal standard of value onto a socioeconomic system unsuited to such a graft.

A final note on interventionist public policy and the problem of moderate criticism will close out these remarks.

If pay equity lacks rigour and cogency as a connected series of postulates, and if it contains within itself a fundamental but largely unarticulated hostility to one of the key elements in the plural balance of welfarism - market pricing - why then are advocates so successful in pushing governments towards the adoption of its principles and programmes?

An answer to this question must eventually bring one back to an assessment of the general disabilities which beset public policy formulation in the age of interest-group accommodation. However, a particular difficulty will be noted here.

Moderate critics of the process through which agenda become public policy - those disturbed by the heady pace of government intervention and the general lack of judicious balance with attaches itself to so many rights-based advocacies - face large disabilities of their own. By "moderate" is meant critics who appeal neither to the socialist left or the reactionary right in seeking theoretical grounding for critique.

F. A. Hayek isolates the crux of the problems associated with moderate criticism:

"Those who attempt to delimit the functions of government in terms of aims rather than methods regularly find themselves in the position of having to oppose state action which appears to

have only desirable consequences or of having to admit that they have no general rule on which to base their objections to measures which, though effective for particular purposes, would in their aggregate effect destroy a free society."²²

Forced to grant that government should intervene in the economy to correct abuses, to ensure subsistence floors below which people must not be allowed to fall and to pursue goals unobtainable through the blandishments of the profit motive, critics are left without a clear principle upon which to naysay a given agenda - a podium from which to declare "enough is enough" and define some "line of the impermissible". Those holding anything other than a strict entitlement stance on distributive justice are left constantly searching for a general rule that might, for instance, help distinguish pay equity as a labour-pricing proposal from minimum wage laws or collective bargaining. No such general rule is immediately discernible to this writer.

One is left with the following seemingly obvious truth: a critique of pay equity legislation need not base itself on a blanket dismissal of economic interventionism. It may raise legitimate concerns - concerns which are not answered by citing coercive impositions in the name of clean air and safe workplaces, as if our consensual acceptance of these particular goals makes any and all interventionist proposals equally valid. Pay equity is not about clear air. It is about discrimination and the market pricing of labour and requires defending on these grounds.

If market-pricing is unfair potentially to half the working population, then serious and fundamental questions are raised about the role played by markets themselves in modern plural states. The pay equity debate casts a harsh light on the question of when so-called corrective measures, designed to ameliorate the supposed unsavoury side-effects of a system of

practices, alter the system being tinkered with beyond recognition. A market economy, even a market economy with minimum wage laws and wheat boards, remains a market economy. Mandating that pricing practices conform to the strictures of factor equivalence may in fact imply something more than compensatory tinkering.

NOTES

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²Ray Marshall, and Beth Paulin, "The Wages of Women's Work", Society, Vol. 22, No. 5, July/August, 1985, p. 38.

³Bernard, W. Dempsey, "Just Price in a Functional Economy", Economic Thought: A Historical Anthology, James A. Gherity, ed., New York, Random House, 1965, p. 7.

⁴Raymond de Roover, "The Concept of the Just Price", Economic Thought: A Historical Anthology, James A. Gherity, ed., New York, Random House, 1965, p. 11.

⁵Dempsey, "Just Price ...", p. 7.

⁶Ibid., p. 11.

⁷Ibid.

⁸Aristotle, Nichomachean Ethics, Martin Oswald, ed. Bobbs-Merrill, Indianapolis and New York, 1962, p. 125 (1133a, 7-17).

⁹Ibid., p. 125-126 (1133a 26-27).

¹⁰Justice & Equality Hugo A. Bedca, ed., Englewood Cliffs, N.J., Prentice Hall, 1971, p. 41.

¹¹R. G. Collingwood, "Economics as a Philosophical Science", Ethics, Vol. 36, 1926, p. 174.

¹²Kai Neilsen, Equality and Liberty, New Jersey, Rowman and Allanheld, 1985, p. 104.

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¹³John Ruskin, Unto This Last, Lloyd J. Jubenka, ed., Lilncoln Univeristy of Nebraska Press, 1967, pp. 74-75.

¹⁴John Rawls, "A Theory of Justice", quoted by Micheal Walzer":, Mcnous Liberals", The New York Review of Books, 26, No. 15, (Oct. 11, 1979), p. 8.

¹⁵Stuart Hampshire, quoted by Michael Walyr, same article.

¹⁶Neilsen, Equality and Liberty, p. 105.

¹⁷Hugo A. Bedau, Justice and Equality, New Jersey, Prentice-Hall, 1971, p. 74.

¹⁸Friedrich Hayek, The Constitution of Liberty, Chicago, University of Chicago Press, 1968, p. 94.

¹⁹Thomas Mahoney, "Approaches to a Definition of Comparable Worth", Academy of Management Review, Vol. 8, No. 1, 1983, p. 21.

²⁰Michael Evan Gold, A Dialogue on Comparable Worth, Cornell, ILR Press, 1983, p. 62.

²¹Neilsen, Equality and Liberty, p. 120.

²²_____, The Constitution of Liberty, p. 258.

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